

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 41 of 2005

JOSEPH G. KABERA.....1ST APPELLANT

JOSEPH MAINA GATHOGA.....2ND APPELLANT

VERSUS

GEORGE KIRUMBA KANGWARA.....1ST RESPONDENT

JOHN WAIGWA NDIRANGU.....2ND RESPONDENT

PETER NJUGUNA.....3RD RESPONDENT

JUDGMENT

The 1st respondent, George Kirumba Kangwara filed suit against the appellants and the 2nd and 3rd respondents seeking to be paid damages on account of injuries he alleged to have suffered on the 29th of August 2002 when motor vehicle registration number KAN 969G owned by the 3rd respondent, John Waigwa Ndirangu and driven by the 2nd respondent, Peter Njuguna (*wherein the 1st respondent was a lawful passenger*) was involved in a collision with motor vehicle registration number KAK 350H owned by the 1st appellant, Joseph Kabera and driven by the 2nd appellant, Joseph Maina Gathongo. The 1st respondent pleaded that the said collision occurred along the Nairobi-Nakuru road. He blamed the drivers of the two motor vehicles for being negligent in their driving and thus causing the said accident. The appellants and the 2nd and 3rd respondents filed defences to the suit filed by the 1st respondent. The appellants blamed the 2nd and 3rd respondents for the said accident. On their part, the 2nd and 3rd respondents blamed the appellants for the said accident.

At the hearing of the suit in the subordinate court it was agreed that the suit filed by the 1st respondent in this case would be a test suit on the issue of liability and the finding of the trial court in this suit would apply in Nakuru CMCCC Nos. 2157, 2164, 2160, 2158, 2153, 2159, 2142, 2161, 2162, 2165, 2321, 2163, 2252, 2246, 2166 of 2002. The trial magistrate heard the evidence that was adduced, by the parties in this suit and after considering the said evidence adduced held that the appellants were solely to blame for the accident that involved motor vehicles registration number KAK 350H and motor vehicle registration number KAN 969G. The appellants were therefore held to be 100% liable in damages to the 1st respondent. The trial magistrate assessed the general damages to be paid to the 1st respondent on account of the injuries that he sustained at Kshs 150,000/=. She also awarded the 1st respondent Kshs 2,000/= being the proven special damages.

The appellants were aggrieved by the decision of the trial magistrate and raised six grounds of appeal against the said decision. The said grounds of appeal may be summarised into two grounds; the appellants were aggrieved that the trial magistrate had held that the appellants were responsible for the accident involving the two motor vehicles after failing to

consider the evidence that was adduced by the appellants and after putting too much emphasis on the evidence adduced by the respondents. They faulted the trial magistrate for awarding the sum of Kshs 150,000/= to the 1st respondent as general damages which in their view was excessive putting into consideration the injuries that the 1st respondent had sustained during the said accident. They urged this court to set aside the judgment of the subordinate court and substitute it with an appropriate judgment of this court.

At the hearing of the appeal, Mr. Theuri Learned Counsel for the appellants urged this court to re-evaluate the evidence adduced before the trial magistrate's court and reach a decision overturning the finding of the trial magistrate that the appellants were solely liable for the accident involving the two motor vehicles. He submitted that the trial magistrate had erred in considering only the evidence which was adduced by the respondents in arriving at her decision. He complained that the trial magistrate had not considered the evidence that was adduced by the appellants on the circumstances of the accident. He submitted that all the witnesses who were called by the 1st respondent to testify on his behalf were interested parties in the outcome of the suit because they had filed suits against the appellants in other cases. He took issue with the evidence which was adduced by DW2 PC Christopher Mwangi, the police officer who produced the police abstract report. He submitted that the said officer had not conducted proper investigations to ascertain the circumstances leading to the said accident between the two motor vehicles. He stated that no sketch plan was produced in evidence by the said police officer. It was his submission that the accident between the two motor vehicles occurred in broad daylight on a straight tarmac road. He argued that there was evidence that the driver of motor vehicle registration number KAN 969G had seen the appellants motor vehicle for some time before the said accident took place but had not taken any reasonable steps to avoid colliding with the appellant's motor vehicle.

He further submitted that the reason why motor vehicle registration number KAN 969G could not avoid the collision with the appellants' motor vehicle was because the said motor vehicle was being driven at a very high speed. It was his argument therefore that the driver of motor vehicle registration number KAN 969G should have been found partially liable for the said accident. He submitted that the evidence on record supported the appellants contention that the said accident was contributed by the negligence of the driver of motor vehicle registration number KAN 969G because the point of impact was near the yellow line in the middle of the road. He submitted that the award of Kshs 150,000/= made to the 1st respondent was inordinately high taking into account the injuries that the 1st respondent allegedly sustained. He submitted that the 1st respondent had basically sustained soft tissue injuries. He took issue with the fact that the trial magistrate had not considered decided cases on similar injuries like the one sustained by the 1st respondent before assessing the said general damages to be paid. He urged this court to allow the appeal with costs.

Mr. Gekonga, learned counsel for the 1st respondent opposed the appeal. He submitted that the trial magistrate properly found that it was the driver of the appellants' motor vehicle who was to blame for the said accident. He submitted that the driver of motor vehicle registration number KAK 350H was carelessly overtaking another motor vehicle without putting into consideration that the oncoming motor vehicle registration number KAN 969G was too close. He submitted that the said accident occurred on the lane where motor vehicle registration number KAN 969G was being legally driven. He submitted that the appellants' driver overtook other motor vehicles in a place where there was a continuous yellow line, where the drivers were prohibited from overtaking other motor vehicles.

He further submitted that it was not true that the driver of motor vehicle registration number KAN 969G had not taken evasive actions to avoid the collision between the two motor vehicles. He argued that the driver of motor vehicle registration number KAN 969G had driven the said motor vehicle off the road to the left side of the road in an unsuccessful attempt to avoid the said accident. He submitted that there was sufficient evidence which established that indeed it was the driver of the appellants' motor vehicle who caused the said

accident. He further submitted that the police who were called to the scene after the accident, established that it was the driver of the appellants motor vehicle who was to blame for the said accident.

It was his submission that the two police officers who testified in the case i.e. PW 4 Cpl. Charles Nyakeya and DW2 PC Christopher Mwangi were independent witnesses who confirmed that the accident had occurred when the appellants motor vehicle left its lane and drove onto the lane where motor vehicle registration number KAN 969G was being lawfully driven. The police made a decision to charge the driver of motor vehicle registration number KAK 350H with the offence of careless driving. At the time the trial was concluded before the subordinate court, the said traffic case had not been determined. He further submitted that the 1st respondent had sustained serious injuries on his left hand and therefore the general damages awarded by the trial magistrate was fair in the circumstances. He urged this court to dismiss the appeal with costs.

Mr. Mongeri Learned Counsel for the 2nd and 3rd respondents associated himself with the submissions made by the 1st respondent. He submitted that the decision of the trial magistrate was arrived at after she had considered all the evidence that was adduced by the witnesses in the case. He submitted that the police had visited the scene of the accident and after investigating the cause of the accident, reached an independent decision that it was the appellants' driver who was to blame for the said accident. He submitted that the evidence adduced by the witnesses of the appellants were contradictory and could not support a finding that it was the driver of motor vehicle registration number KAN 969G who either caused or contributed to the said accident. He urged this court to dismiss the appeal with costs.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its independent determination whether or not to uphold the decision of the trial magistrate. As was held in **Selle & Anor – vs- Associated Motor Boat Company Limited & Others [1968] EA 123** at page 126 by Sir Clement De Lestang VP; *“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge's finding of fact if it appears either that he clearly failed on some point to take account of particulars circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholani (1955) 22 EACA 270).”*

In this case the issues for determination by this court are two fold; whether the trial magistrate properly appreciated the evidence adduced and reached the determination finding the appellants driver to be solely liable for causing the said accident. The second issue for determination is whether the general damages awarded to the 1st respondent was in accordance with the established principles of the law.

On the first issue, whereas the respondents testified that it was the driver of motor vehicle registration number KAK 350H owned by the appellants who caused the accident by carelessly overtaking another motor vehicle where it was prohibited, it was the appellants case that the driver of motor vehicle registration number KAN 969G who was to blame or substantially contributed to the said accident. I have carefully re-evaluated the evidence that was adduced before the trial magistrate's court. I have also considered the submissions made before me by the parties to this case. According to the evidence adduced by the 1st respondent and his witnesses, the two motor vehicles were travelling in opposite directions. Motor vehicle registration number KAN 969G was being driven from the Nakuru direction towards

the Nairobi direction whilst motor vehicle registration number KAK 350H was being driven from the Nairobi direction towards the Nakuru direction.

When the two motor vehicles approached the gate of Shiners Girls School, the 1st respondent and his witnesses testified that the driver of motor vehicle registration number KAK 350H overtook a smaller vehicle without taking into consideration the oncoming motor vehicle registration number KAN 969G. When the driver of motor vehicle registration number KAN 969G realised that they were going to collide head on with motor vehicle registration number KAK 350H, he took evasive action by swerving to the left side of the road but unable because the two motor vehicles were too close and the collision took place. The 1st respondent and his witnesses testified that the collision took place on the left side of the road as one faces the Nairobi direction. The accident therefore took place on the lane of motor vehicle KAN 969G.

On the other hand the appellants witnesses testified that the said accident occurred because the driver of motor vehicle registration number KAN 969G had carelessly overtaken another motor vehicle thereby colliding with motor vehicle registration number KAK 350H. They testified that the said accident occurred on the left lane of the road as one faces the Nakuru direction. It was therefore their testimony that the said accident occurred on their legitimate lane. In the face of this contradictory evidence by the appellants and the respondents, the trial magistrate relied on the independent evidence of the police officers who went to the scene after the accident to reach a determination that it was the appellants driver who was to blame for the accident. What was the testimony of these two police officers?

PW4 Cpl. Charles Nyakeya testified that the police investigated the case and established that it was the driver of motor vehicle registration number KAK 350H who had caused the accident as he overtook another motor vehicle without taking into consideration the vehicle which was coming from the opposite direction, in this case motor vehicle registration number KAN 969G. The police established that it was the appellants driver who was to blame for the accident. PW4 did not however visit the scene of the accident. DW2 PC Christopher Mwangi visited the scene of the accident and saw that the point of impact of the two motor vehicles was on the left lane of the road as one faces Nairobi. He testified that motor vehicle registration number KAK 350H collided with the right hand side of motor vehicle registration number KAN 969G causing it to overturn. After investigating the case DW2 reached the conclusion that it was driver of motor vehicle registration number KAK 350H who caused the accident. He made a decision to charge him with the traffic offence of careless driving. I have re-evaluated the totality of the evidence adduced by the parties to this suit. I am inclined to uphold the decision of the trial magistrate finding the appellants solely liable for causing the said accident. The evidence on record clearly points to the fact that the two motor vehicles collided when the driver of motor vehicle registration number KAK 350H left his lane and drove onto the lane that motor vehicle registration number KAN 969G was being driven. Due to the fact that the appellants driver suddenly entered into the lane where motor vehicle registration number KAN 969G was being driven, the said driver was unable to take evasive action to avoid the collision between the two motor vehicles.

I am not persuaded by the submission made by the counsel for the appellants that the police did not properly investigate the case. I find that the police properly investigated the case and reached the decision to charge the appellants driver with the offence of careless driving. The evidence adduced by the appellants witnesses and particularly DW4 was self serving and therefore the trial magistrate rightly disregarded it as it was contrary to the evidence of the independent investigation conducted by the traffic police. In the circumstances of this case therefore, I am not prepared to interfere with the finding of the trial magistrate who saw and heard the witnesses as they testified. I find no reason to interfere with the said decision because the said decision was arrived at after the trial magistrate took into account the entire evidence that was adduced by the parties to this suit. The appellants' appeal against the finding by the trial magistrate on liability is therefore dismissed. For the avoidance of doubt,

the judgment of this court on liability shall apply in Nakuru CMCCC Nos. 2157, 2164, 2160, 2158, 2153, 2159, 2142, 2161, 2162, 2165, 2321, 2163, 2252, 2246, and 2166 of 2002.

On quantum, this court is aware that the assessment of damages by a trial court is an exercise of discretion on the part of that court. This court will only interfere with the said exercise of discretion if it is established that the trial magistrate had failed to consider relevant factors in arriving at the said decision. The Court of Appeal in the case of Ali –vs- Nyambu t/a Sisera Store [1990] KLR 534 at page 538 quoted with approval the principles laid down by the Privy Council in Nance –vs- British Columbia Electric Railways Co. Ltd. [1951]AC 601 at page 613 where it was held that:

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint –vs- Lovell [1935] 1KB 354) approved by the House of Lords in Davis –vs- Powell Duffryn Associated Colliers Ltd. [1941]AC 601.”

In this case, the 1st respondent testified that he sustained injuries on his upper limbs during the accident. He produced the discharge summary from the Nakuru Provincial General Hospital as plaintiff’s exhibit No. 1. He also produced two medical reports prepared by Dr. Wellington Kiamba and Dr. Amos Otara. According to Dr. Kiamba, the 1st respondent sustained a degloving injury to the left forearm, laceration on the dorsal surface of the left hand and deep cut wound on the right wrist. He observed that there was a scar measuring 12cm X 5cm on the left arm of the 1st respondent. At the time of examination, there was a wound on the central part of the scar which had not healed. It was his opinion that the wound would heal but would leave a permanent scar. Dr. Otara similarly observed that the 1st respondent had sustained a degloving injury to the left forearm. He saw that the 1st respondent had a hyper pigmented scar on the lateral aspect of the forearm which was non-tender and which measured 12cm x 6cm. All the functions of the said arm were however normal. He was of the opinion that the 1st respondent had sustained soft tissue injuries which had healed with no loss of joint or limb function.

The trial magistrate after considering the submissions made by the parties to this suit, awarded the 1st respondent the sum of Kshs 150,000/= as general damages for pain suffering and loss of amenities. I agree with the appellants that the said award was inordinately high taking into account the injuries that the 1st respondent sustained. This court will therefore interfere with the said assessment of general damages by the trial magistrate. The authorities in respect of injuries similar to the one sustained by the 1st respondent mandates this court to award the 1st respondent the sum of Kshs 75,000/= as general damages for pain suffering and loss of amenities.

In the premises therefore, the appeal is partially allowed. The appeal on liability is dismissed but the appeal on quantum is allowed. The award of Kshs 150,000/= made by the trial magistrate as general damages to the 1st respondent is set aside and substituted by an award of this court of Kshs 75,000/=. The 1st respondent shall also be paid the sum of Kshs 2,000/= which was the proven special damages. Interest on the above amounts shall be paid from the 26th of January 2005 when the judgment was delivered by the subordinate court. The 1st respondent shall be paid costs of the subordinate court whilst the appellant shall be paid half of the costs of this appeal.

It is so ordered.

DATED at NAKURU this 23rd day of June 2006.

L.

KIMARU

JUDGE