



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 34 OF 2018

MBITHI MUINDE WILLIAM.....APPELLANT

-VERSUS-

ROSE MUTHEU MULATIA.....RESPONDENT

(Being an Appeal from the Judgment of Hon. E.M Muiiru (SRM) in the Senior Resident Magistrate's Court

at Kilungu Civil Case No. 36 of 2017, delivered on 5th April 2018)

JUDGEMENT

Introduction

1. The respondent filed a suit in the lower Court seeking general damages, special damages, costs of the suit and interest on account of injuries sustained from a road accident on 06/11/2015 along the Nairobi-Mombasa road.
2. The appellant filed his statement of defence and after the preliminaries; the suit was slated for hearing. Judgment was eventually delivered and the appellant was found to be 50% liable. The respondent was awarded khs 700,000/= as general damages, kshs 3,550/= as special damages, costs of the suit and interest.
3. Aggrieved by the said judgment, the appellant filed this appeal and raised 4 grounds stating that the learned trial magistrate erred in law and fact by;
 - a. Failing to judiciously analyze the evidence adduced at trial thereby arriving at a decision that both parties were equally to blame for the subject accident.
 - b. Relying on irrelevant case law thereby arriving at an erroneous decision on the aspect of liability.
 - c. Awarding kshs 700,000/= which award was highly exaggerated.
 - d. Applying the wrong principles thereby arriving at an award on quantum that was highly exaggerated and inordinately high.
4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, they filed their respective submissions.
5. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. In this case, there is no missed benefit as there were no witnesses.
6. Having looked at the record of appeal, the grounds of appeal and the rival submissions, the following issues arise for determination.
 - a. Who was liable for the accident and to what extent?
 - b. Should the quantum of damages awarded be disturbed?.
7. I will proceed to deal with the issues under the distinct heads.

Liability

8. The respondent (**PW1**) testified that on 06/11/2015 (*material day*) she was walking on the side of the road when motor vehicle registration number KAK 248T knocked her down. On cross examination, she said that she was walking on the left side, facing Mombasa direction and the vehicle which was headed towards Mombasa veered off the road and hit her from behind.

9. PW2 was PC Abdi Aziz Mamo from Salama police station. He produced the police abstract. On cross examination, he said that the accident was reported by the driver of the motor vehicle and the case was still pending under investigations. He did not visit the scene and could not form a conclusion as to who was to blame. The driver was not charged.

10. **DW1** was the appellant. His evidence was that on the material day, he was driving towards Makindu from Nairobi. On reaching Salama, he parked his vehicle at the bus stage in order to buy soft drinks. Suddenly, he saw a pedestrian dash into the road from the right side. She had crossed $\frac{3}{4}$ way when she noticed oncoming vehicles and in order to avoid being hit, she dashed towards DW1's vehicle and tried to support herself with the side mirror. She however slipped, fell into the ditch and injured her leg.

11. The appellant submits that since the respondent's version of how the accident occurred was highly disputed, it was upon her to call independent evidence to prove the appellant's negligence. He submits that the respondent failed to produce crucial evidence *to wit* sketch maps and an inspection report. He contends that a sketch map would have explained whether the motor vehicle was in motion or stationary at the time of the accident and the inspection report would have shown the point of impact, if any.

12. He relies *inter alia* on Embu **HCCA No. 53 of 2010; Robert Muriithi Njeru –vs- Diocese of Embu Salesians of Don Bosco** where Lady Justice F. Muchemi stated as follows;

“On the burden of proof, I wish to refer to the case of John Kanyungu Jogs –vs- Daniel Kimani Maingi (2000) eKLR where the Court of Appeal held that the plaintiff had the burden of proving her case on a balance of probabilities. When the case is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to say that one probability was more probable than the other.”

13. He also relies on **Kerugoya HCCA No. 18 of 2013; Michael K. Kimaru –vs- Margaret Waithira Maina** where Justice Limo stated;

“...the police officer who testified never investigated the accident. Her role was just to produce a police abstract which merely demonstrated that an accident had occurred. It does not show whether the appellant's driver was to blame for the accident. The abstract [P Exh 2(a)] produced does not show the results of the investigations that were carried out by any traffic officer if at all. The driver was not charged for any traffic offence...the issue of negligence has not been established...”

14. Further, he submits that the cases relied on by the trial magistrate to apportion liability were markedly different as they involved collision between two motor vehicles.

15. On her part, the respondent submits that the appellant failed to adduce any evidence which indicates that she crossed the road in a manner that endangered her life. That roads are for use by motorists as well as pedestrians and it is the duty of motorists to drive with due care and attention, observe all traffic rules and regulations regarding road signs and right of way for pedestrians.

16. On the case laws relied upon by the trial magistrate, she submits that a trial magistrate has discretion to decide which case law is best suited depending on the circumstances. She also submits that the finding on liability, despite being lenient, was proper.

17. Just as observed by the learned trial magistrate, the evidence on liability was basically the respondent's word against the appellant's. I agree with the appellant that indeed the cases relied on by the trial magistrate on the issue of liability were distinguishable as they involved collision between vehicles. However, the appellant's version of how the respondent got injured is incredible.

18. I don't see how a person who is avoiding being hit by an oncoming vehicle would go all the way to where the left side mirror of a stationary vehicle is located, yet upon getting to the front side of the stationary vehicle (*in a parking area*), the danger of being hit is no longer there. I am simply not convinced that the motor vehicle was stationary.

19. According to the respondent, she was on the side walk when she got hit, however, in light of the appellant's rebuttal and lack of conclusive investigations from the police, it was imperative for her to adduce evidence to confirm her exact location. It is therefore my considered view that both parties should share liability equally just as apportioned by the learned trial magistrate.

Quantum

20. The Medical Report of Dr. G.K Mwaura produced as Exhibit 4(a) shows that the respondent sustained the following injuries;

- a. Swollen, tender-left wrist and left leg
- b. Fracture-left 5th metacarpal bone
- c. Fracture-right tibia

21. In the trial Court and this Court the appellant cited Migori **HCCA No. 7 of 2015; Harun Muyoma Boge –vs- Danie Otieno Agulo** where the plaintiff was awarded kshs 300,000/= for the following injuries.

- a. Blunt chest injuries
- b. Cut wound, right wrist
- c. Deep cut wound right wrist
- d. Fracture right tibia and fibula
- e. Soft tissue injuries.

22. The respondent proposed an award of kshs 2,000,000/= and relied on **Geoffrey Mwaniki Mwinzi –vs- Ibero (K) Ltd & Anor (2014) eKLR** where the plaintiff was awarded kshs 3,794,160/=. In this case, the Court noted that the plaintiff had lost a significant portion of his earning capacity on account of his permanent disability which was assessed by two doctors at about 55-60%.

23. In our case, the learned trial magistrate relied on the following cases;

a. Eldoret HCCA 113 OF 2006; Luka Osoro & Anor –vs Daniel .K. Cheruiyot where the appellate Court upheld an award of kshs 250,000/= for fracture of the right humerus and soft tissue injuries to the upper arm.

b. Nairobi HCCC No. 1296 of 2001; Nancy Wanjiku Mwangi –vs- Peter Njoroge Ngata where a sum of kshs 800,000/= was awarded to a plaintiff who suffered a deep cut wound on the forehead with mild head injury, simple comminuted fracture of the right humerus, compound fracture of the right tibia, loss of bone segment and amputation of the right leg below the knee.

c. Nakuru HCCC No 189 of 2009; Mwaura Muiruri –vs- Suera Flowers Ltd & Anor where the plaintiff was awarded kshs 1,450,000/= for multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left subaxillary area), comminuted fractures of the right humerus upper and lower thirds of the tibia, compound double fractures of the right leg upper and lower 1/3 tibia fibula. Permanent disability was assessed at 50% for the loss of the right arm and 20% on the left leg.

24. From the medical report and as rightly submitted by the appellant, the respondent in this case did not suffer any permanent incapacity. As much as assessment of damages is a question of judicial discretion, that discretion should be exercised judiciously and judicial officers should strive to be guided by comparable authorities.

25. The respondent's authority and the ones cited by the trial magistrate were clearly not comparable as the injuries therein were much more severe. On the other hand, I find proper guidance in the authority submitted by the appellant and agree that indeed the award of kshs 700,000/= was inordinately high and warrants interference by this Court.

26. It is therefore my considered view that an award of kshs 400,000/= will sufficiently compensate the respondent for the injuries sustained. The same should be subjected to the contribution on liability making the net award kshs 200,000/=.

Conclusion

The court thus finds that the appeal succeeds on the issue of quantum to the extent above stated and thus court makes the following orders;

i. -The lower court judgement is adjusted as follows;

A)-Lower court award is reduced to ksh 400,000 less 50 % contribution leaving a balance of ksh 200,000.

B)Plus specials ksh 3550 and lower court costs.

C)-Half costs to the appellant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

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C. KARIUKI

JUDGE