REPUBLIC OF KENYA

IN THE HIGH ÇOURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 128 OF 2019

1. MARTIN MWENDA KARIMI.....1ST APPELLANT

2. RUNGA KAGWIRA FRIDAH.....2ND APPELLANT

=VRS=

JULIUS KYALO KAVITA.....RESPONDENT

{Being an appeal against the Judgment of Hon. N. M. Kyanya

- RM Thika dated and delivered on the 14th day of August 2019 in

the original Thika Chief Magistrate's Court Civil Case No. 248 of 2018}

JUDGEMENT

On 27th March 2018 the respondent herein filed a suit against the appellants for severe injuries he sustained in a road accident that occurred between motor vehicle number KBT 286L and motor vehicle number KCF 393M along Nairobi - Thika Road on 6th December 2017. It was his case that he was a lawful passenger in motor vehicle KBT 286L. He attributed the accident to the negligence of the appellant's driver or agent.

Upon hearing the case, the trial Magistrate found the defendants 100% liable and awarded the respondent general damages in the sum of Kshs. 400,000/=, special damages in the sum of Kshs. 139,970/=, costs and interest.

Being aggrieved by the judgement, the appellants preferred this appeal. The grounds of appeal are: -

"1. THAT the Learned Trial Magistrate erred in law and fact by holding the defendant 100% liable when it was clear that motor vehicle KBT 2861- rammed into the defendants' motor vehicle from the rear.

2. THAT the Learned Trial Magistrate erred in law and in fact by failing to take note of the fact that it was not possible for the motor vehicle KCF 393M to be reversing on a very busy super highway.

3. THAT the Learned Trial Magistrate erred by ignoring the fact that the driver of motor vehicle KBT 286L was at a very high speed which caused him to ram into motor vehicle KCF 393M from behind.

4. THAT the Learned Trial Magistrate erred in law and fact by ignoring the statement filed by the defendant clearly stating how the accident occurred.

5. THAT the Learned Trial Magistrate erred in law and in fact by failing to consider the fact that the plaintiff was wholly or substantially to blame for the accident.

6. THAT the Learned Magistrate erred in fact and law by not apportioning liability between the defendant and the plaintiff.

7. THAT the Learned Trial Magistrate erred in law and fact in making an award which was excessive and not commensurate with the nature of injuries sustained by the respondent.

8. THAT the Learned Trial Magistrate erred in law and fact by not taking into account the fact that the respondent did not

suffer ny residual disability.

9. THAT the Learned Trial Magistrate misdirected himself by failing to consider the past authorities of comparable injuries in law.

10. THAT the Learned Trial Magistrate erred in law by ignoring the submissions made by the appellants and authorities cited and the evidence placed before him.

11. THAT the Learned Trial Magistrate misdirected himself on all points of law."

The appeal proceeded by way of written submissions. The appellants filed their submissions through the firm of Wagaki Murage & Company.

On grounds 1, 2 and 3 it is argued that whereas the respondent detailed particulars of negligence against the appellants and filed a statement to support his case he did not mention that the appellants' motor vehicle KCF 393M was reversing on the highway yet that turned out to be the fundamental basis of his claim and testimony at the hearing. Counsel submitted that the trial magistrate erred in believing the evidence of PW2 who was not the driver of motor vehicle KBT 286L and hence his evidence was mostly speculative of what the driver of the said motor vehicle could have done or not done to avoid the accident. Relying on the case of **Harrison Kamau Mungai Vs Kinuthia Ngethe and Henry Mburu Kariuku [2015] eKLR** and **Section 107(1) of the Evidence Act** Counsel submitted that the trial Magistrate erred in failing to hold that the respondent did not prove or substantially support the allegation that the appellant was reversing his motor vehicle KCF 393M when the accident occurred. Counsel also challenged the evidence of PWI (Police Constable Mwadime) and submitted that PW1 who produced the abstract was not the one who investigated the accident and his evidence was only on production of the document whose contents he could not verify. Counsel pointed out that no detailed report or sketch plan was produced in evidence. Counsel further stated the trial Magistrate failed to note that the appellant was not charged with any traffic case and that the police abstract alone, was not enough evidence to impute negligence to the appellant.

On grounds 7 and 8 Counsel submitted that the trial Magistrate misdirected himself in awarding the respondent general damages of Kshs. 400,000/= as the injuries sustained by the respondent were not very serious and were also completely different in magnitude and severity with the injuries in the authorities she had cited. Guided by the decision of the Court of Appeal in the case of **Simon Muchemi Atako and another v Gordon Osore [2013] eKLR** which the appellant views as a more relevant authority, Counsel urged this court to set aside the extremely high award. Counsel also urged this court to find that the Third Party driver of motor vehicle KBT 286L was wholly or substantially to blame for the accident, that the respondent sustained soft tissue injuries and that an award of Kshs. 200,000/= is adequate compensation as general damages.

The respondent filed his submissions through the firm of M.M. Uvyu & Company Advocates. Relying on the case of **David Thanju Karanja v Samuel Kimani [2002] eKLR,** Counsel for the respondent submitted that the respondent was seated on the front left side of the motor vehicle number KBT 286L when the accident occurred hence he had a clear view of what occurred and his evidence could not therefore be speculative. Counsel also submitted that the respondent's evidence was corroborated by PWI who was a credible and independent witness. Relying on the **Court of Appeal case of Joel Muga Opila v East African Sea Food Limited [2013] eKLR** Counsel submitted that the police abstract is adequate evidence and that as it was not challenged or rebutted by the appellants they cannot dismiss its value and sufficiency.

On the allegation that the respondent omitted to plead that the appellants' motor vehicle KCF 393M was reversing on the highway Counsel submitted that was not correct. Counsel submitted that the respondent pleaded that issue at paragraph 4 of the plaint and reiterated it in his statement dated 14th March 2018.

On the submission that motor vehicle KBT 286L was speeding Counsel submitted that motor vehicle KCF 393M was overloaded and when it suddenly reversed down a hill the impact was inevitable. Counsel also submitted that the respondent was not in any way responsible or liable for the accident as he was merely a lawful passenger who had no control of the two motor vehicles involved.

On the quantum of damages Counsel submitted that the trial magistrate relied on the case of **Francis Wachiuri Murage & Pwani United Builders v PGK & Another [2016] eKLR** where the appellate court upheld an award of Kshs. 400,000/= in respect of cut wounds on the forehead and face, pelvic fracture, fracture to the hand and blunt injuries on the abdomen, injuries which were very similar with the ones suffered by the respondent. Counsel for the respondent urged this court not to interfere with the award of the trial court.

On the issue of submissions in the trial court Counsel stated that **Order 21 Rule 4 of the Civil Procedure Rules** sets out the contents of a judgement and that the court's decision is not bound by the parties' submissions. Counsel stated that it was enough that the learned Magistrate complied with the requirements for the contents of a judgement as outlined under the law. He urged this court to dismiss the appeal with costs.

This being a first appellate court it has a duty in addition to considering the rival submissions to evaluate and re-consider the evidence on record bearing in mind that unlike the trial court it did not have the advantage of observing the demeanour of the witnesses ***(see Kamau v Mungai & another [2006] 1KLR).***

PW2 gave evidence that the driver of motor vehicle number KCF 393M was to blame for the accident as it was reversing on a hill thereby hitting motor vehicle KBT 286L in which he was a lawful passenger. PW1 (PC Charles Mwadime) produced a police abstract which showed that KCF 393M was blamed for the accident. PC Mwamombe for the third party produced a police abstract which also showed that the motor vehicle number KCF 393M was responsible for the accident. Such evidence having been adduced against the appellants by no less than two witnesses it was incumbent upon the appellants to controvert the same. It is my finding that the evidence adduced by the appellants did nothing to rebut the evidence adduced by the respondent and the only logical conclusion is that the driver of motor vehicle registration

number KCF 393M was negligent. I therefore find that the liability apportioned to the appellants was merited.

On the quantum of damages, in the case of **Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142 of 2003** the Court of Appeal stated: -

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles."***

The trial Magistrate relied on the case of **Francis Wachiuri Murage & Pwani United Builders v PGK & another [2016] eKLR** and awarded the respondent Kshs. 400,000/= as general damages for injuries to the head, fracture of the humerus, injuries to the left pelvic region and soft tissue injuries. The P3 Form confirmed those injuries as did Dr. Muli Simon Kioko who examined the plaintiff and produced a medical report. Dr. Kioko also noted that the plaintiff's internal fixation required replacement at a later date and removal after 12 weeks being the period the left surgical neck of the humerus fracture was expected to have re-united. Comparable injuries attract comparable awards and the trial Magistrate cannot be faulted for awarding the sum of Kshs. 400,000/= for almost similar injuries as those sustained by the plaintiff in the cases cited. I therefore find no reason to interfere with the award.

In the upshot I find that the appeal lacks merit and therefore dismiss it with costs to the respondent. It is so ordered.

Signed and dated in 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