



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL APPEAL NO. 39 OF 2019**

**1. CHARLES MOMANYI.....1<sup>ST</sup> APPELLANT**

**2. HUDSON MOKAYA.....2<sup>ND</sup> APPELLANT**

**-VRS-**

**GODFFREY BOSIRE ATUNGA.....RESPONDENT**

***{Being an Appeal against the Judgement of Hon. B. M. Kimtai – PM Keroka dated and delivered on the 16<sup>th</sup> day of April, 2019 in the original Keroka Principal Magistrate’s Court Civil Suit No. 141 of 2016}***

**JUDGEMENT**

This appeal is against the trial Magistrate’s finding of liability and the assessment of the damages awarded to the respondent following his claim for compensation for injuries sustained in an accident involving a motor vehicle Registration No. KAM 611X belonging to the 1<sup>st</sup> appellant but which was being driven by the 2<sup>nd</sup> appellant. The appeal is premised on grounds that: -

- “1. The learned magistrate erred in law in making a finding of excessive damages against the defendants.**
- 2. The learned magistrate erred in law and fact in holding that the defendant was liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.**
- 3. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to General Damages of Kshs. 125,000/= without concrete documentary evidence.**
- 4. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of Kshs. 5,000/= without concrete documentary evidence.**
- 5. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendant to net damages of Kshs. 125,000/=.**
- 6. The learned magistrate erred in law and fact in failing to appreciate the long established principle of *stare decisis*, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.**
- 7. The learned magistrate erred in law and fact in failing to appreciate as follows: -**
  - i. That the plaintiff’s pleadings and the evidence tendered in support thereof was incapable of sustaining the excessive award of damages.**
- 8. The learned magistrate erred in law and fact in entering judgement in favour of the plaintiff against the defendant inspite of the plaintiff’s miserable failure to establish his case more especially on quantum.**
- 9. The learned magistrate erred in law and fact in failing appreciate the legal position to be considered. The court award is unsustainable and baseless in the circumstances.”**

The appeal which is vehemently opposed was canvassed by way of written submissions. Relying on **Sections 107, 108, 109 and 112 of the Evidence Act**, Counsel for the appellants submitted that it was incumbent upon the respondent to prove liability on a balance of probabilities as the mere allegation of a fatal injury will not automatically shift liability to the other party. Counsel further submitted that the respondent did not adduce any evidence imputing negligence upon the defendant. Counsel argued that there is no liability without fault and as the respondent did not prove his case on a balance of probabilities, the appellants should not have been held liable for the misfortune that befell him.

Regarding the quantum of damages, Counsel submitted that the award was inordinately high and did not reflect the injuries suffered by the respondent. Counsel submitted that an award of Kshs. 90,000/= would have sufficed bearing in mind the year the accident occurred. Counsel urged this court to allow the appeal. Counsel cited several cases in support of his arguments.

For the respondent, it was submitted that liability was strictly proved hence the trial Magistrate's finding of 100% liability against the defendant. Counsel argued that the finding was not contested. He urged this court to uphold the same. On the quantum of damages, Counsel for the respondent submitted that Kshs. 120,000/= was reasonable given the injuries suffered by the respondent. Counsel urged this court to find that the trial court exercised its discretion properly and dismiss this appeal with costs to the respondent. Counsel cited several decisions to support his submissions.

On the issue of liability, this being the first appellate court my duty is to reconsider and evaluate the evidence in the lower court so as to arrive at my own conclusions albeit bearing in mind that I did not see or hear the witnesses – **see Selle v Associated Motor Boat Ltd [1968] EA 123**.

On the quantum of damages, the principle that should guide this court was paraphrased by Lenaola J, as he then was, in **Kiwanjani Hardware Ltd & another v Nicholas Mule Mutinda [2008] eKLR** when he stated: -

***“an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or on a misapprehension of the evidence.”***

The respondent testified that he was inside a shop where he worked when the accident occurred. He stated that the vehicle Registration No. KAM 611X hit the wall of the shop breaking it as a result of which he sustained injuries. The 2<sup>nd</sup> appellant conceded that he was driving the vehicle on the material day. He stated that he was offloading sand and that he hit a kiosk when he reversed but blamed the respondent for the accident because of building too close to the road. It is my finding that the 2<sup>nd</sup> appellant's testimony was an admission of negligence. The kiosk was there when he drove to its vicinity to offload sand. He had seen or was expected to have seen it and taken reasonable care when reversing as he owed a duty of care to its occupants. In any event the respondent was a mere employee who could not be blamed for construction of the kiosk **“too close”** to the road as alleged. I find nothing in the evidence to attribute contributory negligence to the respondent and conclude that the trial Magistrate did not err in finding the appellants wholly liable for the accident.

Regarding the quantum of damages, the respondent sustained soft tissue injuries, namely: -

- **Blunt injury to the back.**
- **Blunt injury to right hand.**
- **Injury to the ankle joint.**
- **Tenderness to the forelegs bilaterally.**
- **Blunt injury to the anterior chest wall.**

The medical reports adduced in evidence were to the effect that he was treated and discharged the same day. Comparable injuries should attract comparable awards. I have considered the two cases cited by Counsel for the appellants and I am not persuaded that the injuries there are comparable to those of the respondent those of the respondent being more extensive. The trial Magistrate relied on the case of **Godwin Ileri v Franklin Gitonga [2018] eKLR** where a plaintiff with somewhat similar injuries was awarded Kshs. 90,000/=. That was about one year before the judgement in this case. Even taking inflation into account an increase of that amount by Kshs. 30,000/= was in my view on the higher side. In my assessment an award of Kshs. 100,000/= (one hundred thousand shillings only) is adequate in the circumstances. The special damages of Kshs. 5,000/= were not in contention and the same shall therefore not be disturbed.

Accordingly, the appeal on liability is dismissed but that on the quantum of damages is allowed and the award of Kshs. 120,000/= is substituted with one for Kshs. 100,000/=.

The special damages shall attract interest at court rates from the date of filing suit while those on general damages shall attract interest at court rates from the date of the judgement in the court below.

As the appellant has succeeded only partially, I shall order that each party bears its own costs of the appeal. It is so ordered.

**Signed, dated and delivered in Nyamira this 28<sup>th</sup> day of November 2019.**

**E. N. MAINA**

**JUDGE**