



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 9 OF 2012

ZACHARIAH MWANGI NJERU..... APPELLANT

VERSUS

JOSEPH WACHIRA KANOGA..... RESPONDENT

(Arising from the judgment of Hon. Mr. D. Ogembo, Senior Principal Magistrate Nyeri in CMCC No. 168 of 2010)

JUDGMENT

1. By a plaint filed on 14th April 2010 the Respondent filed suit against the Appellant in respect of an alleged road traffic accident on 25th July 2009 along Nanyuki-Naromoru road involving the Respondent and motor vehicle Registration number KBA 428F registered in the name of the Appellant.
2. The respondent pleaded that the said accident and subsequent injuries were occasioned by the negligence of the appellant and or his servant agent or driver and as a result of the said accident the respondent pleaded that he sustained fracture of the left femur.
3. On 25th May 2010 the Appellant through the law firm of Wamaasa & CO Advocates filed a defence in which he denied the said accident and on without prejudice basis pleaded that the said accident was caused or substantially contributed by the negligence of the respondent, particulars of which were pleaded in paragraph 4 thereof.
4. On 12th October 2010 the respondent filed an amended plaint wherein he pleaded particulars of injuries as commuted fracture of tibia bone of left leg and special damages at Kshs.23,129/- .
5. Based upon the said pleadings the matter proceeded for trial where the appellant was found liable at 100% and awarded the respondent general damages of Kshs.800,000/- and Kshs.400,000/- future medical expenses.
6. Being dissatisfied by the said judgment the Appellant filed this appeal and raised the following grounds of appeal;-
 - (i) That the learned trial magistrate erred in both law and in fact by finding the appellant 100% liable for the accident subject matter hereof contrary to the evidence on record.
 - (ii) That the learned trial magistrate erred in both law and in fact by disregarding the appellant's defence and evidence.
 - (iii) That the learned trial magistrate erred in both law and in fact by awarding the respondent a sum of

Kshs.800,000/- general damages for pain and suffering which sum was excessive and does not reflect the injuries sustained by the respondent.

(iv) That the learned trial magistrate erred in both law and in fact by awarding the respondent a sum of Kshs.400,000/- on account of future medical expenses which amount had not been pleaded neither had evidence been adduced in support thereof.

(v) That the learned trial magistrate erred in both law and in fact by finding the appellant liable on the basis of contradicting evidence.

7. The court was therefore urged to allow the appeal and set aside the judgment of the trial court or in the alternative review and reduce the same.

SUBMISSIONS

8. Directions were given that the appeal be heard by way of written submissions which have now been filed. On behalf of the appellant it was submitted that the trial court erred both in law and in fact in finding him liable at 100% contrary to the evidence on record having found that the parties gave conflicting evidence on how the accident occurred.

9. It was further submitted that the fact that the respondent was hit on the left side and that the appellant left the scene of the accident does not mean that the appellant was wholly liable. In view of the fact that there was conflicting evidence liability should have been apportioned at 50%:50%.

10. On quantum it was submitted that the respondent sustained a fracture of the left tibia and fibula and therefore the most adequate award should have been Kshs.200,000/- together with an award on future medical expenses. The court was therefore urged to enter judgment in favour of respondent at Kshs.600,000/- less 50%.

11. On behalf of the respondent it was submitted that the evidence of the respondent and PW 2 were never challenged and that both the appellant and the respondent's evidence were considered by the court in arriving at 100%.

12. On quantum it was submitted that according to the medical report of Dr. Muchai Mbugua and Dr. MS Malik the respondent sustained comminuted fracture of the left tibia and fibula and that an appellate court can only interfere with an award of the lower court in general damages if it is excessively or inordinately high or inordinately too low.

13. It should be pointed out that the Appellant in its submissions had conceded to an award of future medical expenses and therefore the only issue for the court's determination is;-

a) Whether the trial court was right in finding the appellant liable at 100%.

b) Whether the award on general damages was excessively high to be interfered with by the appellate court.

14. This being a first appeal, I am required to reassess the evidence tendered before the trial court and to come to my own conclusion though taking into account the fact that I did not have the advantage of hearing and seeing witnesses at the trial court .

15. It was the respondent's case that on 25th July 2009 he was travelling from Naromoru along Naromoru – Nanyuki highway on the right side of the road when the motor vehicle which was coming from Nanyuki's side veered off the road and hit his left leg causing him to lose consciousness. He was taken to Nanyuki District Hospital where he was admitted for seven days with a broken left leg.

16. Under cross examination the respondent stated that he was walking on the right side of the road and

that he was not crossing the road at the time of the accident. PW 2 PC NGERA JOSEPH who took the statement from both the respondent and the appellant's driver and the co-driver stated that the driver saw the man (Respondent) standing in the middle of the road and he hooted while the co-driver stated that on reaching the scene there was a stationary matatu to the right and the respondent emerged from the front of the matatu. Under cross examination he stated that the investigation's diary noted that the pedestrian emerged from a feeder road running and was knocked.

17. On behalf of the appellant DW 1 ZACHARIA MWANGI NJERU stated that he saw the respondent crossing road while running at about 50 metres before stopping and to avoid hitting him swerved to the left. He saw a crowd coming and therefore drove to Naromoru. This evidence was also supported by that of DW 2 CAROLINE NDEGWA.

18. Based on this evidence the trial magistrate found as a fact that both the appellant and the respondent gave conflicting evidence on how the accident occurred and in the absence of an independent evidence went ahead and found that at a speed of 70-80km/h the appellant driver would have been able to control the motor vehicle and further that the respondent was hit with the left side of the car only meant that the respondent was knocked while on the left side of the road.

19. With due respect to the trial magistrate the same fell into error by trying to fill the gap for the respondent. It was for the respondent to prove his case on a balance of probability. Further the fact that the appellant ran away from the scene of the accident does not mean that the respondent did not contribute to the said accident. It should be noted that the trial magistrate's finding that the respondent was knocked while on the left side confirm the appellant's case since the respondent's evidence was that he was walking on the right side of the road.

20. In the absence of any independent eye witness then I find that the trial court was wrong in finding the appellant wholly liable and would agree with the submission by the appellant that liability should have been apportioned at 50%:50%. I would therefore allow the appeal on liability set aside the judgment and substitute the same with a judgment on liability at 50%:50%.

21. On the issue of quantum it is not in dispute that the respondent sustained fracture of tibia/fibula as per the medical reports produced and in arriving at an award of Kshs.800,000/- the trial magistrate relied on the case of BETWEL MUTAI V CHINE ROAD & BRIDGE COPP (MOMBASA) HCCC NO. 200 OF 2007 wherein the plaintiff sustained the following injuries;-

- a) Fracture of the left clavicle.
- b) Fracture of the right humerus.
- c) Fracture of the right femur

It is therefore clear that this could not support the injuries sustained by the respondent.

22. From the aforesaid it is clear that in arriving at this award the trial court took into account irrelevant material and therefore his judgment on quantum is liable to be interfered with by this court. I would therefore set aside the judgment on quantum and being a first appellate court hereby proceed to assess quantum.

23. I have looked at the authorities submitted by the appellant before the trial court as follows;-

i) HIGH COURT AT NAIROBI CIVIL CASE NO. 132 OF 1997 MULWA MUSYAKA V WADIA CONSTRUCTION wherein Justice M.A. Angawa on 10th February 2004 assessed general damages at Kshs.150,000/- and in SAMUEL MUNGAI NJAU V WANAINGI SANITARY & HARDWARE LTD NAIROBI HIGH COURT CIVIL CASE NO. 870 OF 2002 for almost similar injuries. I have also looked at the case of THOMAS MUENDO KIMILU V ANNE MAINA & OTHERS MACHAKOS HIGH COURT CIVIL CASE NO. 6 OF 2007 where Justice Isaac Lenaola awarded general damages of

Kshs.700,000/- in respect of the plaintiff who sustained fracture of the right tibia/fibula, fracture of the left humour, amputation of one finger among other injuries.

24. I have looked at the case of SIMON MUTISYA KAVII V SIMON KIGUTU MWANGI IN HIGH COURT AT MOMBASA CIVIL APPEAL NO. 2007 where Justice R.M. Mwongo on 25th day of March 2013 confirmed an award of Kshs.200,000/- in respect of similar injuries and Mombasa INDUSTRIAL COURT CIVIL APPEAL NO. 2 OF 2013 BLUE CAT PORT SERVICES V BENSON NYAGA NJUE where Radido J on 21/3/2014 confirmed an award of Kshs.400,000/- in respect of similar injuries. I would therefore assess general damages for the respondent at Kshs.400,000/-.

25. I would therefore allow the appeal herein and make the following award;-

- a) Liability 50%:50%
- b) General damages Kshs.400,000/-
- c) Costs of future medical Kshs.400,000/-
- d) Special damages Kshs.23,129/-

26. I will award the respondent costs of the suit.

Date and delivered at Nyeri this 27th day of June 2014.

J. WAKIAGA

JUDGE

Court: Judgment read in open court in the presence of Mr. Muhoho for the Respondent. No appearance for the appellant.

J. WAKIAGA

JUDGE

27/6/2014