



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 106 OF 2015

ERICK M. ARORI-----APPELLANT

VERSUS

JULIUS ABERE GESORA-----RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. N. Njagi – SPM dated and delivered on the 30th day of April 2015 in the original Nyamira Chief Magistrate’s Court Civil Case No. 80 of 2013}

JUDGEMENT

This appeal was heard together with Nyamira HCCA 116 OF 2015 which involves the same parties, the same cause of action and Memorandums of Appeal raising the same grounds. It is an appeal against the trial magistrate’s findings on liability and the quantum of damages.

On liability the appellant is aggrieved that the trial magistrate attributed 80% contributory negligence to him and 20% contributory negligence to the respondent yet in his view the accident was wholly or substantially occasioned by the respondent.

On the quantum of damages, the appellant contends that the sum of Kshs. 850,000/= awarded to the respondent as general damages was manifestly excessive given the nature of the injuries. On the specials his contention is that the sum of Kshs. 63,417/= was not proved and court fees on the same were never paid.

From the record this accident is admitted. The same occurred at night at a section of the road where there was a sharp bend. The respondent started by saying that he was seated on the left side of the road then said that he was crossing the road. I have evaluated the evidence as I should as the first appellate court and also being alive to the principle that I ought to be careful when considering whether to upset the trial magistrate’s findings of fact. It is my finding that the account of how the accident occurred given by the appellant is more probable. He was driving home from work when the respondent emerged from the bushes where there was a path he was not aware of and started crossing the road. The respondent walked into the path of the appellant’s motor vehicle and because there was a bend the appellant could not see him. The appellant must also have been at a high speed because at thirty meters he could have applied his brakes or swerved and avoided hitting the respondent. Both the appellant and the respondent were using the road at night and so should have been more careful. Contrary to the finding by the trial magistrate, even pedestrians owe other road users a duty of care not to expose themselves and others to danger in the manner in which they cross the road. It is my finding that both parties contributed to the accident but as the appellant had control of the vehicle which was the more dangerous object than a pedestrian merely crossing the road and hence posed more danger his duty of care was much higher. He shall therefore shoulder a higher liability but not in the ratio ordered by the trial magistrate. I assess liability in the ratio 40%:60% in favour of the respondent against the appellant.

On the quantum of damages the respondent pleaded the following injuries: -

- (i) Abrasion, contusion and concussion on the face and head with loss of consciousness.
- (ii) Abrasion right shoulder.
- (iii) Communitated fracture on the left distal femur.
- (iv) Communitated fracture on the right proximal tibia.

The injuries were proved by a doctor (Pw3) who described the injuries as severe. I have considered Counsel’s submissions. Similar injuries ought to attract similar awards and the courts are enjoined to be consistent. The injuries sustained by the respondent were more severe than those of the plaintiffs in the cases cited by Counsel for the appellant and the cases where those awards were made were much older. The court must also consider the passage of time. In my view the award of general damages by the trial magistrate was not inordinately excessive as to warrant this court to interfere.

In **Mwavita Jonathan Vs Silvia Onunga [2017] eKLR** the respondent had suffered only one fracture. In the instant suit the respondent sustained multiple fractures. The award on general damages is upheld. So shall the special damages. The respondent claimed much more specials but was awarded only that which he strictly proved. I do not agree that failure to pay fees commensurate to the specials should be a ground to deny a party special damages that have been proved. The registry may have made a mistake in assessing the fees which they shall be obligated to collect as further court fees before issuing the decree.

In the end the appeal succeeds only partially and the judgement for the respondent against the appellant is adjusted as follows: -

1. The appellant to bear 60% liability and the respondent 40%.
2. General damages are upheld.
3. Special damages are upheld.
4. Costs in the lower court shall be assessed based on the contribution of each party.
5. Interest on general damages shall be at court rates from the date of the judgement.
6. Interest on special damages shall be at court rates from the date of filing suit.
7. The appellant shall get half the costs of this appeal.

It is so ordered.

Signed, dated and delivered in Nyamira this 21st day of February 2019.

E. N. MAINA

JUDGE