REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 12/2007

SHAH RAMJI PUNJA LTD.....APPELLANT

VERSUS

PETER WANJALA KILWAKE.....RESPONDENT

JUDGMENT

1. By a decree in PMCC No. 681 of 2004 Kitale, Judgment was entered in favour of the respondent for a sum of Ksh. 181,500/= being general damages Ksh. 180,000/= and special damages Ksh. 1,500/=. The respondent was also awarded costs and interest of the suit. Being aggrieved by the said judgment the appellant appealed and raised the following grounds of appeal:-

1. THAT the learned Trial Magistrate erred in law and in fact in finding the defendant 100% liable while their driver was never charged with careless driving in the 1st instance.

2. THAT the learned Trial Magistrate erred in law and in fact in failing to take into account that the plaintiff being a driver ought to have shared in liability.

3. THAT the learned Trial Magistrate erred in law and in fact in disregarding the defendant's submissions and the authorities in support thereof without any reasonable cause to do so.

4. THAT the learned Trial Magistrate erred in law and in fact in awarding the plaintiff damages which were quite high in circumstances of the case.

5. THAT the learned Trial Magistrate erred in law and in fact in evaluation of evidence on record regarding injuries suffered by the plaintiff.

2. Counsel for the appellant in further arguments, faulted the decision by the trial Magistrate for finding the appellant 100% liable for the accident. This is because the respondent was one of the drivers of motor vehicle registration No. KAQ 907C which was involved in collision with motor vehicle Registration No.

KAH 941U. The respondent did not make an effort to avoid collision, although he said he was driving at 30Km per hour, He should have swerved to avoid the collision. Thus the learned trial magistrate should have found he contributed to the accident.

3. Secondly, there was no Inspection Report that was relied on to prove that the respondent's motor vehicle was in good mechanical condition. For that reason the trial Court erred by attributing the entire liability to the appellants driver. Moreover, the appellant's driver was not charged with a traffic offence. Counsel urged the court to apportion liability of 40% to the respondent.

4. The judgment of the trial Court was also challenged on the assessment of quantum in respect of general damages. It was submitted that the plaintiff suffered minor injuries being:-

(a) A deep cut wound on the right supra orbital region.

(b) Both shoulders were broken and tender

(c) Fracture on the left clavicle

(d) Brunt trauma to the chest which was tender on the right rib-cage.

(e) Swollen right leg with multiple bruises.

5. According to the prognosis by Dr Aluda, these were soft tissue injuries and going by similar injuries and decided in other courts, general damages should not have been more than Ksh. 100,000/=. Counsel referred to several decisions that were cited to guide the court in the defendants written submission especially the case of:-

1. **Florence Muthoni Ndatin Vs Danson Njiru Masingo H.C.C No. 538 of 1993 Nairobi** in which the plaintiff was awarded Ksh. 60,000/= for almost similar injuries and

2. **Ngwino Leano Lanza V Mwanu Gatheche H.C.C No. 4671 of 1991 Mombasa** where the plaintiff was awarder a sum of Ksh. 80,000 for pain and suffering and loss of amenities.

6. This appeal was opposed, counsel for the respondent submitted that the respondent suffered for more severe injuries and the award of Ksh. 180,000 is even below the current awards for hard tissue injuries. The respondent should have been awarded Ksh. 300,000 going by the cases cited before the trial court especially the case of; **Jonathan Warito Mutiso V David Wambua Kyaina Moonakas Civil Case No. 127 of 1999** where the plaintiff was awarded Ksh. 300,000/- in 2001. Moreover, the trial Magistrate did not misdirect herself on any matter. As regards the authorities that were cited by the appellant, they were too old to guide the court and bearing in mind the inflation, the award of kshs. 180,000 is very modest.

7. On the issue of liability, the appellant did not even contest at the hearing, the trial magistrate was guided by the evidence that when the accident occurred the respondent was driving uphill, the appellant who was driving down hill swerved as he was trying stated that he was trying to avoid a pot hole and that is how he turned to the right and it is the appellant motor vehicle that hit the respondent.

8. The above is the summary of the salient matters that were raised in this appeal. This being a first appeal, this court is mandated by law to re-evaluate the evidence before the trial court and arrive at its own independent opinion on whether or not to interfere with the judgment of the trial court. In so doing, I must bear in mind that it never heard or saw witnesses who testified and give due allowance for that. The principles to be followed by the first appellate court have been settled in a long line of authorities and such **c**ase is that of **Peter Vs Sundy {1958} E A page 429** which states as follows:-

"It is a strong thing for an appellant court to defer from the finding. On a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellant court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with the caution: It is not enough that the appellant court might itself have come to a different conclusion."

9. The principle issue for determination in this appeal is whether the trial Magistrate was guided by cogent evidence to arrive at the issue of liability and whether the injuries suffered by the respondent were commensurate to the assessment of the 180,000/=.

Going by the evidence on record, it is only the respondent who testified on 13th December, 2005, Thereafter the defence counsel was allowed several adjournments, and on 27th September, 2006, it was recorded as it was recorded as follows:-

"**By consent the defence by DW 1 in Civil Case No. 680/2004 is applied in this file. The medical report by Dr Gaya marked as D Exhibit 1".**

10. Parties filed written submissions, I have gone through the entire evidence before the trial court, the documents that were produced as exhibit as well as the exhibits that were relied on by both counsel in support of their respective positions. The evidence by the respondent was supported by the medical report by **Dr. Aluda** and the discharge summary that shows the respondent was admitted at Trans Nzoia District Hospital and also list of the injuries and treatment given to the respondent. On liability, the defence case was slovenly conducted, the defendant did not testify, seems to have relied on evidence given in another case.

11. The learned trial Magistrate who heard and saw the witnesses attributed the entire blame on the appellant. I see no justifiable reason to interfere with both the findings of liability and assessment of damages. I have also considered decisions that were cited before the learned trial magistrate. I am in agreement with counsel for the respondent that the award of a sum of Ksh. 180,000/= General Damages is moderate. Besides, every case has got its own peculiarities . Taking into the injuries suffered by the respondent which were supported by a medical report and discharge notes from the hospital, I am not satisfied that the learned trial Magistrate erred or took into account any irrelevant factors or misapprehended any evidence.

12. For those reasons, I find no merit in this appeal, which is dismissed with costs to the respondent.

Judgment read and signed on 12th November, 2010

MARTHA KOOME

JUDGE