



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 275 OF 2013

MOHAMED NOOR OLOO.....1ST APPELLANT

MOHAMED WAKO DUBA.....2ND APPELLANT

VERSUS

PETER KINYUA MURIUNGI.....RESPONDENT

(Being an appeal from the Judgment delivered on 2nd July, 2013 by Hon. J. M. Irura (Senior Resident Magistrate) Chief Magistrate's Court at Isiolo CMCC No. 28 of 2012).

JUDGMENT

1. The Respondent who was the Plaintiff in the Lower Court had sued the Appellant for damages arising out of a Road Traffic Accident which occurred on 17th March, 2012. The Respondent who was injured in the accident blamed the accident on the alleged negligent manner that the 1st Appellant drove motor vehicle Registration No. KBP 228A owned by the 2nd Appellant.
2. The claim was denied by the Appellants. The Appellants in the alternative attributed the accident wholly to the alleged negligence of the Respondent.
3. The Respondent filed a reply to the defence. The Respondent reiterated the contents of the plaint and joined issues with the defence.
4. During the hearing of the case before the Lower Court, the Respondent called three witnesses. The Respondent's case was that at the material time he was riding motorcycle Registration N. KMCV 943B along the Meru-Isiolo road heading towards Meru direction. That he was going to Upper Hills School where he was going to drop his two passengers. That he signaled to the right to get into the junction and while he was turning he was hit by a lorry from behind. That the motorcycle and the occupants fell down on the tarmac. That the Respondent and the passengers sustained injuries which resulted in the death of one of the passengers.
5. The Respondent's two witnesses testified in the Lower Court. Their evidence was that the motorcycle indicated that it was turning to the right. That the lorry which was on the left lane slowed down to give way. That the motorcycle turned right and the lorry proceeded on while on it's lane. That a bang sound immediately followed from behind and the driver stopped. That the motorcycle was found on the ground on the left side behind the rear left tyre of the lorry.
6. The Lower Court found the Appellants 100% liable for the accident. The Appellant was awarded Ksh.550,000/= general damages, Ksh.5,500/= special damages, costs and interest.
7. The Appellants were dissatisfied with the said judgment and appealed on the following grounds:
 - a) That the finding that the Appellants were 100% liable for the accident was erroneous.
 - b) That the award of Ksh.550,000/= as general damages was excessive.
 - c) That the judgment is against the weight of the evidence.
 - d) That the Appellants submissions were not considered.

8. The appeal was disposed of by way of written submissions which I have considered.

9. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

10. The Respondent (PW3) who was the motorcycle rider testified that he checked the side mirror and saw the lorry which was at a high speed. He then indicated to the right but was hit by the lorry and thereafter regained consciousness while in hospital. The Respondent further stated that the lorry driver did not indicate it was overtaking. The Respondent further stated that he was hit while he was turning to join the junction.

11. The evidence of the investigations carried out as per the evidence of PW1 PC Richard Murage corroborates that of PW3 in all material respects. The investigations carried out blamed the accident on the lorry driver for overtaking the motorcycle without due care and attention. The evidence of PW1 was that there was a junction at the scene. That there were skid marks left on the road by the lorry which was an indication of high speed. That the road sign indicated 50 KMPH. The point of impact is reflected as on the right side lane as one faces Meru direction. That the lorry veered off the road to the right. PW1 testified that the driver of the lorry was charged with the offence of causing death by dangerous driving and careless driving.

12. DW1 Hussein Diba Konsicha the turnboy who was in the lorry at the time blamed the accident on the motorcycle. He testified that the lorry was heading towards Meru direction. That the motor cycle was ahead and indicated that it was turning right. That the motorcycle turned to the right and the lorry was on its lane i.e left lane proceeded on. That immediately they had a bang sound and that is when they stopped and found the motorcycle and its occupants on the ground. This version of events as narrated by the turnboy does not explain how the accident happened if the motorcycle turned to the right and the lorry proceeded on while on its left lane then the collision could not have occurred.

13. DW1 gave evidence during cross-examination that he is not a driver and has no knowledge of road signs. He did not explain how he knew that the motor vehicle was being driven at 40 KPH as indicated in his evidence. DW1 did not know who was to blame for the accident and could not explain how the motorcycle was hit. It is noteworthy that the driver of the lorry did not testify. The 2nd Respondent (DW2) Mohamed Wako Duba gave evidence in respect of the event that happened after the accident and his evidence is of no probative value on the manner in which the accident occurred.

14. Having evaluated the evidence from both the prosecution witnesses and the defence case, I hold that the trial magistrate correctly held that the Appellants were 100% liable. The evidence by the Respondent is cogent, consistent and corroborated and rested the blame squarely on the motor vehicle driver. On the other hand the evidence by the Appellants side failed to explain in a logical manner how the accident happened. The evidence of DW1 creates a scenario which if believed would mean that the accident could not have happened. The Trial magistrate who had the benefit of seeing the witnesses testify and observed their demeanour believed the Respondents. I have found no reasons to differ with the findings of the trial magistrate.

15. The Respondent’s evidence that he was injured in the accident was corroborated by that of PW2, Dr. Catherine Mwenda Mutuka. The medical report produced by the doctor reflects the following injuries:

- Facial bruises, cut and lacerations.
- A gross bruising (de-gloving injury) over the right shoulder.
- Bruise/laceration right iliac (crest hip).
- Bruise right elbow.
- Multiple cuts and bruises over the knees.
- Bruise on the right thigh.
- Painful left elbow.

16. The doctor’s opinion was that the 25 year old Respondent sustained soft tissue injuries leaving multiple bodily scars. The Appellant submitted for an award of Ksh 100,000/=.

He relied on the following authorities:

- **Josephine Angwenyi v Samuel Ochillo [2010] eKLR.**

- **Kitale Hauliers v Emmanuel Soita Simiyu [2013] eKLR.**

- **Patrick Mwiti M’imanene & ano v Kevin Mugambi Nkunja [2013] eKLR.**

In the said authorities, the awards made as general damages in respect of soft tissue injuries comparable to ones herein range from Kshs.70,000/= - Ksh. 200,000/=.

17. The Respondent relied on the following authorities:

- **James Maleshe v Alfonse Watuka Kiiti [2015] eKLR** where awards between Ksh.180,000/= - Ksh.350,000/= for injuries ranging from soft tissues injuries to fracture of the leg and head injury.

- **Global Allied Industries Ltd v Gerald Mwangi Muiruri [2015] eKLR** where an award of Ksh.700,000/= as general damages for injuries which included a fracture of the hand.

- **G M O (Minor suing through his father and next friend F E O v Kulsum Alibhai & another HCCC MSA No. 250/03** where Ksh.2,500,000/= general damages was awarded for severe head injuries which resulted on brain damage and multiple soft tissue injuries.

The authorities relied upon by the Respondent reflect much more severe injuries than in the case at hand.

18. The award Ksh.550,000/= general damages made by the trial magistrate is inordinately high and falls outside the range of awards in comparable cases. I am guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727**, where the Court of Appeal observed:-

“...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

19. With the foregoing this court is constrained to interfere with the award of the trial magistrate. I award a sum of Ksh.200,000/= as general damages. Consequently, I set aside the judgment of the Lower Court and substitute it with a judgment for the sum of Ksh.205,500/= plus interest and costs. The appeal having been partially successful, each party shall bear own costs of the appeal.

B. THURANIRA JADEN

JUDGE

Dated, signed and delivered in Meru this 31st day of July, 2018

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