



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 140 OF 2009

GEORGE ONDIE MALAKI.....APPELLANT

VERSUS

JOHN CHACHA NALIANYA.....RESPONDENT

(An Appeal from the Judgment/Decree of Hon. G. A. M'masi Senior Resident Magistrate, in Eldoret C.M.C.C.No.308 of 2006 dated 30th July, 2006)

JUDGMENT

1. The accident occurred on the 14th February, 2005 when the appellant's driver whilst driving motor vehicle registration number KAG 485T veered off the road and knocked down the minor JCN hereby occasioning him with serious bodily injuries.
2. The trial magistrate found the appellant to be 100% liable for the accident and awarded the respondent the sum of Kshs.350,000/= as general damages for pain and suffering.
3. The appellant being aggrieved and dissatisfied with the judgment of the Hon. Grace M'masi delivered on the 30th July, 2009 preferred this appeal.
4. There are five (5) grounds of appeal listed in the memorandum of appeal which grounds are as listed hereunder:

- i) that the learned magistrate erred in law and fact in making an award in general damages that was manifestly excessive in the circumstances.;
- ii) that the learned magistrate erred in law and in fact in failing to take into account the pleadings the evidence and the submissions tendered by the defence showing that plaintiff was wholly to blame for the accident.
- iii) the learned magistrate erred in law and in fact in finding the appellant 100% liable in negligence for the injuries suffered by the respondent herein.
- iv) The learned magistrate erred in law and in fact in failing to consider that the plaintiff had admitted liability for negligence by failing to rebut through pleadings and/or evidence the allegations and particulars of negligence contained in the defence.
- v) The learned magistrate erred in law and in fact in finding the appellant liable in negligence for the injuries suffered by the respondent when no evidence to that effect was tendered.

5. At the hearing of the appeal, the parties opted to rely on their written submissions.
6. After reading the respective written submissions, this court finds the following issue for determination:
 - i) liability
 - ii) quantum of damages
7. This being the first appellate court, this court is duly bound to re-evaluate and re-assess the evidence and arrive at an independent conclusion. Refer to the case of **Gabriel Njoroge V. Republic** (1982 – 1988) 1KAR 1134.
 8. On the first issue of liability, it is the appellant's submission that the trial magistrate heard two versions as to how the accident occurred.
 9. The appellant submits further that the trial magistrate did not give sufficient reasons as to why she believed the respondent's version.
 10. That the trial magistrate failed to take into account the evidence of the appellant showing that the minor was wholly to blame for the accident.
 11. The respondent submits that the trial magistrate carefully considered the respondent's unrebutted evidence and was properly guided in her finding that the respondent had established his claim in a balance of probabilities.
12. This court concurs with the submissions of the respondent. The respondent's witness, **ABEL ATITWA (P.W.2)**, a neighbour gave evidence and narrated that he witnessed how the accident occurred.
13. As for the appellant, he did not call the driver of the motor vehicle to give evidence as to how the evidence occurred.
14. This court finds that the trial magistrate based her finding on liability on the uncontroverted and unchallenged evidence of P.W.2.
15. The court finds that the ground of appeal numbers 2, 3, 4 and 5 on the issue of liability have no merit as the trial magistrate properly guided herself in finding the appellant fully liable based on the unrebutted evidence of P.W.2. The appeal on liability is hereby dismissed.
16. On the issue of quantum of damages, the appellant contends that the award made of Kshs.350,000/= was manifestly excessive in the circumstances.
17. The appellant contends that the authorities relied upon by the trial magistrate on the injuries sustained by the respondent were not comparable to the injuries in the cited authorities.
18. It was the respondent's evidence that the minor sustained fractures of the left tibia and fibula and bruises on the upper limbs and ankle.
19. The medical report by the respondent's doctor, Dr. Aluda was produced into court “*BY CONSENT*” and was marked as “*P. Exb.3 (a).*”
20. This court has had occasion to peruse the record of appeal with particular emphasis on the plaint, and the medical report and finds that the particularises of injuries as set out in the plaint are commensurate with those adduced in evidence by the respondent and is corroborated by the Medical Report.
21. Reference is made to the **Bhutt V. Khan** KLR 349 and 356 which sets down the principles which allows an appellate court to disturb an award for damages.

22. In the instant case the appellant submits that the award is manifestly excessive in the circumstances.
- 23 This court has had occasion to peruse the authorities cited by the appellant in the lower court and notes that the decision relate to the years 1984.
22. The court concurs that these authorities could not have properly guided the trial magistrate and the awards made therein were inordinately low.
23. The respondent had proposed to the trial magistrate an award of Kshs.400,000/= for general damages.
24. This court has perused the authorities cited by the trial magistrate in her judgment and is of the view that the award made of Kshs.350,000/= was reasonable and finds that her decision was based on comparable awards and comparable injuries.
- 25.This court finds that the trial magistrate considered relevant factors, to wit, the year the comparable awards were made and the rate of inflation.
- 26.This court finds no reason to disturb or interfere with the decision of the trial magistrate as the award is found to be reasonable.
- 27.For the reasons stated above, this court finds the appeal lacking in merit and hereby dismisses the appeal.
- 28.The respondent shall have costs of the appeal.

It is so orders.

Dated, and Signed this 18th day of March, 2013

A. MSHILA

JUDGE

Dated, Signed and Delivered at Eldoret this 19th day of March, 2013.

JUDGE