REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 10 OF 2019

TSHUSHO CAPITAL LTD.....1ST APPELLANT

ONESMUS WEMBE NDAVUTI.....2ND APPELLANT

-VERSUS-

STEPHEN MBATHA MUOKA.....RESPONDENT

(Being an Appeal from the Judgment of Hon. C.A Mayamba (SRM) in the Senior Resident

Magistrate's Court at Kilungu, Civil Case No.163 of 2017, delivered on 17th August 2018).

JUDGMENT

1. The Respondent filed a suit in the lower court seeking general damages for personal injuries sustained from a road accident on 31/03/2017 at Emali, along the Nairobi-Mombasa road. She also prayed for special damages, future medical expenses, costs of the suit and interest.

2. The Appellants filed a joint statement of defence denying the claim. After the preliminaries, the matter proceeded to hearing and judgment was delivered on 17/7/2018. The learned trial Magistrate apportioned liability in the ratio of 60:40 against the Appellants and assessed damages as follows;

General damages……. Kshs.1,000,000/=

Special damages……Kshs.0

Future Medical Expenses……Kshs.50,000/=

Less 40%.....Kshs.420,000/=

Net award……....Kshs.630,000/=

3. Aggrieved by the decision, the Appellants filed this appeal and listed 5 grounds stating that the learned trial Magistrate erred in law and fact by;

a) *Holding that the Appellants' motor vehicle had contributed to the accident and consequently holding that the 2nd Appellant owed a heavy duty to the Respondent despite all evidence and testimony adduced pointing to the Respondent as being entirely to blame.*

b) *Apportioning liability at 60:40 in favour of the Respondent when the evidence and testimony adduced during trial clearly showed that the Respondent's negligent and reckless acts were what occasioned the accident.*

c) *Awarding general damages at Kshs.1,000,000/= which was excessive in the circumstances considering the injuries sustained by the Respondent and the evidence and testimonies adduced.*

d) Awarding the Respondent Kshs.50,000/= as future medical expenses when no evidence was adduced or testimony given in support of the said claim by the Respondent during trial.

e) Awarding costs and interest thereto.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. On liability, the Appellants fault the trial Magistrate's finding that the accident happened at Emali town and contend that it is contrary to the evidence showing that it happened at Emali along the Nairobi-Mombasa highway.

6. Relying on section 42(B) of the Traffic Act, Cap 403 Laws of Kenya, they submit that the Respondent did not give any evidence to suggest that the accident happened within the boundaries of a trading centre, township, municipality or city.

7. They also submit that there was no mention of whether the 2nd Appellant was charged for driving beyond the speed limit as per the provisions of section 43(1) of the Traffic Act. Further, they submit that the police officer (Pw3) blamed the Respondent for the accident. They submit that it was erroneous for the trial Magistrate to conclude that the 2nd Appellant was negligent yet there was no evidence to support such a conclusion.

8. They also fault the trial Magistrate's finding that the 2nd Appellant did not hoot or switch on his lights. They contend that the record clearly shows that the 2nd Appellant had dimmed his headlight and he hooted to the cyclist but did not have time to stop because the cyclist got onto the road abruptly.

9. They submit that there is no liability without fault and rely on the case of **Kiema Mutuku –vs- Kenya Cargo Services Ltd, 1991** where the Court held that;

> "*There is as yet no liability without fault in the legal system in Kenya and a Plaintiff must prove some negligence against the defendant where the claim is based on negligence."*

10. They submit that the 2nd Appellant did all that was required of a driver on the Kenyan road and was never charged in court with any offence. It is also their submission that the learned Magistrate substantially relied on extraneous matters, conjectures, supposition and theories to make a determination on liability rather than relying on the evidence before it.

11. They submit that the finding on liability should be set aside and be substituted with an order that the Respondent was 100% liable for the accident.

12. On quantum, they submit that there was no indication of permanent incapacity from the medical report. They rely on the case of **Akamba Pulic Road Service –vs- Abdikadir Adan Galgalo (2016) eKLR** where the Plaintiff was awarded Kshs.500,000/= for fracture of the right tibia leg bone malleolus and right fibula bone, blunt injury to the right ankle and a partial disability of 3%. They contend that the injuries therein were more serious compared to the ones suffered by the Respondent. They fault the learned Magistrate for not considering the principle that comparable injuries should attract comparable awards.

13. They submit that Dr. Charles Mwendwa (Pw2) did not mention or confirm that the Respondent had suffered any permanent or partial disability as a result of the injuries. They contend that the Akamba case *(supra)* was decided in 2016 and even if inflation and effluxion of time was to be considered, the same would not double to Kshs.1,000,000/=.

14. With regard to future medical expenses, they submit that the same are in the nature of special damages and should be specifically pleaded and proved. They rely on the case of **Edwin Otieno Japaso –vs- Easy Coach Bus Co. Ltd (2016) eKLR** where the Court held that;

> "*Future medical costs are in the nature of special damages, a fact that must be pleaded if evidence therein is to be led and the court is to make an award in respect thereof."*

15. They submit that the learned Magistrate made the award without any basis as there was no evidence whatsoever that could enable the court make calculations or reach such a conclusion.

16. With regard to costs, they submit that the Respondent did not establish his claim to the required standard and was therefore not entitled to costs. They rely on the case of **Farah Awad Gollet –vs- CMC Motor Group Ltd (2018) eKLR** where the Court of Appeal held that;

> "*It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning. Secondly, that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown."*

17. On liability, the Respondent through the firm of Webale & associates submits that the Appellants did not deny that the motor vehicle was involved in the accident. He contends that even though the police abstract blamed him for the accident, the police witness confirmed that he *(Respondent)* was never called to record any statement or give his side of the story.

18. He also contends that there was no evidence of any further investigations done by the police and it appears that the police only relied on the words of the 2nd Appellant who was at the scene. He submits that neither sketch plans nor description of the accident scene were availed.

He relies *inter alia* on **Baker –vs- Market Halborough Industrial Co-operative Society Ltd (1953) IWLR 1472** where Lord Denning observed that;

> *"Every day proof of collusion is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame and sometimes both."*

19. He submits that the 2nd Appellant admitted to hitting him with the right side of the vehicle and that means that he *(Respondent)* was already halfway across the road when he was hit. It is also his submission that the 2nd Appellant admitted that his lights were off and that he was travelling in a built up area in a speed that was above the expected speed limit for such areas.

20. He submits that the blame about his failure to wear reflective clothes or lights would only be applicable if the 2nd Appellant had put his lights on. He contends that the 2nd Appellant never mentioned that he could not see him and in fact stated that he hooted and applied emergency brakes. According to him, there was no question as to whether he was visible or not.

21. He submits that it is now a well-established principle that the trial court can make its own findings when it comes to civil liability and not have to necessarily rely on the police abstract or traffic proceedings. He contends that the trial court delved into the conflicting positions presented by the witnesses and arrived at a just conclusion.

22. With regard to quantum, he submits that the question to be answered is whether the trial Magistrate acted on wrong principles or took into account an irrelevant factor or failed to take into account a relevant factor thus making the award so inordinately high as to be a wholly erroneous estimate of the damages.

23. He submits that the Appellants proposed an award of Kshs.400,000/= and relied on decisions that were made over 20 years back hence irrelevant. He contends that his cases were relevant as the parties therein sustained injuries that were almost similar to his injuries.

24. On future medical expenses, he submits that the same were pleaded and the evidence was clear that he would require funds for continued management of the injuries.

25. With regard to costs, he submits that they will always follow the event and being the successful litigant, the court was within its right to award him costs. He submits that this appeal is an abuse of the court process and only meant to delay the fruits of his judgment.

Analysis and determination

26. This is a first appeal and it is now settled that the duty of a first appellate court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Anor –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123.**

27. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the following issues arise for determination;

a) Who was to blame for the accident and to what extent?

b) What quantum of damages, if any, is payable to the Respondent?

28. It is not in dispute that an accident involving motor vehicle registration No. KCF 809C *(the motor vehicle)* and the Respondent occurred on 31/04/2017 *(material day)*.

29. **Stephen Mbatha Muoka** who is the Respondent testified as Pw1 and adopted his statement as evidence in chief. He stated that on the material day at around 6.30 am in the morning, the Appellants' driver drove the motor vehicle so negligently, along the Nairobi-Mombasa road at Emali within Makueni county, that it hit him as he was cycling along the said road. He became unconscious and was rushed to Kilome hospital where he was admitted for two and a half months. He said that there was mist and the driver had not put on the lights. He was therefore not able to see the vehicle.

30. Upon cross-examination, he said that he was riding a bicycle from the route leading to the main road and wanted to cross the road. There was a parked lorry and he checked both sides but did not see any vehicle. It was around 6am and there were some lights. He wasn't aware if he had been blamed by the police for the accident. He had been a rider for 5 years but did not know what he was supposed to wear on the road. He was wearing his normal clothes.

31. In re-examination, he said that he was never summoned to record a statement and never went to the scene with the police. He reiterated that there was mist and the vehicle did not have its lights on and did not hoot. The vehicle was moving towards Mombasa and was moving downhill as it was steep.

32. Pw3 **P.C Victor Barasa** was from Sultan Hamud Traffic base. He produced a police abstract on behalf of Inspector Bore as PExb2. He testified that the Respondent was involved in a serious road accident on the material day at Emali town along the Nairobi-Mombasa highway. The Respondent was a cyclist joining the highway from a petrol station and was knocked down by the motor vehicle which was headed towards Mombasa direction. He said that according to the abstract, the cyclist was blamed for the accident. He was not sure whether the Respondent recorded his statement or whether further investigations were done.

33. Upon cross examination, he said that he had not seen the sketch plan and that the cyclist was leaving shell petrol station which is located on the left while facing Mombasa. There is a space before joining the highway. He reiterated that the cyclist was to blame for the accident.

34. **Dw1** was the 2nd Appellant and he adopted his statement as his evidence in chief, and adopted the filed list of documents. He stated that on the material day, he was lawfully driving the motor vehicle heading to Mombasa and on reaching Emali, there was a trailer parked beside the road. As he approached the point, a cyclist got from behind the trailer and he tried to avoid him but hit him from the side. The vehicle's headlamp and side mirror cracked in the process. He produced a motor accident report dated 05/03/2018 as DExb1 and a copy of his driving license as DExb2.

35. In cross examination, he said that he had been a driver for over 10 years and was conversant with Mombasa road. The accident happened at 6.15am and it was neither dark nor foggy. He had dimmed his headlights but did not record that in the statement. The trailer was parked on the left side and as he approached, the cyclist got into the road abruptly.

36. He said he applied emergency brakes until he knocked him with the right side of the mirror. He was driving at 60 kms per hour and there was no sign for speed limit. He hooted at the cyclist but did not have time to stop. He agreed that there were witnesses to the accident but he had not called them.

37. The Appellants submitted at length to show that the accident happened at 'Emali' and not 'Emali town'. According to the Appellants, the plaint and Pw1's evidence talked about 'Emali' and as such the trial Magistrate had no basis to conclude that it was 'Emali town'. The trial Magistrate expressed himself as follows;

> *"On the position as held by the Plaintiff, it was not denied that the accident happened at Emali town at around 6.30am, in which he sustained injuries. It was also confirmed that the 2nd defendant was actually driving as per his own admission at 60km per hour whereas it is the law that while at a build-up section or approaching any town, the maximum allowable speed is 50km per hour. It was clearly an act of negligence."*

38. It is evident that the effort to distinguish is attributable to the speed limit requirements prescribed in section 42(B) of the Traffic Act considering that the evidence of the 2nd Appellant was that he was driving at 60 km/hr. The section provides that;

> *"No person shall drive or being the owner or person in charge of a vehicle, cause or permit any other person to drive, any vehicle at a speed exceeding fifty kilometers per hour on any road within the boundaries of any trading centre, township, municipality or city provided that the highway authority shall erect and maintain traffic signs as prescribed so as plainly to indicate to drivers entering or leaving such roads or areas where the fifty kilometers per hour speed limit restriction begin and ends."*

39. It is indeed true that the Respondent's pleadings and testimony referred to 'Emali' and while I appreciate that no evidence was adduced to show the difference *(if any)* between Emali' and 'Emali town', I note that Pw3 talked about 'Emali town' and was never cross examined about it. In my view, the Appellants should have seized the opportunity to bring out the alleged difference and the failure to do so means that the testimony was uncontroverted.

40. Accordingly, it cannot be said that the finding of the learned trial Magistrate was without basis. Further, his failure to mention which law he was referring to does not negate the requirement in section 42(B) of the Traffic Act.

41. With regard to hooting and switching on the lights, the trial Magistrate expressed himself as follows;

> *"The Plaintiff had indicated that the defendant did not hoot or switch on his lights, in his examination in chief, he did not contest that clear evidence until upon being prodded by the learned counsel for the Plaintiff. It is assumed therefore that the position by the Plaintiff was never challenged which was still an act of negligence."*

42. I have looked at the Insurance Motor Accident Report Form dated 25/03/2018 (PExb2) and noted that the question as to whether any warning was given by the driver was answered as 'none'. Further, the question as to what lights were showing on the vehicle was also answered as 'none'. Having been filled after the filing of the defence (23/11/2017), the contents of this form must be taken as a true reflection of what happened on the material day, which is that the driver of the motor vehicle had no lights on and did not hoot.

43. In their defence, the Appellants indicated that the Respondent was negligent because he did not heed the warning given by the driver of the motor vehicle. If indeed there was any warning given, it should not have been so difficult to indicate as much in the insurance form. Accordingly, the finding by the trial Magistrate was not erroneous.

44. Be that as it may, my re-evaluation of the evidence leads me to the conclusion that the accident could have been avoided if the Respondent had been more careful. The Respondent confirmed that there was a parked trailer at the point where he was exiting to join the highway and this lends credence to the 2nd Appellant's version that the Respondent joined the highway abruptly from behind the trailer.

45. The Respondent's visibility may have been blocked by the trailer but he still had a duty to stop and confirm that the road was clear and safe to cross. It is probable that his presence on the road was so abrupt that the driver did not even get an opportunity to warn him. He was also not wearing any reflective clothing and needless to say, the police blamed him for the accident.

46. From the totality of the evidence, I am convinced that the Respondent should carry 60% of the blame and the Appellants should carry 40%. Had he not abruptly come onto the road without checking, this accident would not have occurred. At the same time the 2nd Appellant ought to have driven more carefully and with his lights on, considering where he was with a trailer parked beside the road.

47. Coming to quantum, the injuries sustained were pleaded as follows;

a) Crush wound of the head-left lateral parietal region

b) Tender and swollen chest

c) Deformity of the right knee joint

d) Fracture of the right proximal tibia

48. The Respondent produced a discharge summary and medical report as PEbx 1(a) & (b) respectively. He also identified an invoice of Kshs.281,650/= from Kilome hospital but agreed that he had not paid the money. On cross examination, he said that he was injured on the head, chest and lower limb and had not fully healed.

49. **PW2 Dr. Charles Mwendwa Mutisya.** He examined the Respondent on 26/08/2017 and the Respondent had injuries to his head, chest, abdomen, right leg and arm. He also had a crush wound on the head and his chest was tender/swollen. His right knee was slightly deformed and an x-ray revealed a fracture of the tibia.

50. In cross examination, he said that he had been a doctor at Sultan Hamud for 4 years but was not a neurosurgeon. The patient was injured on 31/03/2017 and he examined him on 26/08/2017. He had not stated the injuries as they were at the time of examination but the patient was recovering and was capable of conducting his normal duties. In re -examination, he said that the injuries which he saw were consistent with the ones he was treated for.

51. The medical report described the right knee joint as slightly deformed and went on to state as follows;

> *"Patient still recovering and complains of chest and abdominal pains. Further investigations are important and will aid in better management of the patient.*

52. From the evidence, I am inclined to agree with the Appellants that the question of incapacity/disability was not brought out and no percentage was attached to it. In any case, the doctor's opinion about the Respondent's capability of conducting normal duties is inconsistent with incapacity.

53. In the trial court, the Respondent relied on the following cases;

a) **Joseph Musee Mua –vs- Julius Mbogo Mugi & 3 Others (2013) eKLR** where the 1st doctor testified that the Plaintiff had a permanent nerve injury and could not lift his foot, he had external fixators and required surgical removal of dead bone. He also had shortening of the leg and it was not easy for him to drive. The 2nd doctor testified that the shortening was 3cm and assessed permanent disability at 5%. He also said that the deformity to the left ankle joint needed physiotherapy to correct. It was also his evidence that where a dead bone had been removed, the injury would not heal fully and there could be a flare of upto 5 years down the line. The learned trial Judge found that the Plaintiff had proved his injuries and recognized that the same were serious and had resulted in surgeries in several hospitals. He awarded him **Kshs.1,300,000/=** as general damages.

b) **Devna Pandit –vs- Kennedy Otieno Obara & Anor (2016) eKLR** where the Plaintiff sustained multiple fractures on the left leg, hip, injuries to the face, crushed right cheek and broken jaw. The 1st doctor testified that he went through several expensive procedures and needed assistance of a nurse because he was completely immobile. He also required removal of the plates in his left leg and plastic surgery to remove the scars.

The 2nd doctor testified that the left hip injury was severe and destroyed the congruity of the joint in particular. The Plaintiff had over 80% likelihood of developing post traumatic osteoarthritis of that hip

joint and would require a total hip replacement. He was awarded **Kshs.2,000,000/=**.

54. On the other hand, the Appellants relied on the **Akamba case *(supra)*** and;

a) **Njenga Karanja –vs- Trans Ami Transporters (K) Ltd (1999) eKLR** where the Court awarded Kshs.280,000/= for a head injury leading to concussion and a fractured right tibia/fibula.

55. From the foregoing, it is evident that the cases cited by the Respondent were not comparable as the injuries sustained by the Plaintiffs therein were more severe. I found the **Akamba case *(supra)*** more relevant and I do agree with the Appellants that the injuries therein were more serious yet the award was Kshs.500,000/=.

56. I have also looked at several other cases and in **Clement Gitau –vs- G K K [2016] eKLR**, an award of Kshs.600,000/= as general damages was upheld on appeal where the major injury suffered was a fracture of the tibia/fibula. In **Zacharia Mwangi Njeru –vs- Joseph Wachira Kanoga (2014) eKLR** where a Plaintiff suffered a fracture of tibia/tibula and was awarded Kshs.400,000/= general damages.

57. Having looked at the various cases, it is my considered view that the award of Kshs.1,000,000/= in this case was inordinately high and constituted an erroneous estimate. It is however appreciated that besides other injuries the Respondent suffered deformity of the right knee joint and a fracture of the right proximal tibia. An award of Kshs.700,000 is adequate compensation.

58. As for the future medical expenses, the trial Magistrate appreciated that the Respondent had not established their essence and had not provided an exact figure but proceeded to give an award of Kshs.50,000/=. As correctly submitted by the Appellants, future medical expenses must be pleaded and proved. The same were pleaded but no evidence was adduced in support.

59. There was no evidence to show whether the Respondent would require any future additions/subtractions and/or what the estimated cost would be. In my view, stating that he would require some management was vague, speculative and should not have been a basis for any award. Accordingly, the award of Kshs.50,000/= is hereby set aside.

60. The award should therefore work out as follows;

General damages……. Kshs.700,000/=

Special damages……Kshs.0

Future Medical Expenses……Kshs.0

Total ……..Kshs.700,000

Less 60%.....Kshs.420,000/=

Net award…….....Kshs.280,000/=

61. The appeal succeeds to the extent discussed. I therefore set aside the judgment on quantum and enter judgment for the Respondent in the sum of Kshs.280,000/= (***two hundred and eighty thousand shillings only***) plus interest and costs.

62. The Appellants shall have half costs of the appeal.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge