



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 68 OF 2018

SYNGENTA EAST AFRICA LIMITED.....APPELLANT

VERSUS

MARGARET KEMUNTO.....RESPONDENT

JUDGMENT

(Being an appeal from the judgment and decree of Honorable C. OBULUTSA Chief Magistrate delivered on 25th May 2018 in Eldoret Chief Magistrate's court Civil Suit No. 221 of 2016).

1. The appellant was the defendant in the lower court suit being sued by the respondent/plaintiff vide a plaint dated 22.2.2016. The plaintiff averred that on or about the 9.8.2015 she was a lawful passenger travelling on motor-cycle registration number KMDG 810 Hero Honda when the defendant's driver, servant or agent of motor-vehicle registration number KCA 961V Isuzu Pick-up knocked down the motor-cycle and as a result she sustained severe injuries and thus the defendant was vicariously liable for the loss and damage.
2. The appellant/defendant denied the allegations laid against them by its statement dated 5.4.2016. The defendant denied the occurrence of the accident and averred that the rider of the motorcycle was wholly to blame and or he contributed to the occurrence of the accident.
3. This matter proceeded to hearing and after the appellant's two witnesses and the respondent's three witnesses were heard, the case was closed. Submissions were filed and the trial court delivered judgment to the effect that the appellant was wholly liable for occurrence of the accident and general damages was awarded at Ksh2,500,000/= and special damages of ksh 830,000/=. The appellant was dissatisfied with the said judgment and appealed against the same.
4. The following grounds of appeal were raised:
 1. That the honorable trial magistrate erred in law and in fact in holding the appellant 100% liable in negligence when the respondent had not proved liability on a balance of probabilities.
 2. That the trial magistrate erred in law and in fact in disregarding the traffic court's conclusive finding that the motorcycle registration number KMDG 810R of which the respondent was riding on had contravened the law in that the rider was unlicensed and it was uninsured hence ought not to have been on the road at all.
 3. That in light of ground no. 2 the trial magistrate erred in law and fact in not reaching the decision that the respondent's claim lay against the owner of the motorcycle for permitting its use in contravention of the law.
 4. That the learned trial magistrate erred in law and in fact in entering judgment in favor of the respondent and against the appellant which appears the respondent was benefitting from an illegality.
 5. That the learned trial magistrate erred in law and in fact in assessing general damages at Ksh 2,500,000/= for pain, suffering and loss of amenities which amount was manifestly excessive in the circumstances.
 6. That the learned trial magistrate erred in law and in fact in awarding special damages of ksh830,000/= when the same had not been specifically proved.
 7. That the learned trial magistrate erred in law and in fact in failing to take into cognizance the fact that the Kenyan economy cannot sustain such huge awards.

Reasons wherefore the appellant prays that:

- i. This appeal be allowed
- ii. That the decision of the subordinate court be set aside and this appellate court be pleased to substitute the entry of judgment against the appellant with a dismissal order and/or apportionment of liability.
- iii. That the judgment of the subordinate court in respect of quantum both general and special be set aside and this court be pleased to re-assess the quantum awardable had the respondent proved her case.
- iv. Any other relief that this honorable court deems fit to grant.
- v. That the respondent be ordered to pay the costs of the appeal and the cost of the subordinate court.

5. There is a supplementary record of appeal dated 29.4.2020 which was filed by the respondent containing the documents relied upon during hearing and the decree of the trial court.

Plaintiff's case

6. The respondent's first witness at the trial court was P.C Cheserek (PW1) who was stationed at Eldoret police station. He testified that the motor-vehicle hit the motorcycle from behind. On re-examination he stated that he did not investigate the accident and as at 16.8.18 investigations were still pending and the abstract had been issued on 9.8.15.

7. The respondent (PW2) testified that she was injured and treated at St. Luke's hospital where she was admitted on 15.4.18. The driver was speeding and he hit them from behind, the motorcycle rider was not at fault. On re-examination she stated that the rider indicated when at a junction though she wasn't sure if he saw the motor-vehicle. She was not aware if the rider had a licence and nor was she on whether the motorcycle was insured.

8. Jacob Mumina (PW3) testified and relied on his written statement. On cross-examination he stated that he was the motorcycle rider and were moving in the same direction with the vehicle. After the collision the vehicle stopped 30 metres away. The 2nd treatment report was produced by consent as Dex no. 1.

Defence case.

9. Robert Muya (DW1) testified and stated that he prepared a report after the accident. On cross-examination he stated that the accident occurred at 5.00 pm, the weather was clear, a tanker was ahead, he was alone, and the vehicle got damaged. He was informed somebody was injured.

10. Walter Kosgey (DW2) testified and stated that he worked with Syngenta East Africa and he relied on his written statement. He alleged that the vehicle was from the left trying to cross to the right, he swerved to the right but lost control. He blamed the rider and passenger. The defence case was closed.

11. The traffic case file no. 2896/15 was produced as dex no. 5.

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

Appellant's submissions

13. The appellant argued grounds 1,2,3 and 4 as one on the heading of liability. It averred the respondent was a passenger on a motorcycle. Her statement was silent on why she blamed the motor-vehicle. The court was urged to disregard the evidence of the eye witness Jacob as by the vehicle stopping 30 metres away it shows it was not at high speed as he had stated. The witness had failed to state if the motor vehicle was following the motor-cycle.

14. This evidence is controverted by the driver's evidence that he was following a truck when a motorcycle suddenly emerged from the left side of the road intending to join the main road. The motorcycle failed to give way. The respondent ought to have sued the owner of the motorcycle. Thus the trial court ought to have dismissed the case.

15. The respondent did not rebut the appellant's allegation that she contributed to the occurrence of the accident. The motor-cycle was uninsured and the rider was not licensed. This court was urged to dismiss the case not to encourage parties to benefit from unlawful actions.

16. On quantum it was urged that the court assessed permanent disability at 40% yet Dr. Gaya's report had assessed at 30% as per the medical report dated 3.5.2016. The respondent's medical report dated 14.10.2015 was prepared barely 2 months after discharge on 15.9.2015. The injury was to the right limb only. The appellant relied on **Fellon Mwangi Mwakisha v. Datton Mwamburi, Mombasa HCCC No. 529 of 1983** where permanent incapacity was awarded Kshs. 300,000/= but due to inflation the court was urged to award ksh 1,000,000/= as general damages.

17. On special damages the respondent had failed to tender evidence on how the ksh 830,000/= was arrived at after being at St. Luke's

hospital from 9.8.2015 to 15.9.2015 when she was discharged. The court was urged to disregard the receipts she produced. Finally the court was asked to allow the appeal.

Respondent's submission

18. The court was urged that the respondent had proved her case on a balance of probabilities. The evidence of the respondent (PW2) was clear that the rider had slowed down and indicated he wanted to branch off from the main highway and was knocked down by the driver of motor-vehicle registration No. KCA 961V Isuzu pick-up. The driver failed to regard the indicators since he was at high speed and hit the rider from behind. This evidence was corroborated by the evidence of PW3. The driver's evidence that he was following a truck when suddenly the rider emerged from the left side of the road is false evidence. The appellant's claim that the respondent contributed to the occurrence of the accident is not true since the allegation was not proved.

19. Respondent's position was corroborated by PC Cheserek who produced a police abstract and told the court the cyclist was hit from behind.

20. The court was urged to disregard the defence evidence in the case since it did not capture the respondent's statement and thus was meant to mislead the court. The investigations report did not show the point of impact and only showed the vehicle and not the motorcycle. Neither did the report capture the statement by the traffic officer PC Koech who visited the scene of the accident. The court was urged to find the appellant was wholly to blame for the accident.

21. On the issue of allowing an unlicensed motorcyclist and uninsured motorcycle on the road, the court was urged to disregard the same. The owner of the motorcycle had been charged with an offence that occurred on 25.8.2015 yet this is an accident that occurred on 9.8.2015. The appellant had failed to prove that the rider on 9.8.2015 did not have a valid driving license.

22. The appellant could lay claim on the owner of the motorcycle by way of third-party proceedings. The driver of the said vehicle was to blame for the accident for being careless while driving. The respondent neither caused nor contributed to the occurrence of the accident.

23. On quantum the court was urged to find that the award was not excessive as alleged by the appellant. The respondent had sustained serious injuries which included: crushed right leg, comminuted fracture of the right ankles, tibia nerve damage and she bled profusely. The X-ray on the right leg had confirmed the fracture of the tibia medial malleolus and dislocation of the syndermosis joint (joint between the distal tibia fibula). The court did not therefore consider lost earnings as alleged by the appellant. The award of ksh 2.500.000/= was not in excess as the respondent had sustained 40% permanent disability; was using crutches to walk; skin surgery had been performed and she had been left with scars thus the award was reasonable. The court was referred to **Real Tilak Enterprises Ltd. V. Paul Muia Kilonzo (2019) eklr.**

24. The court was urged to find that the special damages of ksh 830.000/= was proved by way of receipts as Pex no. 4a,b, and c. All the receipts were admitted during trial and the appellant could have challenged the same then.

25. Finally the court was urged to find the award reasonable and dismiss the appeal.

Analysis and determination.

26. The court has referred to the record of appeal, the evidence on record, judgment of the lower court, the submissions and authorities relied on. The issues for determination are:-

- i. Who is to blame for the occurrence of the accident and to what extent?
- ii. Whether the respondent contributed to the occurrence of the accident.
- iii. Whether the award in general damages was excessive.
- iv. Whether the award in special damages was pleaded and proved.
- v. Who is to bear costs.

27. The appellate court is duty bound to analyze and re-evaluate the evidence on record in order to arrive at its own independent conclusion bearing in mind that it did not have the benefit of seeing or hearing the witnesses as was held by the Court of Appeal for East Africa in **Peters vs. Sunday Post Limited [1958] EA 424** stated that: -

‘It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484. “My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English -terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court

has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.’

28. The respondent testified that she was a pillion passenger on motorcycle registration number KMDG 810R when they were hit from behind by vehicle registration number KCA 961V. The rider had slowed down and he had indicated to join an off road. Being a pillion passenger there is no way she could have had control of the motorcycle as alleged by the appellant. The police abstract confirmed an accident occurred on 9.8.2015 along Eldoret –Nakuru road at 6.30 pm. The abstract does not indicate who was to blame for the accident but it shows the matter was still pending investigations.

29. It was for the above reason that the appellant produced a traffic charge sheet for motorcycle registration number KMDG 810R which indicates that on 25.8.2015 the owner of the said motorcycle allowed it to be used when it was uninsured and on count 11, allowed a non licensed person to ride the said motorcycle. This was denied by the respondent since the accident in question occurred on 9.8.2015 yet the appellants were relying on records dated on 25.8.2015. Indeed this court agrees with the respondent that the accident in this matter occurred on 9.8.2015. The hospital documents also confirm the respondent was admitted on 9.8.2015 and the P3 form shows the accident occurred on 9.8.2015.

30. The appellant urged that the rider was to blame for the accident for emerging from the left side of the road. This was disputed by the respondent. The report by the appellant at page 9 indicates that the motorcycle obstructed the vehicle and thus the collision occurred. The abstract only shows that one vehicle was involved in the accident and a motorcycle.

31. The police officer PC. Cheserek only produced an abstract but not a police file. The sketch plan which would have given the court a clear picture on the point of impact, the resting position of the vehicle and motorcycle after the accident and probably suggest who was to blame for it, was not availed in court. The investigating officer was not availed to testify in court and PC Cheserek only produced the abstract.

32. The photos of the vehicle shows damage on the left side which suggests the impact was more likely on the left side of the road. The motor-cycle photo is not clearly showing if the same was damaged. It is more probable given the available evidence, that the motorcycle was hit from behind on the left side of the road. The respondent has therefore proved her case on a balance of probability. In the case of *Kanyungu Njogu v. Daniel Kimani Maingi [2000] eKLR* the court held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. In this case, the evidence of the respondent is more probable than that of the appellant.

Quantum of damages

33. The appellant is aggrieved with the quantum of damages awarded by the trial court citing that it was excessively high compared to the injuries, thus this court ought to reduce the same in the eventuality that they are found liable. In *Kemfro Africa Ltd v. Lubia & Another (No.2) 1987 KLR 30* Kneller JA 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 court 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 wholly erroneous estimate of damages”

34. The respondent in her plaint pleaded the following injuries:

- i. Crushed right leg
- ii. Comminuted fracture of the right ankle
- iii. Tibia nerve damage
- iv. Bled profusely.

35. The treatment document from St. Luke’s hospital indicates the respondent sustained a crushed right leg with no history of unconsciousness. On x-ray it was found she had a comminuted fracture of the right ankle and a large wound posteriorly. This was the hospital she was first attended to and where she received treatment. The doctor was therefore in a clear and better position to know the injuries sustained.

36. The first medical report by Dr. Sokobe indicates the injuries in the plaint. These are more than those in the initial report from St. Lukes hospital. Dr. Sokobe gave an opinion of 40% permanent disability.

37. The second report by Dr. Gaya indicates a crushed right leg with multiple fractures at the ankle joint and the right tibia nerve damage. On

examination it further indicates the respondent had multiple healed scars and she had a foot drop on the right lower limb. The assessment of permanent disability was at 30%.

38. It is clear that the respondent was injured and she sustained a fracture on her right ankle.

39. This court can only disturb an award if it is inordinately high or low. The court chose to rely on a 40% permanent incapacity yet a later report placed it at 30%.

40. The respondent must have suffered serious injuries since she was hospitalized for more than a month. The appellant relied on a 1985 case and asked the court to inflate the award due to passage of time to Ksh1.000.000. On the other hand the case relied on by respondent had more injuries than hers. The duty of the court is to fairly compensate the respondent and not to enrich her. I do find an award of ksh 1.500.000/= would be adequate and sufficient in the circumstances. The court herein is guided by the following decisions:-

a. In *Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] eKLR* the claimant suffered multiple fractures involving the right femur, left femur and left scaphoid bones; dislocation of left elbow joined associated with a fracture of the radial head; dislocation of left lunate bone and bruises parietal scalp. The Court of Appeal awarded **Kshs. 1,500,000** general damages when in fact the fractures in the case were much more serious

b. In *Joseph Musee Mua vs. Julius Mbogo Mugi & 3 Others [2013] eKLR*, the claimant sustained much more serious injuries resulting in surgeries in several hospitals and treatment. He had an injury to the left leg, on the head, and face. The left leg tibia and fibula were fractured. He had two broken upper jaw teeth i.e. one molar and one canine tooth. He had chest injury. He had right shoulder injury as well as bruises on the left elbow. The left leg was shortened due to the injury and the treatment procedures undertaken. The nerves therein were also affected. The Court awarded **KShs.1,300,000.00** general damages.

c. In *Mwaura Muiruri vs. Suera Flowers Limited & Another [2014] eKLR* the Plaintiff sustained multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left sub-axillary area), comminuted fractures of the right humerus upper and lower thirds of the tibia compound double fractures of the right leg upper and lower third tibia fibula. Court awarded **Kshs. 1,450,000**.

d. In *James Gathirwa Ngungi vs. Multiple Hauliers (EA) Limited & another [2015] eKLR* the Plaintiff suffered compound comminuted fracture of the right tibia Compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands multiple facial cuts and lacerations and pathological /re-fracture of the right leg. Court awarded **KShs. 1,500,000**.

41. On special damages the respondent pleaded and proved the same as evidenced from Pex no. 4a to c. It is trite law that special damages have to be specifically pleaded and proved. That was satisfied and there is no cause to disturb the award.

The appeal therefore succeeds partly on general damages which is reduced to 1.5 Million. Special damages stands as awarded.

Each party to bear own cost of appeal.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of September, 2020.

In the presence of:-

Ms Ombonya for the applicant absent

Mrs Omunya for respondent

Ms Gladys - Court assistant