



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 20 OF 2017

GEORGE ODHIAMBO SUBA.....1ST APPELLANT

KENYA BUREAU OF STANDARDS.....2ND APPELLANT

VERSUS

JONAH KIPYEGO NGETICH.....RESPONDENT

J U D G M E N T

This is an appeal arising from the judgment of Hon. Telewa in Eldoret CM.CC.No. 393 of 2015 delivered on 27th January 2017.

Vide a memorandum of appeal dated 18th February 2017 and filed on 20th February 2017 the appellants premised their appeal on the following grounds.

- a) That the learned trial magistrate erred in law and fact in holding that the respondent had proved his case on a balance of probability against the appellant in view of the evidence on record.
- b) That the learned trial magistrate erred in law and fact in failing to hold that the respondent was to blame for the accident therein, thereby dismissing their case.
- c) That on a without prejudice basis the learned magistrate erred in law and fact in failing to apportion liability against the respondent in view of the evidence on record.
- d) That the learned trial magistrate erred in law and fact in using the wrong principles in assessment of damages.
- e) That the learned trial magistrate erred in law and fact in awarding damages which were excessive in the circumstances.

The respondent herein, Jonah Kipyego Ngetich instituted legal proceeding against the applicant vide a plaint dated 28th May 2015. The plaint was later amended and filed on 21st July 2016.

In the said pleadings, the respondent herein prayed that judgment be entered against the defendant /Appellants for special damages at Kshs. 6,900/=, general damages for pain, suffering and loss of amenities as well as for the costs of the suit. The claims were premised on the allegation that on or about 15th September 2014, the plaintiff/respondent was abode motor cycle Reg. No. KMDF.365P along the Eldoret – Kapsabet Road when the 1st Defendant, driving motor vehicle Reg.No.KAM.655H Nissan Matatu, allegedly drove the motor vehicle carelessly and caused an accident, thereby occasioning serious bodily injuries to the plaintiff/Respondent. The plaintiff/respondent alleged that the 2nd defendant was the registered owner of the said motor vehicle Reg. No.KAM 655H Nissan Matatu. The Plaintiff/Respondent, in his testimony before the trial court stated that on the 15th September 2014, he was headed to Eldoret Town from Potters Academy on his motor cycle Reg.KMDF.365P when he was hit head on by an oncoming vehicle that was trying to overtake a bus. The motor vehicle in question, he claimed, was Nissan Matatu Reg.No.KBB.499S, Nissan Arban. The Plaintiff/Respondent claimed that he was taken to Moi Teaching and Referral Hospital on 15th September 2014 and consequently admitted till 29th September 2014 when he was discharged. The plaintiff / Respondent claimed that he fractured his right femur as a result of the said accident.

The Respondent/Plaintiff produced an x-ray form in evidence and as marked as PMFI2. The Plaintiff/Respondent claimed that he was examined by Dr. Sukoba who consequently prepared a medical report, produced in evidence and marked as PMFI 4(a).

Dr. Paul Kipkos Rono testified in the trial court as PW2 and stated that he had the medical report of the plaintiff/Respondent with him. He stated that an X-ray examination was conducted on the plaintiff/respondent. He produced a discharge summary in evidence, marked as Exhibit No. 1.

Police Constable Shrek Kiptoo testified as PW3 and stated that there was an accident on 15th September 2014 along Eldoret – Kapsabet road involving Motor vehicle Reg.No.KBB.497S and motor cycle reg. No. KMDF 365P.

The Applicant / defendant vide their statement of defence dated 1st August, 2016 denied the occurrence of the accident involving their motor vehicle on 15th day of September 2014, and that the 2nd defendant was the registered owner of the said motor vehicle Reg. No. KAM.655H, Nissan Matatu.

In the alternative, the defendant averred that if the accident indeed took place, then it was entirely on the fault of the plaintiff / Respondent.

At the close of the pleadings, the trial court magistrate rendered her judgment in favour of the plaintiff as follows:

- a) 100% liability on the defendants
- b) Special damages at kshs.6,900/=
- c) General damages at 350,00/=
- d) Total quantum of damages at kshs.356,900 and
- e) Costs and interest of the suit held in favour of the plaintiff.

It is the above finding that is now the subject of this appeal. The applicant in their written submissions in support of the appeal, dated 13th November and filed on 14th November 2018 submitted that the trial magistrate erred in apportioning liability wholly on the appellant/defendant. The appellant averred that the respondent was incompetent as he didn't have a driving license and that the motorbike wasn't insured.

The applicant/defendant further stated that PW3, who is a police officer was not part of the investigating team and that he didn't have the police file and the sketch plans before the court.

The applicant/defendant also challenged the quantum of damages awarded by the trial court. They averred that the kshs. 350,000/= awarded were excessive and unjustified. They posited that an award of Kshs. 200,000/= would have been reasonable.

On the apportionment of liability, the appellants submitted that the trial court erred in apportioning liability wholly on them. The appellants claimed that the respondent didn't have a driving license at the time of the accident neither had he taken out an insurance cover for his motor cycle.

While these are truly established facts, as was rightly observed by the trial court, lack of a driving licence and an insurance cover on the part of the plaintiff/respondent, were not established to have been the cause, or to have contributed in anyway in the occurrence of the accident. The said accident, from the evidence adduced, was occasioned by the conduct of the 1st appellant who undertook to overtake another vehicle without first ensuring that the overtaking lane was clear, and therefore collided with the plaintiff/Respondent who was riding a motorcycle along that lane, of which was his lawful lane. The trial court was therefore justified in holding the appellant 100% liable.

In the case of *KEMFRO AFRICA LTD VS LUBIA AND ANOTHER, NO.2 OF 1987 KLR 30*, Kneller JA stated as follows:

“The principles to be observed by an appellant court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.”

In the instant appeal, the plaintiff/respondent suffered the following injuries.

- a) A fracture on the right femur; and
- b) A deep cut wound on the right ankle joint area.

At the time of the determination of this suit in the trial court, the plaintiff was still on treatment for the above mentioned injuries.

In the case of *Gicheru –vs- Morton & Another (2005) 2 KLR 33* the Court stated;

“In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which

the Appellant was entitled”.

This court finds the trial court’s assessment of Kshs. 350,000/= in general damages fair and reasonable given the nature of the injuries occasioned upon the respondent.

The trial court assessment of general damages was neither too high nor unreasonably paltry as to warrant an interference by this court.

This appeal is therefore unmerited and is dismissed entirely, with costs to the respondents.

This court so holds.

S. M GITHINJI

JUDGE

Dated, Signed and delivered at Eldoret this 25th day of July 2019.

In the absence of:

Mr. Onyinkwa for the Appellant and

Mr. Keter for the Respondent

S. M GITHINJI

JUDGE