REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 5 OF 2018

HASHI HAULIERS .... 1ST APPELLANT

ERICK JUMA OUMA ....2ND APPELLANT

VS

MESHACK KIPKORIR .... RESPONDENT

(Being an appeal from the judgment and/or decree of C. Obulutsa (CM) delivered on 26.1.2016)

JUDGMENT

1. HASHI HAULIERS (1st appellant) and **ERICK JUMA OUMA** (2nd appellant) were sued by **MESHACK KIPKORIR** (the respondent) seeking general and special damages following an accident which occurred on 23.12.2015 involving the respondent who stated that he was riding motorcycle registration **No. KMDB 040 P (TVS STAR)** when owing to the negligence of the driver (2nd appellant) to motor-vehicle registration No. **KBD 410P,** he was knocked down and sustained severe injuries. He relied on the doctrine of *res ipsa loquitor* and vicarious liability. The 1st appellant was sued as the legal, beneficial and/or registered owner of the said vehicle.

2. The defendants (appellants) denied the allegations of negligence attributed to them and averred that the accident was caused by the rider's negligence and urged the court to dismiss the suit.

3. The matter proceeded to hearing and judgment was delivered in favor of the respondent as against the appellants who were found wholly liable for the accident and an award in the sum of Ksh.400.000/= and Ksh.3000/= as general damages and special damages respectively was made.

4. The appellants were aggrieved by the said judgment and appealed to this court 6 grounds of appeal:

i. That the trial magistrate by condoning and rewarding an illegality on the part of the respondent, who not only had overloaded his motorcycle registration **No. KMDB 040P** by carrying 2 passengers instead of the prescribed one but also drove a motor cycle which was not insured.

ii. That the trial magistrate erred in failing to apportion liability against the respondent in obvious circumstances where the respondent had in fact and in law overloaded his motorcycle registration **No. KMDB 040P**.

iii. That the magistrate erred when he failed to find that the respondent failed to prove that he was licensed to ride a motor cycle contrary to the provisions of section 112 of the Evidence Act and therefore had no right being on the road ab-initio as a motor cyclist.

iv. That the trial magistrate erred in holding the appellants 100% liable in negligence when the respondent had not proved liability on a balance of probabilities.

v. That the trial magistrate erred in assessing general damages at ksh400.000/= for pain, suffering and loss of amenities which amounts was manifestly excessive for soft tissue injuries allegedly sustained by the respondent.

vi. That the trial magistrate erred in failing to take into cognizance the fact that the Kenyan economy cannot sustain huge awards.

The appellants pray:

a) That the appeal be allowed

b) That the judgment of the subordinate court be set aside, and this appellate court do substitute the entry of judgment against the appellant with a dismissal order and/or apportionment of liability.

c) That the judgment of the subordinate court in respect of quantum be set aside and this court be pleased to re-assess the quantum awardable had the respondent proved his case.

5. The grounds raised above are basically on liability and quantum. And the appeal was canvassed by way of written submissions, however, the appellant did not file any submissions.

6. Mr. Mwinamo on behalf of the respondent argues that the trial court did not err in finding the appellants wholly liable as it was supported by the evidence of the respondent (pw2) and the police officer(pw2). It is pointed out that the respondent was riding the motor- cycle along Eldoret- Kitale road, with two pillion passengers. The motor-vehicle in question was also being driven in the same direction as the cyclist when the driver tried to overtake a vehicle, then returned to his lane when he saw it was not safe to do so, at that point he veered off and he knocked down the cyclist. That this evidence remained unchallenged, and was collaborated by the evidence of the police officer who testified that the driver was charged with an offence of causing death by dangerous driving.

7. The court is urged to find that the cause of the accident was not the rider carrying two pillion passengers.

8. **<u>Quantum:</u>** It is submitted that the respondent sustained the following injuries:

i. Blunt trauma to the scalp which was tender

ii. Blunt trauma to the neck which was tender

iii. Blunt trauma to the chest which was tender

iv. Blunt trauma to the right arm which was tender with bruises

v. Blunt trauma to the right leg which was tender with bruises.

9. The sum of Ksh 400.000/= was adequate compensation compared to the injuries sustained. The court was referred to **Catherine Wanjiru Kingori & ors v. Gibson Theuri Gichubi, Nyeri HCC no. 320 of 1998**, where the court gave an award of Ksh 350.000/= for injury of the left elbow joint and injury to both ankles. See also **Sister Margaret W.Chege & Anor v. Beth W.Wanyeri, Eldoret HCCA No.50 of 2005,** where the court gave an award of ksh.350.000/= for soft tissue injuries.

<u>Analysis and determination</u>

10. The issues that arise for determination are as follows:

i. Who was liable for the occurrence of the accident

ii. Whether the court erred in holding the appellants liable

iii. What amount of damages is adequate for compensation

iv. Costs of the suit

11. This is an appellate court and it its duty was restated in **Oluoch Erick Gogo v. Universal Corporation Ltd[2015]eklr** as follows:

> ***"As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd &Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect"***

<u>Liability:</u> The court shall re-evaluate the evidence on record and come up with its own conclusion. The respondent had a duty to prove his case since the burden was on him to prove that the appellants were liable for the said accident. **Section 107 of the Evidence Act provides as follows:**

> **(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

12. The evidence presented was that the motor vehicle was being driven in the same direction as the motorcycle and it tried to overtake a vehicle which was ahead of it, then on realizing that it was not safe to do so, made a retreat to its lane, but in the process it veered onto the lane being used by the motor cycle and hit it.

13. The investigating officer, **PC Ian Liru (PW2)** found that the driver of vehicle **KBD 410P 2C 9457** was at fault and he was charged with an offence for causing death by dangerous driving. On cross—examination he stated that the rider (who is respondent) was carrying two pillion passengers, and was not insured, but nonetheless was not to blame for the accident. In re-examination he testified that the driver overtook carelessly and was to be charged for causing death by dangerous driving. I agree that the fact of not being insured or carrying excess passengers had nothing to do with the occurrence of the accident, and at worst the respondent ought to have been charged for a traffic offence

14. The respondent (PW3) stated that he had been riding the motor-cycle for three years, and blamed the lorry driver for the accident.

15. The police abstract on record indicated that **Erick Juma Ouma** was the driver to motor-vehicle reg. **No. KBD 410P** and trailer **No. ZC 945**. It further indicates that the matter was still pending under investigations and the nature of charge to be preferred was causing death by dangerous driving.

16. Whilst I take note that the respondent's witness who was the investigating officer did not avail the investigation file nor did he shed light on how the accident occurred, the respondent relied on the doctrine of res ipsa loquitor and wants the court to hold the driver to the trailer liable for the accident. In the English case of **Barkway v South Wales Transport Company LimNandwa v Kenya Kazi Limited [1988] eKLR** the Court of Appeal (Gachuhi J. A. as he then was) cited a portion of the judgment [**19560] 1 ALLER 392 at Page 393** B on the nature and application of the doctrine of *res ipsa loquitur* as follows:

> ***"The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed."***

17. The respondent police abstract indicates the accident was occasioned by the driver though further details were not availed. It is not in dispute therefore that an accident occurred and the doctrine does apply to the extent that the said motor vehicle hit the motorcycle, and on impact, the persons on it fell, and sustained injuries.

18. The evidence though uncontroverted, the burden was on the respondent to prove his case. Mulwa J, in **Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eklr** stated:

> ***"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not."***

19. The respondent did not give evidence as to what he did to prevent or avoid the accident, but I take note that he could only take evasive action on what was foreseeable. There is nothing to suggest that the driver of the offending vehicle gave adequate warning that he was returning to the lane, and it appears that his self-saving action to avoid a collision with the other vehicle was sudden. Thus res ipsa loquitar is properly invoked. However, there was the issue of exposure to risk with regard to the pillion passengers- the answer is simple, the respondent was not among the persons not wearing a helmet. Indeed, it was not the excess passengers or lack of insurance cover that caused the accident, but the negligence of the driver-res ipsa loquitar!! The driver to whom the negligent action was attributed, did not attend court to give his version of events. This court finds that the trial court did not err and the appellants were properly held liable for the accident.

Quantum: The respondent testified that he sustained injuries as illustrated in the treatment chit to be:

i. Tender right ankle

ii. Bruised right leg

iii. Bruised right hand

20. The court takes the above injuries as a true reflection of the injuries sustained since this was the first doctor who saw the injuries and treated him. Dr. Aluda's report added blunt trauma to the scalp and chest, but confirmed that these were soft tissue injuries which were then continuing to heal, and the pains would eventually subside

21. The Court of Appeal in **Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others Civil Appeal No. 123 of 1985 [1986] eKLR** held:

> ***"… a member of an appellate court when he naturally and reasonably says to himself 'what award would I have made?' and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views of opinions so that their figures are not necessarily wrong if they are not the same as his own. West (H) & Son v Shephard Ltd [1964] AC 326, Lord Morris of Borth -Y-Gest.***
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> ***And the judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country. Lord Denning MR in Lim Poh Choo v Chamden and Islington Area Authority [1979] 2 All ER 910 (CA); Hancox JA Maraga v Musila (ibid).***

The Court of Appeal stated in **Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998]eKLR** that:

> ***The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.***
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> **In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see Kigaraari v Aya [1982-88] 1 KAR 768 Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and Jabane v Olenja [1986] KLR 661)"**

Having considered the decisions cited, the trial magistrate found that the cases cited by the appellant were over 20years in reaching the award of Kshs. 400,000/- and taking into account the passage of time and rate of inflation, the only error I pick is that the decisions cited dealt with far more extensive injuries with far more serious residual effects not comparable to the present ones. I therefore find the award of Kshs. 400,000/- was excessive as general damages.

22. Consequently**,** I allow the appeal, set aside the award of general damages by the subordinate court and substitute it with an award of Kshs. 180,000/- (One hundred and eighty thousands only) as general damages.

Special damages were proved of ksh.3000

E-delivered and dated this 28th Day of October 2020 at Eldoret

H. A. OMONDI

JUDGE

Mr Matekwa holding brief for Mr Mwinamo for respondent