



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL APPEAL NO. 46 OF 2017

ROVIN INVESTMENTS LTD.....APPELLANT

VERSUS

EDWARD MUMO KYAKA.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable E. Kimilu (PM) delivered on the 3rd October, 2017 in Naivasha CMCC No 507 of 2015)

JUDGMENT

1. The Respondent was passenger as a turn boy in vehicle registration number KBX 050W lorry on 27th May, 2015. At about 11.30pm they had an accident in which they rammed into a stalled trailer. He sustained the following injuries for which the trial court made an award:
 - a) Crush injury of the left hand leading to amputation of the middle, ring and small finger.
 - b) Multiple cut wounds on the hand.
 - c) Blunt injury to the chest leading to severe soft tissue injuries.
 - d) Multiple bruises on the left leg.
 - e) Blunt injuries to the left knee leading to severe soft tissue injuries.
2. The trial court upon hearing the suit filed by the Respondent for recovery of compensation found the Defendant/Appellant 100% liable. The Learned Magistrate awarded general damages of Kshs 1,200,000/= and special damages of Kshs 8,500/= all totaling Kshs 1,208,500/=.
3. The Appellant has challenged the award on both liability and quantum contending that: On liability that the evidence did not support a finding of full liability and it should have been apportioned. On quantum, the Appellant contend that the award is manifestly high; that the trial court failed to consider the Appellant's submissions on cases with similar injuries; and that finding that the Respondent was left handed was supported.
4. Counsel for the Appellant argues that the Respondent did not prove the particulars of negligence pleaded. He urges that there was contributory negligence in that the Respondent as co-driver was in a position to see oncoming vehicles at a distance; that he should have warned and aided the driver to improve safety; and thus should have exercised due diligence to ensure safety precautions to alert the driver. On quantum, the Appellant argues that the trial court's finding that the plaintiff was left handed and had to train his right hand after amputation of the left, was not founded on any pleaded facts, and the award was inordinately excessive.
5. The Appellant submitted that the Respondent should have been found 50% contributorily liable, and that an award of Kshs 240,000/= should have been adequate.
6. The Respondent's submission is that the role of a turn boy is as set out in the obiter dicta by **Nyakundi J** in **Pembe Flour Mills Limited v Ali Omar Swaleh [2019] eKLR**, viz:

“The court does hold that the role of the Appellant (a turn boy) could be merely loading or just watching over the lorry, where only an overall and gloves were required for discharge of his role. The Appellant was tasked with loading and offloading cereals..... As a turn boy it was expected that in case the truck was to encounter a break down, the Respondent would assist the

driver to resuscitate the motor vehicle as it was his job to assist the driver.....”

The Respondent argued that the turn boy not a navigator, and had no role in the causation of the accident.

7. On quantum, the Respondent submitted that the court should not an award of damages unless it is so inordinately high or less as to represent an entirely erroneous estimate, and it must be shown that the court applied wrong principles, or misapprehended the evidence in a material way thus arriving at an inordinately high or low figure. (See **Butt v Khan [1977] KAR 1**).

8. The trial court’s award was based on similar injuries exemplified in the cases of **Pietro Canobbio v Joseph Amani Hinzano [2015] eKLR** where the Plaintiff was awarded Kshs 750,000/= on 17th March 2016; and in the case of **Pyramid Packaging Ltd v Humphrey W. Wanjala [2012] eKLR** where Kshs 650,000/= was awarded for similar injuries in March, 2013.

Liability

9. On liability, the evidence was clear. PW1 said the driver was driving at high speed. A stalled vehicle appeared in front of them, and the driver swerved to the right to overtake it. The driver saw an oncoming vehicle. He swerved back to the left to avoid it. The lorry slammed into the back of the stationery lorry.

10. Defence evidence was given by DW1, the Defendant’s General Manager. He was not an eyewitness. He stated that they gave the Plaintiff piece meal chores in the company, that “*the Plaintiff could help during parking, clean the motor vehicle and even advise the driver when on the road.*” However, in the defence no such fact was pleaded, nor was any document or agreement availed showing the turn-boy’s duties to include advising the driver.

11. I find it unlikely and not credible that the role of the turn boy would include giving such assistance to the driver as to ensure that an accident is avoided, when in fact the turn boy has no control over the propulsion, steering or movement of the vehicle. I agree with the position of **Nyakundi J in Pembe Flour Mills** that the turn boy’s is to assist the driver. Such assistance, given that the turn boy has no veticular controls for propulsion, steering or stopping the vehicle, can only be such as to complement the driver’s comfort.

12. Accordingly in this case, no liability could be apportioned to the turn boy in the absence of a specific agreement assigning the turn boy clear and specific duties related to the propulsion, steering and stopping the vehicle

13. The Appellant in addition cited **Sino Hydro Corporation Limited v Daniela Atela Kamuda [2016] eKLR** where the lower courts award of KShs 1,000,000/= was reduced to Kshs 600,000/=. The injuries, there were amputation of two middle fingers on the right hand, painful weak right hand and 10% disability.

14. Reliance was also placed on **Eastern Produce Limited v Alan Okosai Wasike Eldoret HC Civil Appeal No. 14 of 2013** where Kshs 100,000/= was awarded for amputation of left index finger.

15. The trial court evaluated the injuries in **Umoja Rubber Products Limited v Bobson Rimba Lewa HCCA No. 51 of 2015**, Malindi where the Plaintiff’s hand was amputated below the elbow and was awarded Kshs 2,200,000/=. The court also considered the 2016 **Pietro Canobbio** case (supra) where Kshs 700,000/= was awarded for amputation of left index finger, left ring finger and small finger with 18% permanent disability.

16. In the present case permanent incapacity of 20% was awarded by Dr. Okere and 40% by Dr. Omuyoma. In **Pietro Canobbio**, however, the Plaintiff was removing a piece of metal from a lawn mower when his fingers were cut, and eventually amputated. The trauma in the present case the Respondent suffered laceration caused by broken glasses on the left leg and blunt injuries, and was sick off for a month; he suffered the shock of the accident wherever he was on the side of the lorry that hit the stalled trailer.

17. Taking all these matters into account, and even granting a middle of the road permanent disability of 30%, I think that the award of Kshs 1,200,000/= was excessive, and I would reduce the same to Kshs 900,000/=.

Disposition

18. In the result, the lower court’s judgment on quantum is set aside and an award of general damages is made in favour of the Plaintiff for Kshs 900,000/=.

19. The special damages were not contested and remain as found by the trial court.

20. Liability as against the Defendant/Appellant remains at 100%, and I so award.

21. The total award is therefore:

Kshs 900,000/=

Kshs 8,500/=

Kshs 908,599/=

with interest from the date of judgment in the lower court.

22. Given that the Appellant was partly successfully, each party will bear their own costs.

Administrative directions

23. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

24. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

25. Orders accordingly.

Dated and Delivered in Nairobi by teleconference this 21st Day of October 2020

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1.for the Appellant
2.for the Respondent
3. Court Clerk - Quinter Ogutu