REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 67 OF 2018

KANGETHE MACHUA MOSES.....APPELLANT

=VRS=

JOHN CHEGE.....RESPONDENT

{Being an appeal against the Judgement of Hon. S. K. Arome (Mr.) - RM

Kiambu dated and delivered on the 24th day of May 2018 in the original

Kiambu Chief Magistrate's Court Civil Case No. 393 of 2017}

JUDGEMENT

The accident which forms the subject matter of this appeal involved the respondent as a pedestrian and the appellant's motor vehicle No. KBL 886J. In its judgement the lower court apportioned liability in the ratio 10%:90% in favour of the respondent. This appeal is against liability and the quantum of damages. The grounds of appeal are that: -

> **"1. The Learned Magistrate erred in law and fact by apportioning liability in the ratio of 10%:90% against the Appellant in total disregard of the evidence adduced in court and thereby arriving at a wrong conclusion.**
>
> **2. The Learned Magistrate erred in law and fact by awarding manifestly excessive damages and which was not commensurate with the nature of injuries.**
>
> **3. The Learned Magistrate erred in law and fact by making an award of Kshs. 450,000/= for what was evidently soft tissue injuries.**
>
> **4. The Learned Magistrate erred in law by ignoring guiding principles in the assessment of damages.**
>
> **5. The Learned Magistrate erred in law by ignoring the Defendant's evidence, submissions and Authorities cited."**

The appeal proceeded by way of written submissions. Basically the appellant's submission is that the respondent did not prove his case on a balance of probabilities. That the totality of the evidence points to negligence on the part of the respondent; that the evidence points to a pedestrian who crossed the road without ascertaining it was safe to do so as his focus was elsewhere. Counsel also faulted the trial court for not analyzing evidence from both sides and submitted that whereas the trial Magistrate was being guided by the general principles laid down by courts he failed on the application of those principles. Counsel submitted that the trial Magistrate did not take into consideration evidence by the appellant that the respondent was in fact crossing the road and that the trial Magistrate did not therefore weigh the evidence adduced by both sides before arriving at the degree of liability. Counsel pointed out that the trial Magistrate did not give any reasons for apportioning 10% contributory negligence to the respondent. Counsel urged this court not to rely on the opinion in the police abstract produced by the respondent to apportion liability as the police officer did not testify. He urged the court to instead apportion liability equally.

On the quantum of damages Counsel submitted that although the respondent alleged to have suffered a fracture of the middle phalanx and tenderness to the right wrist and right foot his own doctor's report indicated he only sustained tenderness of the wrist and right foot. Counsel submitted that although the respondent produced a P3 Form showing he suffered a fracture a P3 Form is not primary evidence of the injuries; that the P3 Form was filled more than two months after the accident and in the absence of the primary documents (treatment notes) it was not possible to tell whether the respondent sustained the alleged fracture after the accident. Counsel contended that Dr. Mwaura examined the respondent less than two months after the accident and hence would not have missed to notice the fracture if there was one. Counsel pointed out that in the past courts have placed a lot of importance on treatment notes as otherwise it would be difficult for them to ascertain if the claimant was injured. In this regard Counsel relied on the cases of **Peter Migiro v Valley Bakery Ltd [2015] eKLR** and **Fadna Issa Omar**

v Malne Sirengo Chipo & 3 others [2016] eKLR. Counsel urged this court to be guided by the opinion of Dr. Mwaura that the respondent sustained soft tissue injuries which were minor in nature and hence set aside the award of Kshs. 450,000/= and substitute it with one for Kshs. 40,000/=. Counsel further urged this court to find that even if the respondent indeed sustained a fracture to the middle phalanx the award of Kshs. 450,000/= was excessive and reduce it to an award between Kshs. 200,000/= to Kshs. 250,000/=. He proposed a sum of Kshs. 230,000/=.

The respondent filed his submissions on 21st August 2020 through the firm of Waiganjo Wachira & Co. Advocates. Counsel for the respondent begun by submitting that this court did not have jurisdiction to entertain this appeal as the decree or order appealed from was not included in the record of appeal. Counsel submitted that not even filing a supplementary record of appeal could cure that fatal omission. On this Counsel relied on the case of **Chege v Suleiman [1988] eKLR** and the case of **Nancy Wamuyu Gichobi v Jane Wawira Gichobi Court of Appeal No. 15 of 2013**.

On the merits Counsel submitted that on the issue of liability the respondent adduced evidence which fully laid blame for the accident on the negligence of the appellant's driver and that the respondent produced a police abstract which confirmed the occurrence of the accident and blamed it upon the driver of the motor vehicle. Counsel noted that the abstract was produced by consent. Counsel stated that it was clear from the evidence that the accident occurred on the side of the road and that the appellant having failed to adduce evidence to support its version the trial Magistrate was correct in finding their driver liable at 90%. Counsel contended that the driver of a vehicle has a greater duty of care because he is in control of a lethal machine.

On the assessment of damages Counsel submitted that the respondent indeed sustained a fracture of the middle phalanx. Counsel described the injuries as severe and contended that the award was reasonable in the circumstances and it ought not to be disturbed.

I have considered the rival submissions and the cases cited but as this is a first appeal I have also considered and re-evaluated the evidence in the trial court so as to arrive at my own independent conclusion ***(see Selle v Associated Motor Boat Company Limited [1968] EA 123).***

Before I can consider the appeal on its merits I must first determine the issue of jurisdiction. Counsel for the respondent correctly noted that the appellant did not file the decree or order appealed from. In my view however, the judgement of the trial court having been filed through the supplementary record of appeal received on 9th June 2020 that omission was cured as the requirement of **Order 42 rule 13 (4) (f)** of the **Civil Procedure Rules** is: -

"(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal."

Indeed, when Meoli J gave directions on 18th June 2020 her order stated inter alia that the record of appeal filed was in order. The appeal is therefore competent and properly before this court.

On liability the principle is that this court should be slow to disturb the trial court's finding of fact unless it is based on no evidence, or on a misapprehension of the evidence or it is shown that the trial court acted on wrong principles in reaching the finding – ***see Kamau v Mungai & another [2006] 1 KLR.*** In this case the respondent testified that he was walking off the road when he was hit by the appellant's motor vehicle. He alleged not to have seen the vehicle before it hit him. On the other hand, the appellant and his wife testified that the respondent was crossing the road and that when they noticed him they stopped the vehicle and that it was the respondent who hit their vehicle while it had already stopped. Other than the opinion in the police abstract which I agree is no more than hearsay hence not admissible as a fact there was no evidence from an independent witness or source on the cause of the accident. Both versions of causation sounded plausible and probable and I therefore agree with Counsel for the appellant that both parties should have been found equally to blame. In the case of **Farah v Lento Agencies [2006] 1 KLR 123** the Court of Appeal held that: -

"4. The trial court had two conflicting versions of how the accident occurred. It was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident.

5. Where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both drivers. Therefore, each driver was equally to blame."

The same scenario applies to this case where there was no independent or objective evidence from which the court could determine which of the parties was to blame. I am therefore entitled to interfere with the trial Magistrate's apportionment of liability. I hereby set it aside and substitute it with one of 50%:50%.

On the assessment of damage, I find that the respondent's evidence that he sustained fractures on two of his toes was negated by the medical report of Dr. G K Mwaura which he himself produced in evidence. In that report the doctor alleged to have used the respondent's P3 Form, hospital attendance card and X-rays request form and the injuries he noted were a swollen, tender right wrist and a swollen tender right foot. His final prognosis was that the healing was fair but: -

> **"I. He (meaning the respondent) experiences pain right foot on exertion.**
>
> **II. He sustained soft tissue injuries, moderate in degree.**
>
> **III. Prognosis is fair."**

The respondent did not adduce any other medical evidence save for that report and the P3 Form upon which the doctor relied but did not find

the presence of a fracture. It is my finding therefore that the trial Magistrate's finding that the respondent sustained a fracture of the middle phalanx was not supported by evidence. Accordingly, I find that the respondent sustained soft tissue injuries as opined in Dr. GK Mwaura's report.

Comparable injuries should attract comparable awards and the Kshs. 450,000/= awarded was way on the higher side even was there a digit fracture of the middle phalanx. Based on the cases cited by Counsel and doing the best that I can including considering the passage of time I shall award the respondent a sum of Kshs. 120,000/= (one hundred and twenty thousand) which after deducting his contribution of 50% should leave him with a net award of Kshs. 60,000/=.

The special damages of Kshs. 3,550/= shall remain undisturbed but shall also be subjected to the ratio of contribution. The respondent is also entitled to the costs of the suit in the lower court as well as interest. For this appeal the order that commends itself to me is that each party bear their own costs. It is so ordered.

Signed and dated at Nyamira this 16th day of December 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered in Kiambu Electronically via Microsoft Teams on this 18th day of December 2020.

MARY KASANGO

JUDGE