



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 12B of 2002

BHUPINDER SINGH BHANGRA APPELLANT

VERSUS

JOEL TUWEI KOECH (Minor suing through Mother and next friend

ESTHER KOECH CHEROP) RESPONDENT

JUDGEMENT

This is an appeal from the decision of the Honourable M. J. Kiptoo (Mrs) Senior Resident Magistrate delivered on 14th January, 2002 in Eldoret Senior Principal Magistrate's Court Civil Case No. 1174 of 2000.

In the said case the Plaintiff, a minor sued the Defendants through his next friend his mother. He claimed that on or about 6th August, 2000, the Plaintiff was lawfully cycling along Eldoret-Nakuru road when near Ngeria Area, the 1st Defendant so carelessly and recklessly drove and controlled motor vehicle registration number KAC 119 L Hino Lorry that he caused it to knock down the Plaintiff and thereby causing him serious injuries. A list of particulars of negligence was set out in the Plaint. The injuries allegedly sustained were:-

- (a) swollen scalp and forehead tender with bruises
- (b) blunt trauma to neck
- (c) blunt trauma to the chest
- (d) blunt trauma to the lumbar spine region
- (e) right shoulder swollen
- (f) dislocation of the left shoulder joint
- (g) left elbow swollen, bruises and lacerations
- (h) left knee – swollen, tender, bruised and lacerations
- (i) left ankle – swollen tender with bruises and lacerations

- (j) thighs swollen, bruises and lacerations
- (k) Right ankle and foot swollen and tender

The Learned Trial Magistrate found the Defendants liable

for the accident but allowed contributory negligence on the part of the Plaintiff. He assessed the liability at 90% - 10% ratio.

With regard to quantum of damages be awarded Shs. 170,000/= less the 10% contribution, special damages of Kshs. 2,000/= costs and interest.

The Plaintiff testified at the trial that he is 17 years old. On material day he was lawfully riding his bicycle along the Eldoret-Nakuru road. He was on the left side of the road. He was suddenly knocked from behind by a lorry which is motor vehicle registration number KAC 119 L Hino Lorry. The road was a straight stretch. There were no vehicles ahead and the traffic was not heavy.

In cross-examination, he admitted that there were bumps on the road at the place the accident took place. He said that he did not have side-mirrors on his bicycles. He fell on the left side of the road.

The Plaintiff's witness who was the driver of the lorry said that he was following a small vehicle and there was another vehicle from the Nakuru direction. There was also the cyclist on the left side of the road. He said that the small vehicle overtook him and then came back to the road. He said he hooted but it was too late. He claimed the cyclist is the one who hit the fuel tank.

I have considered the Memorandum of appeal, the proceedings and submissions. The Learned Trial Magistrate heard the testimonies of the witnesses. She was able to hear and see them. She considered the demeanour and credibility of witnesses.

From the facts, I find that the trial court's finding on liability to be fair and sound. The Plaintiff was riding his bicycle on the correct side of the road. He was on the left side. The Defendant's driver was driving from behind. He was in control of the vehicle and he could see well ahead. He overtook the cyclist when there was a vehicle ahead of him and another trailer passing towards the opposite direction.

The trial Court found that the cyclist was not in the middle of the road. The driver was responsible for the accident. He could have prevented or avoided it by just slowing down to let the other trailer pass him. He is the one over-taking and had the opportunity to slow down for a few minutes. In fairness, the Court awarded the Defendant an element of contribution by the Plaintiff.

This Court will not interfere with the finding on liability.

With regard to the quantum of damages the Law is quite well established. As decided in the Court of Appeal case – **CATHOLIC DIOCESE OF KISUMU –V- TETE (2004) 2 KLR 55.**

1. The assessment of general damages is at the discretion of the trial Court and the Appellate Court is not justified in substituting a figure of its own for that awarded by the lower Court simply because it would have awarded a different figure if it had tried the case at first instance.
2. An Appellate Court can justifiably interfere with quantum of damages awarded by a trial Court only if it satisfied that the trial Court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one, or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.

The Plaintiff pleaded that he sustained a dislocation of the left shoulder joint. Dr. Aluda did an X-ray of the chest and found that there was a dislocation of the right shoulder. He saw him on the said day of the accident and he is the doctor who treated him. The trial Court found that this injury existed as a

matter of fact.

It would appear as is the practice the Counsel submitted the Medical Reports by consent without calling the doctors as witnesses. While pleadings bind the party but I think that there was no prejudice to the Defendant in the misdescription of which shoulder was dislocated. I do not think it matters whether it was left or right since the Plaintiff did not seek enhancement of the award on basis of being right or left handed. In any case, this Court is of the view that even if the word "left" was omitted in the Plaintiff the result would have been the same.

The Appellant has not shown why the amount awarded was excessive or was an erroneous estimate. It has not been demonstrated that the trial Court applied wrong principles or took into account any irrelevant factor or misapprehended the law.

Taking the dislocation of the shoulder and all the soft tissue injuries which were substantial, I think that an award of Kshs. 170,000/= in 2001 was reasonable and fair. When the contributory portion is deducted, the amount was further reduced.

In all, I see no basis to interfere with the discretion of the trial Court.

I do hereby dismiss the appeal with costs to the Respondent.

DATED AND DELIVERED AT ELDORET ON THIS 21ST DAY OF MAY, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Ngugi holding brief for Mr. Cheruiyot for the Appellant

Mr. Nabasenge for the Respondent