REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 57 OF 2016

PETER MUCHIRI NJUGUNA ..... APPELLANT

VERSUS

DAVID NJUGUNA MUIRURI .....RESPONDENT

***(Being an appeal arising from the judgment/ decree of Honourable Mr. V.O Nyakundi R.M delivered on 23rd September 2016 in Embu CMCC No. 271 of 2013*)**

J U D G M E N T

A. Introduction

1. This appeal arises from Embu CMCC No. 221 of 2013 whereas the appellant sued the respondent for a claim of general and special damages for pain, suffering and loss of amenities as well as loss of future earnings following a road traffic accident which occurred on or about the 9/05/2013. It was pleaded in the plaint that the accident was caused by negligence on the part of the respondent herein. After the conclusion of the trial, the court in its judgment delivered on 23/09/2016 found the appellant 100% liable and dismissed the suit before it with costs.

2. The appellant being aggrieved by the judgment and decree of the court in the afore mentioned case, filed this appeal based on ten (10) grounds that can be summarized as follows: -

> ***1.*** *That the learned trial magistrate erred in law and in fact by finding that the appellant did not prove his case to the balance of probabilities and in doing so took into account irrelevant considerations.*
>
> ***2.*** *That the learned trial magistrate erred in law and in fact by proposing an award of Kshs. 50,000/= which was inordinately low and thus failed to take appreciate that comparable injuries should attract comparable awards.*

3. The appeal was canvassed by way of written submissions.

B. Appellant's submissions

4. The appellant's submissions were to the effect that all the evidence he tendered before the trial court was sufficient to prove negligence against the respondent. He testified that the point of impact was within the parking slot and while he was in front of the accident motor vehicle he was hit by it. He refuted the evidence of the respondent that he suddenly emerged on the parking lot as he was crossing the road making the impression given in the respondent's evidence that he was to blame. As such, he submitted, the trial court misapprehended evidence before it in material respect and further based its conclusion on no evidence at all and further acted on the wrong principles of law when it held that the appellant was 100% liable as there was no evidence to prove that the appellant was crossing the road when the accident

occurred.

5. It was his further submissions that the trial court erred in awarding Kshs. 50,000/= as general damages and in doing so failed to take into account the evidence on record being the radiography report was produced in court as exhibit. He prayed for an award of Kshs. 400,000/= as general damages and made reliance to **Rivatex Ltd -vs- Phillip Mochache [1999] eKLR, Bonface Mugendi & another v Emilio Murimi Njue (HCCA 71 of 2016) [2019] eKLR** and **Karangu -vs- Malele [1983] eKLR.**

C. Respondent's submissions

6. The respondent submitted that the accident in question happened at the parking bay as he was trying to park his vehicle and when the appellant emerged into the space the vehicle was being parked as he tried to avoid being hit by a motor cycle without ascertaining his safety. The respondent further stated that it is the appellant who hit his leg on the vehicle's bumper. As such, it was submitted, the appellant's actions demonstrated the doctrine of *volenti non fit injuria.* Reliance was made on the case of **Julius Omolo Ochanda & Joyce Atieno Muga -vs- Samson Nyaga Kinyua (2010) eKLR {Nairobi HCCA No. 680 of 2007)** to the effect that a pedestrian owes a duty to other highway users to move with due care and to follow the provisions of the Highway Code.

7. The respondent submitted that the appellant caused the accident by not being as he jumped to avoid being hit by the motor cycle and as such, this court ought to uphold the trial court's finding that the appellant was 100% to blame for the accident. On the quantum, it was submitted that the award of Kshs. 50,000/= by the trial court was proper as the injuries suffered were soft tissue injuries and that there was no evidence to prove that the appellant suffered a fracture since the radiography report was not produced. As such he urged the court to dismiss the appeal with costs.

D. Issues for determination

8. It is well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. (See **Selle & Ano. -vs- Associated Motor Boat Co. Ltd (1968) EA 123**). This court ought not to ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. {See **Mwanasokoni -vs- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348)}.** However, this court is not bound to accept the trial court's findings of fact if it appears either that the trial court clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. (See **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278).**

9. Further, in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court. What matters in the analysis is the substance and not its length? {See the Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)}.**

10. I have considered the grounds of appeal, the parties' respective written submissions and the lower court records and identified the following as the issues for determination: -

i. Whether the trial court erred in finding that the appellant was wholly to blame for the accident or whether there was contributory negligence.

ii. Whether the appellant suffered a fracture/dislocation.

iii. Whether the appellant was entitled to an award of special and general damages.

iv. Whether damages assessed by the trial court were inordinately low.

E. Determination of the issues

i. Whether the Respondent was to blame for the accident

11. There is no dispute that an accident occurred on 9.05.2013 involving the appellant and the respondent's motor vehicle registration number KBA 634V along Mama Ngina street in Embu Town and which vehicle was being driven by the Respondent herein. It is also not disputed that the appellant sustained injuries as a result of the said accident.

12. As a general rule, in civil cases, the burden of prove is always on the plaintiff to prove his claim against the defendant on the balance of probabilities and that such burden was not lessened even if the case was heard by way of formal proof (See **Kirugi & Ano. -vs- Kabiya & 3 Others [1987] KLR 347**). This burden remains as such even in matters where negligence is alleged. (See **East Produce (K) Limited -vs- Christopher Astiado Osiro - Civil Appeal No. 43 Of 2001**. The plaintiff must adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise *to wit*, whether on that evidence, negligence may be reasonably inferred and whether, assuming it may be reasonably inferred, negligence is in fact inferred (See **Treadsetters Tyres Ltd –vs- John Wekesa Wepukhulu [2010] eKLR).**

13. The appellant testified in the trial court to the effect that he was walking on the left side of the road when he was hit from behind by the respondent's car he confirmed to belong to him through a copy of records. He further stated that he went to the hospital whereas x-ray was done that revealed a dislocation of the left ankle. During cross examination, he confirmed that he was hit from the behind and was injured on the left heel. PW3 the investigating officer produced the police abstract and corroborated the testimony of the appellant on how the accident occurred.

14. The respondent said he was parking his vehicle when the appellant was hit by it. He added that before he entered the parking, he did not see anyone but as he parked the appellant emerged suddenly and was hit on the left leg. The respondent said that he was told by the appellant that he was avoiding a motor cycle that was about to hit him. The respondent was later to admit that he did not see any motor cycle hitting the appellant but insisted he was told so by the appellant. The appellant denied this allegation.

15. The evidence points to the respondent entering the parking and attempting to park his vehicle without taking due care. His defence that the appellant entered the parking lot suddenly was refuted by the plaintiff and by PW3. Despite the respondent's evidence that the appellant was running away from being hit by oncoming motor cycle, this does not add up in the chain of events as can be drawn from the totality of the evidence. It was the story of the respondent alone. In my view, the respondent had his share of blame in the accident which is supported by the evidence of the appellant and his witness.

16. As for the appellant, he knew he was walking next to a parking lot where vehicles were already parked at the material time and that any other vehicle could be parked in the vacant spaces any minute. It is my considered opinion that he ought to have been on the lookout as he walked next to the car park beside the road. PW3 said that the respondent was trying to park his vehicle between two other cars. The appellant by failing to take due care as he walked next or at the parking lot, was to some extent negligent and thus contributed to the accident.

17. In my considered view that both the respondent and the appellant were to blame for the accident. The respondent owed a duty of care to other road users whereas the appellant had a duty to ensure his own safety on the road.

18. I find that the trial court erred in finding that the appellant was wholly liable for the accident. It is my considered opinion that each of the parties herein contributed to the accident and as such liability ought to have been apportioned between them. I hereby set aside the judgment of the trial court on liability and hereby enter judgment in favour of the appellant at the ratio of 60:40. The respondent will bear 60% liability while the appellant bears 40%.

ii. Whether the appellant suffered a fracture

19. It was not in dispute that the appellant suffered injuries on his left leg as a result of the accident. However, the respondent argued that the injury was not a fracture but a blunt soft tissue injury. According to the medical report of Dr. Njiru Njuki, the appellant suffered dislocation of the left leg at the ankle joint, specifically the proximal metatarsal bone. The appellant was examined by Dr. Njiru about one month after the accident and the injury site was still painful. He was put on plaster of Paris (POP) and put on outpatient surgical treatment and on clutches to aid him walk. Dr. Njiru stated that the long term effect of the injury was onset of osteoarthritis.

20. Dr. Wambugu disputed the existence of any dislocation injury and said that the appellant suffered a blunt trauma of the left foot at the ankle joint. He examined the appellant and opined that he had a plaster cast bandage for only 21 days. The source of this information was not explained in the report. His opinion was that the appellant who complained of occasional pain on exertion had suffered soft tissue injury on

the left ankle and not a dislocation or fracture.

21. The trial court believed Dr. Wambugu that the appellant did not suffer a fracture. Dr. Njiru Njuki was faulted by the court for not examining the x-ray films which the court found that they did not show any fracture. This was not a correct finding in that Dr. Njuki stated in his evidence as follows: - *"I rely on the P.3 form, medical notes, interviewed the patient and on the x-ray film".* The appellant was blamed for not producing the x-ray film in court despite the fact that Dr. Njiru had testified that his medical report was based on the said films.

22. As much as the language on the P.3 form as cited is not very clear, I am of the considered opinion that the said statement means that the doctor relied on the P.3 form, medical and treatment notes, the x-ray film and also interviewed the patient.

23. The trial court was then presented with two conflicting expert reports. This court is obligated to determine which one of the two reports will be taken to guide the court. Section 48 of the Evidence Act Cap 80 laws of Kenya provides for admissibility of expert opinions. This section was well appreciated by the Court of Appeal in **Mutonyi versus Republic (1982) KLR 203 at 210.** The court in **Amosam Builders Developers Ltd v Betty Ngendo Gachie & 2 others [2009] eKLR** while adjudicating the issue of conflicting experts' evidence held as follows: -

> ***"…..There is no doubt that the witnesses called by both sides as experts were each qualified in their respective fields. That notwithstanding, as a general rule evidence by experts being opinion evidence is not binding on the court. The court has to consider it a long with other evidence and form its own opinion on the matter in issue. The court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it ……****(emphasis mine)"*
>
> ***"……In the case before us there is a conflict of opinion by the experts called by both sides. It was the responsibility of the trial court to come to a decision one way or the other after analyzing all the evidence before it. In a case as this where evidence of experts is conflicting a decision one way or the other depends on the credibility of witnesses….."*** See also **Dhalay vs Republic [1997] KLR 514)**.

24. I have considered the two reports as to the nature of the injuries sustained by the appellant herein and I find the report by Dr. Wambugu not being persuasive. I note that the said witness examined the appellant on 20/01/2016 and in his report noted that he did not see any fracture from the x-ray films presented to him. One wonders whether the doctor was presented with different e-ray films from the ones Dr. Njiru had used earlier. He stated in his report that the appellant suffered soft tissue injuries. The opinion of Dr. Wambugu opinion contradicts the report of Dr. Njiru as well as the P.3 form and the treatment notes. Yet I have reason to believe that the doctors used the same documents to prepare their reports.

25. Firstly, this court ought to correct the mistake of the trial court in that it stated that Dr. Njiru did not look at the x-ray film as he prepared his report. The record is very clear that he did so and there was no evidence to the contrary. I hold that Dr. Njiru used several documents to prepare his report including the x-ray films contrary to what the trial court stated.

26. The accident occurred on 9/05/2013 and Dr. Wambugu examined the appellant on 6/06/2016 which was about two and a half years after the accident. By this time, the patient could have made a lot of progress in recovery and pain could have been experienced only on exertion as the doctor said in his report. However, on the existence of the fracture, Dr. Wambugu failed to explain satisfactorily why a plaster of Paris (POP) was put on the left leg of the appellant as shown by the documents he relied on although he formed an opinion to the contrary. From the explanation of Dr. Njiru, a dislocation is a fracture because "the bone was broken". In fact, in his report, he refers to the injury as "Fracture dislocation left Proximal Metatarsal bone".

27. I have looked at the P.3 form which refers to the injury in the same terms as Dr. Njiru's report. The P.3 confirms that what was fixed on the patient was a plaster of Paris which Dr. Njiru explained is what is applied on fracture sites. The treatment notes from Embu Level 5 hospital dated 9/05/2013 supports Dr. Njiru's position.

28. Consequently, I am well persuaded by Dr. Njiru's report, and it is my considered opinion that the P.3 form and the treatment notes that the appellant suffered a dislocation of the left metatarsal bone. I hereby so find.

iii. Whether the damages assessed by the trial court were inordinately low

29. It is noted from the record that the trial court did not award special damages which were pleaded in the plaint and proved per se by the

evidence of PW1 and PW2 as follows: -

i. Medical report - Kshs. 3,000/=

ii. Copy of records - Kshs. 500/=

iii. Court attendance - Kshs. 3,500/=

The total special damages are **Kshs. 7,000/=** which I hereby award to the appellant.

30. The trial court assessed general damaged payable in the event that the respondent was found liable as Kshs. 50,000/= without referring to any comparative decisions or to the nature and severity of the injury as opined in th medical reports.

31. I have considered the medical report of Dr. Njiru as to the nature of the injuries sustained and the damages proposed. I have further considered the authorities cited by the parties herein both in the trial court and in this appeal. It is trite law that when making an assessment for damages, the same must measure up to the injuries suffered. In **Rivatex Ltd -vs- Phillip Mochache (1999) eKLR,** the appellant therein suffered a fracture of the metatarsal bones and the High Court on appeal awarded him Kshs. 240,000/=. In **Bonface Mugendi & another v Emilio Murimi Njue [2019] eKLR)** which is a decision of this court, and which was quoted by the appellant, the court awarded Kshs. 300,000/=. However, the injuries there were more serious and not comparable with the injuries hereijn. It is my considered opinion that the damages proposed by the trial court were inordinately low and the same ought to be reviewed.

32. Having considered all the above factors and authorities, I hereby award the appellant Kshs. 250,000/= subject to the ratio of 60:40.

33. The appellant sought damages for loss of earnings and future earnings. However, he did not tender any tangible evidence to support this claim. As such, I uphold the trial court's finding that the claim was not proved.

34. Judgment is hereby entered in favour of the appellant subject to the ratio of 60:40 as follows: -

a) General damages - Kshs. 250,000/=

b) Special damages - Kshs. 7,000/=

Total - Kshs. 257,000/=

Less 40% contribution - Kshs. 102,200/=

- **Kshs. 154,200/=**

35. Costs of the suit are hereby awarded to the appellant.

36. It is hereby so ordered.

DATED AND SIGNED AT EMBU THIS 17TH DAY OF AUGUST, 2020. (To be sent to the parties through email).

F. MUCHEMI

JUDGE