REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL NO.182 OF 2015

JULIUS M. KIMAIYO.....1ST APPELLANT

MSALENDO LIMITED.....2ND APPELLANT

VERSUS

FIDELIS SILINGI MUSILA.....RESPONDENT

(Being an appeal from the whole Judgement delivered on 30.10.2015, in CMCC 643 of 2011 at Machakos by Hon M.K. Mwangi, P.M)

JUDGEMENT

1. Before the trial court, the Appellants were found 100% liable for an accident that took place on 25.12.2010 in which the respondent sustained injuries. The plaint alleged that the Respondent was as a pillion passenger aboard a motor-cycle along the Machakos- Wote Road when near Machakos General Hospital the Motor Vehicle registration number KBB 602G was negligently, carelessly and/ or recklessly driven, managed by the Appellants authorized driver, agent and/ or servant that it was allowed to lose control, veer off its lawful lane and violently knock down the Respondent thereby occasioning him severe and extensive injuries. The Respondent pleaded *res ipsa loquitor*. Thereafter the Respondent filed suit and was awarded a total of Kshs. 900,000/- as general damages for pain and suffering, Kshs 1,104,050/- as special damages and Kshs 60,000/- as cost of future medical care.

2. The Appellants denied the accident and pleaded in the alternative that if the accident did take place then the Respondent was wholly or substantially to blame as he was the author of his misfortune and pleaded *volenti non fit injuria*. The appellants also alleged and pleaded fraud on the part of the Respondent for he was not injured at all.

3. This appeal is on liability and quantum and being a first appeal, this court is required to re-evaluate the evidence adduced before the trial magistrate before reaching its own independent determination as to whether or not to uphold the decision of the trial magistrate. The court should bear in mind that it neither saw nor heard the witnesses testify (se ***Peters v Sunday Post Ltd* [1958] E.A 424**).

4. The thrust of the appellant's case on the issue of liability as set out in the memorandum of appeal dated 24th November, 2015 and amended on 1st March, 2016, and further amended on 8th December, 2016, is that the trial magistrate misdirected himself in disregarding the weight of evidence and submissions on liability and consequently came to the wrong conclusion. Counsel for the appellant consolidated the appeal into two grounds, which is on quantum and liability.

5. On liability, counsel submitted that according to the evidence on record, there was no contact between the appellants' motor vehicle and the motorcycle and that the trial court failed to take the evidence into consideration. Therefore the finding that the appellant was 100% liable was erroneous and the court ought to re-evaluate the evidence afresh and arrive at a proper conclusion. On assessment of damages, he submitted that the award was excessive and proposed a figure of Kshs 450,000/- to Kshs 600,000/- for comparable awards. He relied on the case of **Julius Kiprotich v Eliud Mwangi Kihohia (2006) eKLR**. On special damages, he submitted that the amount was not proven and should be rejected.

6. In response, counsel for the respondent, submitted that, according to the evidence by Pc Nyala, the vehicle KBB 602G veered onto the path of the motorcycle and was thus to blame for the accident. In his view, the respondent's case was proved on a balance of probabilities. On the award of damages, the learned counsel submitted that the trial court could not be faulted since what was awarded was specifically pleaded. In the case of **Kiru Tea Factory & Another v Peterson Watheka Wanjohi** a sum of Kshs 800,000/- was awarded as general damages for pain, suffering and loss of amenities in respect of similar injuries.

7. Two issues arise for determination in this appeal. The first issue is whether the trial magistrate reached the correct decision in finding the appellants 100% liable for the accident. The second issue is whether the trial court applied the correct principles in arriving at the quantum of damages.

8. I will deal with the issue of liability first. The respondent's key witness was Fidelis Silingi Musila (PW 2) who recalled that on 25.12.2010 he was from Machakos aboard a motorcycle and he saw motor vehicle Reg. number KBB 602G coming from the opposite direction and it hit him whilst on the motorcycle and he was injured. He tendered receipts, payslip, police abstract and copy of records. Pw3 was Catherine Anyala, the police officer who testified on the accident that took place on the material day and who confirmed that the suit vehicle entered the path of the motorcycle but went on to add that no one had been charged with an offence of causing the accident.

9. Patrick Michael Khalif (DW 1) recalled that on the material day he was driving KBB 602D on 25.12.2010 when he saw a motorcycle being ridden in the middle of the road and when the motorcycle passed his vehicle, one of the passengers fell off after the cyclist suddenly swerved and that the second passenger was flung below his vehicle while the motor cyclist fled from the scene.. He testified that there was no contact between his vehicle and the motorcycle and that had the Respondent stayed on the motorcycle, he wouldn't have been injured.

10. The trial court found that the Respondent had given plausible evidence as compared with that of the Appellants. The learned magistrate came to the conclusion that the Appellant's driver ought to have driven the suit vehicle on the proper side of the road at a reasonable speed and that the Respondent did not contribute to the accident and hence he found that the driver of the vehicle was 100% liable for the accident.

11. Was liability proved in these circumstances? Were the appellants properly sued? **Sections 107**, **108** and **109** of the ***Evidence Act, Chapter 80 of the Laws of Kenya*** place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. It was the duty of the respondent to prove liability on the balance of probabilities. Although, PW 3 did not investigate the accident, she produced the police abstract which confirmed the fact of the accident, the date it occurred. Pw2 who was the respondent testified of the fact that he was a pillion passenger and that he sustained injuries. The police abstract relied on was produced which indicated that the matter was pending under investigations. The officer who investigated the accident did not testify and that PW3 testified on his behalf. According to the said witness, the Appellants vehicle entered the path of the motorcyclist.

12. The question then is whether the Respondent established negligence by establishing that an accident occurred. In other words, could the Respondent rely on the doctrine of *res ipsa loquitor* that was pleaded in his plaint so as to make the case that the Appellants were liable?

13. In the case of ***Barkway v South Wales Transport Company Limited*** **[1956] 1 ALL ER 392**, **393 B** the nature and application of the doctrine of *res ipsa loquitur* was stated as follows:

> *The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.*

14. PW3 further stated in her evidence that there was an eye witness named Teresia Mueni who had recorded a statement to the effect that M/v KBB 602G had encroached onto the lane of the motorcyclist. The said eyewitness however could not be reached and further the motorcyclist is reported to have disappeared after the accident.

15. Dw1 in his testimony stated that the motorcycle was riding in the middle of the road and the respondent fell off because the motorcycle swerved. Could it be that the motorcycle rider could be blamed? We cannot tell because there is no evidence from the scene of the accident on the position that the motorcycle was found so as to enable the court make an inference. DW1 further stated that the respondent jumped off the motor cycle and landed under his vehicle and was run over. DW1 maintained that had the respondent not jumped off the bike, he would not have been injured.

16. In ***Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another*****[2015] eKLR,** the court observed that:

> ***The evidence of the plaintiff on the occurrence of the accident attributed negligence to the 2nd respondent in that he was over speeding and driving without due care and attention causing the vehicle to lose control. This evidence was not controverted since the defendant chose not to tender any evidence. The 2nd defendant was charged with a traffic offence. The plaintiff therefore proved negligence on the part of the 2nd respondent***

17. In the absence of an independent witness , it would appear to me that it is the Respondents word against that of the Appellants. However what is not in doubt is that an accident did occur and in which the Respondent sustained injuries. The Appellants witness stated that his vehicle did not come into contact with the motor cycle and that the rider sped off immediately. DW1 also confirmed that his vehicle ran over the Respondent. Since the motor cycle could not be traced so as to establish whether it came into contact with the vehicle, then it is logical that the respondent could either have been tossed off from the bike or he had jumped off before being hit by the Appellants vehicle.

18. As regards the issue of liability, I note that the trial court solely blamed the appellants for the accident. However the evidence of the appellant's driver is that he had earlier flashed his lights to warn the rider of his presence on the road. The appellant's driver was expected to have slowed down or even swerved so as to avoid the accident. He had already noticed the rider and the pillion passenger and ought to have stopped. It is also likely that the respondent upon seeing an impending danger must have jumped off the motor cycle .Had he not jumped off then he might have avoided being injured. Under those circumstances, liability ought to be shared between the Appellants and the Respondent. However I find that the Appellants driver should shoulder a higher degree of liability than the Respondent. It is my view that the Appellants should shoulder liability at 80% while the Respondent shoulders 20% contributory negligence. It follows therefore that the trial court had erred in holding the Appellants solely liable for the accident and that the same must be interfered with.

19. On quantum, learned counsel for the appellants submitted that the award of Kshs 900,000/as general damages by the trial court was excessive. Learned counsel proposed an amount ranging between Kshs 450,000/ and Kshs 600,000/.Reliance was placed in the case of Julius

Kiprotich V Eliud Mwangi Kihohia [2006]eKLR where a sum of Kshs 450,000/ was awarded as general damages for a fracture of pelvis, severe injury to the abdomen, deep cut wound on right parietal region of the scalp. Also the case of Anthony Keriga Mogesi V Florence Nyomenda Tumbo [2015]eKLR where a sum of Kshs. 600,000/ was awarded for a cut wound on left upper eyelid, open book fracture of pelvic bones, weak lower limbs.

20. On special damages, learned counsel for the Appellants submitted that the sum of Kshs 1,104,050/ be rejected since the Respondents insurer and employer paid the same and that it is only the employer who can claim the same under the doctrine of subrogation.

21. Learned counsel for the Respondent submitted that the awards by the trial court be upheld in that the general damages were reasonable and further that the special damages were pleaded and specifically proved.

22. The Respondent was examined by both doctors for the Respondent and the Appellants. The injuries sustained comprised of multiple scalp and facial bruises, urethral injury, acetabular fracture left side, fracture of humerus with radial nerve injury and fracture of the right femur. The Respondent was admitted at Mater Hospital from 25/10/2010 to 18/02/2011 where he underwent several operations such as urethrogram, urethra plasty and radial tendon transfer as well as fixing of screws on humerus, femur and left T acetabular. From these injuries, it is quite clear that the Respondent suffered severe injuries. Indeed it is trite that an appellate court should be slow to interfere with award of damages by a trial court unless it is shown that the trial court had taken into account an irrelevant factor or left out a relevant one or that it took into account a wrong principle with the end result that the award arrived at is high or low so as to represent an erroneous estimate of the damages. The case of **Mary Nzomo &Others(Suing through Father and Next Friend Wilson Nzomo)-VS-The Headmistress, Machakos Girls, The Chairman ,B.O.G & Wambua Makau Machakos HCC N.O.55 of 2001** had been cited by the Respondent and in which an award of Kshs 1.250,000/ had been awarded for similar injuries. Looking at the injuries suffered by the Respondent and the doctor's reports, I am satisfied that the award of Kshs 900,000/ by the trial court as general damages was not inordinately high as contended by the Appellants. The doctors had proposed a sum of Kshs 200,000/ for future medication which was reduced by the trial court to Kshs 60,000/. I find the said sum to be reasonable on the ground that the Respondent has to have the screws removed.

23. On special damages it is noted that the Respondents employer and underwriter paid some of the medical bills. The insurer paid the cover sum of Kshs 600,000/ while the employer paid the balance after engaging the Respondent to agree to have his salary deducted at the rate of Kshs 5000/ per month until he clears the same. Indeed the Respondent produced the salary slips clearly showing the said deductions. Hence I see no reason to disturb the award of special damages in the sum of Kshs 1,110,642/ by the trial court.

24. In the result I find the Appeal has partly succeeded. The judgement of the trial court is set aside and substituted with judgement for the Respondent against the Appellants jointly and severally in the sum of Kshs 1,608,513.60 made up as follows:

(a) Liability at 80% to 20% in favour of the Respondent.

(b) General damages…….....Kshs 900,000.00

(c) Special damages……....Kshs 1,110,642.00

(d) Less 20%contribution…….....Kshs 402,128.40

Net damages…….....**Kshs 1,608,513.60**

The Appellant is awarded a third of the costs of the appeal while the Respondent shall have full costs in the lower court.

It is so ordered.

Signed, Dated and Delivered at Machakos this 30th day of May, 2019.

D.K. KEMEI

JUDGE