REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL NO. 21 OF 2017

LEONARD KAMENWA NJENGA..... APPELLANT

-VERSUS-

DAVID MAINA MBUGUA.....RESPONDENT

(An appeal from the judgment and Decree of Honourable Senior Principal Magistrate in Kiambu CMCC No.100 of 2007, David Maina Mbugua -vs- Leonard Kamenwa Njenga delivered on 5th May 2009)

JUDGMENT

1. The Appellant Leonard Kamenwa Njenga was dissatisfied with the subordinate court's award of damages to the Respondent for injuries following an accident involving his vehicle which knocked him down on the 11th December 2005 along the Limuru-Nairobi Highway. It is his submission that the damages were inordinately high.

2. The Respondent David Maina Mbugua too filed a **Cross Appeal** on the 50:50 apportionment of liability between the two parties stating that the findings were not based on the evidence on record.

3. This court as the first appellate court has been urged to interfere with the subordinate courts findings on both liability and *quantum* of damages and re-assess the same.

That is the duty of an appellate court, but before it can interfere with the findings and conclusions, it must satisfy itself that the said findings are based on the evidence on record or on no evidence at all, or that the trial magistrate misapprehended and misapplied the law and the principles thus arrived at wrong conclusions – **Mwanasokoni –vs- Kenya Bus Services Ltd (1982-88) KAR 278, Butt -vs- Khan (1987) e KLR** among others.

4. Likewise, this court will not interfere with the trial courts discretion in the assessment of damages unless it is satisfied that the trial magistrate took into account an irrelevant factor or left out a relevant factor, or that the damages are either too high or too low to be a wholly erroneous estimate of the damages – **Kemfro Africa Ltd –vs- A.M Lubia & Another (1987) e KLR.**

5. **The Appeal and Cross Appeal**

The Appeal is on *quantum* of damages as being inordinately too high.

The cross-appeal is against the apportionment of liability.

6. ***Quantum* of Damages**

(**The Appeal**)

The Respondent's injuries are stated in the two medical reports by Dr. Jacinta Maina dated 29th November 2006 and Dr. Wambugu's dated 27th September 2007.

They both agree on the injures as

- **Fracture of the right femur**
- **Fracture of left tibia/fibula**
- **Cut wound eyebrow/forehead.**

7. The Respondent had proposed an award of Kshs.1.5 Million while the Appellant had proposed Kshs.220,000/= and Kshs.60,000/= future medical expenses of Kshs.125,000/= by the Respondent. Each supported their proposals with cited authorities.

Are the awards in damages inordinately high as to invite this court's interference?

The Respondent **David Maina Mbugua** supports the awards and itemised the items and costs of each award.

8. The appellant is of a different opinion. I have looked at the judgment.

The trial magistrate relied on the respondents authorities which he stated were similar and discounted those of the appellant as being not comparable. These are **Nakuru HCCC No. 193/87 Wachiga Kimani -vs- A.G. and Esther Wanjiru Kiarie -vs- Joseph Kiarie Nganga.** I have perused the said authorities.

9. The injuries are more serious being multiple fractures including fractures to the hips, crush injury to right finger dislocation of the hip joint as well as fractures to the fibula/tibia. In both Visram J (as he then was) awarded Kshs.1,000,000/=.

The Appellant's authorities though comparable in injuries were over ten years old.

10. I have considered more recent and comparable authorities for the relevant period.

In **Samuel Mwangi Kamau -vs- Joseph M. Kimemia & Another HCCC No.192 of 2001,** a sum of Kshs.1,000,000/= was awarded for fractures to the tibia and fibular, fracture of left temporal bone and other soft tissue injuries.

In **Mary Pamela Oyioma -vs- Yess Holdings Ltd (2011) e KLR** for comminuted fracture of the right femur, compound fracture to the right tibia/fibular resulting to shortening of the leg, wasting of the leg muscles and soft tissue injured, a sum of Kshs.900,000/= was awarded in 2015.

11. The Respondent's injuries are closely comparable to those in the above decisions.

I do not find the trial magistrates award of Kshs.1,200,000/= to be inordinately high as to invite interference by this court.

The same is upheld.

12. **Future medical expenses**

A sum of Kshs.125,000/= was pleaded. Dr. Jacinta Maina upon examining the Respondent recommended removal of the plates and nails *in situ* at the fracture sites. A further evaluation and treatment were recommended and itemised the approximate costs at Kshs.125,000/=.

Dr. Wambugu agreed to the future treatment and surgery but proposed an approximate sum of Kshs.60,000/=. None of the two doctors stated which hospitals their estimates related to, public or private. While the sum of Kshs.125,000/= may appear to be high, the doctor itemised the necessary procedures. Dr. Wambugu did not say what the Kshs.60,000/= would cater for.

13. There is no doubt as to the need of the future medical interventions by the Respondent.

As a future cost, it can only be an estimate, as different hospitals charge differently at different times.

The appellant has not persuaded me on what reasons I should interfere with the trial court's award. I find it fair and reasonable. The appeal is thus dismissed.

14. **Liability (on Cross Appeal)**

The Appellant (plaintiff in trial court) submits that the trial magistrate erred in fact by apportioning liability equally to the parties against the weight of evidence.

PW1 evidence was that at about 7.30p.m. it was raining and he was walking along the road, when he was suddenly hit by a vehicle. He did not say anything else save on cross examination when he stated that he was about 5 metres off the road that it was dark and that there was no eye witness shown the police abstract, he agreed that the police blamed him.

15. The investigating officer **DW2** testified that he visited the scene of accident had took the defendant's statement but, that the plaintiffs statement was not given to him. He too stated that no eye witness recorded a statement.

16. The appellant who was the owner and driver of the accident vehicle testified **as DW1**. His evidence was that it was dark that his vehicle's headlights were on and was driving at a speed of about 60 Kph following a *matatu* and had passed a bus stage when he saw three people crossing the road. It was his testimony that two stopped to allow him pass but the plaintiff dashed across the road when he was about 10 metres away. It was his testimony that the collision was on the road not off the road and that despite braking the distance was too short. He further testified that he was not charged with any traffic offence. He denied veering off the road and being negligent.

17. Upon the above evidence, the trial magistrate made a finding that both parties were equally to blame.

18. I have re-evaluated the parties evidence. I agree with the trial court that it was not possible to determine which of the two parties caused the accident, each giving a different version on how it happened and there being no independent witness.

The evidence was scanty of details. The investigating officer's evidence was to say the least of no evidential value. He failed to produce a sketch map to show the point of impact, a point contested by both parties.

19. In such circumstances, there is irresistible inference that both parties contributed to the occurrence of the accident.

It is settled law that where there is no sufficient evidence to establish negligence of any party that the court must find both parties to blame as no accident happens without negligence by either one or both parties.

The court must be satisfied that each party was negligent by their conflicting evidence which none of them called evidence to resolve.

20. The **Court of Appeal in Hussein Omar Farah –vs- Lento Agencies, C.A No. 34/2005 Nairobi** held that

> ***"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 arise whether drivers should be held to blame if there is no concrete evidence to determine who is to blame between two divers, both should be held to blame."***

21. Likewise, it is trite that a pedestrian has a duty to take care of his own safety while crossing or walking on a road and to have due regard for other road users including motor vehicles and regard of the **Highway Code – C.A 608 Julius Omollo Chanda & Another -vs- Samson Nyaga Kinyua.**

22. In the instant case, both parties pleaded negligence against each other. It was therefore incumbent that each party proves the negligence attributed to the other on a balance of probability - **Section 107 and 108 Evidence Act.** That was not done. It is not enough to throw allegations to the court without proof and expect the court to go fishing for the evidence to support such allegations.

Evidence adduced by the Appellant and the Respondent show that each party contributed to the accident and their failure to call eye witnesses as well as the investigating officer's failure to produce credible evidence cannot help either of them.

Thus the court's conclusion that each party was equally to blame at 50:50 basis. I am not persuaded to interfere with the trial courts findings on liability.

23. **Special damages**

The Respondent pleaded a sum of Kshs.15,600/= as special damages and Kshs.125,000/= as future medical expenses.

I agree that the trial magistrate did not make a finding on the sum of Kshs.15,600/= special damages.

24. I have seen the bundle of receipts in respect thereof. Receipts for medicines without the names of the purchasers are inadmissible.

Invoices are not payment receipts. I am satisfied of only Kshs.15,600/= being actual payments made by the Respondent.

I allow the said sum as special damages.

25. In its totality, I find that the trial magistrate did not err in fact or law in arriving at the decision she did.

The upshot is that the Appeal and the Cross-Appeal have no merits. They are dismissed.

Each party shall bear own costs of their respective appeals.

Dated and signed at Nakuru this 27th Day of March 2019.

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J.N. MULWA

JUDGE

Dated, signed and Delivered at Kiambu this 10th Day of April 2019.

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C. MEOLI

JUDGE