



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CIVIL DIVISION

CIVIL APPEAL NO. 1 OF 2019

BETWEEN

FRANCIS LOKADONGOY LOKOGY.....APPELLANT

AND

REUBEN KIPLAGAT KIPTARUS.....RESPONDENT

(Being an appeal against the entire judgment of Hon. Phoebe Y. Kulecho, Senior Resident

Magistrate in Kapenguria Senior Principal Magistrate Civil Case No. 2 of 2018 delivered on 28th February, 2019)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. The Memorandum of Appeal herein was filed on 27th March, 2019 and sets out the following grounds of appeal:-

- 1. THAT the learned trial magistrate erred in law and fact in finding the Defendant/Appellant 100% liable for the accident.***
- 2. THAT the learned trial magistrate erred [in law and fact] by failing to exonerate the appellant from any wrong doing in view of the actions of the respondent.***
- 3. THAT the learned trial magistrate erred in law and fact in finding that an award of Kshs 1,500,000/= would sufficiently compensate the Plaintiff/Respondent.***
- 4. THAT [the] learned trial magistrate misdirected herself and based her findings on wrong considerations.***
- 5. THAT the learned trial magistrate erred in law and fact in finding that [the] Plaintiff had proved his case against the Defendant and granted judgment in favour of the Plaintiff.***

2. The appellants prays that his appeal be allowed with costs.

Duty of this Court

3. As this is a first appeal, this court is under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. In carrying out this duty this court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. The court has also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanor of witnesses. In a nutshell a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. For these propositions, generally see Section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya which requires a first appellate court "to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions by the superior courts among them **Peter M. Kariuki –vs- Attorney General [2014] eKLR** where the

court held *inter alia* as follows:-

“We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI -vs- REPUBLIC [1984] KLR 729 and SUSAN MUNYI -vs- KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported).”

Background and Facts

4. The respondent in this appeal sued the appellant vide Kapenguria PMCC No. 2 of 2018 seeking both general and special damages arising out of a road traffic accident which is said to have occurred on 21st July, 2017 along the Kapenguria – Lodwar road at Marich Road Block. The respondent alleged at paragraph 4 of the plaint dated 19th February, 2018 and filed in court on the same day that the appellant, his servant and or agent was negligent in driving, managing or controlling his motor vehicle registration number KBT 480A a Subaru Forester. The respondent further alleged that as a result of the said negligence the said motor vehicle veered off the road, started to drive on the wrong side of the road before knocking the respondent down thereby causing the respondent to suffer the following injuries:-

- ***A scar to the right inguinal measuring approximately 16.0 cm x 0.25 cm.***
- ***Three surgical scars to the right thigh approximately 10.0 cm x 0.25 cm, 10.0 cm x 0.25 cm and 5.0 cm x 0.25 cm.***
- ***Complete right femur fracture with mal-alignment of the bone fragments.***
- ***Soft tissue injuries [and] laceration to the right inguinal.***

5. The respondent in justifying his allegations of negligence against the appellant pleaded that the appellant, his agent and or servant drove at an excessive speed and without due care and attention; drove on the wrong side of the road failed to brake and or swerve to avoid causing the accident; drove on without appreciating the condition of the road and also drove a defective motor vehicle.

6. In his prayers, the respondent also prayed for costs of the suit and interest on amounts awarded.

7. The appellant filed defence, dated 2nd May, 2018, on 8th May, 2018. The appellant denied all the averments contained in paragraphs 4 and 5 as well as paragraph 6 in the respondent’s plaint. However, by consent of the parties the respondent’s discharge summary, the P3 form, the police abstract, the medical report, assorted medical cash receipts and copy of the traffic case proceedings were adduced in evidence during the trial. The consent thus confirmed occurrence of the accident and expenses incurred. All that remained to be determined by the trial court was quantum of general damages.

The Respondent’s Case

8. The respondent testified as PW1 and stated that on the material day at around 5.00 a.m., he had just concluded duty of manning the Marich road block along the Kapenguria- Lodwar highway. He had just concluded inspection of a car when as the said car drove off another car approached the road block and knocked him down even as he tried to move aside to make way for the car to pass. He was rushed to Ortum Mission Hospital after the accident for initial treatment. Later he was transferred to St. Luke’s Hospital Eldoret for specialized orthopedic treatment. Upon discharge from the hospital as indicated in the discharge summary the respondent reported the accident to the police whereupon he was issued with a P3 form. Thereafter, he was examined by a doctor. All the medical evidence confirming the injuries sustained by the respondent was adduced in evidence by consent.

9. The respondent also adduced evidence confirming that the appellant was charged and duly convicted by the traffic court. To this and a copy of the proceedings of the traffic case was produced in evidence by consent.

10. PW2 Godfrey Mugo Maina testified in support of the respondent’s case.

The Appellant’s Case

11. The sole witness for the appellant was Francis Lokadongei Lokogy. He confirmed that the accident occurred, but explained that as he approached the car that was driving off from the road block, he saw a person suddenly emerge from behind the said vehicle and though he tried to apply emergency brakes in order to avoid the accident the person ran towards him resulting in the accident. In his evidence and in answer to allegations that he had driven a defective motor vehicle, the appellant produced as Exhibit 1, the motor vehicle inspection report which showed that the motor vehicle did not have any pre-accident defects.

Judgment of the Trial Court

12. After careful consideration of the evidence the law and the submissions of parties, the learned trial court found the appellant 100% liable for the accident. After considering Dr. S. C. Njenga’s medical report dated 12th October, 2017, setting out the extent of the injuries sustained by respondent, the trial court assessed general damages of Kshs 1,500,000/= as an amount that would reasonably compensate the damage suffered by the respondent. As for special damages the trial court awarded Kshs 11,000/= which it said had been pleaded and proved. The court also awarded costs and interest.

The Submissions

13. On the 12th March, 2020, the parties advocates appeared before me and took directions for the appeal to proceed by way of written submissions. The submissions were to be filed and exchanged within 30 days from that date. The highlights, if any, were to be done on 30th April, 2020.

14. Meantime Covid-19 struck and the courts down-scaled their operations. When the courts finally upscaled their operations, the parties filed their submissions. The appellant's submissions were filed on 21st July, 2020. The appellants submits that the apportionment of liability as well as the award of damages on the various heads were all wrong and that this court should find enough reason therein to set aside the judgment of the learned trial court. On liability the appellant relies on **Section 107 (1) of the Evidence Act** and submits that the respondent did not prove his case on a balance of probabilities.

15. Regarding quantum of damages for pain and suffering the appellant opines that a sum of Kshs 300,000/= would be reasonable in the circumstances. He placed reliance among other authorities on **Jitan Nagra -vs- R.D.O [2018] eKLR**. He also relied on the case of **Edith Mary Owuor -vs- Across Africa Safaris Ltd – HCC No. 1054 of 1996 – Nairobi** in which the court awarded Kshs 460,000/= as general damages for what the appellant calls comparable injuries.

16. On the issue of special damages the appellant submits that the respondent did not specifically plead and prove the special damages as required by law. In this regard, reliance was placed on **Cornelia Elaine Wamba -vs- Shreeji Enterprises Ltd & Another [2012] eKLR**.

17. The respondent's brief submissions are dated 30th April, 2020 and filed on 4th May, 2020. The respondent's position is that there is nothing wrong with the judgment of the learned trial court on both liability and quantum. The respondent urges this court to dismiss the appeal with costs.

Analysis and Determination

18. It is true that an appellate court will only interfere with the conclusions and findings of a trial court if these findings and conclusions were not supported by evidence or were premised on wrong principles of the law. Where the impugned judgment entails the exercise of discretion such as the award of damages the appellate court would be slow to interfere with such discretion unless the appellate court is satisfied that the discretion was not exercised judiciously. For this preposition see the case of **I. P. Veronica Gitahi & Another -vs- Republic [2017] eKLR**.

19. In the instant case, I have reconsidered and evaluated the evidence afresh. I have also considered the law and the submissions by the parties in light of the judgement of the learned trial court, and my considered view is that here is no discernable error on the part of the trial court in the assessment of both liability for the accident and the award of quantum of damages. There is no evidence that the findings were based on no evidence or that the trial court applied the wrong principles of law in reaching the conclusions and findings made.

20. In the result, I find and hold that this appeal has no merit and is accordingly dismissed with costs to the respondent.

21. Orders accordingly.

Judgment delivered, dated and signed in open court at Kapenguria on this 29th day July 2020

RUTH N. SITATI

JUDGE

In the Presence of

N/A for appellant

N/A for respondent

Mr. W. Juma – Court Assistant