



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO 69 OF 2014

DENNIS BALOZI.....1ST APPELLANT

KHETIA DRAPERS LIMITED.....2ND APPELLANT

VERSUS

CLEOPAS SONGOK.....RESPONDENT

(An Appeal arising out of the Judgment of Hon. B. Kasavuli SRM delivered on 29th April, 2014 at Eldoret Chief Magistrate's Court Civil Case No. 244 of 2013)

JUDGMENT

The Appellants were the Defendants and the Respondent the Plaintiff in the original trial in **Eldoret Chief Magistrate's Court Civil Case No. 244 of 2013**. The Respondent instituted the said suit in the trial court for general and special damages, arising from injuries sustained from an accident involving motor vehicle registration number KAV 888D Land Cruiser Prado driven by 1st Appellant, and owned by the 2nd Appellant. The Respondent attributed the occurrence of the said accident to the negligence of the Appellants. The Respondent relied *inter alia* on the doctrines of *res ipsa loquitur* and vicarious liability. The trial magistrate, in a judgment delivered on 29th April, 2014, held that the Respondent was able to prove that the Appellants were 100% liable for the accident, and awarded the Respondent general damages amounting to Ksh.350,000/- and special damages amounting to Ksh.32,774/- as well as costs of the suit .

The Appellants being dissatisfied with the said judgment filed an appeal challenging the judgment of the trial magistrate and raised several grounds of appeal challenging both quantum and liability. The Appellants were aggrieved that the trial magistrate applied wrong principles in the assessment of damages and that the amount awarded was excessive for the injuries sustained by the Respondent. The Appellants were of the view that the Respondent's case was not proved to the required standard. The Appellants faulted the trial magistrate for finding that they were wholly liable for the accident irrespective of the evidence adduced to the contrary. The Appellants challenged the trial magistrate's decision claiming it was based on wrong principles of law. The Appellants were aggrieved that the trial magistrate failed to consider all the issues raised by the parties in the pleadings, evidence and submission. Finally, the Appellants were of the view that the trial magistrate's decision was not based on any judicial authority.

By consent of the parties, the appeal was canvassed by way of written submission. Both parties filed their written submission. During hearing of the appeal, the Appellants argued that the Respondent failed to prove any of the particulars of negligence pleaded. They submitted that the Respondent conceded to the fact that he saw the Appellants' motor vehicle behind him before he entered the junction. They averred that the Respondent also conceded that he did not take any measures to avoid the accident. They pointed out that PW3 (PC Omolo) stated that he did not have material facts with regards to the accident as he was not the investigating officer in the matter. They stated that inspection reports, sketch map, and police file were not availed in court to prove liability on their part.

The Appellants submitted that the trial magistrate disregarded evidence of the 1st Appellant, Dennis Balozi. The 1st Appellant testified that the Respondent suddenly emerged from the left side of the road and made a U-turn, which resulted in the aforesaid accident. The Appellants argued that this evidence was corroborated by that of PW3, PC Omolo. They asserted that the 1st Appellant's conviction in traffic case does not preclude the Appellants from alleging contributory negligence on the part of the Respondent. The Appellants relied on the cases of **Robinson vs. Oluoch [1971] EA** and **David Kinyanjui & 2 others vs. Meshack Omari Monyoro Civil Appeal No.121 of 1993** (unreported), which reiterated their submission that a conviction does not close the door to a defence on liability as well as the issue of contributory negligence.

The Appellants submitted that the evidence of the 1st Appellant proved that the Respondent contributed to the occurrence of the accident. They complained that the trial magistrate made a determination based purely on his own instinct without subjecting the same to any legal basis. The Appellants prayed that the trial court's decision on liability be set aside and the same be apportioned at ratio of 50:50. The Appellants submitted that the trial court in arriving at its decision ought to have relied on the evidence on record and not on the trial magistrate's instincts.

On quantum, the Appellants were of the opinion that the amount of Ksh.350,000/- awarded to the Respondent as general damages was excessive, and that the same ought to be substituted by an award of Ksh.200,000/-. The Appellants pointed out that the testimony by Dr. Aluda was to the effect that the Respondent's injuries had healed with no permanent disability. They cited the case of **Parodi Giorgio vs John Kuria Macharia [2014] eKLR** where the amount of damages was reduced from Ksh.350,000/- to Ksh.200,000/-. The Appellants asserted that the amount of Ksh.32,774/- awarded to the Respondent as special damages was erroneous since the Respondent did not provide any evidence in support of the same.

The Respondent, while opposing the appeal, stated that he blamed the Appellants for the accident. The Respondent submitted that another claimant filed a suit arising from the accident subject matter in the present appeal in **Eldoret CMCC no.245 of 2013 John Nundu Awich vs. Dennis Balozi and Khetia Drappers Ltd** which was chosen as the lead file for determination on the issue of liability. He asserted that the Appellants were held liable for the accident in that suit. The Respondent averred that the 1st Appellant was driving motor vehicle registration No.KAV 888D when he hit him and subsequently hit the plaintiff in the above stated suit. He stated that the evidence of PC George Omolo established that the 1st Appellant was to blame for the accident. He submitted that the 1st Appellant was charged with a traffic offence arising from the present accident in **Eldoret CMCC Traffic Case No.299 of 2013**. The 1st Appellant was convicted on his own plea of guilt and fined Ksh.10,000/-.

On quantum, the Respondent was of the view that the amount awarded as general damages by the trial court was reasonable in the circumstances. He was of the view that the same ought not to be disturbed. He averred that the amount awarded as special damages was pleaded and proved by production of relevant receipts. In the premises, he urged this court to dismiss the Appellants' appeal.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal. This being a first appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced in the trial court in order to arrive at its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. (See **Selle vs Associated Motor Boat Company Ltd [1968] EA 123.**)

In the present appeal, the issues for determination are whether the Respondent proved that the Appellants were to blame for the accident, and secondly, if the first issue is answered in the affirmative, whether the amount awarded to the Respondent as damages constituted a fair assessment for purposes of compensation.

It is not disputed that an accident involving the Respondent and motor vehicle registration No. KAV 888D occurred on the date and place stated in the plaint. It is also not disputed that the motor vehicle was owned by the 2nd Appellant and was being driven by the 1st Appellant. The 1st Appellant testified that he was employed by the 2nd Appellant as a driver, and that on the material day, he was driving the said car. What is disputed in this appeal is the trial court's finding on liability and quantum of damages.

This court notes that there were two different claimants who filed suit on the basis of the accident in the present appeal; *i.e.* the Respondent and the Plaintiff in **Eldoret CMC Case No.245 of 2013 John Nundu Awich vs. Dennis Balozi and Khetia Drappers Ltd**. The trial court in its judgment stated that by consent of the parties, it was agreed that the determination on liability in **Eldoret CMCC no.245 of 2013 John Nundu Awich vs. Dennis Balozi and Khetia Drappers Ltd** would be adopted in the present case. The Appellants were held wholly liable for the accident in **Eldoret CMC Case No.245 of 2013**. Therefore, the trial magistrate in the present appeal adopted that finding on liability and held the Appellants wholly liable for the accident in the present case. The trial court's decision in **Eldoret CMC Case No.245 of 2013** was appealed against by the Appellants. The trial court's finding on liability was upheld by the Appellate Court in **Eldoret Civil Appeal No.70 of 2014**.

In his evidence, the Respondent who testified as PW1 narrated how the accident in which he was injured occurred. He testified that on the material date of 10th February 2013, he was riding his motorcycle along Eldoret-Webuye Road. On reaching Tairi Mbili area, while branching to join a junction, the Appellants' vehicle hit him from behind. The Respondent stated that the Appellants' vehicle veered off its lane before hitting him.

The investigating officer in **Eldoret CMCC no.245 of 2013**, PC Omolo, testified that the Appellants' motor vehicle registration No.KAV 888D being driven towards Eldoret town. At Tairi Mbili area, there was a motor cycle ahead of the Appellants' vehicle which wanted to branch to the left. The Respondent was riding the said motorcycle. The driver of the said vehicle wanted to overtake the motorcycle. Unfortunately, the driver knocked down the motorcycle. Immediately after hitting the motorcycle, it swerved right as one faces the Eldoret town direction and knocked down a cyclist who was coming from the Eldoret town direction. PW3 charged the 1st Appellant who was the driver of the said motor vehicle in **Eldoret Traffic Case No.299 of 2013** with the offence of **careless driving**, to which he pleaded guilty and paid a fine of Ksh.10,000/-.

On the other hand, the 1st Appellant who was the driver denied that he was to blame for the accident. He confirmed that he was driving from Kitale towards Eldoret town. He claimed that on reaching Tairi mbili area, there was a lorry joining the main highway from his left side of the road. The lorry stopped before joining the highway to allow him to drive through. He suddenly saw a motorcycle ahead of him make a U-turn and hit an oncoming bicycle. The two fell on his vehicle and damaged it. He however contradicted himself by stating that he did not know the direction where the bicycle and the motorcycle were coming from. From the evidence adduced before the trial court, the Respondent was hit from behind by the Appellant's vehicle.

The 1st Appellant denied being charged with the traffic offence in **Eldoret Traffic Case No.299 of 2013** despite the proceedings of the said case being availed in court. This shows that he was not a credible witness. The Respondent produced copies of proceedings of the traffic case which showed that the 1st Appellant was convicted of the offence of careless driving with regard to the accident in the present Appeal. In addition, he was convicted on his own plea of guilt. From the particulars of the offence in the charge sheet, he pleaded guilty to driving motor vehicle registration No.KAV 888D without due care and attention and without reasonable consideration for other road users hence causing the said accident. **Section 47A** of the **Evidence Act** provides that:

“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

In **Francis Mwangi vs Omar Al-kurby Civil Appeal 87 of 1992 (unreported)**, the Court of Appeal was clear that a conviction is conclusive evidence of negligence but does not rule out the element of contributory negligence. In the present appeal, although the Appellants pleaded contributory negligence, no evidence was led to prove contributory negligence on the part of the Respondent.

From the evidence adduced, the 1st Appellant was driving in the same direction as the Respondent. The Respondent wanted to make a turn and join a junction when the 1st Appellant hit him from behind. The 1st Appellant must have been driving at a high speed. The Appellants did not lead any evidence to show how the Respondent contributed to the occurrence of the accident. The 1st Appellant’s version of events that the Respondent’s motorcycle made a U-turn and hit an oncoming bicycle, and that the two fell on his vehicle and damaged it, was disproved in **Eldoret Civil Appeal 70 of 2014**. This court therefore finds no basis to disagree with the finding of the trial court on liability. The fact that the 2nd Appellant was held vicariously liable was not appealed against hence this court will not address itself on the same. The appeal against liability therefore lacks merit and is hereby disallowed.

On quantum, the trial court awarded the Respondent general damages amounting to Ksh.350,000/-. The trial court relied on authorities cited by the Respondent in the lower court. The Appellants were of the view that the amount awarded as general damages was excessive, and that the same ought to be substituted by an award of Ksh.200,000/-. They cited authorities outlined earlier in this judgment. The Respondent on the other hand, argued that the trial court was not misdirected in assessment of the damages and that the award ought not to be disturbed. In **Butt V Khan (1977) 1 KAR** the Court of Appeal held as follows;

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low....”

The Respondent pleaded the following injuries which were corroborated by PW2, Dr. Aluda and PW3, Dr. Joseph Embezi.

- a) The right thigh was swollen and tender with a deep cut wound
- b) Fracture of the right femur
- c) Large scar on the right thigh

This court has considered the authority cited by the Appellants as well as the authorities relied on by the trial magistrate. The injuries in **Parodi Gorgio** Case (supra) cited by the Appellants were not as severe as in the present appeal since the Respondent in the present appeal underwent an operation due to the fracture on his right femur and a metal was inserted to stabilize the fracture.

The injuries in **Kinyanjui Wanyoike v Jonathan Muturi Choga [2004] eKLR** cited by the Appellants in the lower court are comparable to the injuries in the present appeal. The learned magistrate was alive to the fact that inflation is a factor of consideration in determining the quantum of damages. The trial magistrate rightly stated that the injuries in the authorities relied on by the Respondent were comparable to those suffered by the Respondent and therefore offered guidance in assessment of damages. The trial magistrate also considered the severity of the injuries sustained in assessing the damages. The medical report by Dr. Aluda indicated that the injuries were severe and that the scar would remain a permanent feature on Respondent’s body.

Therefore, this court is of the view that the trial court did not commit any error in principle since it considered all relevant factors and did not take into account any irrelevant factor in the assessment of damages. Accordingly, the amount of general damages awarded by the trial court was a reasonable and fair compensation of the injuries sustained by the Respondent. This court finds nothing on which to fault the trial court’s decision on quantum. The same is hereby upheld. With regards to the special damages, the Respondent availed receipts in support of the same (**Plaintiff’s Exhibits 3(a)-3(c) and 4(b)**). The submission by the Appellants that the receipts were not availed is incorrect. The award of special damages by the trial court is also upheld.

For the foregoing reasons, this court finds that the appeal herein is without any merit both on liability and on quantum. Interest shall be calculated from the date of judgment by the trial court. The same is hereby dismissed with costs to the Respondent. It is hereby so ordered.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF JUNE 2019

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF JUNE 2019

HELLEN OMONDI

JUDGE