



**REPUBLIC OF KENYA**

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

**HCCA. NO. 252 OF 2016**

**ALI MALIK BROTHERS MOTORS (K) LTD..... 1<sup>ST</sup> APPELLANT**

**EMMANUEL OMONDI OWINO.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**EMMANUEL ODUOR ONYANGO.....RESPONDENT**

**(Formerly PMCC Civil Case 8227 of 2013 Milimani Commercial Courts, Nairobi)**

**JUDGEMENT**

**INTRODUCTION**

1. The dispute herein arose out of Road Traffic Accident in which the Respondent motor cycle collided with 1<sup>st</sup> Appellant motor vehicle occasioning injuries to the Respondent/Plaintiff.
2. This prompted the Respondent to lodge civil case No.8227/2013 in Milimani CMC claiming general and special injuries.
3. After the case was heard, the Trial Court found Appellant 100% liable for the accident and awarded the Respondent Kshs.700,000/= as general damages and Kshs.4,710/= as special damages.
4. Being aggrieved by the above decision, the Appellants lodged instant appeal and set out 6 grounds of appeal namely:-

- 1) The Learned Trial Magistrate erred in fact and in Law in failing to consider the Appellants submissions on liability and quantum of damages.***
- 2) The Learned Magistrate erred in law and fact in failing to consider the evidence tendered before the court sufficiently to inform her decision.***
- 3) The learned trial Magistrate erred in law and in fact by awarding damages that were so inordinately high in view of the circumstances of the case.***
- 4) The Learned trial Magistrate erred in law by failing to consider conventional awards for similar cases.***
- 5) The Learned Trial Magistrate erred in law by failing to consider conventional awards for similar cases.***

***6) The learned trial magistrate erred in law and in fact by awarding special damages that were not specifically proven.***

5. The parties agreed to canvass appeal by way of submissions which they were to file and exchange within the agreed time lines. None of the parties filed the same.

6. The court thus was constrained to prepare judgment without the same as the time lines agreed had lapsed.

### **THE DUTY OF THE 1<sup>ST</sup> APPELLANT COURT**

7. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR -VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

### **EVIDENCE ON RECORD**

8. The plaintiff, Emanuel Oduor Odhiambo was a boda boda rider. On material date (04/11/2013) he was going to town. He had written witness statement which he adopted as his evidence herein.

9. He was injured on the pelvis and right knee. He was taken to Huruma Nursing for treatment. Plaintiff's produced list of documents as Plaintiff Exh 1-10. He blames Defendants for knocking him.

10. In cross-examination he stated that, he did not knock the Defendant m/v. He stated that, he was not on the wrong lane. He was from Huruma coming to town.

11. The accident occurred in the middle of the road. He had not healed. He had not healed within the 8 months. He was injured on the pelvis and right knee.

12. DW1 testified that, he was coming from town (at 8:00 am) going to a place called "rounda".

13. He was on his lane. On reaching the junction, he found a motor cycle ready to enter the main road. A motor bike went to his lane and knocked him. He stopped there until police came.

14. They took motor vehicle to pangani Police Station where a statement was made.

15. When he was cross examined, DW1 said that he was going to town and admits that an accident occurred and as stated. He was going to Kariobangi roundabout and the motor cycle was going to town.

16. He was on the main road and had right of way. He did not stop and the road is not a dual carriage. The accident occurred on his lane and he did not go to the police station, as the police came to the scene. The Plaintiff PW1 had been rushed to hospital.

17. DW1 motor vehicle was knocked on the right near the steering.

18. DW2 was police officer No.39038 PC Duke Mogaka who testified that, he was based at at Pangani Police Station at Traffic Office. He had police abstract and OB No. 22 of 04/11/2013. OB extract Dexh 1. Police abstract Dexh 2.

19. When cross examined, PC Duke Mogaka No. 39038 said that he was not the Investigating Officer and neither was he connected to instant case. It was not indicated who reported the accident.

20. The OB extract did not indicate the point of impact. The case was pending under investigation. He did not have the investigation file; which should contain the statement of Plaintiff. It was reported as a slight injury.

## ISSUES, ANALYSIS AND DETERMINATION

### ISSUES

21. After going through the pleadings and the evidence on record, I find issues are:-

- 1) *Did Respondent/Plaintiff prove his case on balance of probabilities?*
- 2) *If above is in affirmative, what is the degree of Appellant/Defendant liability?*
- 3) *What is the amount in quantum if any?*
- 4) *What is the order as to costs?*

22. The Respondent/Plaintiff testified that he was lawfully riding his motor cycle along Juja Road when 2<sup>nd</sup> Respondent drove motor vehicle KAS 305Z negligently that it veered off its lane, swerved negligently thus lost control and knocked down him inflicting pleaded injuries. However, in cross examination he stated that the accident was in the middle of the road.

23. DW1 (Appellant No. 2) testified that Respondent emerged from behind his motor vehicle and rammmed into it when the accident took place.

24. On his take DW2 a police officer confirmed that he was only mandated to produce OB which stated that the investigation was still pending. The police abstract stated as much. He said that he was not an Investigating Officer and had nothing to do with the case.

25. He never shed light as who was to blame and thus the situation remained in the realm of Appellant No. 2 evidence versus that of the Respondent.

26. DW2 said the point of impact was not indicated in the Occurrence book he produced. He did not have investigation file.

27. These were the circumstances of the evidence in which the Trial Court assessed liability at 100% against Appellants.

28. The question is, was Trial Court justified in arriving at such decision?

29. The evidence seem not to shed light as to who was to blame for the accident but both the contestants in the dispute.

30. In the circumstances, the liability should have been apportioned on equal basis 50:50%.

31. See the decision of Lord **Denning L J in Baker -Vs- Market Harborough Industrial Co-operative Society Limited [1953] 1 WLR 1472** where it was held that in the circumstances of the where it is not clear as to who was to blame, both vehicles' drivers ought to share equal liability.

32. On quantum the injuries sustained by the Respondent were:-

- 1) *Fracture of the pelvic sprain of hymen.*
- 2) *Cuts of the (r) knee.*

33. This was set out in Dr. Wokabi's report produced as an exhibit.

34. Plaintiff/Respondent relied on **CIVIL APPEAL 323/2012 MUKUBU & ANOTHER -VS- LOISE KIMANI** eKLR 2015 where injuries sustained were:-

*1) Fractures of right distal humerous bone and;*

*2) Tibia and appeal reduced award to Kshs.600,000/=.*

35. HCC MSA 85/2010 MKHA –VS-TAWAKAL COACH & ANOTHER where injuries sustained were:-

*1) Fracture of left iliac crest.*

*2) Left pubis.*

*3) Acetabulum.*

*4) Left knee general damages awarded was Kshs.2,040,000/=.*

36. Also HCC 1224/99 OTIENO VS- OIL CROP DEV CO. LTD & ANOTHER injuries sustained were:-

*1) Fracture inferior pubic ramus,*

*2) Superior ramus,*

*3) Fracture (L) acetabulum.*

The general damages awarded was **Kshs1,200,000/=.**

37. On Appellant side, the only authority cited in their submissions in trial court was NYAGA –VS- THUO & ANOTHER (2007) HCC 96 of 2007. where the injuries sustained were: - fracture inferior and superior ramus fracture and dislocation of right hip and soft tissue injuries, the award was Kshs.300,000/=.

38. Taking to account the age of the authority and factoring in inflationary element of Kenya shillings, it would appear the award of Kshs.700,007/= was not inordinately high.

39. In sum, the court therefore finds that the appeal succeeds partially and thus makes the following orders:-

*1) The appeal is allowed on liability to the extent that the blame is shared 50%:50% between both appellants and Respondent's sides. That is: Kshs.704,710/= less 50% = (Kshs.352,355/=) = Kshs.352,355/=*

*2) The quantum remains as assessed by trial court.*

*3) Parties to bear their own costs.*

*4) Interest is to accrue from the date of the lower court judgement.*

**SIGNED, DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018 IN OPEN COURT.**

.....

**HON. C. KARIUKI**

**JUDGE**