



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 94 OF 2011

DAVID KIPROTICH BOR.....APELLANT

VERSUS

KASSIM MARANGA1ST RESPONDENT

CELTEL KENYA LTD T/A ZAIN KENYA LTD.....2ND RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable A. Onginjo in Eldoret Civil 482 of 2009, dated 19th April, 2011)

JUDGMENT

1. The appellants were the defendants in Eldoret Chief Magistrate's court Civil Suit No. 482 of 2009. They had been sued by the respondent (cross-appellant) for general and special damages in the sum of Kshs. 107,200 as a result of personal injuries sustained in a road traffic accident which occurred on or about 14th April, 2009 involving the 2nd appellant's motor vehicle Registration No. KBB 362 A Toyota Land Cruiser which was being driven by the 1st appellant along Eldoret-Kisumu Road.
2. The respondent's case is that he was being conveyed as a pillion passenger on a motor cycle on the aforesaid date at around 8 p.m. The motor cycle was being ridden on the left side of the road as one proceeds to Eldoret direction. There was a Nissan van behind them and when the motor cycle rider slowed down and indicated his intention to turn to the right side of the road to enter Malele Junction, the motor vehicle suddenly emerged, overtook the Nissan Van and rammed into the rear of the motor cycle just as it turned right to join the junction.
3. According to the respondent, the 2nd appellant's motor vehicle was being negligently driven at high speed by the 1st appellant. As a result of the accident, the respondent sustained multiple injuries. He sustained two fractures on the right hand, one fracture on the left leg and bruises on the forehead and left elbow. The 1st appellant took him to Moi Teaching and Referral Hospital where he was admitted from 14th April, 2009 to 26th May, 2009. He was operated on as part of his treatment and metals fixed to his right hand and left leg.
4. After being discharged from hospital, he reported the accident at Eldoret Police station. He was issued with a P3 form which was filled by *Dr. Aluda* (Pexbit 7) and a police abstract (Pexhibit 8). He also obtained a copy of records from the Kenya Revenue Authority which confirmed that the motor vehicle belonged to the 2nd appellant. He denied having contributed to the occurrence of the accident stating that as a pillion passenger, there was nothing he could have done to avoid the accident. He blamed the collision entirely on the negligence of the 1st appellant.

5. The appellants in their joint statement of defence dated 20th July, 2009 denied each and every allegation made against them by the respondent. On a without prejudice basis, they contended that if the accident occurred, it was caused by the sole negligence of the respondent or that he substantially contributed to its occurrence or that the accident was occasioned by factors beyond their control.

6. In his evidence before the trial court, the 1st appellant admitted that he was the driver of motor vehicle registration number, KBB 362 A at the material time. He denied that he was over speeding and that he crashed into the motor cycle while overtaking another motor vehicle. He claimed that he saw the motor cycle about 70 metres ahead of his vehicle. It had two pillion passengers and appeared unstable. In a bid to avoid it, he switched on his right indicators and started overtaking it but when he was close to it, the motor cycle rider suddenly turned to the right without notice. He applied emergency brakes and hooted but the collision occurred. His witnesses DW2 gave a similar version of events.

7. In her judgment dated 19th April, 2011 the learned trial magistrate apportioned liability in the ratio of 40 : 60%. The respondent and the rider were to shoulder 40% liability while the appellants were to shoulder the remaining 60%. The respondent was awarded general damages for pain and suffering in the sum of Kshs. 1,200,000 less 40% contribution and Kshs. 103, 900 as special damages. He was also awarded costs of the suit and interest.

8. Both the respondent and the appellants were aggrieved by the learned trial magistrate's decision on both liability and quantum. The appellants lodge an appeal vide a memorandum of appeal dated 16th May, 2011 while the respondent filed a cross appeal on 21st May, 2012.

9. In their memorandum of appeal, the appellants raised five grounds of appeal which are as follows;

(i) The award of general damages by the learned magistrate in Eldoret SRMCC No. 482 of 2009 was manifestly excessive.

(ii) The learned magistrate erred in law and in fact by ignoring the authorities submitted by the appellants in their submissions when arriving at the figure for damages in the judgment.

(iii) The learned magistrate erred in law and in fact by failing to appreciate that the respondent was the sole and/or substantial author of his own misfortune.

(iv) The learned magistrate erred in law and in fact in disbelieving the submissions of the appellant without affording sufficient reasons while believing that of the respondent against the weight of evidence in arriving at her decision.

(v) The learned trial magistrate disregarded totally the evidence from the respondent as it emanated from the cross examination when apportioning liability against the appellants at 60%.

10. In the memorandum of cross appeal dated 21st December 2012, the respondent raised the following five grounds of appeal;

(i) That the learned magistrate erred in law and fact in apportioning 40% liability as against the respondent which liability has not been proved on a balance of probability.

(ii) That the learned magistrate erred in law and fact in failing to take into account all material and relevant facts that the respondent was a pillion passenger and reached into a wrong decision on holding the Respondent 40% liable.

(iii) That the learned magistrate erred in law and fact in failing to award future medical expenses to the Cross-Appellant yet the same was pleaded for.

(iv) That the learned magistrate erred in law and fact by misapprehending the evidence on

record and as a result arrived at erroneous decision of quantum on damages.

(v) That the learned magistrate erred in both in law and fact by failing to consider submissions and authorities tendered before the subordinate court.

11. By consent of the parties, the court directed that the appeal be prosecuted by way of written submissions. The cross –appellant filed his submissions on 4th October 2016 but the appellants did not file any despite being given sufficient time by the court to do so.

12. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. I am alive to the duty of the first appellate court which is to re-evaluate, re-assess and reconsider the evidence presented before the trial court to reach its own determination bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses and give due allowance for that disadvantage. See: *Selle V Associated Motor Boat Co. Ltd (1968) EA 123*; *Kenya Ports Authority V Kuston (Kenya) Ltd 2009 2 EA 212*.

13. I have carefully considered the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by the cross appellant together with all the authorities cited. Having done so, I find that only two key issues emerge for my determination. These are;

(i) Whether the learned trial magistrate erred in her finding on liability.

(ii) Whether the trial magistrate erred in arriving at her decision on quantum of damages.

14. From the evidence on record, I find that it is not disputed that the 2nd appellant was the owner of the vehicle which was being driven by its employee the 1st appellant and that an accident occurred at the time alleged involving the said vehicle and a motorcycle on which the respondent was being conveyed as a pillion passenger. It is also not disputed that as a result of the accident, the respondent sustained some serious injuries for which he was treated at Moi Teaching and Referral hospital.

15. Having outlined the undisputed facts, let me now address the first issue. When rendering her decision on the issue of liability, the learned trial magistrate stated as follows:-

“My finding on liability is that both the plaintiff and the rider of motor cycle were to blame for reasons that plaintiff knowing too well that or motor cycle is meant to carry one passenger also boarded same motor cycle and it could be true that due to excess weight the rider was unstable as DW1 and DW2 said. Secondly it is statutory that everyone who rides on a motor cycle wears helmet to avoid or reduce severity of injuries in case of an accident but plaintiff did not have any.

They also did not have reflector jackets. It is believed as defence said that rider of the motor cycle was not licenced and his motor cycle was not registered if he was not at fault then it would be expected that he would report accident to police and claim for damage to motor cycle and even in injury to body but he went under ground. It is also most likely that the unregistered motor cycle was not insured. For the above reasons I do find plaintiff and the rider 40% liable for the accident I do find defendants 60% liable...

16. In my view, the learned trial magistrate fell into error when she apportioned 40% liability on the motor cycle rider and the respondent for the following reasons;

To start with, the motor cycle rider was not a party to the suit as he had not been sued by the respondent nor had he been enjoined to the proceedings as a 3rd party by the appellants. In their evidence, DW1 and DW2 appeared to fault the motor cycle rider for the accident saying that he turned right suddenly without notice when the motor vehicle was just about to overtake him thus causing the collision. If this was the

appellant's position, then they ought to have joined the rider as a 3rd party under *Order 1 Rule 15* of the *Civil procedure Rules 2010* so that the issue of who between the 1st appellant, the rider and the respondent was to blame for the accident could be determined by the trial court. They did not do so and the learned trial magistrate erred in not appreciating this fact and in proceeding to apportion liability on the rider who was not a party to the suit.

17. Secondly, as a pillion passenger, the respondent was not in control of the motor cycle and there was nothing he could have done either to cause or to avoid the accident. In the circumstances, it was a misdirection on the trial court's part to blame him in any way for the occurrence of the accident.

18. Thirdly, whether or not the motor cycle was registered or insured; whether or not the motor cycle was damaged and the rider injured and whether or not he reported the matter to the police was an irrelevant consideration by the learned trial magistrate as none of them had any bearing on the issue of how the accident occurred. The same case applies to whether or not the two pillion passengers had worn reflector jackets or helmets.

19. According to the evidence of the defence witnesses, they had seen the motor cycle and its passengers when they were between 70 – 100 metres ahead of them and had he been a prudent driver, instead of overtaking the motor cycle, DW1 should have slowed down and driven behind the rider until he was sure it was safe to overtake or take any other measure necessarily to avoid ramming into it considering that there is evidence that the road at that point was straight.

20. In view of the foregoing, I am satisfied that the learned trial magistrate erred in attributing any liability to the respondent considering that he was a pillion passenger and was not to blame in any way for the occurrence of the accident. I therefore set aside her finding on liability and in its place substitute it with a finding on liability in favour of the respondent against both appellants jointly and severally at 100%.

21. On quantum of damages, according to *Dr. Aluda's* report (Pexhibit 10(a)), the respondent sustained the following injuries;-

- (i) Double fractures of the right radius and ulna.
- (ii) Compound fractures of the left tibia
- (iii) Cut wound on scalp, right forearm, right thigh and left leg which were also swollen and tender.
- (iv) Compound fractures of the left tibia
- (v) Blunt trauma to the lumbar spine which was tender.

22. According to the doctor, upon examination, he found that the respondent had scars on the scalp, right forearm and left leg. In his opinion, the injuries sustained were very severe and were continuing to heal and pain previously felt by the respondent would continue to subside with the use of analgesics; the swellings would also subside with time but the scars were permanent features in his body. The fractures were also healing.

23. The cross – appellant submitted that the award of Kshs.1,200,000 was low considering the injuries sustained. He proposed that an award of Kshs.2,000,000 was more appropriate as was awarded to the plaintiffs in **Ben Mitsonga (Minor) suing through Zuma Mangala as next friend V Said Baker Said & Another HCC No. 139 of 2003 (Mombasa)** who had allegedly sustained similar injuries. The respondent also referred the trial court to the case of **Charles Wanyoike Githuka V Joseph Angi Thuo and 2 others (2008) eKLR** where *Maraga J* (as then was) awarded Kshs.1,600,000 allegedly for similar injuries.

24. The appellants in their memorandum of appeal complained that the award of Kshs. 1, 200,000 general

damages was manifestly excessive and that the learned trial magistrate ignored the authorities cited by the appellants in their submissions.

25. I wish to state at the outset that the award of general damages is always at the discretion of the trial court. That discretion must however be exercised judiciously in accordance with the law. The mandate of an appellate court to interfere with damages awarded by a trial court is not unlimited. It is confined to certain circumstances.

An appellate court can only disturb an award of damages made by a trial court if it was satisfied that it was either inordinately high or low as to justify an inference that it represented an erroneous estimate of the damage suffered; or that the trial court took into account irrelevant factors or omitted to take into account relevant ones or acted on wrong legal principles in arriving at the award. See: **Mariga V Musila (1984) KLR 251; Kemfro Africa Ltd t/a Meru express Services 1976 and Another V Libia & Another (1987) KLR 30.**

26. Though the respondent claimed that the trial court erred in ignoring the authorities cited above, I find no merit in this submission as the learned trial magistrate in her judgment clearly indicated that she had considered the submissions made by each of the parties.

27. On my part, I have read the authorities availed by both parties to the trial court supporting their respective proposals on quantum. I find that the injuries sustained by the plaintiffs in those authorities were different and far more severe than the injuries sustained by the respondent in this case.

Given the evidence on record, I am unable to fault the learned trial magistrate's award of Kshs.1,200,000 as general damages for pain and suffering considering the injuries that were suffered by the respondent in the instant case.

28. It is important to note that the respondent sustained several fractures among other injuries and was admitted in hospital for over a month, to be precise about 42 days. He had to undergo surgery and have metal plates fixed on two parts of his body. In my view, the award was reasonable. There is nothing on record to suggest that in arriving at the decision, the trial court considered any irrelevant factors or applied the wrong principles of the law. The award is therefore upheld save that it shall not be subject to 40% contribution by the respondent as held by the trial court now that the appellants have been held liable at a 100%.

29. The award of special damages was not contested by any party and therefore the same is affirmed.

30. The respondent also claimed in his submissions that the learned trial magistrate erred by failing to award him damages for future medical expenses though it was specifically pleaded in the plaint. I beg to disagree with this submission because though the claim was pleaded, it was not supported by any evidence.

31. For the foregoing reasons, I do not find any merit in the appellant's appeal. The same is hereby dismissed with costs to the respondent. I however find merit in the cross appeal and it partially succeeds on liability only. The cross appeal on quantum of damages fails.

32. In the result, I set aside the judgment of the trial court and substitute it with a judgment in favour of the respondent against the appellant's jointly and severally in the total sum of Kshs.1,303,900. The amount shall attract interest at court rates from date of judgment of the lower court until full payment. The appellants shall bear the respondents costs in the lower court and also on appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of February 2017

In the presence of:

Ms. Cheronno holding brief for A. K Chepkonga for the respondent

Mr. Lobolia Court Clerk

No appearance for the appellants.