



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.215 OF 2010

ABDI OSMAN.....APPELLANT

-VERSUS-

KAMAU C. NJUGUNA.....RESPONDENT

(Being an appeal from the Judgment/decree of Hon. W. Juma, Chief Magistrate, delivered on 21st July 2010 in Nakuru CMCC No.1129 of 2007)

JUDGMENT

INTRODUCTION

1. The appellant herein who was the plaintiff in the lower court sued the respondent /defendant seeking general and special damages for the injuries he sustained when the respondent/defendant's vehicle registration number KAQ O24 F collided with him while he was cycling along Elementaita-Game road. The trial magistrate apportioned liability at 50:50 and awarded general damages of kshs.325,000 and special damages of kshs.8,000. The appellant being dissatisfied with the trial magistrates determination on liability filed this appeal on the following grounds:

1. The learned magistrate erred in law and in fact in finding that the Appellant contributed to the occurrence of the accident contrary to the evidence on record.
2. That the learned magistrate erred in law and in fact in apportioning liability against the Appellant in the ration of 50:50.
3. That the learned magistrate erred in law and in fact in finding that the respondent was not 100% liable for the injuries sustained by the Appellant when there was no evidence in his favour.
4. That the learned honourable magistrate erred in law and in fact by failing to fully evaluate the evidence before her and thus arrived at wrong conclusion.

2. The Respondent/defendant was also dissatisfied with the determination of the trial court on quantum and filed cross appeal on the following grounds:-

1. The Honorable magistrate made an excessively and inordinate high award in general damages.
2. The Honorable magistrate applied wrong principles in arriving at the award of general damages.
3. The Honorable magistrate failed to consider the conventional awards made in respect to cases of similar injuries as suffered by the respondent.
4. The Honorable magistrate failed to take into account the defendant's submissions on arriving at the award on general damages.

3. Counsels herein filed written submissions and highlighted on 20th may 2019.

APPELLANT'S SUBMISSIONS

4. The appellant/plaintiff submitted that the appellant who was cycling towards the same direction with the vehicle was knocked from behind. Counsel submitted that the appellant and the eyewitnesses testified that they were ahead of the vehicle and that the vehicle drove passed the eyewitness and knocked the appellant. He further submitted that evidence on record show that the appellant had moved off the

main road when he was knocked.

5. The appellants advocate argued that it is not clear why the trial magistrate apportioned liability at 50:50. Counsel submitted that all drivers have a duty of care on the road and one driving from behind has a higher duty. He urged court to find the respondent 100% liable.

RESPONDENT'S SUBMISSIONS

6. In response counsel for the respondent submitted that the respondent has no issue with apportionment of liability; that the plaintiff admitted that he did not check behind before turning off. Respondent added that the trial magistrate had opportunity to hear evidence and make a concrete decision. Counsel submitted that both the driver and cyclist had responsibility to ensure that the road was clear.

7. On quantum, the respondent submitted that the trial magistrate failed to consider authorities cited and that the award was high.

8. In a rejoinder, Mr. Gekonga submitted that the appellant was already on the feeder road at the time of the accident.

ANALYSIS AND DETERMINATION

9. I have considered arguments by parties herein. This being the first appellate court, I am required to reevaluate evidence adduced in the lower court and arrive at an independent determination. This I do with the knowledge that I never got the opportunity of taking evidence first hand and observe the demeanor of witnesses. I therefore give the due allowance.

10. On perusal of the court record, I note that the appellant testified that he was hit as he crossed the tarmac road to the marram road. He said that the colleague who was behind was not hit because he was on the tarmac. He said the vehicle left the tarmac and moved to where he was. He said that it was windy and he did not check behind before joining the marram road. He said that he had crossed by 4 meters from the tarmac.

11. PW2 testified that he was cycling behind the appellant. He said that near Kobito Secondary School, he saw the appellant cross to join earth road and as he joined, a vehicle behind him passed him without hooting, moved to the earth road and hit the appellant. He said the appellant and the bicycle were thrown back to the tarmac.

12. PW2 further testified that the vehicle was moving in high speed and that it did not brake immediately but proceeded and stopped far ahead. He said that there was no traffic ahead to warrant the vehicle driver move off the road to where he hit the appellant.

13. In cross examination PW2 testified that the marram road was on the right and that the front bicycle tyre was on the marram road and the rear one was on the tarmac. He added that when he wanted to cross the road, he saw the vehicle hit the appellant.

14. From evidence adduced in the lower court, it is evident that the appellant was not fully out of the tarmac when the collision occurred. It is also evident that he was crossing to the right side of the road to go a marram road. He admitted that he never checked behind to see if there was a vehicle coming before he crossed. He had a duty to do so before crossing.

15. Further there is no mention of him having indicated that he intended to cross may be by use of hand; he was riding a bicycle which may not have an indicator. On the other hand the driver did not indicate any attempts to brake. Each had responsibility of ensuring that the road was clear before crossing and for the driver to move in a speed that would enable him control the vehicle in the event of sudden occurrence that would require him to stop.

16. From the foregoing I find that the appellant and respondent equally share the blame for the accident and the trial magistrate was right in holding so. Appeal on liability is therefore dismissed.

17. On quantum I note that the appellant sustained the following injuries

- a) Compound fracture to right tibia and fibula
- b) Degloving injury to the right thigh on lateral aspect
- c) Multiple lacerations on the right thigh on the posterior aspect extending up to popliteal fossa
- d) Deep lacerations on the left parietal region

18. I have considered the above injuries and compared with injuries sustained in the cited authorities and find that the award of kshs.650,000 as general damages is reasonable. I have no reason to interfere with the said award.

FINAL ORDERS

1. Appeal on both liability and quantum is dismissed.
2. Each party to bear own costs of appeal

Judgment Dated, signed and delivered at Nakuru this 27th day of June 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Mr. Gekonga Counsel for Appellant

Nyaundi Tuiyot Counsel for Respondent