



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 103 OF 2012**

**ABDULRAHIM EBRAHIM.....APPELLANT**

**VERSUS**

**CHARLES MWAI NDEGWA.....RESPONDENT**

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

1. In its Judgement dated the 15/5/2012 the trial court, Mr. Oletanchu, RM, in Mombasa RMCC No. 1896 of 2010 found the appellant wholly liable to the Respondent for the injuries and damages resulting from an accident alleged to have occurred on 19/3/2016 along Haile Selasie Avenue, Mombasa, involving the Respondent and motor vehicle Registration No. KAN 378K alleged to belong to the appellant. Having so found the appellant 100% liable the court assessed general damages in the sum of Kshs.23,000 and special damages in the sum of Kshs.2,000/=.

2. It is that judgment the appellant has now challenged on grounds among other that it was erroneous for the trial court not to apportion liability to the Respondent, that the case by the Respondent was not proved and that the damages awarded were not warranted for being too high and exorbitant.

**Pleadings by the parties**

3. The plaintiffs' cause of action as pleaded was founded on the tort of negligence attributed to the defendant in the manner motor vehicle registration KAN 378L was driven and controlled that it was permitted or caused to hit the plaintiff and occasion to him bodily injuries. Based on the alleged negligence of the Appellant, the Respondent blamed the Appellant as responsible for the injuries loss and damages consequent therefore. The injuries were pleaded as fracture of the pelvic bone, blunt injury to the chest and forehead and bruises on both elbows.

4. In the defence filed against the plaint, the defendant not only denied ownership of the offending motor vehicle but also the occurrence itself and any negligence on the Appellant or that the Respondent ever suffered any injuries loss of damages and alternative averment was advanced to the effect that if any such occurrence ever occurred then the same was a result of sole or substantial negligence by the Respondent.

**Evidence Adduced**

5. At trial the Respondent called PW 1 the Investigating Officer, PW 2, the respondent himself and PW 3 Dr. Ajoni Adede. The evidence of PW 1 & 2 were to the effect that after the accident traffic charges were preferred against the Applicant who pleaded guilty thereto and was fined Kshs.3,000 and in default to serve 1 month jail term. That on the material day, the Repondent was walking along Moi Avenue when

the Appellants motor vehicle was driven from a side road and without stopping drove into Moi Avenue and hit him occasioning to him the pleaded injuries.

6. On the injuries the net effect of PW 2 and PW 3, Dr. Ajoni Adede was that the plaintiff suffered fractured of the left hip bone beside soft tissue injuries to the chest and both elbows. According to the Respondent, he was not able to work as at the date of giving evidence in court while the doctor assessed his disability at 2% from the injuries.

7. For the Appellant in his defence one Mudhahir Abdulkarim gave evidence and said he was the driver on the material day. His evidence was that while driving the subject motor vehicle along Haile Sellasie Avenue, near Ethiopia Bar, a person suddenly jumped on the road, he swerved to the left and the person jumped there and when he swerved to the right the person again jumped there and was hit by the windscreen. In his view the Respondent was to blame because he crossed at a junction without Zebra crossing. On cross examination however, he admitted having been charged with the offence of careless driving that he pleaded guilty of the charge and that he was driving in a manner that was not careful. That in effect was the totality of the evidence on which the trial was called upon to make a determination and on which it did base its judgment of 15/5/2012.

### **Analysis and determination**

8. On the evidence adduced before the trial court, the judgment appealed from and the submissions tendered before this court there are two issues for determination by the court. The two issues are whether or not the trial court's decision on liability was founded on the facts led in evidence and whether or not the damages awarded were deserved.

### **Finding on liability**

9. Having heard the parties, the trial court delivered itself on liability as follows:-

**“He admits there was a zebra crossing and there was a junction and that he tried to brake but it was too late. He blames the plaintiff for the accident and then denies there was a zebra crossing and denies that he was driving fast. He admitted that he was charged with the offense of careless driving and he pleaded guilty to the same. From the evidence, I have no doubt that the defendant is wholly liable for the accident. The driver of the motor vehicle (DW 1) accepted that he drove the motor vehicle carelessly and was duly convicted. He stated that he swerved and braked but he was not able to avoid the accident. This means that he was not able to properly control and manage the motor vehicle as required.**

**Also, after considering DW 1 evidence, the same is not consistent. One time he says there was a zebra crossing another time he says there was no zebra crossing. This shows his evidence is not entirely credible save for the fact that the accident occurred.**

**With the evidence thus on record, I do find the plaintiff has proved his case on a balance of probability and I find the defendant 100% liable for the injuries”.**

10. Having been an action founded on the tort of negligence the duty of the Respondent was to establish on a balance of probabilities that there was negligence on the part of the appellant so as to lead to an inference by the court that the accident was caused by the appellant. It required the Respondent to prove a set of facts showing that there was failure by omission or commission on the part of the Appellant. Once that is done, the burden then shifted upon the Appellant to provide some answers adequate to displace the general evidence of fault.

11. In the appeal before me, the Respondent proved that he was walking on the road at broad daylight, that the appellants motor vehicle emerged for a feeder road into the main road. The appellants driver was blamed for failure to show down, brake or stop in time to avoid the accident. In an attempt to dislodge that evidence the appellant not only admitted having been careless but also the fact that the accident

occurred at a junction and that he was driving at about 50KPH at the time of the accident. This court take notice that the accident occurred within Mombasa, an urban area where the highest speed limit is by law coped at 50KPH. That however is the highest speed allowable and must therefore be reduced as the circumstances dictate. I take the evidence of the PW 1 to be the truth that he was at a junction and saw the Respondent some 5 metres away and swerved left, right and then left before hitting the Respondent. To this court that was negligent because, at a junction he ought to have slowed down and even slower having seen the Respondent ahead of him and on the road instead of doing triple swerves. Had he braked rather than swerving as he said he did, he would have avoided the collision and therefore the injuries loss and damage to the Respondent. That evidence is itself proof of negligence and does not serve to dislodge the Respondents case against the Appellant.

12. In effect he did not lead evidence to dislodge the Respondents evidence and therefore negligence upon him was proved and remained undisturbed. This court in **IMPERIAL BANK LT VS BAKARI JUM BECHPENDE MBS HCCA NO. 68 OF 2012** said:-

**“In the circumstances of this case, reasonableness could have demanded that the driver shows down or stops within the time and distance at his disposal. He did not and it is not difficult to see that he was outrightly negligence”**

13. I repeat and adopt such sentiments in my finding in this matter and hold that the Appellants driver was negligent and was rightfully so found by the trial court. Grounds 1, 2, 3, 4 7 5 of the Memorandum of Appeal therefore fail and the same are hereby dismissed.

#### **Assessment of damages**

14. The injuries suffered by the Respondent are as pleaded at paragraph 5 of the plaint, and confirmed by medical report exhibit P4. The extent of the injuries was not made a subject of dispute by the evidence led at trial even when one looks at the cross examination and the Appellants evidence. Even the finding by the doctor not challenged. Therefore, there was a clear basis to assess damages by the trial court. Both parties submitted on the subject and proposed their respective sums seen as acceptable to either sides.

15. For the Respondent, while relying on decided cases, the sum of Kshs.550,000/- was proposed while the defendant proposed Kshs.200,000 while equally relying on decided cases. In coming to its assessment for general damages of 230,000 the trial court evidently took into account the parties submissions. The court found the decisions cited by the Respondent as representing more severe injuries and therefore not comparable to the injuries in the case before the court. To the contrary he found the authorities cited by the Appellant to be more comparable and relied upon same.

16. The law bound the trial court that even in exercise of judicial discretion, reasons be given. That obligation and duty was met and discharged by the trial court and I find no reasons to fault the court or interfere with its finding. It is only necessary to print out that in urging the court to award a sum of Kshs.200,000 the Appellant relied on the decisions of the High Court made in the year 2000 and 2005 awarding Kshs.250,000 for comparable injuries.

17. To this court the award by the court was very conservative if not too mean if one was to take into account the passage of time, incidence of inflation associated therewith and the consequent erosion of value of money. I would have, had I sat at trial, awarded a higher figure but I stand reminded that it is indeed a strong thing to interfere with a finding of a trial court based upon judicial discretion. I find that the fault attributed to the trial court was ill founded and totally unjustifiable as the court essentially agreed with its appellant in its submissions.

#### **Conclusion**

18. The appeal as filed and urged on both limbs of liability and quantum of damages lacks merit and is dismissed with costs.

Dated and signed at **Mombasa** this day **19th** day of **December 2016**.

**HON. P.J.O. OTIENO**

**JUDGE**