



**THE REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 16 OF 2013**

**GILBERT KIPNGETICH AIYABE.....APPELLANT**

**VERSUS**

**WASHINGTON MWAMBUIRI.....RESPONDENT**

**J U D G M E N T**

1. This is an appeal from the judgment and decree of Hon. GANDANI (SPM) at Mombasa delivered on 8<sup>th</sup> February 2013 in CMMC NO. 153 of 2009.
2. The Respondent instituted a suit against the appellant claiming for general damages, special damages and costs of the suit plus interest thereof.
3. The Respondent pleaded that on or about 16<sup>th</sup> April, 2008 the Appellant was involved in a road accident while walking along Jomo Kenyatta Avenue as a lawful pedestrian when he was hit by his motor vehicle registration No. KAY 516 E causing him to suffer serious injuries.
4. The Appellant blamed the Respondent for the alleged accident, the particulars thereof as enumerated at paragraph 5 of the plaint.
5. The particulars of the injuries sustained by the Respondent were enumerated at paragraph 5 of the plaint.
6. The Respondent filed a defence in which he denied the Appellant's claim. He averred that if the said accident occurred at all, then the same was due to the sole and or contributory negligence of the appellant, particulars thereof as enumerated at paragraph 9 of the defence statement.
7. The case was heard whereby the Respondent called three (3) witnesses while the Appellant called no witness. The court then found the Appellant 100% to blame and proceeded to award the Respondent Ksh 380,00 as general damages, Ksh 3,700/= as special damages together with costs of the suit and interest thereon.
8. The appellant was dissatisfied with the above said decision and he lodged the instant appeal setting out seven (7) grounds in the memorandum of Appeal dated 21<sup>st</sup> February 2013;

**(a) the learned trial magistrate greatly misdirected herself in treating the submissions of the appellant on liability very superficially thereby erroneously arriving at a wrong conclusion on liability.**

**(b) The learned trial magistrate did not consider or sufficiently consider the demand of contributory negligence on the part of the respondent.**

**(c) The learned trial magistrate erred in misdirecting herself to consider only a part of and not all the evidence and submissions presented to her particularly the submissions presented to her by the appellant consequently arriving at damages which were inordinately high that it represented an entirely erroneous award vis a vis the injuries of the respondent.**

**(d) The learned trial magistrate proceeded on wrong principles when assessing the liability to be apportioned to the plaintiff/respondent.**

**(e) The learned trial magistrate erred in law and fact in not making and award which was within the limits of already decided cases of similar nature.**

**(f) The learned trial magistrate erred in law and fact in holding the appellant wholly liable for the occurrence of the accident when there was no evidence on record to support such a finding.**

**(g) The learned trial magistrate's judgment is against the weight of evidence and law placed before her.**

From the seven (7) grounds of appeal, the appellant's appeal is mainly on the issue of liability.

9. The appeal was admitted on 11<sup>th</sup> November, 2016 after the filing of the record of appeal and counsel for parties agreed to file written submissions and highlighting of the same was fixed for 15.10.2018. And on 15.0.2018, the counsel for the parties agreed to rely on their written submissions as filled.

#### **THE APPELLANT'S SUBMISSIONS.**

10. The appellants counsel submitted that the impugned judgment failed to meet the threshold as set out under the Provisions of Order 21 Rule 4 of the Civil Procedure Rules where the essentials of a judgment are set out. He stated that the said essentials are missing from the said judgment.

11. The appellant's counsel also submitted that the respondent's evidence was incredible and riddled with glaring contradictions which were never captured nor explained by the trial court in arriving at a finding of negligence and 100% as liability against the appellant.

12. Further, it was submitted that the finding and quantum awarded by the trial magistrate in favour of the respondent was not only excessive but outrageous in view of the injuries that he sustained and no reasons were furnished to justify the same.

13. In conclusion, the appellant urged the honorable court re-evaluate the evidence that was tendered before the trial court and exercise discretion in light of the facts of the case and allow the appeal so that the respondent shoulders the costs of the appeal.

#### **RESPONDENT'S SUBMISSIONS**

14. Counsel for the respondent opposed the appeal in its entirety while relying on the judgment of the trial court and their written submissions. He submitted that there were absolutely no contradictions in the evidence of Pw1 and PW2 on record as submitted by the appellant's counsel. He submitted that the appellant never called any evidence or witness to rebut the respondent's evidence.

15. The respondent's counsel finally submitted that damages that were awarded by the trial magistrate were reasonable and commensurate to the injuries that the respondent sustained. He stated that the award was not inordinately high to amount to an erroneous estimate of damages and was consistent to precedents in similar decided cases that it ought not to be disturbed.

#### **ANALYSIS AND DETERMINATION.**

16. This court, being the first Appellate court has a duty to re-evaluate the evidence that was tendered before the trial court and reach its own finding as was held in the case of **SELLE AND ANOTHER VRS ASSOCIATED MOTORS BOAT CO. LTD & OTHERS ( 1968) 123**. The court is not bound to follow the trial court's findings of fact if it appears that the court failed to take into account particular circumstances of the case. The appellant court must re-consider the evidence, re-evaluate it and draw its own conclusion. In doing all this, the court must always bear in mind that it neither saw nor heard the witnesses,, and should therefore make allowance for the same.

#### **EVIDENCE:**

17. Apart from testifying as Pw1, the respondent called two (2) witnesses being the police officer (Pw2) and the doctor (PW3). According to the respondent (Pw 1), he was walking home on a pedestrian path along Moi Avenue on the material day, when he was hit from behind by the defendant's motor vehicle whereby he sustained a fracture on the left leg and a blunt injury on his left hand. Pw1 said that he was admitted at the Coast General Hospital for treatment for 3 days. He produced

- treatment notes from Coast General Hospital as Exhibit P1

- receipts for police abstract as Exhibit P4

- 7 receipt from Coast General Hospital as Exhibit P5

- demand letter dated 8.5.2008 as exhibit P8.

18. Pw2, No. 73008 P.C PETER ATEBE, who was performing traffic duties at Makupa police station told court that on 16.4.2008, at around 10.30 Pm an accident was reported to have occurred along Jomo Kenyatta Avenue involving motor vehicle registration No KAY 516 E make Suzuki Escado and a male pedestrian, GILBERT KIPNGETICH and was issued with a notice of intended prosecution as the pedestrian was issued with a P3 form. He produced the notice of intended prosecution as exhibit P2 and police abstract as exhibit P4. He added that the police file indicated that the pedestrian was knocked as he was crossing the road.

19. Pw3, DR AJONI ADEDE testified that on 18.6.2008 he examined the plaintiff who had been involved in an accident on 16.4.2008 where he suffered the following injuries;

- fracture of the left tibia and fibula leg bone;
- blunt object injuries to the left arm;
- blunt object injuries to left leg.

He confirmed that the plaintiff was treated at Coast General Hospital and he saw him two months after the accident while still on crutches, because his left leg had a plaster-cast. He was shown an X-ray film and treatment notes which displayed the fracture the plaintiff sustained. Pw3 filled the P3 form. He concluded that he anticipated permanent partial disability since the fractures would heal with residual disability. He produced a report dated 18.6.2011 as exhibit P6, a receipt of Ksh 2000/= as exhibit P7 and another for court attendance for Ksh 3000 as Exhibit P10.

20. The appellant did not call any witness or evidence in support of his defence.

21. In her judgment the trial magistrate found for the Respondent.

22. In considering the appeal, I have read through the pleadings, the evidence by the respondent and his witnesses, the exhibits produced, the judgment by the trial court in line with the grounds of appeal, cited authorities and the relevant law, in the written submissions by the parties. Two issues arise for determination being;

- Whether the Respondent proved his case to the required standard;
- Whether the damages awarded were excessive.

23. It is undisputed that the appellant did not call any witness or adduce any evidence, hence the only account on how the accident occurred is available in the evidence of pw1. Pw2 did not witness the accident happen and his evidence was merely to produce the police abstract (Exhibit P4) and confirm what was in the police file as authorized by corporal Kamita who by the time of the trial had been transferred to another station. Had the appellant availed himself or a witness to give an account of how the accident happened or did not happen, may be some light could have been shown. But the court was denied this chance.

24. The onus of proof of the plaintiff was and remains on a balance of probabilities to discharge that duty, the respondent had evidence by Pw1 (self) on how the accident occurred between him and the appellant's motor vehicle. There was no rebuttal of this evidence as the appellant offered no evidence at all. The suit having been based on claim by negligence, and there being no evidence to controvert the same, any judicial need applying itself to law and facts would not have come to any conclusion different from that which the trial magistrate arrived at.

In the case of **EMBU PUBLIC ROAD SERVICES LIMITED VRS RIMI (1968) E.A 22**, the court cited that;

***“Where circumstances of the accident give rise to an inference of negligence, then the defendant in order to escape liability has to show that there was a probable cause of the accident, which does not connote negligence or that the explanation for the accident was consistent only with the absence of negligence”.***

25. The appellant's counsel also submitted that the trial magistrate erred in treating their submission on liability and quantum very superficially. I wish to rely on the Court of Appeal decision in the case of **DANIEL TOROITICH ARAP MOI VRS MWANGI STEPHEN AND ANOTHER (2011) eKLR** where it was clearly stated that:

***“ Submissions cannot take the place of evidence. The 1<sup>st</sup> Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and were over unable to countenance it. Submissions are generally parties. “marketing language” each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented”.***

26. From the proceedings of the lower court, Dr. AJONI ADEDE who testified a Pw2 gave evidence of the injuries that the Respondent sustained. And again, there was no evidence by the appellant to controvert the same. In fact, by consent of counsel for the parties, the medical report by DR. UDAYAN SHETH, was produced as an exhibit.

In the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE GATHOGO KANINI VRS A.M.M. LUBIA AND ANOTHER (1982- 1988) I KAR 777**, the court of appeal held as follows;

***“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by trial judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages”.***

27. It is worth noting that a court can only interfere with an award of damages if the aggrieved party satisfies on of the two conditions;

(a) That the trial court took into account irrelevant factors or left out relevant factors when assessing damages; or

(b) The amount of damages is so inordinately high or low that the awarded must be a wholly erroneous estimate of damages.

28. In the instant appeal, it will be noted that the injuries sustained by the respondent were not controverted by any evidence, hence they were found proved on a balance of probabilities. In addition to this, the parties counsel entered into consent where DR. UDAYAN SHETH'S medical report on the same was admitted as evidence for the Respondent.

29. From the above findings, it is clear that it has not been shown that the trial court either failed to take into account. Irrelevant factors or left out relevant factors in awarding of damages it awarded.

30. I have also considered the said injuries in terms of the cited authorities where parties suffered injuries almost similar to those suffered by the respondent and find that the sum of Ksh 380,000 is reasonable and Proportional to the said injuries. The decision by the trial magistrate is therefore upheld and appeal dismissed with costs to the respondent.

**Delivered, dated and signed this 29<sup>th</sup> day of November, 2018.**

**LADY JUSTICE D.O. CHEPKWONY**

In the presence of :

Mr. Otieno counsel for the Appellant

Mr. Otwere counsel holding brief for Mr Nyaboke counsel for the Respondent

C/clerk- Beja