



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO 70 OF 2014

DENNIS BALOZI.....1ST APPELLANT

KHETIA DRAPERS LIMITED.....2ND APPELLANT

VERSUS

JOHN NUNDU AWICH.....RESPONDENT

(An Appeal arising out of the Judgment of Hon. B. Kasavuli SRM delivered on 29th April, 2014

at Eldoret Chief Magistrate's Court Civil Case No. 245 of 2013)

JUDGMENT

The Appellants were the original Defendants and the Respondent the Plaintiff in the original trial in **Eldoret Chief Magistrate's Court Civil Case No. 245 of 2013**. The Respondent instituted the said suit in the trial court for general and special damages, arising from injuries sustained from an accident involving motor vehicle registration number KAV 888D Toyota Land Cruiser driven by 1st Appellant, and owned by the 2nd Appellant. The Respondent attributed the occurrence of the said accident to the negligence of the Appellants. The Respondent relied, *inter-alia*, the doctrines of *res ipsa loquitur* and vicarious liability. The trial magistrate, in a judgment delivered on 29th April, 2014, held that the Respondent was able to prove that the Appellants were 100% liable for the accident, and awarded the Respondent general damages of Ksh.850,000/- and special damages amounting to Ksh.47,945/- as well as costs of the suit .

The Appellants being dissatisfied with the said judgment filed an appeal challenging the judgment of the trial magistrate. They raised several grounds of appeal challenging the decision on both quantum and liability. The Appellants were aggrieved that the trial magistrate applied wrong principles of the law in the assessment of damages and that the amount awarded was excessive for the injuries sustained by the Respondent. The Appellants were of the view that the Respondent's case was not proved to the required standard of proof. The Appellants faulted the trial magistrate for finding that the Appellants were 100% liable for the accident irrespective of the evidence adduced. The Appellants challenged the trial magistrate's findings claiming that it was based on wrong principles of law. The Appellants were aggrieved that the trial magistrate failed to consider all the issues raised in the pleadings, the evidence adduced and the submissions made. Finally, the Appellants were of the view that the trial magistrate's decision was not based on any judicial precedent.

By consent of the parties, the appeal was canvassed by way of written submissions. Both parties filed their written submissions. During hearing of the appeal, the Appellants argued that the Respondent failed to prove any of the particulars of negligence pleaded. They asserted that there was no negligence on their part as the accident was unforeseeable. The Appellants averred that the Respondent failed to avail an eye witness to corroborate his claim of negligence on the part of the Appellants. They stated that the Respondent was a pedal cyclist who was knocked down by a motor cyclist and due to the impact he landed on the Appellants' vehicle. They submitted that the Respondent did not adhere to the **Traffic Rules**. The **Traffic Act** requires that every road user to have a duty of care to other road users and a motor cyclist is required to keep his/her distance. The Respondent's failure to adhere to the said regulations resulted in the accident. The Appellants argued that evidence adduced by the Respondent was conclusive. PW4, PC Omolo, stated that he did not have material facts with regards to the accident as he was not the investigating officer in the matter. They stated that inspection reports, sketch map, and police file were not availed in court to prove liability of the Appellants.

The Appellants submitted that the trial magistrate disregarded evidence of DW1, Dennis Balozi, which was not controverted by the Respondent. DW1 testified that a motor cyclist suddenly emerged from the left side of the road, made a U-turn on the main road, which resulted in the aforesaid accident. The Appellants argued that DW1's evidence was corroborated by that of PW3, PC Omolo. They asserted that the 1st Appellant's conviction in traffic case does not preclude the Appellants from pleading contributory negligence on the part of the Respondent. The Appellants relied on the cases of **Robinson vs. Oluoch [1971] EA** and **David Kinyanjui & 2 others vs. Meshack Omari Monyoro Civil Appeal No.125 of 1993**, which reiterated their submission that a conviction does not close the door to a defence on liability as well as on the issue of contributory negligence. The Appellants stated that the evidence of DW1 proves that the Respondent substantially

contributed to the accident. They complained that the trial magistrate made a determination purely based on his own instinct without subjecting the same to any legal scrutiny. The Appellants prayed that the trial court's decision on liability be set aside and the same be apportioned on a 50:50 basis.

The Appellants were also of the view that the trial magistrate failed to adhere to provisions of **Order 21 Rule 4** of the **Civil Procedure Rules, 2010**. They argued that the trial magistrate in writing his judgment, made no reference to the plaint, the defence or review of evidence adduced by the parties. They maintained that the trial court's judgment lacked points of determination and a concise statement of the case.

On quantum, the Appellants submitted that the amount of Ksh.850,000/- awarded to the Respondent as general damages was excessive, and that the same ought to be substituted by an award of Ksh.350,000/-. They cited the case of **James Makathi Maira vs M. A. Bayusuf & Sons Ltd [2013] eKLR**. In this case, the plaintiff suffered fracture of the neck and right femur which led to shortening of his leg by $\frac{1}{2}$ cm. the court awarded him Ksh.450,000/-. They also relied on the case of **Kimilimi Hauliers vs Samuel Kangongo [2011] eKLR** where the court awarded Ksh.600,000/- as general damages. The plaintiff in this case had suffered a fracture to the distal end of his left femur, dislocation of left ankle and other blunt force injuries.

The Respondent, while opposing the appeal, stated that he blamed the Appellants for the accident. He stated that he was riding his bicycle on the correct lane when he saw a motor vehicle KAV 888D, Toyota Land Cruiser, hit a motor cyclist first, then lost control and subsequently hit him. The Respondent maintained that his evidence was corroborated by that of PW3, PC Omolo, who narrated the events of the day as investigated by traffic police. He blamed the 1st Appellant for the accident. He added that the 1st Appellant was charged and convicted of the traffic offence of careless driving in connection with the accident **in Eldoret CMCC Traffic No. 299 of 2013**. He was convicted on his own plea of guilt. The Respondent asserted that he was therefore negligent and liable for accident that occurred.

On quantum, the Respondent was of the view that the trial court should not be disturbed as the same was comparable to the injuries sustained by the Respondent.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal.

This being the first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion whether or not to uphold the decision of the trial court. Further, the Court has jurisdiction to delve into matters of fact and law in determining the appeal. (See **Selle V Associated Motor Boat Company Ltd [1968] EA 123.**)

In the present appeal, the issues for determination are whether the Respondent proved that the Appellants were to blame for the accident and secondly, if the first issue is answered in the affirmative, whether the amount awarded to the Respondent as damages constituted a fair assessment for purposes of compensation.

It is not disputed that an accident involving the Respondent and motor vehicle registration number KAV 888D occurred on the date and place stated in the plaint. It is also not disputed that the motor vehicle was owned by the 2nd Appellant and was being driven by the 1st Appellant. The 1st Appellant testified that he was employed by the 2nd Appellant as a driver on the material day he was driving the said car. What is disputed in this appeal is the trial court's finding on liability and quantum of damages.

In his evidence, the Respondent who testified as PW1 narrated how the accident in which he was injured, occurred. He testified that on the material date, he was cycling on the left side of the road, from Huruma direction headed to Maili Nne. On reaching Tairi Mbili area, there was a motor vehicle, Toyota Land Cruiser Registration Number KAV 888D, which was being driven from the opposite direction. The said motor vehicle veered off its lane and hit him after colliding with a motor cycle rider. The investigating officer, PC Omolo (PW3), corroborated the Respondent's testimony. He explained that the motor vehicle Registration Number KAV 888D was heading towards Eldoret town. At Tairi Mbili area, there was a motor cycle ahead of the said motor vehicle which wanted to branch left. The driver of the said motor vehicle wanted to overtake the motor cycle. Unfortunately, the driver knocked the motor cycle. Immediately after hitting the motor cycle, it swerved right as one faces Eldoret town and knocked down a pedal cyclist who was coming from Eldoret town direction. The point of impact was on the right side as one faces Eldoret. PW3 charged the 1st Appellant who was the driver of the said motor vehicle in **Eldoret Traffic Case No.299 of 2013** with the offence of careless driving. The 1st Appellant pleaded guilty to the charge. He paid a fine of Ksh.10,000/-. PW3 produced police abstract as proof that the said accident occurred.

On the other hand, the 1st Appellant who was the driver denied that he was to blame for the accident. He confirmed that he was driving from the Kitale direction towards Eldoret town. He claimed that on reaching Tairi Mbili area, there was a lorry joining the main highway from the left side of the road. The lorry stopped before joining the highway to allow him to drive through. He suddenly saw a motor cycle ahead of him make a U-turn and hit an oncoming pedal cyclist. The two fell on the vehicle and damaged it. He however contradicted himself by stating that he did not know the direction where the bicycle and motor cycle were being ridden from. On re-examination, he again stated that he saw the pedal cyclist on the right side of the road. His testimony was contradictory. He stated that the point of impact was in the middle of the road on the yellow line. **So was the cyclist on the right side of the road or in the middle of the road?** No evidence was adduced to prove that the Respondent was actually cycling on the middle of the road.

The 1st Appellant denied being charged with the traffic offence in **Eldoret Traffic Case No.299 of 2013** despite the proceedings of the said case being availed in court. This shows that he is not a credible witness. The Respondent produced copies of proceedings of the traffic case which show that the 1st Appellant was convicted of the offence of careless driving with regard to the accident in the present Appeal. In addition, he was convicted on his own plea of guilt. From the particulars of the offence in the charge sheet, he pleaded guilty to driving motor vehicle Registration Number KAV 888D without due care and attention and without reasonable consideration for other road users hence causing the said accident. **Section 47A** of the **Evidence Act** provides that:

“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

In **Francis Mwangi vs Omar Al-kurby Civil Appeal No.87 of 1992 (unreported)**, the Court of Appeal was clear that a conviction is conclusive evidence of negligence but does not rule out the element of contributory negligence. In the present appeal, although the Appellants pleaded contributory negligence, no evidence was led to prove contributory negligence on the part of the Respondent.

From the evidence adduced, the 1st Appellant and the Respondent were on different lanes on the road, travelling on opposite directions. The fact that the 1st Appellant hit the Respondent on the right side of the road meant that the 1st Appellant did veer off the road from his lane to the right side of the road. This court agrees with the trial court on this analysis. This court therefore finds that the Appellant’s appeal challenging the trial court’s finding on liability lacks merit. It is dismissed.

The fact that the 2nd Appellant was held vicariously liable was not appealed against hence this court will not address itself on the same.

On quantum, the trial court awarded the Respondent general damages of Ksh. 850,000/-. The trial court relied on authorities cited by the Respondent in the trial court. The Appellants were of the view that the amount awarded as general damages was excessive, and that the same ought to be substituted by an award of Ksh.350,000/-. They cited several authorities outlined earlier on in this judgment. The Respondent on the other hand, argued that the trial court was not misdirected in assessment of the damages and that the award should not therefore be disturbed. In **Butt V Khan (1977) 1 KAR** the Court of Appeal held as follows;

“An appellate court will not disturb an award of 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 so arrived at a figure which was either inordinately high or low....”

The Respondent pleaded the following injuries which were corroborated by PW2, Dr. Aluda and PW4, Dr. Joseph Embezi.

- a) Head injury- He sustained a brain concussion during the accident
- b) Bruises on the forehead and face
- c) Fracture of the left femur mid shaft
- d) Lower limbs were swollen and tender
- e) Fracture of the right femur
- f) Fractures of the left tibia and fibular

This court has considered the authorities cited by the Appellants as well as the authorities relied on by the trial court. The injuries in the authorities cited by the Respondent in the trial court are comparable to the injuries that he sustained. The Learned magistrate was alive to the fact that inflation is a factor of consideration in determining quantum of damages. The trial magistrate rightly stated that the injuries in the authorities relied on by the Respondent were comparable to those suffered by the Respondent and therefore offered guidance in the assessment of damages. The trial magistrate also considered the severity of the injuries sustained by the Respondent in assessing general damages to be awarded. The trial court relied on the medical evidence that the injuries were severe and that the scars would remain a permanent feature on Respondent’s body. These were relevant factors to consider and the trial court considered them and stated so in his judgment.

Therefore, this court is of the view that the trial magistrate did not commit any error in principle, for he considered all relevant factors and did not take into account any irrelevant factor in his estimation of damages. Accordingly, his estimation of damages was reasonable and fair compensation of the injuries sustained by the Respondent. This court finds nothing on which to fault the trial court’s decision on quantum. The same is hereby upheld.

The Appellants argued that the judgment did not contain points for determination and no reasons were given for the decision. Looking at the judgment, points for determination were set out as required by the law in page 3 of the judgment. The judgment referred to the issues raised. The trial court analyzed the evidence prior to reaching its verdict. Reasons for the ultimate decision can be discerned from the body of the judgment. Therefore, the Appellants’ submission in that regard fails.

For the foregoing reasons, this court finds that the appeal herein is without any merit both on liability and on quantum. The same is hereby dismissed with costs to the Respondent. It is hereby so ordered.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2019

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 19TH DAY OF FEBRUARY 2019

HELLEN OMONDI

JUDGE