



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Appeal 2 of 2010**

**JULIUS CHELULE**

**JESSIKAY ENTERPRISES LTD.....APPELLANTS**

**-VS-**

**NATHAN KINYANJUI.....RESPONDENT**

**JUDGMENT**

1. The Respondent was awarded the sum of Kshs 600,000/= as general damages.
2. The Appellants being aggrieved by the decision of Hon. Nathan Shiundu in Eldoret CMCC 122 of 2008 delivered on the 14th December 2009 preferred this appeal.
3. The Appellants listed four (4) grounds of appeal in their Memorandum of Appeal. The Grounds of Appeal are as listed hereunder:
  - (1) That the learned trial magistrate erred in law and in fact in failing to hold that the accident in question arose due to careless attempt at overtaking by the driver of motor vehicle registration number KAM 713W.
  - (2) That the learned magistrates erred in law and in fact in failing to hold that the accident in question was solely or substantially contributed to by the negligence of the driver of motor vehicle registration NO. KAM 713W.
  - (3) That the learned magistrate erred in law and fact in failing to take into account the evidence of the 1st and 2nd witnesses of the Appellants.
  - (4) That the learned trial magistrate erred in law and in fact in awarding general and special damages which were excessive and granted the same on wrong principles thus the damages do not reflect the extend of loss allegedly suffered.
4. At the hearing of the appeal both Counsel for the Appellant and the Respondent chose to argue the appeals by putting in Written Submissions.
5. The issues for determination are;
  - (a) Liability
  - (b) Quantum of damages.

6. This being the first appellate court, its duty is to re-evaluate, re-assess, re-examine the evidence on record and arrive at an independent conclusion. Refer to the case of **ARROW CAR LTD -VS- BIMOMO & 2 OTHERS C.A 344 OF 2004.**
7. On the issue of liability it was the Appellants contention that the accident was caused due to the negligence of the driver of motor vehicle registration number KAM 713W in which the Respondent was a passenger.
8. That the Appellants witness **DW1 JULIUS CHELULE** testified that the motor vehicle KAM 713W was overtaking another vehicle and was being driven on the wrong side of the road when it collided with KAS 224J.
9. That the finding of the traffic court was not binding on the trial court and that the trial court ought to have arrived at its own independent finding.
10. The trial magistrate erred in law and fact in holding the Appellant solely and substantial to blame whereas the driver of motor vehicle registration number KAM 713W also substantially contributed to the accident.
11. The Respondent submitted that the 1st Appellant was convicted of the offence of careless driving contrary to Section 49 (1) of the Traffic Act.
12. The 1st Appellant had admitted in cross-examination that he had been charged and convicted with the offence of careless driving and placed on probation for six (6) months
13. That the provisions of Section 47A of the Evidence Act provides that the conviction is an inference of negligence on the part of the 1st Appellant.
14. This court has had the occasion to peruse the trial courts record and finds the evidence of the Respondent was corroborated by the evidence of Sergeant Vincent Sululu (PW2) a police officer. His evidence was that the 1st Appellant was to blame for the accident as he did not stop to give way before going into the high way.
15. The Appellants called **TECLA CHERUIYOT (DW2)** to testify on their behalf. In cross examination she confirmed that the 1st Appellant joined the main road from a feeder road. She stated in her evidence that;

**“.....one is supposed to check before joining the main road. There would have been no accident if we had stopped.....”**

16. The Appellants submitted that a finding on liability must be founded on the evidence and this court concurs and finds that the trial magistrate from the evidence adduced particularly that of DW2, correctly found that the 1st Appellant was solely liable for the accident.

17. This court finds no reason to interfere with the trial courts finding on the issue of liability and apportionment.

18. On the issue of quantum the case of **ARROW CAR LTD -VS- BIMOMO & 2 OTHERS(Supra)** lays down the principles as to when an appellate court can interfere with an award for damages and this is as set out hereunder;

**“...It must be satisfied that either the judge in assessing the matters it took into account an irrelevant factor or left out of account a relevant one or hat short of this the amount was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”**

19. The Appellants submit that the general damages and special damages were excessive and granted on wrong principles and thus the damages did not reflect the extent of loss suffered.

20. The special damages awarded by the trial magistrate was in the sum of Kshs4 ,194/= and the sum pleaded in the Complaint for special damages is the sum of Kshs 4, 194/=.

21. In tort the claimant seeks reimbursement of the sum actually spent as expenses as a consequence of the wrongful act complained of. Refer to **HANN -VS- SINGH (1985) KLR 716**

22. This court finds that the Respondent produced receipts in support of the special damages in the total sum of Kshs 5, 194/=. The trial court only awarded what was pleaded in the Complaint. This court finds that the sum of Kshs 4, 194/= awarded as special damages was duly proved and was not excessive.

23. The trial magistrate awarded the sum of Kshs 600,000/= as general damages for the injuries sustained.

24. The injuries sustained by the Respondent as per the Complaint were;

- (a) Fracture to the skull
- (b) Head injuries.
- (c) Injury to the left knee with small cut wound and tenderness.

25. The Respondent testified to having sustained injuries to the knee and head and produced a Discharge Summary from Moi Teaching and Referral Hospital (**PEXb 1**). The Respondent was examined by Doctor Aluda who prepared a Medical Report and the Respondent was later examined by Dr. Gaya who also prepared a Medical Report.

26. The Medical Report by Dr. Aluda (PEXb 3) confirmed that the Respondent sustained a linear fracture of the skull and tenderness to the left knee. The doctor made a finding that the injuries sustained were severe in nature.

27. This Doctor corroborated the evidence of the Respondent on the injuries sustained.

28. The medical report of Dr. Gaya also confirms that the Respondent sustained a linear fracture to the skull and bruised left knee with a small cut wound.

29. The Appellants submitted that an award for Kshs 200,000/= would be a reasonable award and relied on the authorities;

(1) **MOHAMMED GHANI -VS- AGGREY KINYANGI IMBAGA HCCA NO. 102 OF 2003 (ELDORET).**

The Respondent was awarded the sum of Kshs 90,000/= as general damages for a head injury.

(2) **JOSEPHINE ANGWENYI -VS- SAMUEL OCHILLO HCCA NO. 125/2008 KISII.**

The Appellant award was enhanced to Kshs 70,000/= for soft tissue injuries accompanied by cerebral conclusion.

30. The Respondent submitted that the sum awarded of Kshs 600,000/= was sufficient compensation for the injuries sustained. The authorities relied upon were;

(a) **MOMBASA HCCC NO. 834/1995 MUTINDA SAMMY -VS- TAWFIQ BUS SWERVICES.** The Plaintiff sustained a depressed fracture of the skull and was awarded the sum of Kshs 650,000/= as general damages.

**(b) NAIROBI HCCC NO. 4077/1992 JACKSON K. KAMAU -VS- PETER MUTUKU & ANOTHER.** The Plaintiff sustained a depressed fracture of the skull and multiple soft tissue injuries and was awarded the sum of Kshs 650,000/=.

31. This court has had an opportunity to peruse comparable awards;

**(a) KAKAMEGA HCCA 21/2008 WEST KENYA SUGAR LTD -VS- SABION NDULA KAYUGIRA.** The Respondent had been awarded Kshs 500,000/= for a depressed skull with multiple soft tissue injuries.

**(b) MOMBASA HCCA NO. 39 OF 1998 (UR) ELPHAS WANIRA MAKIN -VS- EXCELLENT SECURITY SERVICES LTD.** Onyancha J awarded the Appellant general damages of Kshs 500,000/= for a depressed skull fracture.

32. Taking into account inflationary trends this court finds that the trial magistrate did not apply wrong principles and indeed used comparable awards when making the award. This amount awarded is not inordinately high nor an erroneous estimate of damages.

33. This court finds no reason to interfere with the award made by the trial court for General damages.

34. For those reasons, this appeal is hereby dismissed with costs to the Respondents.

Dated and delivered at Eldoret this 22nd day of January 2013.

**A.MSHILA  
JUDGE**

Coram: Before Hon. A Mshila J

CC: Oscar.

Counsel for the Appellants: Ms. Khaya

Counsel for the Respondents: Busienei holding brief for Andambi

**A.MSHILA  
JUDGE**