REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 24 OF 2017

KIPKOSKEI TANGUS TESOT.....APPELLANT

VERSUS

JULIUS KIPRONO TANUI.....RESPONDENT

[Being an appeal from the judgement of Hon. W. Juma (Mrs) Chief Magistrate delivered on 19th April, 2017 in the Chief Magistrate's Court at Narok in CMCC 38 of 2015, Julius Kiprono Tanui v. Kipkoskei Tangus Tesot)

JUDGEMENT

1. Appellant has appealed against the judgement and decree of the trial court which awarded damages in the sum of Kshs.3, 512,700 together with costs and interest in favour of the respondent. In doing so the trial court found that the appellant was 90% liable in negligence. The appeal is against both liability and the quantum of damages. The respondent has opposed the appeal both in respect of liability and quantum of damages.

2. The appellant has raised ten grounds in his memorandum of appeal to this court. In ground one, the appellant has faulted the trial court both in law and fact in failing to find that the appellant's driver was not charged with any offence and was not blamed by the police and for that reason he was not to blame for the accident. In this regard, the evidence of No. 235617 IP. Moses Onyango (PW2) is that a report of this accident was made by the respondent at Narok Police station vide OB. No.12 of 23rd February, 2015 in which the respondent was the victim. It was his evidence that he never visited the scene of accident. It was also his evidence that when he issued the police abstract report, which was put in evidence as exhibit pexh 2, the accident was still under investigation.

3. In view of the evidence of PW2, the police were not in a position to blame the appellant's driver. Even if they were to blame the appellant's driver, that blame is not evidence of blame worthiness. It would have been their opinion and not evidence. The evidence of the appellant's driver, Robert Kipkoech Kosgei (DW1), consists of his witness statement, which was adopted as his evidence at trial. DW1 in that statement stated that:

> *"On reaching Lamek there were two motorcyclists ahead of me carrying huge sacks of charcoal. They had overloaded. I hooted signalling them to give me way to overtake. Once I started overtaking, the first motorcycle in front slowed down as though to bypass a pothole, the second motorcyclist was in a very high speed and rammed into the rear of the first motorcycle. The rider of the 2nd motorcycle who I came to know as Julius Kiprono Tanui fell on the ground under my rear left tire and was injured."*

4. The evidence of the respondent (PW1), who similarly adopted his statement as evidence testified that: *"As the lorry registration No. KAE 510V came closer to me forcing his way as though to overtake me, another motorcycle which was ahead of me slowed down and stopped because there was a culvert section ahead. I hit the motorcycle ahead of me and fell right under the lorry. The lorry ran over my left foot, causing me multiple fractures. My right foot was also dislocated. My motorcycle too was badly damaged in the accident. Good Samaritan took me to Tenwek Mission Hospital where I am currently admitted. My left leg has so far been amputated. I reported the same to Narok Traffic Base and I was issued with Police Abstract and P3 form."*

5. It is clear from the totality of the above evidence that the appellant's driver had partially overtaken the two motor cyclists in front of him. The one immediately in front of him was the respondent, and the one in front of the respondent was another motor cyclist who is not party to this case and was not called as a witness. I find from this evidence that the respondent did not keep safe distance between himself and the motor cyclist in front of him. That is why when the motor cyclist in front of him slowed down and stopped because there was a culvert ahead of him, the respondent hit the motor cyclist ahead of him. As a result he fell right under the lorry of the appellant's driver. According to the evidence of DW1, it is the respondent who fell on the road under the rear left tyre and was injured in the process. The respondent sustained injuries, which led to the amputation of his left leg and fractured in the right leg namely in the tibia and fibula.

6. I find from the foregoing evidence that the respondent was substantially to blame for the accident. He failed to keep a safe distance between himself and the motor cyclist in front of him. He was bound to keep a safe distance in view of the fact that he was carrying huge sacks of charcoal. This accident occurred because the respondent hit the motor cyclist ahead of him.

7. Furthermore, I find as a fact after re-evaluating the evidence as a first appeal court that the appellant's driver contributed to the accident. I find that the motor cyclists were driving in a wavering manner and were not steady on the road. In those circumstances the overtaking appellant's driver was bound to maintain a safe overtaking distance. Additionally, he should have maintained a proper look-out in the process of overtaking.

8. It is clear therefore that both the appellant's driver and the respondent were both to blame for the accident. The question that falls for consideration is the degree of blame to be apportioned between them. I have already found that the respondent was substantially to blame for the accident. The degree of contributory negligence on the part of appellant's driver is not substantial. The apportionment of the degree of negligence is a problematic issue. Doing the best I can in the circumstances, I find that the respondent was to blame for the accident in the region of 70%, while that of the appellant's driver is in the region of 30%.

9. In arriving at the foregoing conclusions I bear in mind that the trial court had the advantage of seeing and hearing the witnesses which opportunity is not open to this court as a first appeal court. It is to be borne in mind that it is the duty of every motorist to drive carefully having regard to the condition of the road and other road users. In the circumstances, I find that the trial court erred in law and fact in finding that: "*The defence witness had all the opportunity to avoid getting embroiled in the accident."* This finding by the trial court fails to take into account that the accident occurred because the respondent hit the motor cycle in front of him and by virtue of that impact he fell into the rear tyre of the appellant's vehicle. If it had been that his leg was crashed by the front tyre of the appellant's motor vehicle, then one could have safely concluded that the appellant's driver was substantially to blame for the accident.

10. In ground 2 the appellant has blamed the trial court both in law and fact for failing to find that the finding by the traffic police officer was a matter of opinion which was not binding on the trial court. I have considered the judgement of the trial court and there is nowhere in that judgment that the trial court took into account the opinion of the police officer, who merely issued an abstract report. I therefore find no merit in this ground and I hereby dismiss it.

11. In ground 3, the appellant has faulted the trial court for failing to find that the respondent and his witnesses did not prove his case as required. In view of his pleadings in the plaint I have already found the respondent proved his case in negligence to the extent of 30% on the part of the appellant's driver. I find from the further amended plaint that the particulars of negligence mainly that the appellant's driver failed to exercise due care and attention and failing to keep a proper look-out were proved in evidence to the extent of 30% negligence on the part of the appellant's driver.

12. In ground 4 the appellant has faulted the trial court both in law and fact for failing to evaluate the entire evidence and erred in finding that the respondent had proved his case on a balance of probabilities to the extent of 90% negligence on the part of the appellant's driver. I find that there is merit in this ground in the manner in which the trial court made finding without according due weight to both the evidence of the parties. I have already done so in considering ground one of the memorandum of appeal. I therefore uphold this submission to the extent that the appellant's driver was to blame in negligence to the extent of 30% only.

13. I find in condensed form that grounds 5,6,7,8 and 10 are in respect of quantum of damages made in favour of the respondent. In this regard according to the medical examination report of Mr. Wokabi, a consultant surgeon, the respondent sustained the following injuries:

1) Crash injury of left leg which resulted in amputation at the level of above the knee.

2) Fractures of the right tibia and fibula.

Mr. Wokabi confirmed that the fractures were treated conservatively with a plaster cast and left leg stump had healed and was fitted with an artificial limb. He also added that the respondent had been walking with the aid of crutches. Upon examination he found the following:

1) The stump is 20cm long and it is well cushioned with muscles.

2) The right thigh and calf muscles are wasted due to disuse.

3) The left knee is very stiff and virtually frozen with no movements possible.

4) The right foot is slightly deformed due to contraction caused by disuse.

5) X-rays reviewed showed presence of shattered fractures of the lower third of the lower half of the tibia.

6) There are also shattered double fractures of the right fibula.

14. Furthermore, Mr. Wokabi concluded that the loss of the respondent's leg at the thigh will impact him for the rest of his life in more than one way especially doing farming. He further concluded that the artificial leg costs approximately Ksh.250,000 and that properly used would require changing every eight years for the rest of his life. He also concluded that the fracture of the right leg tibia and fibula have reunited but the leg has become very stiff due to disuse. Mr. Wokabi used the police P3 form, the discharge summary from Tenwek Mission Hospital, x-ray reports and the previous medical report from Dr. C. O. Okere. Finally, he concluded that all the above mentioned injuries contribute to a total sum of 80% disability.

15. Counsel for the appellant cited a number of authorities in respect of quantum of damages. He cited *Kajuna Idd Noor v. Rapid Kate Services Ltd & 4 others (2013) eKLR,* in which the plaintiff was awarded Kshs.1,500,000 for pain and suffering in 2013 in respect of communited fractures of the right tibia and fibula and crush wound of the right foot leading to a below the knee amputation of the right leg. In addition the plaintiff in that case sustained abrasions of the left hand. The court upon reaching that decision stated as follows: *".....On*

general damages, the plaintiff's counsel urged that a sum of Kshs. 1,500,000/- was reasonable compensation for pain suffering and loss of amenities. He cited Charles Kipkorir Ruto vs. Fahari Building & Civil Engineering & Another Kericho HCCC No. 56 of 2002 where the plaintiff sustained fractures of the tibia and fibula on the left leg which was later amputated below the knee. He was assessed to have suffered 85% disability. He was awarded Kshs.1,200,000/- for pain suffering and loss of amenities. Counsel also cited Francis Randiki Okaro vs. Akamba Public Road Services Limited & Another Kericho HCCC No. 32 of 2004 where the plaintiff sustained a crush to his left leg that led to a below the knee amputation of the same. He was assessed to have suffered 80% disability. The court awarded him 1,300,000/-." In that case the court cited a number of authorities before reaching that conclusion. Counsel therefore submitted that the injuries sustained by the respondent herein are similar to those cited in *Kajuna Idd Noor v. Rapid Kate Services Ltd & 4 others, supra.* I find that the authority cited by counsel and those cited by the court clearly show that the injuries sustained by the plaintiffs in those cases were not as serious as those sustained by the respondent herein.

16. Bearing in mind that the case of *Kajuna Idd Noor v. Rapid Kate Services Ltd & 4 others, supra,* was decided in 2013, I have to give effect to the incidence of inflation and the loss of the purchasing power of the shilling over the years. After considering those authorities and those cited by the respondent in the trial court, I find that the award of Kshs.3,903,003 was manifestly excessive. The upshot of these considerations is that I find an award of Kshs.2,500,000 as general damages is fair compensation for the injuries sustained by the respondent less 70% contributory negligence.

17. I therefore find that the sum total of the award is as follows:

General damages Kshs.2,500,000 (less	
70% contributory negligence)	Kshs. 750,000
Special damages	Kshs. 253,000
Future medical expenses	Kshs. 500,000
	Kshs.150,000
TOTAL	**Kshs.1,653,000**

I therefore enter Judgement for the respondent in the sum of Kshs.1,653,000.

Each party will bear its own costs.

Judgement Delivered in open court at **Narok** this **23rd** day of **July, 2018** in the presence of Mr. Kiptoo holding brief for Mr. Modi for the respondent and in the absence of the appellant.

J. M. BWONWONGA

JUDGE

23/7/2018