REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 165 OF 2010

PETER NJUGUNA.....APPELLANT

VERSUS

FRANCIS NJUGUNA NJOROGE .....RESPONDENT

(*Appeal arising from the decision and judgment of the Principal Magistrate's court at Nyahururu* ***(Hon. A.B. Mongare SRM)*** *delivered on 18th May 2010)*

JUDGMENT

1. The appeal hereof arises from the judgment of the trial court where after a full hearing, the Appellant was held 100% liable for the accident and damages assessed in the sum of Kshs.350,000/= for pain and suffering and Kshs.1,850/= in special damages.

2. The Appellant faulted the trial court both in its findings on liability and quantum of damages.

The Respondents case was that as he walked with others at about 6.00-6.30p.m. along the Nyahururu-Nyeri road, while two metres off the road on the pedestrian path, the Appellant's motor vehicle **Registration Number KAT 910 B** knocked him from behind pushing him forward where he landed on the footpath and sustained serious injuries. He stated that he was walking on the right side of the road as one faces Nyeri from Nyahururu. His two witnesses who were walking alongside him but on the left side of the road testified that the defendant's motor vehicle knocked the respondent from behind and pushed him ahead to land on the walking path. He testified that he and his friends took him to hospital and reported at the police station.

3. The Appellant's version of the accident is different. That at about 50 metres ahead, he saw four people trying to block another vehicle in front of him. That two were on the left side and as he approached, one of them moved to the right and he moved to the left and he knocked him damaging the vehicle windscreen. He stated that the incident was not an accident as the person he knocked down moved into the road wilfully and was not off the road but onto the road. He stated that he did not know where the person fell after he knocked him down as he sped away to the police station. He stated that he had other people with him in his vehicle. At the police station the appellant made a report of an intended attack by the respondent and others when he knocked him down.

4. The trial court was unable to believe the Appellant's story of an intended attack and totally discredited his version. He wondered why his evidence was not corroborated by persons who he stated were with him in his vehicle. It was the finding by the trial court that the Appellant knocked down the Respondent while he was walking off the road on the pedestrian path and that was corroborated by the two witnesses who were walking with him. It was his finding that the

Respondent had proved to the required standards that the appellant was wholly to blame for the accident.

5. According to the Appellant (ground (c) and (d) – the trial magistrate erred both in law and fact in holding the appellant wholly to blame for the accident against the weight of evidence adduced and disregarding the appellants evidence.

This court being the first appellate court is under a duty to re-evaluate the evidence adduced before the trial court and come up with its findings and conclusions. See – **Selle & Another -vs- Associated Motor Boat Co. Ltd & Another (EA) 123.**

I have carefully considered the evidence by both the Appellant and the Respondent and the witnesses. Like the trial court, the version of the occurrence of accident as narrated by the Appellant cannot be believed. If the appellant believed he was in danger of being attacked by the Respondent and others, he had enough room to turn back but opted to knock down the respondent, sped off and on his own admission did not bother checking where he fell after the impact. He did not call any of the persons he stated were in his vehicle to back up his evidence.

6. The Respondent and his witness evidence came through as truthful. It was not dark when the accident occurred. He was knocked down from behind. It cannot be good submission as stated by the Appellants that since the Respondent admitted he did not see the appellants vehicle immediately before or after the accident, he could therefore not prove how its driver was negligent. With great respect to the Appellants submissions, the Respondent was knocked down from behind, while walking on the pedestrian path, off the road. After the accident, he was injured and only found himself at the hospital. How could he have seen the vehicle that came from behind?

7. I find no shred of evidence to attach contributory negligence upon the Respondent.

This court is pursuaded that the trial court considered all the evidence and rightly came to the conclusion that the Appellant was fully to blame.

I find no reason to upset such finding. The Appeal fails on the issues of liability.

8. There is no dispute that the Respondent sustained injuries from the said accident, nor is it disputed that he sustained the following injuries:

- Bruises on the occipital region of the scalp
- Deep cut on the forehead
- Bruises on the chest and lower back
- Bruises on the right elbow
- Bruises on both hands
- Tender left knee joint
- Broken tooth.

The Respondent had quantified general damages at Kshs.600,000/= seeking guidance from several authorities while the appellant proposed Kshs.70,000/=. That was in April 2010. The trial court in its discretion assessed damages for pain and suffering at Ksh.350,000/= after due consideration to the medical report, degree of injury and that no disability occurred and that as stated by the doctor the pains would have subsided within six months.

9. The Appellant in his appeal has enhanced his proposal to Kshs.150,000/= and has urged that the sum of Kshs.350,000/= is excessive and ought to be set aside.

The Respondent on the other hand has defended the trial court's award and Relying on **John Mutisya Ngile -vs- Nthambi Paul Mutisya (2006) KLR** in which the Plaintiff had similar

injuries as the Respondent, the court awarded Kshs.200,000/= for pain and suffering six years ago. He believes Kshs.350,000/= is seasonable compensation due regard being taken on the inflationary trends.

10. An appellate court will not readily interfere with damages awarded by a trial court unless it is satisfied that in assessing the damages, the court took into account an irrelevant factor or left out of account a relevant one or that the amount is so inordinately low or high that it must be a wholly erroneous estimate of the damages- **See Butt-vs- Khan (1981) KLR 349.**

11. In deciding award awardable damages the court must ensure that the award is within limits set out by decided cases and within the Kenyan economy, and must be based on comparable injuries. See **Kemfro Africa Ltd t/a Meru Express Services & Another -vs- Lubia & Another (1987) KLR.**

For comparable cases, the following cases are of assistance.

Leah Nyanguthii Kamunya -vs- KBC Nairobi HCCC NO 1128 of 1993 (2009) KLR, a sum of Kshs.200,000/= was awarded in 2009 for pain and suffering for scalp cut wound cut wound left calf region, multiple hand bruises and blunt truma to the chin.

John Mutisya Ngile (Supra), the injuries sustained were loss of an incissor tooth, abdominal injury likely to cause obstruction in life, laceration wound in the perinea region and bruises on the lower ***lib.*** The court awarded Kshs.200,000/= for pain and suffering in 2006.

12. The court is minded that almost ten years have passed since the above decisions. I must state here that the award proposed by the Appellant is on the lower side and the authorities are too old to be applicable in the present case. In **Peter Ambani Shrindwa -vs- Gordon Osore (2013) KLR,** the Court of Appeal in November 2013 allowed a sum of Kshs.120,000/= for injures to the nose with bleeding, blunt injury to the chest, right hip, bruise wound on the right knee. The plaintiff here had not lost a tooth.

13. Taking into account of the above I find that the award of Kshs.350,000/= by the trial court is rather on the higher side. The trial court did not address itself to more recent and comparable decisions in arriving at the ward. Applying the principles enunciated in the above decisions, I shall reduce the said award to Kshs.230,000/= for pain and suffering, being fair and reasonable compensation to the Respondent.

As the appeal succeeds in part, each party shall bear its costs on the appeal.

Dated, signed and delivered in open court this 16th day of December 2015

JANET MULWA

JUDGE