



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 60B OF 2018

KAHINDI WAMBUGU.....1ST APPELLANT

ISSAC MACHARIA KAMAU.....2ND APPELLANT

-VERSUS-

JEREMIAH WANYIRI WAMBUGU.....RESPONDENT

(An appeal from the judgment and/or decree of honourable B. Mararo Principal Magistrate in Nakuru CMCC Number 1000 of 2015 delivered on 2nd May 2018)

JUDGMENT

1. This appeal arises from a suit filed by the respondent in the lower court through a plaint dated 15th September 2015 and amended on 27th March 2017. The respondent sought general and special damages of kshs 377,060 for injuries sustained on 15th August 2015 along Lanet – Dondori road near Lanet Military Academy area while travelling in motor vehicle registration number KBT 530Q which collided with the 1st appellants/ defendants’ motor vehicle registration number KAJ 259J which was being driven by the 2nd appellant/defendant.

2. By judgment delivered on 2nd May 2018, the trial magistrate found the appellants 100% liable and awarded general damages of kshs 1,200,000 and special damages of Kshs. 337,060/= making total award kshs 1,537,060.

3. The Appellants being aggrieved by the judgment of the trial Court filed this appeal seeking to set aside the judgment and decree of the trial Court and substituting it with the judgment of the High Court on the following grounds: -

i. That the learned trial magistrate erred in making a finding and arriving at an award of damages which is inordinately too high as to represent an erroneous estimate of damages payable.

ii. That the learned trial magistrate erred in law and in fact in finding the appellants 100% liable against the over whelming evidence on record against the Respondent.

iii. That the learned trial magistrate erred in applying wrong principles and failing to take into account relevant facts in arriving at an erroneous award of Kshs. 1,200,000/= being general and special damages of Kshs. 337,060/=.

iv. That the learned trial magistrate erred in law and in fact in disregarding the appellants’ submissions

4. Parties agreed to canvass the appeal through written submissions.

5. The Appellants opposed the suit through a statement of defence dated 16th October 2015 and amended on 13th June 2017. They denied the allegations of the amended plaint and being the registered and/or beneficial owners of motor vehicle registration number KAJ 259J. The appellants in their statement of defence blamed the driver of motor vehicle registration number KBT 530Q for the occurrence of the accident and alleged contributory negligence. They prayed to the Court to dismiss the respondent’s suit with cost.

6. The plaintiff and his wife **Grace Mugure Wanjohi** filed their respective suits for claim of damages CMCC.1000 and 999 of 2015 respectively which were later consolidated. This appeal is in respect of CMCC. 1000 of 2015 where the respondent was the plaintiff.

7. The case proceeded for full trial and the plaintiff called 4 witnesses while in defence only the 2nd appellant testified.

8. On 21st May 2020 directions were given that the appeal was to be canvassed by way of written submissions. Both advocates filed in their

submissions through email.

APPELLANT'S SUBMISSIONS

9. The appellants submitted that the trial magistrate urged in fact and law by holding the appellants 100% liable for the occurrence of the accident despite the overwhelming evidence on record against the respondent. Appellants submitted that PW2 who was supposed to be the key witness stated that she did not witness the occurrence of the accident as she only heard a loud bang. The police officer who testified did not give concrete evidence as he was not the investigation officer; he only stated the appellants' motor vehicle did not keep distance but didn't state which distance he was referring to; that the respondent did not prove negligence on the part of the appellants.

10. In respect to damages, the appellants submitted that the trial magistrate awarded general damages of kshs. 1,200,000/= and Kshs. 337,060/= as special damages without giving a basis of how he had arrived at that amount as provided under **Order 20 Rule 4 of the Civil Procedure Rules**, that provides all judgement in defended suits should contain a concise statement of the case, points for determination, the decision thereto and the reason for such decision. Appellants submitted that the trial magistrate proceeded on the wrong principle as he failed to analyse the evidence of the lower court before making a determination and reasoning thereafter.

11. The appellants submitted that amount of damages awarded is inordinately too high and not commensurate to the injuries sustained by the respondent. That the appellants' proposal to award kshs 150,000 as general damages and the respondent proposed kshs 1,700,000 and awarded Kshs. 1,200,000/= for only one fracture.

12. On special damages the appellants submitted that the respondent did not prove the entire amount and had testified a sum of Kshs. 146,048 had been catered for by NHIF therefore was not entitled to that amount, the special damages award ought to be Kshs. 196,152. He urged Court to allow the appeal as it is merited.

RESPONDENTS' SUBMISSIONS

13. The respondent's advocate submitted that the award by the trial magistrate was adequate and the same should not be disturbed. He submitted that the trial magistrate had the discretion to award damages as it deemed fit in the circumstances and an Appellate Court can only disturb such an award if it finds it to be inordinately high. The trial Court found that the accident resulted from the negligence of the 2nd appellant and that they were 100% liable as per the OB extract and abstract produced by the police. The respondent suffered severe bodily injuries which resulted to 40% permanent disability and has resulted to him seeking further medical assistance in correcting his right knee, injuries he sustained during the accident. On special damages the respondent specifically pleaded them in the amended plaint and he strictly proved them by production of receipts as required under the law. He submits that the appeal should be dismissed with cost.

ANALYSIS AND DETERMINATION

14. The appellants appeal on both liability and quantum awarded in the trial Court. This being the first Appellate Court, I am required to re-evaluate and analyse evidence adduced before the trial Court and arrive at an independent determination. This I do knowing that unlike the trial Court, I never got the opportunity to take evidence first hand and observe demeanour of witnesses. In respect to the role of the first Appellate Court, the Court of Appeal in the case of **Abok James Odera t/a A. J. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR**, held as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

15. In view of the above, I have perused the lower Court record. The appellants challenges the finding on both liability and quantum. The argument is that the trial magistrate erred in finding the appellants 100% liable and that the award is an inordinately high and not commensurate to the injuries the respondent sustained by the respondent.

16. The respondent testified that 15th August 2015, he was travelling as a passenger in motor vehicle registration number KBT 530Q from Nakuru to Nyahururu when while approaching speed pumps, the driver of the motor vehicle he was in slowed down then they heard a loud bang from behind; he said their motor vehicle flown off the road. He realised their vehicle had been hit by motor vehicle registration number KAJ 259J. He said his leg got stuck near the steering wheel but was assisted by the army officers. He sustained injuries to his left ankle, hip joints and both shoulders. He was first treated at Nyahururu District Hospital where plaster of Paris applied on his leg. He stated that he never recovered and he went for further treatment at Kimkan in Muranga where joint knee replacement was done at a cost of Kshs. 32,202/=. He produced receipts for the payment. He testified that his ankle was found to be infected and he was admitted at Kijabe Hospital where surgery was done at a cost of Kshs. 146,048/=. He further stated his knee did not recover and he needs a surgery of knee replacement at a cost of Kshs. 402,000/=. He said he cannot work without the support of crutches. He said that he paid kshs 342,220/= and NHIF paid kshs 1400 for 17 days. Record show that he produced receipts to prove payment. In further cross examination he said insurance paid for treatment in Kijabe and that he did not pay any money.

17. PW2 corroborated PW1'S testimony by confirming that the motor vehicle they were travelling in KBT 530Q had not stalled; that it had only slowed down when it approached the speed pumps and had rear brake lights on when it was hit from behind by motor vehicle registration number KAJ 259J.

18. PW3 the police officer confirmed that an accident occurred on 15th August 2015 near Military Gate Academy along the Nakuru – Dondori road when motor vehicle registration number KBT 530Q while heading towards Dondori slowed down at a bump and in the process motor vehicle registration number KAJ 259J rammed into it from behind. He testified that the 2nd appellant who was driving KAJ 259J

failed to keep distance resulting in the accident and passengers aboard KBT 530Q were injured.

19. PW4 the doctor from Kimkan Hospital testified that he treated the respondent herein. He confirmed that knee replacement was done at a cost of Kshs. 342,220/= which the respondent paid in through a cheque. He produced a medical report dated 14th June 2016 which indicated that the respondent had suffered 40% permanent disability and the degree of injury classified as grievous harm.

20. DW1 in his defence relied on his statement as filed on 21st January 2016. In cross examination, he admitted that he hit the motor vehicle number KBT 530Q from behind and that he could not avoid it as he was driving at 50 Kilometres per hour; he said police blamed him for the accident.

21. I have considered the above evidence and find the following as issues for determination: -

i. **Who is to blame for the accident and to what extend?**

ii. **Whether the quantum awarded was commensurate to the injuries sustained.**

22. On the issue of liability, the trial Court apportioned liability to the appellant 100% in favour of the respondent. I find the same was appropriate because the 2nd appellant ought to have adhered to the traffic rules by observing distance while driving, he rammed onto the rear of the motor vehicle registration number KBT 530Q while it had slowed down at a place where there were pumps and vehicles are required to slow down taking into account it was near a school.

23. A copy of records produced in Court shows motor vehicle registration number KAJ 259J was registered in the name of **Kahindi Mburu**. Ownership was sufficiently proved. The police abstract indicates the 2nd appellant was the driver of the motor vehicle at the time of the accident and he also admitted the same during his testimony. It was the 2nd appellant's testimony that he was driving at 50 Kilometre per hour while approaching the pumps and could not avoid hitting the motor vehicle KBT 530Q. He was blamed for causing the said accident. From the respondent's evidence and that of his witness, their motor vehicle had slowed down because of the pump. PW3 the police officer produced the relevant OB extract and an abstract to show that the 2nd appellant was to blame.

24. Evidence adduced show that the respondent was a passenger in motor vehicle KBT 530Q. The respondent and his witnesses testified that the 1st appellant's vehicle hit the vehicle they were travelling from behind. They blamed the 2nd defendant for negligence in driving. They never filed 3rd party proceedings against the driver of motor vehicle KAJ 259J. The respondent having been a passenger could not have contributed to the accident. The trial magistrate did not therefore err in holding the appellant 100% liable for the accident. Appeal on liability is therefore dismissed.

25. In respect to quantum, the appellant submitted that the trial magistrate applied wrong principles and failed to take into account relevant facts in arriving at an erroneous award of Kshs. 1,200,000/=

26. In respect to special damages the respondent confirmed that treatment expenses of kshs 146,048/= for surgery at Kijabe Hospital was paid by insurance. He stated that he did not claim any money for treatment at Kijabe Hospital as it was paid by insurance and NHIF.

27. It is not disputed that assessment of general damages is an act of exercise of discretion on part of a Court. Principles to guide the Appellate Court in making determination on appeal in respect to assessment of damages were laid down by the court of appeal in the case of **Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini Vs A.M.M. Lubia & Another (1982-88)1 KAR 777** where they stated as follows: -

“...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

28. I note from **Dr. Omuyoma's** medical report that the respondent sustained the following injuries: -

- i. Oblique fracture of the medical femoral condyle of the right knee joint leading to osteoarthritis
- ii. Blunt injury to the occipital region leading to severe soft tissue injuries;
- iii. Blunt injury to the neck leading to severe soft tissue injuries;
- iv. Blunt injury to both shoulder joints leading to severe soft tissue injuries;
- v. Blunt injury to both hip joints leading to severe soft tissue injuries;
- vi. Blunt injury to left ankle joint leading to severe soft tissue injuries.

29. **Dr Omuyoma** noted that the respondent cannot work without crutches and assessed permanent disability at 40%. The appellants urged

Court to consider reduced earning capacity and award general damages of kshs 1.7Million.

30. **Doctor Julius Murimi Mwega** of Kimkan Hospital confirmed that they did total hip replacement on the respondent at a cost of kshs 342,220 which the respondent paid by cheque. He said the respondent recovered fully; that he did not have further injuries as there were no complications. He said metals were to be removed after 3 years. He however said he got infection on the same knee from various source.

31. The respondent's advocate proposed an award of kshs 1.7Million as general damages in respect to the appellant herein and cited two authorities where the Court granted 2.5Million and kshs 980,000 respectively.

32. I have compared the injuries sustained by respondent with injuries suffered by victims in the cited authorities; taken note of the fact that the respondent suffered 40% disability and find that the trial magistrate did not err in awarding kshs 1.2Million under general damages.

33. In respect to special damages, they must be pleaded and proved before they can be awarded by the Court as stated in the decision of the Court of Appeal in **Hahn V. Singh, Civil Appeal Number 42 of 1983 [1985] KLR 716, at P. 717, and 721** where the Learned Judges of Appeal – **Kneller, Nyarangi JJA, and Chesoni Ag. J.A.** – held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

34. The respondent in his amended plaint pleaded a sum of Kshs. 377,060/= (medical report kshs. 5,000/=, medical expenses Kshs. 371,560/= and search Kshs.500/=). The trial court awarded a sum of Kshs. 377,060 as pleaded and proved.

35. There is no doubt that as held by the trial magistrate, special damages awarded by the trial Court were pleaded and proved. The trial magistrate did not therefore err in awarding Kshs. 377,060 as general damages

36. **FINAL ORDERS**

1. **This appeal is hereby dismissed**

2. **Costs of the appeal to the respondent.**

Judgment dated, signed and delivered via zoom at Nakuru This 24th day of September, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

E. M. Juma & Ombui

Rober Ndubi & Co. for Respondent