REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 18 OF 2018

JOHN MWANGI.....APPELLANT

VERSUS

RAJAB MRABU.....RESPONDENT

(Being an Appeal from the Judgement and Decree of the Honourable Lutta, Senior Principal Magistrate delivered in Mariakani SPMCCC No. 215 of 2016 on 5th July, 2017)

JUDGEMENT

1. Rajab Mrabu, the Respondent, had sued John Mwangi, the Appellant, for general and special damages in Mariakani SPMCCC No. 215 of 2016 as a result of injuries sustained in a road traffic accident which occurred on 16th April, 2016 involving the Appellant's motor vehicle registration no. KBJ 246Q. At the conclusion of the trial the Respondent was awarded Kshs.800,000 as general damages, Kshs.2,000 as special damages, costs of the suit and interest on the decretal amount.

2. The Appellant is aggrieved by the said judgment and has appealed to this court on the grounds that:-

> **"1. The Honourable Magistrate erred in fact in failing to take into account the evidence adduced by the Appellant on how the accident arose.**
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> **2. The Learned Trial Magistrate erred in law and in fact by misapprehending the evidence and misapplied, misunderstood and overlooked the legal principles and judicial precedent by finding that the Appellant was wholly to blame for the accident when the evidence adduced did not reveal as such.**
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> **3. The Learned Trial Magistrate erred in law and in fact by making her own assumptions, suppositions and conjectures thereby finding that the Appellant was wholly to blame for the accident.**
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> **4. The Learned Trial Magistrate erred in law and in fact by failing to properly consider the evidence on record therefore arriving to the wrong decision on liability.**
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> **5. The Learned Trial Magistrate erred in fact and in law by failing to consider the Appellant's submissions on quantum.**
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> **6. The Learned Magistrate erred both in law and in fact in failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages which was excessive in the circumstances."**

This appeal therefore faults the trial court's findings on both liability and quantum.

3. The Respondent opposed the appeal.

4. The appeal was, by the consent of the parties, argued through written submissions. On the finding on liability, counsel for the Appellant submitted that the evidence of PW1 Police Constable Edna Chelangat was merely a narration of how the accident occurred as captured in the Occurrence Book and did not in any manner establish who was to blame for the occurrence of the accident. According to the Appellant's counsel, there was no evidence called to corroborate the evidence of the Respondent as to how the accident occurred.

5. It is the Appellant's case that the trial court failed to consider the evidence of DW2 Charles Nthiga who was the driver of the accident motor vehicle. It is the Appellant's submission that the Respondent was warned but failed to heed the warning and liability could not therefore be solely attributed to the Appellant.

6. In support of the submission that a plaintiff must establish liability, the Appellant cited the decisions in the cases of **Kenya Power & Lighting Company Limited v Nathan Karanja Gachoka [2016] eKLR; Isaac Michael Okenye v Lacheka Lubricants Limited & another [2017] eKLR; W.K. (Minor suing through Next Friend and Mother L.K.) v Ghalibkhan & another [2011] eKLR;** and **Vincent Ochieng Wanga (Minor suing through uncle and next friend Ezekiel Ojiambo Wanga) v Private Safaris Limited, Nairobi Civil Appeal No. 329 of 2010.**

7. The Appellant urges this court to find that the Respondent failed to establish how the accident occurred and therefore did not establish liability. Further, that the Respondent failed to produce a certificate of registration to prove that the Appellant was the owner of the accident motor vehicle.

8. It is the Appellant's position that the Respondent failed to discharge the burden of proof and his case should have been dismissed. This court was referred to the Court of Appeal decision in **Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR** as defining what amounts to proof on a balance of probabilities. Counsel urged this court to find that as per sections 107, 108 and 109 of the Evidence Act, Cap. 80, it was upon the Respondent to establish the occurrence of the accident, the ownership of the accident motor vehicle and negligence on the part of the driver.

9. Counsel for the Appellant concludes on this issue by urging this court to find that the trial magistrate erred in his finding on liability. According to counsel, the appeal should be allowed with an order dismissing the Respondent's claim with costs. Alternatively, counsel for the Appellant submits that this court should apportion liability between the Respondent and the Appellant at 70%: 30% respectively.

10. On the issue of quantum of damages awarded, counsel for the Appellant faulted the trial court for failing to consider the medical report availed by the Appellant before determining the quantum of damages to award. It is also the Appellant's case that the trial magistrate failed to apply the principle that requires that similar injuries should attract the same compensation. Counsel for the Appellant is therefore asking this court to find the award Kshs.800,000 as general damages inordinately high and reduce the same to between Kshs.250,000 and Kshs.400,000. Counsel cited various decisions in support of the suggested figures. I will come back to those decisions when making my decision.

11. Opposing the appeal on the findings on liability, counsel for the Respondent submits that the particulars of negligence on the part of the Appellant's authorized driver were outlined in the plaint. This, the Respondent's counsel asserts, was buttressed by the Respondent's testimony to the effect that he was washing a motor vehicle at Mariakani bus stage when he was hit from behind by the Appellant's motor vehicle.

12. Further, that PW1 testified that the Appellant's motor vehicle had mechanical defects and this was confirmed by the Appellant's driver who talked of the motor vehicle having a mechanical problem.

13. It is the Respondent's case that DW2 was negligent in operating a defective motor vehicle and the Appellant did not demonstrate that the Respondent contributed to the occurrence of the accident. The Respondent's counsel therefore submits that the trial magistrate did not misdirect himself as his decision was based on the evidence adduced.

14. On the issue of the ownership of the motor vehicle, counsel for the Respondent submits that the Appellant never raised the issue of ownership of the motor vehicle as one of the grounds of appeal. Nevertheless, counsel for the Respondent urges this court to find that since the police abstract was produced without any objection by the Appellant, the Appellant cannot now turn around and deny ownership of the motor vehicle. Reliance is placed on the decision of the Court of Appeal in **Joel Muga Opija v East Africa Sea Food Limited [2013] eKLR** in support of this proposition.

15. As regards the quantum of damages awarded, counsel for the Respondent asserts that the Appellant has not established that the same is inordinately high to warrant disturbance by this court. It is consequently urged for the Respondent that this appeal is without merit and the same should be dismissed with costs.

16. This being a first appeal, the same proceeds by way of a retrial. This court should only give due allowance to the fact that, unlike the trial court, it did not have the opportunity of hearing or seeing the witnesses testify. In **Kimatu Mbuvi t/a Kimatu Mbuvi & Brothers v Augustine Munyao Kioko, Nairobi C. A. No. 203 of 2001; [2006] eKLR**, the Court of Appeal outlined the jurisdiction of a first appellate court as follows:-

> **"As for findings of fact made by the superior court, this Court in discharging its duty to re-evaluate the evidence on a first appeal, will be slow to disturb them. This has been underscored in many decisions but we take it from Mwanasokoni v Kenya Bus Services Ltd [1985] KLR citing with approval Peters v Sunday Post Ltd [1958] EA 424, thus:**
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> > **"It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness. But the jurisdiction (to review the evidence) should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."**

17. The Appellant's appeal on the question of liability is two-pronged. He claims that the Respondent did not establish that the accident motor vehicle belonged to him and that the Respondent did not establish negligence on the part of the driver who caused the accident.

18. On the issue of the ownership of the motor vehicle, I note from the record that the production of the police abstract by PW1 was not opposed by the Appellant. The police abstract produced showed that Motor Vehicle Registration No. KBJ 246Q belonged to John Mwangi whose postal address was located in Mariakani. In the circumstances the applicable law is the one stated by the Court of Appeal in **Joel Muga Opija** (supra) thus:-

"We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."

The Respondent therefore established through the production of the police abstract that the motor vehicle belonged to the Appellant.

19. As for liability in respect of the occurrence of the accident, the testimony of the Respondent was to the effect that he was washing a motor vehicle at a car wash when a motor vehicle came from behind and ran over him. The Respondent testified that he was outside the road. His evidence was not shaken during cross-examination.

20. PW1 testified that the motor vehicle that knocked the Respondent had mechanical defects and was being pushed. DW2, the driver of accident motor vehicle confirmed that the motor vehicle had a problem and had to be pushed in order to start. He confirmed that the Respondent was washing a vehicle parked on the right side.

21. Although DW2 testified that the Respondent was told to move, he did not say who told the Respondent to move. It is also noted that the record does not show if the Respondent was asked by way of cross-examination if he had indeed been told to move.

22. From the evidence that was adduced the trial magistrate was correct in finding that the Appellant's driver was to blame for the accident. The driver had seen the Respondent and must have been aware of the likelihood that he was going hit him but nevertheless persisted in trying to jump start the motor vehicle before ensuring that the Respondent had gotten out of the way. In the circumstances, I find that the trial magistrate was right in holding the Appellant vicariously liable for the accident.

23. The question is whether the Appellant was 100% liable for the accident. The Respondent was washing a motor vehicle in a stage for public service vehicles. It must have been a busy place. Even as he concentrated on washing the motor vehicle he ought to have been alive to his surroundings. He played a role, however small, in the occurrence of the accident. There is no evidence that he tried to avert the occurrence of the accident. In the circumstances the trial magistrate ought to have apportioned him some blame for the accident.

24. I therefore agree with the Appellant's counsel that the trial magistrate erred in not finding some fault on the part of the Respondent. The fault of the Respondent was however minimal. I thus allow the appeal on liability and set aside the finding that the Appellant was entirely to blame for the accident. I apportion liability between the Appellant and the Respondent at 90% & 10% respectively.

25. As for the quantum of damages awarded, I note that PW3 Dr. Stephen Ndegwa opined that the Respondent sustained a compound fracture on the left tibia, compound fracture of the left fibula and cut wound on the left leg. The Respondent also complained of pains on the left leg.

26. On her part DW1 Dr. Leah Wainaina confirmed the injuries. She however opined that the repeat X-rays had been done and there was no permanent disability.

27. In arriving at the award of Kshs.800,000, the trial magistrate relied on the decision in **Charles Mwania & another v Batty Hassan [2006] eKLR** in which an award of Kshs.800,000 for a bruised forehead; wounds on the right thumb, left wrist joint, second right finger, below the right knee and lateral aspect of the right ankle joint; and fractures of the right tibia and fibula was upheld on appeal.

28. Counsel for the Appellant prayed for a reduction of the award of Kshs.800,000 as general damages and relied on the following decisions:

a. **George Okewe Osawa v Sukari Industries Limited [2015**] **eKLR** where an award of Kshs.80,000 as general damages for a fractured pelvis and soft tissue injuries, was, on appeal, enhanced to Kshs.400,000.

b. **Luka Charles Musumba v Charles Munge [2017] eKLR** where an award of Kshs.600,000 for fracture of the right talus bone of the ankle, blunt trauma to the back, blunt trauma with swelling of the right ankle and wounds to the hands and right eye was affirmed on appeal.

c. **Florence Njoki Mwangi v Peter Chege Mbitiru [2014] eKLR** where an award of Kshs.700,000 was on appeal found not to be inordinately low. In that case the plaintiff had sustained fracture of the right mid-shaft femur, fracture of the left mid-shaft femur, degloving wound on the right tibia fabula necessitating skin grafting, amputation of the right foot behind the ankle joint and multiple cuts on the forehead.

d. **Francis Maina Kahura v Nahason Wanjau Muriithi [2015] eKLR** where an award of Ksks.850,000 for segmentary fracture of the mid-shaft and a cut wound on the knee was reduced to Kshs.500,000.

29. As was stated in **Catholic Diocese of Kisumu v Tete [2004] eKLR** , an award of damages can only be interfered with by an appellate court in the following circumstances:-

"It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages, awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate."

30. A survey of the authorities cited will show that claimants who have received injuries that were far more serious than those received by the Respondent herein have received lesser awards. Those decisions are also recent. The Respondent herein had fully healed without any disability and his doctor's fear that he would suffer 6% disability was disapproved by DW1.

31. In the circumstances, I find that the award of Kshs.800,000 was inordinately high. I therefore allow the appeal on quantum and set aside the award of Kshs.800,000 as general damages for pain and suffering. In line with the cited authorities, I award the Respondent Kshs.500,000 as general damages for pain, suffering and loss of amenities. This amount and the sum of Kshs.2,000 awarded as special damages will be subjected to the apportionment of negligence already arrived at in this judgment. This gives the Respondent Kshs. 451,800 in total.

32. Having partially succeeded in his appeal, the Appellant will have half the costs of the appeal.

Dated and Signed at Nairobi this 29th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 29th day of April 2019

R. Nyakundi,

Judge of the High Court