REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 5 OF 2014 AND 6 OF 2014 (CONSOLIDATED)

JOSEPH MUTINDA.....1ST APPELLANT

JOHN KANGAI MUNGAI.....2ND APPELLANT

EQUITY BANK LIMITED.....3RD APPELLANT

V E R S U S

SIMON MUTEMI KAVANGULI.....RESPONDENT

From the decision in Civil Case No. 7 of 2012 at Mwingi –V. A. OTIENO –Ag.SRM)

JUDGMENT

1. BACKGROUND.

The two appeals herein, civil appeal No. 5 of 2014 and Civil Appeal No. 6 of 2014 were by consent of the advocates for the parties, consolidated and heard together as they arose from the same civil case in the magistrate's court, and relate to the same parties.

In the trial court, Simon Mutemi Kivanguli was the plaintiff and Joseph Mutinda, John Kangai Mungai, and Equity Bank Limited were the 1st , 2nd and 3rd defendants respectively.

Simon Mutemi Kivanguli brought proceedings in the trial court through a plaint alleging that he was injured in an accident which occurred on the 18th April 2011 at the Mwingi bus stage wherein a motor vehicle registration No. KAZ 302L Toyota Hiace matatu, driven by Joseph Mutinda as a driver of John Kangai Mungai joint owner of the vehicle with Equity Bank Ltd. It was alleged that the driver drove the vehicle negligently and collided with him and caused him sustain severe injuries. He pleaded particulars of negligence and particulars of injuries. He stated that he was hospitalized following the accident. He sought general damages, special damages, cost of the suit, as well as interest and any other or further relief.

The Equity Bank Ltd did not either enter appearance or file a defence. As a consequence on 23rd August 2012 Interlocutory Judgment was entered against them.

Joseph Mutinda and John Kangai Mungai filed a joint defence through their advocates on 23rd March

2012. They denied the occurrence of the accident. They also stated in the alternative, that if the accident occurred then Simon Mutemi Kivanguli was solely or substantially negligent. They listed particulars of negligent. They further and in the alternative, stated that the said Simon Mutemi emerged suddenly on the road as Joseph Mutinda was trying to avoid a vehicle KAZ 302L and, though he applied brakes, since the said Simon Mutemi appeared suddenly, the accident did occur. They stated that they would rely on the doctrine of volenti non fit injuria, they also denied that the doctrine of ras ipsa loquitor applies.

After hearing the evidence on both sides, the trial court came to the conclusion that Simon Mutemi Kivanguli had proved negligence against the respondents on the balance of probabilities, awarded general damages of Kshs 160,000/=. The court also awarded special damages and costs.

2. THE TWO APPEALS

Both sides were aggrieved by the decision of the trial court. As a consequence Joseph Mutinda, John Kangai Mungai and Equity Bank Ltd through their counsel Kairu and McCourt filed Civil Appeal No. 5 of 2014 on 24th March 2014. They listed 6 grounds of appeal as follows:-

1. ***The learned magistrate erred in law and facts in failing to appreciate that the burden of proof lays squarely on the plaintiff or the plaintiff's side.***

2. ***The learned magistrate misdirected himself in light of the evidence tendered before the honourable court in his finding as to which party was to blame for the occurrence of the accident on 31st January 2012.***

3. ***The learned magistrate misdirected himself on the assessment of quantum of general damages.***

4. ***The learned magistrate erred in fact and in law in failing to totally consider the defendants submissions on liability.***

5. ***The learned magistrate erred in facts and in law in failing to consider conventional awards on general damages in similar and all related cases by superior courts of law.***

6. ***The learned magistrate erred in fact and in law in making an award for special damages that had not been strictly proved at the trial.***

Simon Mutemi Kivanguli also filed a separate appeal No. 6 of 2014 through counsel Mulinga Mbaluka and Company Advocates. The appeal was filed on 25th March 2014 on six grounds which are as follows:-

1. ***The learned trial magistrate erred in law and misdirected himself on the facts of the matter before him by holding that the appellant had no serious injuries following the accident.***

2. ***The learned trial magistrate erred in law and misdirected himself on the facts of the matter before him when he assumed the degree of injuries on the part of the appellant were minor injuries.***

3. ***The learned trial magistrate erred in law and fact when he failed to consider the fact that the appellant had permanent injuries.***

4. ***The learned trial magistrate erred in law and fact when he held that the injuries sustained by the appellant were not serious and he overlooked the medical records.***

5. ***The learned trial magistrate erred in law and fact by awarding the appellant Kshs 160,000/- when he had a fracture.***

6. ***The learned trial magistrate misdirected himself in both law and facts by failing to be guided by the appellant's evidence on record and specifically the medical records.***

As I have stated above in this judgments, the two appeals were consolidated and heard together. I will use Appeal No. 5 of 2014 to be the reading file in this appeal proceedings. Thus Joseph Mutinda, John Kangari Mungari and Equity Bank Ltd will be 1st, 2nd and 3rd appellants respectively, while Simon Mutemi Kavanguli will be referred to as the respondent.

Both counsels agreed that the appeals do proceed by way of written submissions. Each firm of Advocates filed one set of written submissions in respect of the two appeals. Mr. Nyaga who appeared for Simon Mutemi Kivanguli (the respondent) holding brief for Mbaluka on 24th February 2016, asked the court to deliver judgment and opted not to make oral submissions.

I have perused the written submissions on both sides. The submissions of counsel for the appellants M/s Kairu & McCourt are to the effect that the decision reached by the trial court was based on the evidence on record, and that the appeal of the respondent should thus be dismissed. Counsel relied on a number of court cases.

The submissions of counsel for respondent are that the trial magistrate underestimated the injuries suffered by him and urged that the award of damages be varied to be at least Kshs 400,000/= in line with the injuries suffered.

3. THE EVIDENCE AT THE TRIAL

On the side of the respondent 3 witnesses testified. PWI was Dr. Wangura Lawrence of Mwingi. He testified that on 18th of April 2011, he examined Simon Mutemi (the respondent) aged 65 who had a history of having been knocked down by a Nissan matatu. He observed cut injuries on the knee, upper and lower limbs. There were also cuts on the ears and the head and he complained that he had lost consciousness initially. There was also a history of a deep cut in the ankle joint causing a fracture of the bones and that the victim was admitted to Mwingi hospital and discharged on 13th May 2011.

The doctor stated that the patient complained of hearing problems in both ears and walking difficulties. The doctor observed that general condition of the patient was good, and that there was a scar on the left nostril and on the outside of the right ankle, he observed a healing wound. He observed tenderness and limit of movements and the patient was walking with a limp. He produced the medical reports, a P3 form and discharge summary as exhibits. He also stated that he was paid Kshs 5,000/- for his professional services and produced the receipt for the same and further stated that he was paid Kshs 1,000/ - for his attendance in court to give evidence on that day.

In cross examination, he stated that he examined the patient on 11th January 2012 for an accident reported a year earlier. He stated that some of the complaints of the patient would have been caused by old age. He said that there was no fracture at the time of examination.

PW2 was the respondent who testified that on 18th April 2011 at about 1.00 Pm, while at Mwingi Bus Station he was knocked down by a Nissan vehicle registration No. KAZ 302N. He stated that thereafter, he was admitted in hospital for one and a half months. He stated that his leg was broken and he could not stand for long. He stated that the driver of the vehicle was at fault and that he was issued with a police abstract and also visited Dr. Wangura who prepared a medical report. He asked to be paid damages.

In cross examination, he maintained that the accident occurred at a Country Bus Station and that there was no pedestrian foot path. He said he was attempting to cross the road after looking both sides and that the speeding driver knocked him. He maintained that his hearing difficulties were as a result of the accident. He however did not know if the driver of the vehicle was charged with an offence.

PW3 was Police Constable Kennedy Kirui of Mwingi Traffic Base. He came to court with the OB No. 5

of 18th April 2011, an entry made by Corporal Omwisa relating to the accident in which Festus Kauna was the driver of motor vehicle KAZ 302Z matatu Toyota. He stated that a pedestrian Simon Kivanguli was said to have suddenly emerged from the side and was hit and seriously injured and taken to Mwingi Hospital. He said that the driver disappeared. He produced the police abstract and the OB extract as exhibits.

In cross examination, he stated that the pedestrian emerged from nowhere. He stated that he was not aware if there was a designated lane for pedestrian at the scene. He also stated that it was indicated in the OB entry that the vehicle driver attempted to apply brakes. It was not stated however in the entry that the driver was to blame for the accident.

That was the evidence of the respondent before the trial court.

The defence case was supported by the evidence of two witnesses. DWI was Dr. Sophia Opiyo who testified on a medical report for Simon Mutemi prepared by Dr. Theuri on 5th May 2012. From the report, it was noted that the patient was involved in an accident on 18th April 2011 and treated at Mwingi Hospital and discharged. That the patient had sustained a fracture, and some injuries were not indicated in the treatment notes. According to this doctor, there was no alleged loss of consciousness indicated in the treatment notes. The doctor stated that the P3 form Dr. Theuri relied upon, was dated 15th September 2011 which was five months after the accident. The doctor said that some deformities would be as a result of old age, and produced the medical report of Dr. Theuri as an exhibit.

In cross examination, the doctor confirmed a fracture of the ankle joint and stated that the patient was admitted for 25 days. She maintained that it was unlikely that the injuries would have escaped attention of the doctor.

DW2 was Festus Kauna Mutinda a resident of Mwingi. He stated that on 11th April 2011, as he was driving a Nissan vehicle KAZ 302L at Mwingi stage, he saw an Executive Coach Bus, the respondent emerged ahead of the bus running. He braked, but the vehicle knocked the pedestrian on the left side. He stated that he was driving at a speed of 20Km/h and that the place had dense traffic. He denied speeding and stated that the pedestrian was to blame for the accident because he did not stop at all. He stated that though he reported the accident to the police, he was not charged with any offence.

In cross examination, he stated that the pedestrian was an old man and that the leg was broken and suffered an injury on the head. He stated that he was charged with an offence and fined Kshs 5,000/-.

In reexamination, he clarified that he deposited a bond of Kshs 5,000/- and had so far not been charged with any offence.

4. ANALYSIS AND FINDINGS.

This is a first appeal. As a first appellate court, I am required to reconsider the evidence on record afresh and come to own conclusions but always bearing in mind the fact that I did not have the opportunity to see witnesses testify and determine their demeanor and give due allowance to that fact. See the case of ***Selle -vs- Associated Motor Boat Company Ltd (1968) EA 123.***

I have re-evaluated the evidence on record. The two consolidated appeals herein are on the proof of negligence, injuries suffered, and damages awardable.

I observe that throughout the evidence at the trial on both sides, the driver of the motor vehicle was Festus Kauna. This is in the evidence of PW3 PC Kennedy Kirui of Mwingi Police Traffic Base. It is also the evidence of DW2 who testified that his name was Festus Kauna Mutinda the driver of Nissan KAZ 302L on the 11th April 2011 who hit Simon Mutemi Kivanguli at Mwingi stage.

In the plaint however, the driver of the motor vehicle was described as Joseph Mutinda. Since no objection has been raised on the identity of the motor vehicle driver, I take it that Joseph Mutinda and

Festus Kauna Mutinda are one and the same person. Joseph Mutinda is the 1st appellant herein. I will thus not make any further comment on that issue.

The trial court made findings on the evidence tendered before it. I have been urged to find that some of the findings of the trial court, were not based on the evidence on record. Specifically I have been referred to the findings on the injuries suffered.

In dealing with this issue, I have to bear in mind that an appellate court will normally not interfere with a finding of fact of a trial court unless it is based on no evidence or is based on mis apprehension of the evidence or the trial court is shown demonstrably to have acted on a wrong principle in reaching the findings that it did. Nevertheless, an appellate court is entitled and it will interfere if it appears that the trial court failed to take account of particular circumstance, or where the impression, based on the demeanor of a material witness, is inconsistent with evidence in the case generally. See the case of ***Ephantus Mwangi & Another -vs Duncan Mwangi Wambu (1982-88) 1KAR 278.***

The evidence tendered on both sides at the trial herein was brief. The injuries suffered by the respondent were described by both sides. It was admitted on both sides that a motor accident occurred, and that the pedestrian was knocked down by the vehicle. Even the driver of the vehicle, the 1st appellant, who testified as DW2 confirmed from his layman's observations, that the pedestrian sustained injuries on the ankle and the head and was thus taken to hospital by the conductor of that vehicle.

In my view, both medical reports agree on the major factors that the pedestrian was an old man. He was injured mainly on the ankle and head. He was treated and, for a person of his age, he had sufficiently recovered. In my view therefore the findings of the magistrate on the injuries suffered cannot be said to be either an over estimate or an under estimate. The learned magistrate had to do a balancing act on the evidence tendered, and in my view he did the best he could. It is my opinion that the findings of the trial court on the injuries suffered were justified and based on the evidence, and were thus correct.

With regard to assessment of damages, it is trite law that the assessment of damages is an exercise of discretion by the trial court. An appellate court will ordinarily not interfere with the quantum of damages unless the same was based on misapprehension of facts or based on a wrong principle, or were so inordinately high or so inordinately low that they would result in an injustice. See the case of ***Butt –vs-Khan (1982)KLR 356.***

The learned magistrate awarded general damages of Kshs 160,000/-. In my view, with the injuries which were proved with the evidence tendered in the trial court, it cannot be said that the said award was outrageous. It was not based on a misapprehension of the facts. It was not based on a wrong principle. It was not based on consideration of irrelevant facts. The general damages were neither inordinately high or inordinately low. I will uphold the quantum of general damages awarded by the trial court.

With regard to special damages the receipt for preparation report was produced in court as an exhibit. The Doctor also said he had charged Kshs 1,000/- for court attendance that day which was not challenged. The trial court stated merely that special damages are awarded as proved. I find no mistake made by the learned magistrate in awarding special damages as proved. It would however be preferable for the learned magistrate to have specifically stated the exact amount of special damages proved. I will state for the record that from the evidence special damages of Kshs 6,200/- was proved which included Kshs 5,000/- for the medical report, Kshs 1,000/- for doctors attendance in court and Kshs 200/- for the police abstract.

In my view, both appeals are not merited and they are both dismissed. Since each side filed their own appeal, which has been

dismissed by this court, I order that parties bear their respective costs of the appeals.

Dated and delivered at Garissa this 23rd day of March 2016.

GEORGE DULU

JUDGE