



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 53 OF 2014**

**MOSES KIRAGU KAIREGI.....APPELLANT**

**VERSUS**

**CHINGA TEA FACTORY.....RESPONDENT**

**JUDGMENT**

1) The appeal arises from the judgment of Honourable C. Mburu, Resident Magistrate in Nyeri CMCC No.284 of 2013; the respondent herein was sued for damages arising out of an accident that occurred on 14<sup>th</sup> October, 2012 involving motor vehicle Registration Number KBM 224H being driven by the respondent and motorcycle Registration Number KMCN 106C.

2) After a full hearing, judgment was awarded by the trial court in favour of the appellant as follows:

- (i) Liability – 80:20 in favour of the appellant;
- (ii) General damages - Kshs.300,000/=;
- (iii) Special damages – Kshs.328,134.50
- (iv) Costs of the suit less 20%

3) The appellant being dissatisfied with the trial Court's decision filed this appeal and sought to have it set aside; the appellant listed five (5) grounds of appeal in his Memorandum of Appeal dated the 12<sup>th</sup> August, 2012 which are as summarized hereunder;

- (i) The trial Court erred in fact in finding that the appellant was the rider of the motorcycle;
- (ii) The trial Court erred in fact and law in finding the appellant 20% liable for the accident;
- (iii) The trial Court erred in fact and law in awarding damages that were inordinately low in the circumstances;
- (iv) The trial Court erred in fact and law in awarding the appellant part of the costs of the suit.

4) The appellant prayed that the appeal be allowed with costs.

**ISSUES FOR DETERMINATION**

5) The Grounds of Appeal as summarized above shall also form the issues for determination which are listed as follows:-

- (i) Whether the appellant was the rider of the motorcycle?**
- (ii) Who was to blame for the accident?**
- (iii) Whether the damages awarded were inordinately low in the circumstances;**

(iv) **Whether the appellant is entitled to the full costs of the suit;**

### **ANALYSIS**

6) In addressing the issues this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**. The Court held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, the Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal also held that:

***“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”*** (See also LAW JA, KNELLER & HANNOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).

### **Whether the appellant was the rider of the motorcycle;**

7) According to the Record of Appeal filed in this matter, the appellant was involved in an accident on 14/10/2012. The plaint provides that the appellant was a pillion passenger on motorcycle Registration Number KMCN 106C when a collision occurred with motor vehicle Registration Number KBM 224H.

8) According to the police abstract, the appellant was the rider of the said motorcycle an allegation he emphatically denied at trial.

9) Section 107 of the Evidence Act, Chapter 80 Laws of Kenya provides as follows:-

**‘107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.’**

10) The appellant had a duty to prove on a balance of probabilities that he was not the rider of the motorcycle. A mere denial does not suffice. The appellant went on to produce the said abstract even though the same was contrary to his assertions. The abstract could have been amended but this was not done. Since the information in an abstract is obtained from the Occurrence Book, it would have been prudent for the appellant to have called the Investigation Officer or a Police Officer from the Nyeri Police Station to produce the extract of the OB for that date of the accident to prove he was a pillion passenger and not the rider of the motorcycle. The appellant did not discharge his burden of proof. For these reasons, this court finds no reason to interfere with the trial magistrates findings that the appellant was indeed the rider of the motorcycle.

11) This ground of appeal is found lacking in merit and is disallowed.

### **Who was to blame for the accident**

12) At trial, the appellant testified that he was riding as a pillion passenger on the motorcycle when the respondent veered into their lawful path of travel causing a collision. On the other hand the respondent testified that he was overtaking two vehicles in front of him when the motorcycle suddenly appeared. He testified that it was coming at a high speed and it did not allow him to finish overtaking the two vehicles hence the accident ensued. The respondent was charged and convicted of careless driving as a result of the accident and fined Kshs.3,000/=.

13) The appellant testified that the motor vehicle hit him from the right. This is consistent with the injuries he suffered. He also testified that as a result of the collision, he fell into a ditch. The respondent testified that the right side of his vehicle to wit his right headlight and side mirror were damaged in the accident. The damage the vehicle sustained is consistent with the respondent having hit the appellant while they were on the left side of their lane. Falling into a ditch is consistent with the appellant's evidence that they were on the extreme left side of the road. There cannot be a ditch in the middle of the road. The conclusion is that the respondent was overtaking despite there being an oncoming motorcycle on the road. From the circumstances, it is evident that the accident did indeed occur on the respondent's lane.

14) The trial magistrate did not give reasons why he found the appellant 20% liable for the accident only that he was the rider of the motorcycle. Being the rider of the motorcycle is not proof of negligence. This court's considered view is that the trial magistrate misapprehended the evidence thereby arrived at the wrong conclusion.

15) For the above reasons the trial magistrate's findings on liability are hereby set aside and this court is satisfied that the respondent was solely to blame and liable for the accident.

16) This ground of appeal is found to be meritorious and it is hereby allowed; the respondent is found to be 100% liable.

### **Whether the damages awarded were inordinately low in the circumstances;**

17) For this court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in various decisions. In the case of **Butt vs Khan (1977) 1KAR** Law JA stated that:-

**“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low.”**

18) Similarly in the case of **Kenya Breweries Ltd** [1991] eKLR it was held that,

**“...It is now well established that this Court can only interfere with a trial judge’s assessment of damages where it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred.....”**

19) According to the Medical Report of Dr. Maina, the appellant suffered a fracture of the proximal 1/3 of the right tibia and the distal 1/3 of the fibula. The Medical Report of Dr. Mwangi prepared on 27/07/2013 confirmed the appellant’s injuries. It stated that the appellant had not yet healed from his injuries and was still using crutches. Another Medical Report of Dr. Kabugi prepared on the 29/01/2014 stipulates that the appellant was still using crutches and he had not completely healed. This is over a year since the accident. Dr. Kabugi found that the appellant’s injuries left him with 15% disability. At the trial, the appellant testified that he had not yet fully healed from his injuries. The trial Court awarded Kshs.300,000/= as damages for pain and suffering.

20) The appellant now prays that he be awarded Kshs.700,000/= as damages for pain and suffering. In support of this prayer, the appellant relies on the case of **Paul Otieno Obuya & Another vs Joshua Atuti Ngoto & Another** [2016]eKLR where the Court on appeal set aside the trial Court’s award of Kshs.900,000/= and awarded Kshs.700,000/= as damages for injuries similar to the appellant.

21) On the other hand the respondent has submitted that the award by trial Court of Kshs.300,000/= should not be disturbed. It cited the case of **Harun Muyoma Boge vs Daniel Otieno Agulo** [2015]eKLR wherein the appellant was awarded Kshs.300,000/=. Also cited is the case of **James Murithi Ireri vs Cyprian Mugendi Igonga** [2016]eKLR wherein the trial Court’s award of Kshs.400,000/= was upheld. In both cases, the appellants sustained injuries comparable to that of the appellant herein.

22) From the Medical Reports produced as evidence, it is clear that the appellant did suffer serious injuries. The latest Medical Report by Dr. Kabugi awarded the appellant 15% disability. The appellant also testified that he was still unable to walk. In the circumstance, this court is satisfied that the trial Court did not take into account the gravity of the appellant’s injuries when making its award. There is therefore good reason to interfere with the same and award the appellant Kshs.600,000/= as damages for pain and suffering. In doing so this court is guided by the case of **Clement Gitau v G K K** [2016] eKLR wherein the 1<sup>st</sup> respondent suffered a fracture of the tibia and fibula. As a result of the injuries the 1<sup>st</sup> respondent suffered a permanent disability of 20%. Similarly in the case of **Kenny Nyaga Mboi v Mash Bus Services Limited** [2015] eKLR the appellant therein suffered a fracture of the tibia with 15% disability and the Court awarded Kshs.500,000/= as damages.

23) This ground of appeal is found to be meritorious and it is hereby allowed; the inflationary trends of the Kenyan shilling have been taken into account in arriving at this decision.

**Whether the appellant is entitled to the full costs of the suit:**

24) Having set aside the trial Court’s finding on liability it then follows that the appellant is entitled to full costs of the trial Court.

**FINDINGS AND DETERMINATION**

25) The appellant is found to have been the rider of the motor cycle.

26) The appeal on liability has merit and the lower Court’s finding is hereby set aside. The respondent shall bear 100% liability;

27) This ground of appeal on quantum is found to have merit and it is hereby allowed; this court finds that the trial magistrate proceeded on the wrong principles and the award is found to be inordinately low; the trial Court’s award is hereby set aside and substituted with an award of Kshs.600,000/=.

28) The appeal is found to have merit and the appellant shall have costs of the appeal and full costs of the trial in the lower court.

It is so Ordered.

**Dated, Signed and Delivered at Nyeri this 25<sup>th</sup> day of October, 2018.**

**HON.A.MSHILA**

**JUDGE**