REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 26 OF 2014

JULIUS BUNDI RINGERA.....1ST APPELLANT

KANAKE MWANGANGI.....2ND APPELLANT

VERSUS

JOSEPH THURANIRA RUKARIA.....1ST RESPONDENT

ROBERT BOAZ ODONGO.....2ND RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Honourable Wilbroda Juma, Chief Magistrate in Nyeri CMCC No.22 of 2008; the 1st Respondent herein sued the Appellants and the 2nd Respondent for damages arising out of an accident that occurred on 21st March 1996 involving motor vehicles registration numbers KAE 459V belonging to the 1st Appellant and driven by the 2nd Appellant and KTG 651 belonging to the 2nd Respondent.

2.. After a full hearing, judgment was awarded by the trial court in favour of the 1st Respondent as follows:

a. Liability – 65% - Appellants and 35% - 2nd respondent

b. General damages - Kshs.700,000/=;

3. The Appellants being dissatisfied with the trial Court's decision filed this appeal and seek to have it set aside; the Appellant listed six (6) grounds of appeal in their Memorandum of Appeal dated the 15th May, 2014 which are as summarized hereunder;

(i) The learned Magistrate erred in fact and law in finding that the Appellants 65% liable for the accident;

(ii) The learned Magistrate erred in fact and law in finding the 2nd Respondent 35% liable for the accident and not 100%;

(iii) The learned Magistrate erred in fact and law in disregarding the ruling made in Inquest Number 38 of 1997;

(iv) The learned Magistrate erred in fact and law in awarding damages that were manifestly excessive in the circumstances.

4. The Appellants prayed that their appeal be allowed with costs.

5. The following is a summary of the case; according to the 1st Respondent's plaint and amended plaint, the accident occurred on 21st March, 1996; that he was a passenger in motor vehicle registration number KAE 459V when it collided with motor vehicle registration number KTG 651; the accident happened along Naromoru/Nanyuki Road; and the 1st Respondent blamed the drivers of both motor vehicles for the accident; he further blamed the 2nd Appellant for driving with full lights for oncoming vehicles even after being cautioned by the 1st Respondent;.

6. At the trial of the matter, the 1st Respondent gave testimony that he had hired the 1st Appellant's motor vehicle registration number KAE 459V to transport his goods from Meru to Nairobi; he was seated in the front cabin of the said motor vehicle with the turn boy in the middle and the 2nd Appellant driving the same; the 1st Respondent testified that he cautioned the 2nd Appellant from driving with his full headlights on so as not to blind other drivers; his evidence was that the collision suddenly happened and he was thrown onto the dashboard; he blamed the 2nd Appellant for the accident for driving with full headlights; as a result of the accident he injured his ribs, head and left leg; under cross

examination, the 1st Respondent indicated that there was no seatbelt so he wasn't wearing one; he testified he did not see any animal on the road; he also testified that he did not know on what side of the road the accident happened; with regard to whether or not the 2nd Respondent's driver was drunk, the 1st Respondent testified it was what he was told by the police officer.

7. The 1st Appellant also testified at the hearing; it was his evidence that he was called and informed of the accident; he arrived at the scene and found the motor vehicles on the scene; it was his opinion that the collision occurred on the left side of the road facing Naromoru; he produced the inquest ruling as evidence that the 2nd Respondent was to blame for the accident; the 2nd Appellant also testified at the hearing his evidence was that he was driving with dim lights on and came upon motor vehicle registration number KTG 651 which swerved into his lane to avoid colliding into an ox cart; he also testified that he did not participate in the inquest; he blamed the 2nd Respondent's driver for the accident.

8. The last witness was a traffic officer from Nyeri Traffic Base and he produced evidence from the Occurrence Book; the OB confirmed the occurrence of the accidents and the victims thereof; it however did not indicate who was blamed for the accident; he testified that the 2nd Respondent's driver was found to blame in the ruling after an inquest was held; that the learned magistrate had arrived at this conclusion from the police statements.

ISSUES FOR DETEERMINATION

9. After hearing the witnesses and upon reading the written submissions filed herein this court finds two issues for determination;

(i) Liability

(ii) Quantum of damages

ANALYSIS

10. In considering this issue, this court is guided by the Court of Appeal decision in the case of **Selle & Another vs Associated Motor Boat Co. Ltd &Another (1968) EA 123**. The Court held that the duty of an Appellate Court 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 the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, the Court will normally as an Appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal also held that:

> ***"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."* (See also LAW JA, KNELLER & HANNOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).**

LIABILITY

11. From the evidence on record and the Parties' submissions in the matter, it is not disputed that a collision occurred between motor vehicles registration number KAE 459V and KTG 651; the question is who is to blame for the collision.

12. The eye witness accounts are that of the 1st Respondent and the 2nd Appellant not indicate how or what caused the accident only that it happened; he however blamed the 2nd Appellant for driving with full headlights on; the 2nd Appellant stated that he saw the deceased driver of KTG 651 swerve into his lane to avoid colliding with an ox cart; but the 1st Respondent did not see the said ox cart; the 1st Appellant testified that the accident happened on the 2nd Appellant's lane, as he found the motor vehicles at the scene; however since he did not witness the accident, his evidence is therefore discounted; it would have been prudent for the Respondents to have procured the police file so as to have sketches of the accident scene to bolster their case.

13. The Appellant's case is hinged on the inquest ruling and upon perusal of the same indeed the learned Magistrate blamed the 2nd Respondent's driver based on the police statements; however no eyewitness participated in the said inquest; the proceedings of the said inquest were not produced so as to shed light on how this conclusion was arrived at.

14. In the circumstances it is improbable to find that one driver was more to blame than the other; what is clear is that there was a collision between both motor vehicles; it is this court's considered view that both drivers were equally to blame;

15. Reference is made to the Court of Appeal's decision in the case of **Hussein Omar Farah v Lento Agencies** [2006] eKLR, where the Court made the following observation;

> **"In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of *BARCLAY – STEWARD LIMITED & ANOTHER VS. WAIYAKI [1982-88] 1 KAR 1118,* this Court said:-**

"The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."

The Court said further:-

"The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame."

In BAKER V MARKET HARBOROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LTD [1953] 1 WLR 1472 at 1476, Denning L.J. (as he then was) observed inter alia as follows:-

"Everyday, proof of collision is held to be sufficient to call on the Defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them…….. "

See also WELCH V STANDARD BANK LTD [1970] EA 115 at 117 and SIMON V CARLO [1970] EA 285. It cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame……."

12. This ground of appeal is found to be meritorious and it is hereby allowed; the trial magistrate's finding on liability is hereby set aside; and substituted with a finding that the Appellants and the 2nd Respondent were equally to blame for the accident.

ON QUANTUM

13. For an appellate court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in various decisions; in the case of **Butt vs Khan (1977) 1KAR** Law JA stated that:-

"An Appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low."

14. Similarly in the case of **Kenya Breweries Ltd** [1991] eKLR it was held that,

"….It is now well established that this Court can only interfere with a trial judge's assessment of damages where is it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an Application of wrong principles must be inferred….."

16. According to the Medical Report of Dr. Wokabi, the 1st Respondent/ suffered 3 fractured ribs, a fracture of his left shoulder blade, lacerations to his face and left cheek and an injury to his knee.

17. The 1st Respondent testified that he was admitted in hospital for three weeks after the accident; according to the medical documents he produced in Court, the 1st Respondent also underwent further treatment with Dr. Bodo; the trial Court awarded Kshs.700,000/= as damages for pain and suffering.

18. The Appellants have prayed that the award be reduced to Kshs.300,000/=; and in support of this prayer, the Appellants have relied on the case of **George Kinyanjui t/a Climax Coaches & Anor vs Hassan Musa Agoi [2016]eKLR** where the Court on appeal set aside the trial Court's award of Kshs.800,000/= and awarded Kshs.450,000/= as damages for injuries similar to the 1st Respondent.

19. On the other hand the 1st Respondent has submitted that the award by trial Court of Kshs.700,000/= should not be disturbed; the Medical Report by Dr. Wokabi projected that the 1st Respondent's injuries would heal but he would never completely be pain free; be that as it may it is noted that the learned Magistrate did not justify the award for Kshs.700,000/=; it is found to be excessive in the circumstances and this court has good reason to interfere with the same and award the 1st Respondent Kshs.400,000/= as damages for pain and suffering;

20. In doing so it is guided by the case of **Morris Miriti v Nahashon Muriuki & another** [2018] eKLR wherein the Appellant sustained the following injuries: tender chest posterior and anterior, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lung contusion and fracture of the right scapula. The Court maintained the trial Court's award of Kshs.300,000/= in damages.

21. This court is satisfied that the trial magistrate proceeded on the wrong principles and the award is found to be inordinately high; the trial Court's award is hereby set aside and substituted with an award of Kshs.400,000/=; in making this award this court has taken into account that the 1st Respondent suffered slightly more severe injuries.

22. This ground of appeal has merit and is hereby allowed.

FINDINGS AND DETERMINATION

23. The appeal on liability is found to have merit; the judgment of the lower Court on liability is hereby set aside; the Appellants and the 2nd Respondent are found to be equally liable for the occurrence of the accident;

24. The ground of appeal on quantum is found to have merit and it is hereby allowed; the judgment of the lower court is hereby set aside and substituted with an amount of Kshs.400,000/- for general damages; and shall be apportioned accordingly;

25. Special damages shall remain the same;

26. Each party shall bear their own costs of this appeal.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 21st day of February, 2019.

HON.A.MSHILA

JUDGE