REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 256 OF 2015

BENSON MUCHIRA.....1ST APPELLANT

SAMSON MENJI GITARI.....2ND APPELLANT

-VERSUS-

MWN.....1ST RESPONDENT

IW (Minor suing through his mother and next friend MWN)....2ND RESPONDENT

JUDGEMENT

Background:

1. The Appellants were initially the defendants in Milimani CMCC 7385 of 2012 instituted by the 1st Respondent and in Milimani CMCC 7384 of 2012 instituted by the 2nd Respondent.

2. The 2nd Respondent (initially the plaintiff in cc no 7384 of 2012), moved to court via the plaint dated 18th October, 2011 praying for judgement against the Appellants for special damages of Kshs.3,810/= and general damages arising from an accident that is alleged to have occurred on or about 11th June, 2010 involving motor vehicle KBA 876G belonging to the 2nd Appellant that was being driven and/or controlled by the 1st Appellant.

3. His claim was that he was a pedestrian when he was hit by the Appellant's motor vehicle. This plaint was later amended on 25th November, 2013.

4. The 1st Respondent (initially the plaintiff in cc 7385 of 2012), moved to court via the plaint dated 18th October, 2011 praying for judgement against the Appellants for special damages of Kshs.6,740/= and general damages arising from an accident that is alleged to have occurred on or about 11th June, 2010 involving motor vehicle KBA 876 G belonging to the 2nd Appellant that was being driven and/or controlled by the 1st Appellant.

5. Her claim was that she was a pedestrian when she was hit by the Appellant's motor vehicle. This plaint was later amended on 25th November, 2013. The two plaints in the two suits were amended on 25th November, 2013.

6. The Appellants opposed the claims vide the statements of defence dated 9th July, 2013 in which they denied liability and prayed for dismissal of the suit. They disputed the occurrence of the accident as alleged. By consent the two suits were consolidated on 26th February, 2015.

7. The matter then proceeded to hearing and a judgement was delivered on 30th April, 2015. The trial court awarded the 1st Respondent special damages of Kshs. 6,740/= and general damages of Kshs. 180,000/= for injuries suffered. It also awarded the 2nd Respondent special damages of Kshs. 3,810/= and general damages of Kshs. 150,000/=.

8. Dissatisfied with the above findings the Appellants have approached this court challenging the entire decision of the trial court on 5 grounds as contained in the memorandum of appeal.

Grounds of Appeal:

(i) That the learned magistrate erred in law and in fact in finding that the Respondent had proved that the Appellants were 100% liable for causing the accident yet no evidence had been tendered.

(ii) That the learned trial magistrate erred in law and in fact in finding that the Respondent had proved his case against the Appellant on a balance of probability.

(iii) The learned magistrate erred in law and in fact by ignoring the defence witness testimony and proceeding to find in favour of the Respondent.

(iv) The learned magistrate erred in law and in fact by relying on the Respondent's witness account on how the accident occurred yet it was not corroborated.

(v) The learned magistrate erred in law by awarding damages to injuries that had not been proven by the Respondent and which award was exorbitant under the circumstances.

9. Parties were directed to file submissions to canvass appeal.

Appellant's Submissions:

10. The Appellants submit that the Respondents failed to discharge the legal burden, contrary to the findings of the trial court of the following reasons;

(a) The Police Abstract produced in court stated that the accident was reported to have happened on 11th June, 2010 while the medical report (P3 form) indicates that the accident happened on 15th June 2010. Such a material contradiction as to the dates of the occurrence of the accident was ignored by the trial court despite being raised in the submissions.

(b) The evidence of PW2 as to the occurrence of the accident was not corroborated. The court never examined her evidence save for the fact that the court stated that she had no reason to follow the Appellants to confront them on the accident has she not been hit.

(c) The trial court never considered the fact that there was ditch that separated the main road from the footpath, as admitted by the Respondent's witness. Had the court considered the same, it would have found that the accident never happened as alleged.

(d) The trial court never examined the evidence that was tendered on behalf of the Appellants. The Appellants called three witnesses in support of its case. The principal claim by the Appellants witnesses before the trial court was that there was a ditch at the alleged place the accident occurred.

(e) It could not be possible that the vehicle could have veered off the road, went over the ditch, hit the Respondents, and returned to the road to continue to its destination. There was no material damage to the vehicle and the evidence of DW2 and DW3, both who were inside the vehicle at the alleged time confirm that the vehicle did not hit any person.

11. In light of the conflicting versions, the Respondents bore a duty to call either an eye witness or a police officer to give independent evidence as to how the accident could have happened. There is no proof that investigations were done and sketch maps produced to further support the assertions made by the Respondent.

12. Appellant submit that the police abstract produced was of low probative value and could not shed light as to how the accident happened. It could have only served to prove that a report was made to the police of an accident. They cite the case of ***Z.O.S & C.A.O (Suing as the legal representatives in the Estate of S A O (deceased) vs Amollo Stepehne [2019] eKLR*** where this court stated as follows:

"The police abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of an accident but proof of the fact that following an accident, the occurrence thereof was reported to the police who took cognizance of that accident. It is therefore the police, having received information or a report of occurrence of an accident, would investigate and establish circumstances under which such an accident occurred."

13. The Respondents failed to prove any injuries they sustained. It is clear from the medical report produced by Dr. Okere that he only examined the Respondents for injuries sustained as a result of an accident that had occurred on 15th June, 2010.

14. The accident that is subject of this claim occurred on 11th June, 2010. It therefore means that the medical report and the evidence of the PW1 was misplaced as it does not relate to the subject accident.

15. The fact that the 2nd Appellant was charged could not be relied upon in proving negligence as the charge had not been proved. There was no conviction and/or judgment and the same could not be relied upon in proving liability.

16. No evidence was led to assist the court in apportioning liability save for the fact that the court wrongly proceeded under the impression that the Appellants had failed to address the issue of the criminal case against the 2nd Appellant, therefore finding them liable.

17. They cite the case of ***Robinson vs Olouch [1971] EA 376*** stated;

"But that is a very different matter from saying, as Mr. Shamra would have us say, that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. That is not what S. 47A states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the Respondent, or any other person, was also guilty of negligence which caused or contributed to the accident."

18. The upshot of the foregoing is that the trial court proceeded under the wrong impression of the facts and apportioned liability without any prove. The court just relied on the evidence of PW2 and disregarded the evidence tendered by the Appellant's three witnesses.

Respondents Submissions:

19. The respondents submitted that in the instant case, it was incumbent upon the Appellant to prove to the required standard, on a balance of probabilities any of the particulars of negligent acts attributed to the Respondents as they so alleged to warrant the court apportioning liability as pleaded. The Appellants did not in any way whatsoever shake the Respondents clear testimonies which were never shaken during cross examination.

20. The respondents relied on the Court of Appeal case of ***Mohamed Mahmoud Jabane vs Highstone Butty Tongoi Olenja [1986] eKLR*** as cited by **Justice Sergon** at paragraph in ***Metal Crowns Limited vs Eliud musembi Nthalika [2019] eKLR*** where it was remarked in this sense;

"Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be entirely erroneous estimate for an appropriate award leave well alone."

21. The question is, was the assessments and award of damages merited or erroneous? The general principle applicable in considering an appeal on quantum is that the assessment of damages by a trial court is an exercise of discretion.

22. And that the appellate court will not normally interfere with such exercise of discretion unless, the judge has either acted on wrong principles or awarded so excessive or, so inordinately low damages or, has taken into consideration irrelevant matters, or failed to take into consideration relevant matters in the result arrived at the wrong decision that would otherwise cause an injustice.

23. They rely on the case where **P.J.O Otieno J** in ***Securicor Security Services Kenya Ltd vs MF & Another [2016] e KLR*.**

24. Respondents contend that leading to the award of the quantum as appealed against, the 1st Respondent pleaded particulars of injuries as follows;

(i) Tender chest.

(ii) Bruised, swollen and tender right shoulder joint; and

(iii) Bruised and tender knee joint.

25. The 2nd Respondent as well pleaded as follows;

(i) Tender neck

(ii) Bruised swollen left shoulder joint

(iii) Bruised tender knees; and

(iv) Swelling and bleeding on the left hip joint.

26. Respondents rely on the Court of Appeal case of ***Mohamed Mahmoud Jabane vs Highstone Butty Tongoi Olenja [1986] eKLR*** as cited by **Justice Sergon** at paragraph in ***Metal Crownls Limited vs Eliud Musembi Nthalika [2019] eKLR*** remarked in this sense;

"Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone."

27. In support of the said holding , they relied on the cases of:

(a) ***Mumias Sugar Company Limited vs Francis Wanalo [2007] eKLR;*** in which case the Respondent suffered inter alia crush injury to the fourth finger of the right hand and soft tissue contusion with bruises on the right thigh and the court awarded Kshs.200,000.00 as general damages for pain and suffering.

(b) ***Patrick Mwitin MacManene & Another vs Kevin Mugambi Njunja [2013] eKLR***; in which case the Respondent sustained

bodily injuries i.e. swollen scalp right side, tender, swollen and bruised left shoulder, bruised right knee, tender neck, tender back e.t.c and incurred expenses and the trial court awarded damages of Kshs. 170,000.00 for pain, suffering and loss of amenities and the same were upheld by appellate court.

28. It is based on the above cases that they submit that therefore there is no reason for this court to interfere with the award on general damages since the same appears to fall within the reasonable range of comparable awards {as seen above} and cannot therefore be said to be inordinately high.

Evidence Adduced:

29. PW1 Doctor Okere who testified and produced medical report for the Respondents, on cross examination he indicated he saw the treatment notes.

30. PW2 MWN she testified on her behalf and that of her child narrated how she was involved in an accident. She was hit by the motor vehicle. By the time of accident she was with a child. She relied on her statement. She said she was on right side of road on a footpath. There was a ditch. She was hit and fell on a ditch. She was treated in a health centre. She identified treatment notes. She was treated on 11/6/010. The abstract indicated accident was on 11/6/010. They were not attended to on 11/6/010 but next day 12/6/010, thus documents show 12/6/010. She close their case at this stage.

31. DW1 Benson Muchira owner KBA 876G said he was called and told motor vehicle had been involved in an accident by hitting someone on 11/6/010. He informed the company. He filled a notice claim form. He informed the insurance company of the accident. On cross examination, he said the form indicated reporting of accident. He said he was not aware there was case against 2nd Appellant.

32. DW2 Samson Menje Gitau was 2nd Appellant. He recorded statement with insurance company and in court. He was aware of the case. He said at the scene there was road ditch and a path. On cross examination he said, the police arrested him and he was charged with careless driving. The case was still going on in court.

33. DW3 Waweru Francis said he recorded statement which he wished to rely on. He narrated that on 11/6/010 he was with driver (DW2) and went to the driver's home. Shortly a lady came complaining she had been hit by the motor vehicle along the road.

34. He had seen her along the road but she was not hit. She threatened to take action. On cross examination he said, he saw her that day. It was approaching 7pm. They had parked outside Samson's Kiosk. He said it was not just normal to just claim she had been hit.

ISSUES:

35. After going through the proceedings and parties submissions, I find the issues are; Whether ***the Respondents established Appellants liability on balance of probabilities. Was there any evidence for contributory negligence? Whether the award in damages was inordinately high? What is the order as to costs?***

ANALYSIS AND DETERMINATION

36. In her testimony, MWN the 1st Respondent said that she was walking home with her child (2nd respondent) on a footpath off the road when the motor vehicle knocked them into the ditch injuring them. She went for treatment and reported to the police.

37. For the Appellant, DW1 Bernard the 1st Appellant said the motor vehicle KBA 876G was being driven by the 2nd Appellant and said he was called by the driver who said he had been accused of knocking someone.

38. According to DW2, Samson Menje he was driving the motor vehicle with DW3 Ireri as a passenger and after parking outside Samson Kiosk a lady who they had passed along the road accosted them accusing them of hitting her. The 2nd Appellant said he was suspiciously arrested by the police and charged with careless driving which was still in progress.

39. From the evidence, it is not in dispute the 1st Appellant was the owner of the motor vehicle and it was driven by the 2nd Appellant.

40. There would be no reason shown by appellants why the Respondents followed the Appellants to tell them they had hit her and her daughter. Whereas they say she was not injured, the treatment notes and medical report by Dr. Okere show Mercy had blunt injury on the neck and bruises on the right shoulder and left knee and bruises on the left shoulder, hip and chest.

41. In the submissions, the Appellants did not address themselves to the issue of the driver having been arrested and charged with careless driving. Thus I uphold the trial court finding on a balance of probability that the Respondents proved negligence on the part of the 2nd Appellant and the 1st Appellant as owner was vicariously liable.

42. The appellant did not tender any evidence to attribute any measure of negligence on the part of the respondents instead they went on frolic of their own to insist that there was no accident which had occurred as between the 1st appellant m/v and the respondent which mission failed miserably. Thus the trial court was justified in finding appellant 100% liable.

43. On quantum, the court considered the authorities cited. the Respondents relied on the cases of: ***Mumias Sugar Company Limited vs Francis Wanalo [2007] eKLR;*** in which case the Respondent suffered inter alia crush injury to the fourth finger of the right hand and soft

tissue contusion with bruises on the right thigh and the court awarded Kshs.200,000.00 as general damages for pain and suffering.

44. Also the case of ***Patrick Mwitin Macmanene & Another vs Kevin Mugambi Njunja [2013] eKLR;*** in which case the Respondent sustained bodily injuries i.e. swollen scalp right side, tender, swollen and bruised left shoulder, bruised right knee, tender neck, tender back etc and incurred expenses and the trial court awarded damages of Kshs. 170,000.00 for pain, suffering and loss of amenities and the same were upheld by appellate court.

45. The ones by the Appellants dealt with unrelated injuries and were also delivered many years ago. The Respondents authority were more recent and taking into account the injuries, this court finds that the appropriate awards were made to wit;

For MN 1st respondent

- ***General damages*** ***Kshs.180,000/=***
- ***Special damages*** ***Kshs. 6,740/=***

Kshs.186,740/=

For IW 2nd respondent

- ***General damages*** ***Kshs.150,000/=***
- ***Special damages*** ***Kshs. 3,810/=***

Kshs.153,810/=

46. The Court of Appeal in the case of ***Mohamed Mahmoud Jabane vs Highstone Butty Tongoi Olenja [1986] eKLR,*** as Cited By **Justice Sergon** in ***Metal Crowns Limited vs Eliud Musembi Nthalika [2019] eKLR*** remarked in this sense;

> ***"Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone."***

47. The appellants have not tendered any evidence to demonstrate that the awards were based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high as to be an entirely erroneous estimate for an appropriate award.

48. Thus the court finds ***no merit in the appeal and dismisses the same with costs to the respondents.***

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE