



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 94 OF 2013

MESHACK ODONGO.....APPELLANT

VERSUS

STEPHEN MUATHE MASILA.....RESPONDENT

JUDGMENT

1. The appellant, *Meshack Odongo* was the defendant in Milimani CMCC No. 5467 of 2011. He had been sued by the respondent (then the plaintiff) who was seeking general damages for pain, suffering and loss of amenities for injuries sustained in a road accident on or about 14th March 2011. He blamed the occurrence of the accident on the negligence of the appellant. The respondent also sought special damages in the sum of KShs.147,395.50 together with costs of the suit and interest.
2. In his plaint dated 29th August 2011, the respondent averred that on the material date, he was standing on a highland at the intersection of Dar-es-Salaam and Dunga Roads when the appellant who was driving a motor vehicle registration number KBJ 426Z knocked him down as he was in the process of overtaking other motorists.
3. In his statement of defence dated 20th November 2012, the appellant admitted that he was the driver of motor vehicle registration number KBJ 426Z but denied that an accident occurred as alleged by the plaintiff and put him to strict proof thereof. In the alternative, the appellant averred that if the accident occurred on the date alleged which was denied, it was solely caused or substantially contributed to by the negligence of the respondent. The particulars of the plaintiff's alleged negligence were pleaded in paragraph 6 of the defence.
4. After a full hearing, the learned trial magistrate rendered his judgment on 30th January 2012. He entered judgment on liability in favour of the respondent against the appellant at 100%. He also awarded the respondent general damages in the sum of KShs.800,000 and special damages in the sum of KShs.37,141 together with costs of the suit and interest.
5. The appellant was aggrieved by the decision of the trial court. He proffered this appeal through the memorandum of appeal dated 18th February 2013. He faulted the trial court's findings on both liability and quantum. In the memorandum of appeal the appellant advanced seven grounds of appeal which can be condensed into two main grounds as follows:
 - i) That the learned trial magistrate erred in law and misdirected himself when he failed to apportion liability between the appellant and the respondent despite the existence of evidence which demonstrated that the respondent contributed to the occurrence of the accident;
 - ii) That the learned trial magistrate erred by awarding the respondent general damages which were inordinately high and not commensurate with the injuries sustained by the respondent.
6. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellant filed his submissions on 30th May 2018 while those of the respondent were filed on 29th June 2018.
7. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. The duty of a first appellate court is now well settled. The court is enjoined to revisit and to re-evaluate all the evidence tendered before the lower court to arrive at its own independent conclusion while bearing in mind that unlike the trial court, it did not have the benefit of hearing and seeing the witnesses and give due allowance for that disadvantage. *See: Selle V Associated Motor Boat Company Limited, [1968] EA 123; Peters V Sunday Post (1958) EA 424.*
8. I have considered the grounds of appeal, the evidence tendered before the trial court, the rival written submissions made on behalf of both parties and the authorities cited. I have also read the judgment of the learned trial magistrate.
9. Before addressing myself to the complaints made by the appellant on the trial court's finding on liability, I think it is important to give a

brief summary of the evidence that was presented before the lower court.

The court record shows that the respondent testified in support of his case and also called one witness. The appellant also testified to rebut the respondent's case but he did not call any other witness.

10. In his evidence, the respondent testified that on 14th March 2011, he was walking to work and on reaching Dar-es-Salaam road, he found some traffic jam. He crossed the first lane and stood on a pavement/island waiting to cross the other lane. He checked both sides and as he did so, he saw motor vehicle registration number KBJ 426Z overlapping; that there was an oncoming vehicle and the vehicle which was overlapping others veered off the road and knocked him down while he was still standing on the pavement. The driver of that same vehicle took him to Mater Hospital for treatment. He thereafter reported the matter to the police and he was issued with a police abstract (pexhibit 1). He also conducted a search at the Registrar of Motor Vehicles and established that the appellant was the owner of the vehicle which had hit him. He produced a copy of records from the Registrar of Motor Vehicles to substantiate his claim (pexhibit 4).

11. The respondent's witness *Faraj Osman* testified as PW2. He supported PW1's evidence in every material particular. In his testimony, PW2 also gave an eye witness account of how the accident happened. He testified that on the material date, he was on duty along Dar-es-Salaam Road as a conductor when he saw a vehicle starting to overlap other vehicles; that in order to avoid an oncoming vehicle, its driver swerved to the side and knocked down the respondent. He was forced to stop and take the respondent to hospital.

12. In his defence, the appellant admitted having been involved in the accident in which the respondent was injured but he did not give a clear account regarding how it happened. He claimed that as he drove to work on 14th March 2011, at the intersection of Dunga and Dar-es-Salaam Roads, he saw a pedestrian on the left and then heard a bang. His side mirror came off. He took the injured pedestrian to hospital. He denied that he had been overtaking on the wrong side of the road.

13. Given the foregoing summary of the evidence that was placed before the trial court, I find that although the learned trial magistrate did not give an elaborate explanation for his conclusion that the appellant was solely to blame for the accident, he expressly noted that the authorities that had been relied upon by the appellant to support their proposition that the respondent was partially liable for the accident did not apply to the facts of the case that was before him. This in my view means that the learned trial magistrate had applied his mind to the evidence on record and had found that the respondent did not contribute to the occurrence of the accident hence his finding on liability against the appellant at 100%.

14. It is trite law that an appellate court can only interfere with findings of fact made by the lower court if such findings were based on no evidence or on a misrepresentation of the evidence or if the trial court in reaching its decision applied the wrong legal principles. See: *Sumaria & Another V Allied Industrial Limited, [2007] 2 KLR 1; Jabane V Olenja, [1986] KLR 661; Simon Muchemi & Another V Gordon Osore, [2013] eKLR.*

15. Given the evidence adduced by PW1 and PW2 regarding the events that led to the accident which I must say was not shaken by the appellant's evidence, I am unable to fault the trial court's finding on liability. The evidence on record does not show that the respondent was to blame for the accident in any way. My independent analysis of the evidence adduced in this case leaves me with no doubt that the trial magistrate's finding was not only based on the evidence on record but was also based on good legal principles. I do not therefore find any reason to disturb it and it is hereby upheld.

16. Regarding the appeal on quantum, the appellant has submitted that the award of KShs.800,000 was excessive and was not comparable to past awards made for similar injuries. He proposed that the award be revised downwards to KShs.400,000 relying on the authorities of *Zacharia Mwangi Njeru V Joseph Wachira Kanonga, [2014] eKLR*, where the High Court revised an award of KShs.800,000 to KShs.400,000 and *Tabro Transporters Limited V Absalom Dora Lumbasi, [2015] eKLR* where the High Court also revised an award of KShs.500,000 to KShs.400,000.

17. It is important to point out that an award of damages is always at the discretion of the trial court. That discretion must however be exercised judiciously in accordance with the law taking into account the relevant facts and circumstances of each case. The principles that guide an appellate court in deciding whether or not to interfere with an award of damages made by a trial court has been established in many authorities. It will be sufficient for purposes of this appeal to cite just two of them. In *Mariqa V Musila, (1984) KLR 251*, the Court of Appeal while addressing its mind to this question held as follows:

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles.”

In *Kemfo Africa limited t/a Meru Express Services (1976) & Another V Lubia & Another (1987) KLR 30*, the same court expressed itself as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage...”

18. Guided by the above principles, I now turn to consider whether the learned trial magistrate erred when he awarded the respondent general damages in the sum of KShs.800,000. According to the medical report by *Dr. Wokabi* dated 22nd August 2011, the respondent sustained the following injuries:

- a) Compound fracture of the right tibia;
- b) Compound fracture of the right fibula; and
- c) Multiple blunt injuries to the trunk.

By the time of examination which was about five months after the accident, the fractures had united but the respondent was still walking with the aid of crutches.

19. In awarding the aforesaid sum, the learned trial magistrate considered the proposals on quantum that were made by both parties and the authorities cited in support of their respective proposals. The respondent proposed a sum of KShs.1,000,000 while the appellant proposed a sum of KShs.400,000. The trial court besides finding that the award proposed by the appellant was too low also noted that the awards in the cases relied on by both parties were made a long time ago. After appreciating inflationary trends, the court settled for the sum of KShs.800,000 which in its view was sufficient to compensate the respondent for his pain and suffering following the accident.

20. In my considered view, given the severity of the injuries that were sustained by the respondent which included two fractures, an award of KShs.800,000 cannot be said to have been inordinately high or low as to justify an inference that it was an erroneous estimate of the damage suffered by the respondent. There is also nothing in the lower court's record to suggest that the award was based on any wrong legal principle. Consequently, I find no basis to interfere with the said award. The same is accordingly maintained.

21. For all the foregoing reasons, I do not find any merit in this appeal. It is accordingly dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of April, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms. Kimemia holding brief for Ms. Khisa for the appellant

Ms Jemtai holding brief for Mr. Kaburu for the respondent

Mr. Salach: Court Assistant