REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 50 OF 2009

BERNASCONI FRANCESCO ……APPEALLANT

VERSUS

PETER NYONGESA……..…….…….RESPONDENT

J U D G M E N T

1. This appeal challenges the decision of the trial court dated 27/2/2009 by which the court apportioned liability at 80:20 in favour of the Respondent, as plaintiff then, and awarded general damages of Kshs.75,000/= and special damages of Kshs.2,000/=.

2. The pleadings by the Respondent and evidence led in support of thereof were that on the 14/5/2004 he was walking along Moi Avenue, Mombasa, towards Kilindini, when he was hit by a motor vehicle he identified as Registration No. KAN 453J. Out of that accident he pleaded and led evidence that he suffered injuries which were pleaded and a medical report to that extent produced by the doctor who examined him. For the accident and injuries, the Respondent blamed the Appellant for negligence and thus sought to recover damages both general and special.

3. For the defendant the defence filed and later amended initially admitted the occurrence of the accident and was amended to delete that admission. In the initial defence what was denied was the negligence and instead alleged negligence on the part of the Respondent with the particulars thereof being of relevance for the determination was the particulars that the Respondent crossed the road when it was dangerous to do so, ignoring the presence of the defendant's motor vehicle on the road, failing to keep a proper look out and acting recklessly without regard to own safety. In the amended defence filed, the occurrence of the accident was denied but the allegations of negligence by the Respondent were retained without being pleaded without prejudice or in the alternative. That amended defense equivocates that there was an accident contributed to by the Respondent as much as no accident ever occurred.

4. That is the kind of a defense that can never surmount the accusation of being embarrassing and unfair to the opponent because it is difficult to clearly focus on which defence to counter. In addition that denial of occurrence of the accident came up after both the Respondent and the police officer had given evidence.

5. Even though the trial court seems not to have had regard of that specific aspect of the pleadings, as the trier of facts, the court considered the evidence and delivered himself as follows:-

> **"It was PW 1 evidence that he was knocked down by motor vehicle registration number KAN 453J while crossing a feeder road and the driver of the said vehicle abruptly made a turn and drove against traffic. He is the only eye witness. His evidence is corroborated by the police abstract produced in evidence by PW 2 who said he is the incharge of traffic investigations. The production of the abstract confirms that the accident was reported. I therefore find on a balance of probabilities that an accident occurred as reported. It was the plaintiff's collection that he was crossing the feeder road where only vehicles from the feeder road to main road Moi Avenue are allowed but that the defendant/his driver made a turn from the main road and drove against traffic. That in itself was negligent. The plaintiff on his part ought also to have been on the look out to avoid such an eventuality. That being so, I apportion liability as follows**
>
> **Plaintiff……20%**
>
> **Defendant…….80%"**

6. I do appreciate that even though on a first appeal the court proceeds by way of rehearing, I lack the benefit of having observed the witnesses testify a benefit the trial court enjoyed. However on my re-examination of the record I do not find any error on the decision reached by the trial court on liability and I thus find no merit on the appeal on the apportioned of liability and dismiss the same.

7. On assessment of quantum of damages, the court reminds itself that the exercise invokes the exercise of judicial discretion and the thresholds for an appellate to interfere are very high. It must be established that an error in principle was committed or short of that the damages assessed are too high or too low as to be wholly and manifestly demonstrate an erroneous estimate. It is not enough that another judge would have awarded a different sum nor is it sufficient a cause that a previous decision had settled on a specific sum. The decisions in previous cases when cited to court are not a fetter or clog on the courts discretion. Even the principle that comparable injuries should attract comparable awards does not purport to say that if a high court awarded say Kshs.10,000/= some ten years ago. The magistracy cannot award any other sum but the said Kshs.10,000.00. In this case the trial court cannot be faulted for failure to consider the decisions cited to it when the record bear it out that he adverted to considering the same.

8. Accordingly the challenge on assessment of damages cannot succeed but is dismissed.

9. The upshot is that the entire appeal lacks merit and the same is hereby dismissed with costs.

Dated and signed at Mombasa this 21st day of June 2019.

P.J.O. OTIENO

JUDGE

Dated and delivered at Mombasa this 28th day of June 2019.

LADY JUSTICE D. CHEPKWONY

JUDGE