REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 24 OF 2016

DAN MOGWAMBO NYATUKA.....APPELLANT

VERSUS

DAVID ORINA SIBWOGA.....RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. E. K. Nyutu – PM dated and delivered on the 26th day of July 2016 in the original Nyamira Principal Magistrate's Court Civil Case No. 118 of 2013}

JUDGEMENT

1. The respondent sued the appellant for compensation for personal injuries sustained in a motor vehicle accident between himself and a motor vehicle Registration KAV 293J for which the defendant was found wholly liable.

2. This is a judgement against the trial magistrate's findings on liability and the assessment of the quantum of damages.

3. The grounds of appeal are: -

> **"1. That the learned trial magistrate erred in law and fact in failing to dismiss the Respondent's suit in the lower court as he had not proved her case on a balance of probability.**
>
> **2. That the learned trial magistrate erred in law and fact in holding the appellants 100% liable for the alleged accident when there was no sufficient evidence to support that finding.**
>
> **3. That the learned trial Magistrate erred in law and fact in failing to hold the Respondent wholly liable for the alleged accident.**
>
> **4. That the learned trial magistrate erred in law and fact in awarding the Respondent special damages of Kshs. 220,736/= that were not proved to the required standard.**
>
> **5. That the learned trial magistrate erred in law and fact by awarding the Respondent a sum of Kshs. 2,000,000/= as general damages that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the Respondent.**
>
> **6. That the learned trial magistrate erred in law and fact in awarding the Respondent a sum of Kshs. 250,000/= for future medical treatment without any legal basis and/or justification.**
>
> **7. That the learned trial magistrate erred in law and fact in awarding the Respondent a sum of Kshs. 250,000/= for future medical treatment that was so excessive as amount to an erroneous estimate of loss or damage suffered by the Respondent.**
>
> **8. That the learned trial Magistrate erred in law and fact in failing to consider the appellant's submissions and legal authorities relied upon in support to the Defence thereof.**
>
> **9. That the learned trial Magistrate erred in law and fact by overly relying on the Respondent's submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.**
>
> **10. That the learned trial Magistrate's decision albeit, a discretionary one was plainly wrong."**

4. The appeal was canvassed by way of written submissions.

5. Having considered the evidence in the court below so as to arrive at my own conclusion and being guided by the very able submissions by Counsel for both sides, I find no reason to disturb the trial magistrate's finding on liability and on the quantum of damages.

6. At the hearing the appellant admitted not only causing an accident but also hitting the respondent who was standing besides the road. His exact words in examination-in-chief were: -

> ***"……I was driving a motor vehicle No. KAV 293J make Toyota Corolla. On the way, just after Nyamira town along the Nyamira – Senta road at Nyabite market there was a pro-box vehicle white in colour parked on the opposite side of the road picking passengers.***
>
> ***As I approached the motor vehicle a little girl crossed between the pro-box van out to the road. On seeing the girl, I applied emergency breaks and swerved to the left edge of the road to avoid hitting the girl. I swerved to the left as you face Senta from Nyamira. I stopped a few meters from the scene…. I hit two pedestrians. One on the left edge of the road and the little girl. The person that was standing on the left side of the road is the plaintiff in this case.***
>
> ***The plaintiff was standing on the edge of the road. I hit him as I swerved to avoid hitting the little girl. The point of impact is far front left part of the vehicle. The edge of the road is raised. He was on the pedestrian walk off the edge of the road. The road was tarmacked."***

The appellant's testimony rather than controvert, confirmed the respondent's testimony that he was standing by the roadside. The appellant blamed the little girl and not the respondent for the accident. There was no evidence of blameworthiness on the part of the respondent. I am satisfied that he proved his case on a balance of probabilities as required under Sections 107 and 108 of the Evidence Act. The magistrate based her finding on liability on the evidence before her and I am not persuaded that she erred either in law or in fact or that she misdirected herself on a principle of law.

7. On the damages, the sum of Kshs. 2,000,000/= was not only fair and reasonable but is what was adequate to compensate the respondent for pain and suffering. The injuries he sustained were multiple fractures to his limbs, blunt injury to the anterior chest wall and multiple cut wounds on the face. Those injuries were proved through medical evidence which was not controverted. The appellant did not identify the injuries which he alleges were repeated or exaggerated. It would have been absurd to require the respondent to produce the X-rays in evidence as the trial magistrate has no expertise to interpret the same. The contents of the X-rays were after all explained to the court through the medical reports.

8. As for the special damages, the trial magistrate awarded only that which was strictly proved although the respondent had pleaded much more. The doctor who gave evidence clearly stated that the respondent would in future require Kshs. 200,000/= to remove the plates. Pw3 an orthopaedic practitioner who would know better as that is what he used to do at Tenwek Hospital put the cost at Kshs. 250,000/= and I am satisfied that the award was based on evidence.

9. In the upshot this appeal lacks merit and it is dismissed with costs to the respondent.

Signed, dated and delivered in Nyamira this 29th day of March 2019.

E. N. MAINA

JUDGE