



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
[CORAM: AZANGALALA, J.]

HCCA NO. 88 OF 2008

BETWEEN

PATEL SHAILESH KESHULAL ::::::::::::::: APPELLANT

AND

PETER LOGOM EKHARANI ::::::::::::::: RESPONDENT

[An appeal from the Judgment and decree of the Chief Magistrate's Court (I. Maisiba (RM)) dated 25/7/2008 in CMCCC No. 407 of 2007]

JUDGMENT

This appeal is by **Patel Shailesh Keshulal**, the defendant in the original action from the judgment and decree of the Resident Magistrate (**I. Maisiba**) in Eldoret Chief Magistrate's Court Civil Case Number **407 of 2007 (Peter Lojom Ekharani –vrs Patel Shailesh Keshulal)**. In that action, the Respondent, **Peter Lojom Ekharani** pleaded that the appellant's driver, servant or duly authorized agent, drove motor vehicle Registration No. **KAP 992 V** so negligently, carelessly and/or recklessly that it knocked him down, thus occasioning him serious body injuries. In the particulars of negligence, the respondent stated that the said vehicle was driven without regard for other road users and in particular the respondent and in the particulars of injuries, sustained by the respondent, the respondent stated that he had among other things sustained dislocations of the right shoulder, right wrist joint, left elbow joint and right elbow joint.

The appellant denied the respondent's claim particularly the negligence alleged and the injuries. At the trial, the respondent testified and called **Dr. S.I. Aluda** and **Patrick Kiprono**, a Clinical Officer. He stated that on the material date as he was riding a bicycle in Elgon View Estate, he was hit by the appellant's vehicle and sustained injuries on his left leg. He lost consciousness and was taken to Medihealth hospital where he received outpatient treatment. He was also treated at Huruma Clinic. He produced the treatment notes from the two institutions. He blamed the appellant's driver for the accident.

Dr. S.I. Aluda told the trial court that the respondent had dislocations to the left shoulder joint, the left elbow joint, the right wrist joint and the left elbow joint in addition to soft tissue injuries. He produced a medical report of those injuries.

Patrick Kiprono, the Clinical Officer at Uasin Gishu District hospital, testified that the respondent was

treated at Uasin Gishu District hospital for soft tissue injuries after a road traffic accident. The injuries included a dislocated wrist and a dislocated patella in addition to soft tissue injuries.

The appellant did not offer any evidence at the trial but his counsel submitted that the respondent was the author of his own misfortune. The learned trial Magistrate did not believe him. He held that the respondent had proved his case against the appellant whom he held 100% liable and awarded to the respondent Kshs 480,000/= general damages for pain and suffering and Kshs 2,000/= special damages.

The appellant was not satisfied and has appealed to this court on 6 grounds expressed as follows:-

- 1). **That the learned trial Magistrate erred in law and in fact in failing to take into account the evidence tendered by the appellant.**

- 2). **That the learned trial Magistrate erred in law and in fact in finding the appellant 100% liable for the injuries sustained by the respondent despite evidence being adduced by the appellant.**

- 3). **The learned trial Magistrate erred in law and in fact in failing to consider submissions made by the defence counsel.**

- 4). **That the learned trial Magistrate erred in law and in fact in awarding special and general damages which were so excessive despite liability not being proved by the respondent.**

- 5). **That the learned trial Magistrate erred in law and in fact in not following the rules of precedent in awarding general damages.**

This being a first appeal, I am duty bound to reconsider and re-evaluate the evidence which was adduced before the lower court and make my own evaluation and draw my own conclusions. In doing so, I should bear in mind that I did not have the advantage of the trial court of seeing and hearing the witnesses testify. The court should therefore be slow to disturb findings of fact of the trial court. (See **peter –vrs- Sunday Post Limited 1958 E.A. 424**).

I must therefore examine with care whether the findings of fact by the learned trial Magistrate were not based on evidence adduced before him or whether there was a misapprehension of the evidence or that the learned trial Magistrate acted on wrong principles in arriving at those findings of fact. The respondent testified that he got involved in a road accident at Elgon View Estate. He was riding his bicycle when he was hit by motor vehicle registration number KAP 992 V thereby sustaining injuries to his left leg. He blamed the driver of the said motor vehicle. In cross-examination, he testified that the said driver turned suddenly and he rammed into one of its tyres. In my judgment, the respondent demonstrated that the driver of the said motor vehicle failed to keep any or any proper look out or at all for other road users including the respondent. The appellant did not adduce any rebuttal evidence. The only evidence before the learned trial Magistrate placed blame for the accident upon the appellant's driver. The learned trial Magistrate was in the premises, entitled to find the driver of the appellant 100% liable for the accident. In the premises, I dismiss the appeal against liability.

With regard to quantum, the learned trial Magistrate relied upon Nakuru HCCC No. 209 of 1996 in awarding to the respondent Kshs 480,000/= as general damages for pain and suffering. He also found that the respondent had suffered a dislocated right shoulder, a dislocated right elbow, a dislocated right wrist and a dislocated left elbow. He made those findings, no doubt, on the basis of **Dr. S.I. Aluda's** report. That report however, seemed to exaggerate the injuries sustained by the respondent. I say so, because the respondent himself testified that he only sustained injuries on his left leg. P.W.3, **Patrick Kiprono**, the Clinical Officer at Uasin Gishu District Hospital, testified about the respondent sustaining a dislocated right wrist and a dislocated left patella – in addition to soft tissue injuries. It is illustrative that P.W.3 did not testify of a dislocated left shoulder and a dislocated elbow.

I have not read Nakuru HCCC No. 209 of 1996 as the full report was not availed to me. The extract annexed to the respondent's submissions before the trial court however shows that the plaintiff therein sustained a fracture of the left femur, an injury to the right knee joint and had ugly scars. **K.**

Remita J., (as he then was) awarded Kshs 514,907.05 to the plaintiff therein. Assuming that extract was correctly extracted, it is obvious that the plaintiff in that case suffered more serious injuries which included a fracture. The case would not therefore have provided the best guide to the learned trial Magistrate in his assessment of the damages payable to the respondent.

The principles upon which a court on appeal may interfere with the quantum of damages awarded by a trial court are well settled. (see **Kenfrom Africa Limited T/A (Meru Express Service, Gathongo Kanini –vrs- A.M. Lubia and Olive Lubia [1982 -88] IKAR 727, Ilango –vrs- Monyoka [1961] E.A.705, Leukemia Ranching & Farming Cooperative Society Limited –vrs- Karototo [1970] E.A. 44 and David Kipragat & Another –vrs- peter Okabe Rango [CA No. 68 of 2004 Eldoret](UR).**

All the authorities are united that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. (See also **Butt –vrs- Khan (CA No. 40 of 1977 (UR).**

I have already found that the learned trial Magistrate misapprehended the medical evidence adduced before him. He also relied on an authority in which the victim suffered more serious injuries than the respondent herein. He, in the premises erred in principle. I am therefore entitled to interfere. As the respondent only sustained soft tissue injuries and was treated as an outpatient, it is my considered opinion that the sum of Kshs 480,000/= he was awarded as general damages was inordinately high and represents an entirely erroneous estimate. In my judgment, an award of Kshs 250,000/= general damages for pain and suffering would adequately compensate the respondent.

With regard to special damages, I have come to the conclusion that the same were specifically pleaded and strictly proved as required and I will not interfere with the award of the learned trial Magistrate in that respect.

In the end, I do allow the appeal to the extent that the sum of Kshs 480,000/= awarded for pain and suffering is reduced to Kshs 250,000/=.

The appellant has partially succeeded. I award him 1/3 of the costs of this appeal.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF FEBRUARY 2011.

**F. AZANGALALA
JUDGE**

Read in the presence of :-

1. Mr. Songok for the appellant and
2. Mr. Andambi for the Respondent.

**F. AZANGALALA
JUDGE
15/2/2011**