



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 202 OF 2011

BUZEKI ENTERPRISES LTD APPELLANT

VERSUS

JOSEPH AMUDIRA RESPONDENT

(Being an appeal from the Judgment and decree of the Senior Resident Magistrate, Hon. A. Alego in Eldoret Chief Magistrate's Civil Case No. 695 of 2010 delivered on 18th November, 2011)

JUDGMENT

The Appellant filed this appeal after being dissatisfied with the Judgment made in Eldoret Chief Magistrate's Civil Case No. 695 of 2010. The Appellant had been sued by the Respondent (then the Plaintiff) for general and special damages following injuries sustained as a result of a road traffic accident along Eldoret - Webuye Road. The Respondent was a cyclist and was apparently knocked from behind by motor vehicle registration number KBH 032J a semi-trailer driven by the Appellant's driver.

The Respondent is said to have sustained the following injuries:-

- (a) Swollen scalp and tender with cut wound.
- (b) Right forearm swollen and tender.
- (c) The abdomen was tender and acute.
- (d) Heamoperitoneum (bleeding in the abdominal cavity)

In its Judgment, the trial court apportioned liability in the ratio of 95:5 per cent in favour of the Plaintiff. Damages were then awarded as follows:-

General damages	-	Ksh. 750,000/=
Less 5% liability	-	<u>Ksh. 37,500/=</u>

Sub Total - Ksh. 712,500/=

Special damages

Respondent was also awarded costs and interests.

The Appellant has filed the following grounds of appeal:-

1. The learned Magistrate erred in law and fact in awarding general damages that were manifestly excessive in the circumstances.
2. The learned trial Magistrate erred in law and in fact in failing to apportion liability as against the plaintiff and the defendant against the weight of the evidence on record.
3. The learned Magistrate erred in law and in fact in finding the defendant 95% liable contrary to the evidence on record.
4. The learned Magistrate erred in law and in fact in not finding the plaintiff 100% liable contrary to the evidence on record.
5. The trial Magistrate erred in law and fact in not taking into account or considering the submissions of the Appellant and evidence adduced.
6. The learned trial Magistrate erred in law and fact in failing to take into account the pleadings tendered by the defence showing that the plaintiff was to blame for the accident.
7. The learned trial Magistrate erred in law and in fact in failing to consider pertinent factors which she ought to have considered while making the awards on both liability and quantum.
8. The learned trial Magistrate erred in law and in fact in awarding general damages which were so excessive despite liability not being proved by the plaintiff as against the defendant.
9. The learned Magistrate erred in law and in fact in considering irrelevant issues contrary to the evidence on record in arriving at her judgment.
10. The learned Magistrate erred in law and in fact in failing to find that the plaintiff had failed to prove his case to the required standard.
11. The learned Magistrate erred in law and in fact in not considering the evidence before her in arriving at her judgment.

In its defence filed on 10th March, 2011, the appellant denied liability in total and urged the court to dismiss the suit.

It is well settled law that the duty of the first appellate court is to consider the evidence adduced before the trial court re-evaluate it and make its own conclusions, bearing in mind that it has neither seen nor heard the witnesses - See **PETERS -VS- SUNDAY LTD (1958) E.A. 424, SELLER AND ANOTHER -VS- ASSOCIATED MOTORS BOARD CO. LIMITED & OTHERS (1968), EA. 123.**

It is also settled law that the appellate court will not normally interfere with the findings of the trial court unless it is demonstrated that the trial court in arriving at its findings, acted on the wrong principles and the findings were based on no facts and evidence tendered before it.

LIABILITY

The Plaintiff called a total of four witnesses. PW1, (the Respondent) testified that on 24th October, 2009, he was riding his bicycle from Webuye towards Eldoret direction on the extreme left side. He said that a lorry hit him from behind and he lost consciousness. That when he came to, he found himself at the Moi Teaching & Referral Hospital where he was admitted until 18th November, 2009. He stated that he knew the motor vehicle that hit him after he reported the matter at the Police Station.

PW3, Police Corporal James Momanyi confirmed that indeed the accident occurred on 24th October, 2009. He said that the accident was reported at Turbo Police Station by one Michael Kipsono Chemwenon the driver of the motor vehicle registration No. KBH 032J/ZD 09669 Mercedes Benz trailer. That he was accompanied to the scene along Eldoret - Webuye Road by his colleague one Police Constable Pius Kre. That at the scene they saw blood stains on the left side of road as one faces Eldoret from Webuye direction. That neither the victim nor the vehicle and bicycle were at the scene. That on the following day they traced the victim Joseph Amudira at Moi Teaching & Referral Hospital.

He further stated that the plaintiff was issued with a P3 form and a Police Abstract but he never returned the P3 form to the police.

He said that no one was charged in court as investigations could not be completed without the P3 form being returned to the police. He produced the Police Abstract, Road Sketch plan and Inspection Reports as P. Exhibits 4, 8, 9 and 10 respectively.

PW4, Jacob Mahingo said that on the material day at about 4.00 p.m., he was walking home from the shop when he saw a lorry being driven from the Webuye direction at a high speed. He said the Respondent was riding his bicycle from the road towards Kipkaren and was on his side. That the lorry then hit him and he fell 10 metres into the bush. He stated that he helped the Respondent to Lumakanda District Hospital for treatment.

From the foregoing, it is clear that both the lorry and the Respondent were on the same side of the road at the time of the accident. I have seen the sketch plan drawn by PW3 and produced as P. Exhibit 8. The same is only contained in the original lower court record but was not compiled in documents contained in the Record of Appeal. A Supplementary Record of Appeal ought to have been filed so as to include this document.

Be that as it may, the sketch plan does not bring out a clear picture on exactly where the point of impact was. All that the map shows are marked pot holes in two positions on the left lane leading towards the Eldoret direction. At the extreme left side, off the road is marked some blood stains which are about 1.5 feet from the edge of the road. The point at which the blood stains are found cannot necessarily be deemed to have been the point of impact. This is so because the victim may have spilt the blood at the point he rested. Moreover, both the vehicle and the bicycle were not found at the scene hence it was difficult for PW3 to discern at which point both the vehicle and the bicycle collided.

In the circumstances, I would also say that it is difficult to tell from what distance into the left lane the lorry hit the bicycle. But one thing is clear, that PW1 was hit while he was riding on the left side of the road. The lorry was also driving on the same side of the road. It is the lorry that drove into the bicycle. Hence the onus lay on the lorry driver to ensure that he kept a safe distance so as not to hit the Respondent.

The defence called only witness, the driver of the truck lorry who stated that it is the cyclist who hit him. It was his testimony that the accident occurred at the shopping centre, an area that would be well populated. He called no witness to controvert the Plaintiff's evidence. I find the Plaintiff's evidence, in the circumstances more weighty and easy to belief.

However, given that the lorry was also on its lane, it is my view that the Respondent ought to

shoulder some responsibility. The trial court therefore properly directed itself in finding that the Respondent failed to fix his bicycle with a side mirror which would have enabled him to see the lorry from a distance. He also failed to aid the police in completing their investigations by failing to return the P3 form. For this reason, the 5% contributory negligence apportioned to him was based on good evaluation of evidence and was not an error or a misdirection on the part of the trial court.

QUANTUM

Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. Therefore an appellate court will only normally interfere with the award on general damages on the following grounds:-

- (a) When the award is inordinately so high.
- (b) When the award is inordinately so low.
- (c) When the estimate is erroneous.
- (d) When the award is based on wrong factors.
- (e) When the award is founded on wrong principles of law.

See case of **OSSUMAN DHAHIR MOHAMED & ANOTHER -VS- SALURO BUNDIT MUHUMED**, Omollo, Shah & Pall, JJA while relying on **KIGA RAGARI -VS- AYA (1982 - 88) 1 KAR 768** and **CHEGE -VS- VESTERS (1982 - 88) 1 KAR, 1021:-**

"Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees"

In **KIVATI -VS- COASTAL BOTTLERS LTD CIVIL APPEAL NO. 69 OF 1984**, the Court of Appeal said:-

"The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

The Respondent was admitted in hospital between 24th October, 2009 to 18th November, 2009, which was a period of about twenty three (23) days. His discharge summary was produced by PW2, Doctor Paul Kipkorir Rono of Moi Teaching & Referral Hospital where the Respondent was admitted. The same was marked as P. Exhibit 2. He also produced the Respondent's P3 form as P. Exhibit 5 and three X-Ray forms as P. Exhibits 7 (a), (b) and (c) respectively.

PW2 testified that the Respondent sustained head injuries, fracture of the right upper limb and blunt abdominal injuries.

A medical report (P. Exhibit 3 (a)) was produced by PW1 (Respondent). The same shows that the Respondent sustained the following injuries:-

- (a) Swollen scalp, tender with a cut wound.
- (b) Swollen and tender forearm.

- (c) Tender abdomen and acute.
- (d) Hemoperitoneum (bleeding in the abdominal cavity).
- (e) X-Ray of the forearm showed a fracture of the right ulna, of which open reduction was done and a pin and screws applied.

The Respondent's counsel had submitted on an award of Ksh. 800,000/= but did not cite any case law.

The Appellant's counsel on the other hand submitted on an award of Sh. 50,000/=. He cited the following case law.

1. BONIFACE MBITHI MBALUTO -VS- JOHN NJAI KIMANI & ANOTHER NAIROBI HCCC. NO. 533 OF 2001 - in a Judgment delivered on 25th June, 2003, general damages for pain, suffering and loss of amenities were awarded at Ksh. 80,000/= for:-

- Mouth injuries with fractured right upper central tooth.
- Cut wound on upper and lower lips.
- Soft tissue injuries and bruises on face.
- Bruises on right knee and left wrist

2. SAFARI KYALO -VS- MAURICE MUIA MUASYA - NAIROBI HCCA. NO. 159 OF 2001

General damages of Ksh. 70,000/= was awarded on 4/5/2005 in which the Appellant suffered injuries to the nose, blunt fracture to the eye and bruises on the face.

Given the injuries the Respondent suffered I would be persuaded by the authority in the case of **CHAO -VS- DHANJAL BROTHERS LIMITED & 4 OTHERS (1990) KLR, 482**. In this case, the Plaintiff suffered lacerations on her face, severe abdominal pain and hemorrhage and a comminuted fracture of the shaft of her right femur. She was awarded general damages of Ksh. 310,000/=.

In my view, considering the above authority and the time the Judgment was delivered, an award of Ksh. 550,000/= would suffice as general damages. I have also given regard to the fact that the injuries have fully healed.

In the result I make the following award and order:-

- | | | |
|---------------------------------|---|-------------------------------|
| (a) General damages | - | Ksh. 550,000/= |
| Less 5% contributory negligence | - | <u>Ksh. 27,500/=</u> |
| Sub-Total | - | Kshs. 522,500/= |
| (b) Special damages | - | <u>Kshs. 2,100/=</u> |
| Total payable | - | <u>Kshs. 520,400/=</u> |

(c) Half the costs of this appeal shall be payable by the Appellant.

(d) Costs of the lower court suit shall be paid by the Appellant less 5% (of the assessed

costs.

It is so ordered.

DATED and DELIVERED at ELDORET this 8th day of August, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

Langat holding brief for Songok for the Appellant

No appearance for Mr. Andambi & Co. for the Respondent - Duly served with Judgment Notice