



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO.188 OF 2010

KENYA COMMERCIAL BANK.....1ST APPELLANT

EDWIN OTIENO ODHIAMBO.....2ND APPELLANT

VERSUS

STANLEY KEMBOI CHESORWO.....RESPONDENT

(An Appeal from the Judgment/Decree of Hon. N. Shiundu, Resident Magistrate, in Eldoret
P.M.C.C. No.340 of 2010 dated 13th September, 2010)

JUDGMENT

1. The respondent sustained injuries arising from a road traffic accident when the motor cycle he was riding collided with appellants' motor vehicle registration number KAS 039Q.
2. The trial magistrate made an award in the sum of Kshs.320,000/= as general damages. Liability was apportioned on a ratio of 80:20% with the appellants bearing the larger portion.
3. The appellants being dissatisfied with the decision of the Hon. N. Shiundu, Resident Magistrate, Eldoret, preferred this appeal and listed seven (7) grounds of appeal in their Memorandum of Appeal.
4. The grounds of appeal as as listed hereunder:

(i) The learned trial magistrate erred in law and in fact and misdirected himself in finding the appellants 80% liable notwithstanding the evidence on record to contrary.

(ii) The learned trial magistrate erred in law and in fact in failing to appreciate the fact that the onus of proof was on the plaintiff and therefore shifted the burden by holding that the plaintiff had proved his case to required standards on the basis of scanty evidence whereas there was overwhelming rebuttal evidence.

(iii) The learned trial magistrate erred in law and in fact in failing to consider the evidence and submissions of the defence and critically analyse the same and accord it due weight to the extent that it was able to prove that this case brings about two competing versions of the story as to the occurrence of the alleged accident and at worst, the parties ought to have shouldered equal apportionment at blame.

(iv) The learned magistrate erred and misdirected himself as to the occurrence of the alleged accident. As even the police officer who purported to give evidence was emphatic he could not ascertain who caused the accident as he was not the investigating officer.

(v) The learned trial magistrate erred in law in failing to appreciate and apply the principle applicable in circumstances such as where there is no concrete evidence to determine who is to blame between the driver and the motor-cyclist

(vi) The learned trial magistrate erred in law and in fact in finding the appellants liable at all on the face of all available evidence.

(vii) The learned trial magistrate erred in law and in fact in awarding general damages that were manifestly excessive which were not in line with the respondent's injuries and which were against the tenor, spirit and principle of awarding general damages and incompatible with recently decided authorities.

5. At the hearing of the appeal, the parties chose to rely on their written submissions.

6. Upon reading the respective written submissions of both parties, this court finds two (2) issues for determination:

(i) liability

(ii) quantum of damages.

7. This being the first appellate court, it is incumbent upon this court to re-assess and re-evaluate the evidence on record and to arrive at an independent conclusion. Refer to **Jumba Holding Limited T/a Baharini Chalets V. Nadum Said** [2006] eKLR.

8. It is the appellants' contention that the versions as to the occurrence of the accident were not properly addressed by the trial magistrate.

9. It was submitted that from the evidence on record, both parties equally contributed to the occurrence of the accident.

10. The appellant further submitted that where there exists intricate evidential conflict and where there was no clear evidence on the occurrence of an accident, the best course to be adopted was to apportion liability on a 50:50% basis. Reference was made to the cases of **Berkley Steward & Others V. Waiyaki**, [1982 – 1888] 1KAR 118 and **Eliud Sabuni V. Kenya Commercial Bank**, HCCC No.37 of 2000.

11. The appellant urged the court to apportion liability on the aforementioned ratios as there was no valuable, reasonable nor independent evidence to support either the appellants' version or the respondent's as to how the accident occurred.

12. On the issue of quantum of damages, the appellants referred this court to the submissions made before the trial court and urged the court to re-evaluate and to make an award commensurate with the respondent's injuries.

13. The appeal was opposed by the respondent and he associated himself, totally, on the findings and decision made by the trial magistrate on the issue of liability.

14. The respondent urged the court not to interfere with the trial magistrate finding on liability and the award on quantum of damages.

15. Upon re-evaluating the evidence on record, the evidence of Corporal Ayub Pache (P.W.1), he testified that it had been noted in the Eldoret Occurrence Book that the appellants' driver was to blame for the accident.

16. P.W.1 produced the Police Accident Abstract Report and the report was marked as "P EXB. 7"

17. The evidence of the respondent was that the appellants' driver joined the main Highway from a junction. The respondent was already on the Highway and the said driver should have allowed

- the respondent to pass.
18. The evidence of the appellants' driver D.W.1 EDWIN OTIENO ODHIAMBO was that motor cycle was "**on coming**" that it was 300 meters way. He (D.W.1) then crossed to the left lane going towards Nakuru.
 19. After careful re-assessment of the evidence on record, this court finds the appellants' driver liable for the accident. His evidence shows that he was driving **towards Eldoret** and he states that the motor cycle was "**on coming**" and he could therefore see it.
 20. It is apparent from the Appellants' driver's evidence that he drove to the other side of the road heading "**to Nakuru**" which is in the opposite direction to Eldoret without ascertaining whether it was safe to do so and without due care and attention to other road users, particularly the respondent.
 21. This court finds that the appellants' driver was to blame for the accident and finds no merit in this ground of appeal in liability and it is hereby dismissed.
 22. As there is no opposition by the respondent on the trial magistrate's findings on liability, the respondent having associated himself with the said findings, this court finds no reason to interfere with the trial magistrate's apportionment of liability and adopts the same.
 23. On the issue of quantum, the evidence of the respondent on his injuries is uncontroverted and unchallenged.
 24. The P3 form, the treatment notes and the Medical Report prepared by Dr. S.I. Aluda were all tendered in to evidence and marked as PeExhs. 3(a), 3(b), 3(c), 5, 6(a) and 6(b).
 25. The trial magistrate considered the authorities submitted by both parties on quantum. The Respondent proposed an award of Kshs.800,000/= whereas the appellant proposed the sum of Kshs.40,000/-. The trial magistrate made an award of Kshs.320,000/- which he considered to be adequate compensation.
 26. After perusal of comparable awards i.e. **Soren Peterson & Another V. Charles Muhavi Isinga** [2008] eKLR (where the injuries were slightly more severe but comparable) where an award of Kshs.40,000/= was granted as general damages.
 27. This court finds that after the award is subjected to contribution, the award becomes reasonable.
 28. This court finds no reason to interfere with the award made by the trial magistrate as the award is not manifestly excessive and is found to be in line with comparable awards and that the trial magistrate did not apply wrong principles of law when arriving at his decision. Refer to the case of **Butt V. Khan** (1977) 1 KAR 1.
 29. This ground of appeal is found lacking in merit and is hereby dismissed
 30. In conclusion, the appeal is found lacking in merit and it hereby also dismissed.
 31. The respondent shall have the costs of this appeal.

It is so ordered.

Dated and Signed this day of....., 2013

A. MSHILA

JUDGE

Dated, Signed and Delivered at Eldoret this 26th day of June, 2013.

G. W. NGENYE MACHARIA

JUDGE