REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 123 OF 2019

BENSON DULO ……..…… APPELLANT

-VERSUS-

JOSEPH WAIRE NJOROGE ……....……. RESPONDENT

(Appeal from the Judgment of the Chief Magistrate's Court at Eldoret (Hon C. Menya, SRM) delivered on 26th July, 2019 in CMCC No. 539 of 2015).

Coram: Hon. Justice R. Nyakundi

J.M Kimani & Co. Advocates for the respondent

Kitiwa & Co. Advocates for the appellant

J U D G M E N T

1. The Appellant was the original Defendant and the Respondent the Plaintiff in the original trial in Eldoret Chief **Magistrate's Court Civil Case No. 539 of 2015.** The Respondent instituted the said suit in the trial court for general and special damages, arising from injuries sustained from an accident involving motor vehicle registration number KBZ 866R driven by the Appellant. The Respondent attributed the occurrence of the said accident to the negligence of the Appellant.

2. The trial magistrate, in a judgment delivered on 26th July 2019, and found the Appellant to be 100%b liable. The trial magistrate having found the Appellant to be 100% liable awarded the Respondent general damages of Kshs. 450,000/= and special damages amounting to Kshs.17,510/= as well as costs of the suit.

3. The Appellant being dissatisfied with the said judgment lodged his memorandum of appeal dated 20th September 2019, raising the following grounds, namely:

1) The trial magistrate erred in law and in fact in holding the Appellant 100% liable without any evidence to that effect.

2) The trial magistrate erred in law and fact in failing to dismiss the Respondent's suit.

3) The trial magistrate erred in law and fact in failing to be finding that the Respondent had failed to prove his case on a balance of probabilities.

4) The trial magistrate erred in law and fact in failing to find that there was no accident that occurred.

5) The trial magistrate erred in fact in law in failing to analyze the evidence on record.

6) The trial magistrate erred in law and fact in failing to consider the Respondent's submissions on record.

7) The trial magistrate erred in law and in fact in awarding damages that were inordinately high.

8) The trial magistrate erred in law and fact in awarding damages that were not commensurate with the injuries sustained.

9) The trial magistrate erred in law and in fact in using wrong principles in assessing general damages.

4. The Appellant urged that the learned trial magistrate's judgment on both liability and quantum be set aside with an order dismissing the Respondent's case with costs.

5. When this appeal came up for hearing, parties agreed to dispose it by way of written submissions. Both parties filed their written submissions.

Appellant's submissions

6. The Appellant's case is that on 20th November, 2014 at around 9:00am he was driving towards Moi University at the corner around Kesses, he was keeping left when a pedestrian emerged from behind an oncoming motor vehicle which had stopped on the right-hand side of the road. That he hooted, braked and swerved to the left causing the Respondent retreated back to the right where he had come from. The Appellant maintains that there were no casualties and contends that later on in the day at around 5:00pm he learnt that someone was claiming that he had hit him. The Appellant submitted that the learned trial magistrate erred in law and fact in finding the Appellant 100% liable without evidence to that effect.

7. The Appellant submitted that on cross-examination **PW2 Laban Ngetich** had confirmed that he was 50 meters away from the scene of the accident and that he did not know whether the police officers visited the scene of the accident. He further submitted that PW3, the Respondent herein on cross-examination, confirmed to court that he did not see the motor vehicle that hit him and he was not aware that he was hit but was only told by people that he had been hit and injured on the leg, head and back.

8. The Appellant submitted that, on cross-examination **PW5, police constable David Kipsang,** had confirmed that he was not the investigating officer that had visited the scene of the accident and had only gotten the information about the alleged accident from the police abstract. That PW5 further confirmed that he did not have any occurrence book extract and therefore did not know whether a police file was opened with respect to the accident. It was the Appellant's submission that on further cross-examination PW5 told court that before a police file is opened in respect to an accident, preliminary investigations are to be undertaken first. The Appellant contends that at the trial court, PW5 had confirmed that he was not familiar with the circumstances that led to the accident and did not know whether the accident had occurred and further stated that the Appellant has never been charged with a traffic offence following the accident and therefore did not know who is to blame for the accident. That on re-examination, PW5 told court he did not know exactly where the accident occurred.

9. The Appellant submitted that at the trial court he denied causing the accident. According to the Appellant the Respondent did prove his case against him on a balance of probabilities. He contends that, the trial court did not consider the Appellant's evidence and only proceeded to hold the Appellant 100% liable only on the basis of the Respondent's evidence.

10. On quantum of damages, the Appellant submitted that the Respondent had pleaded that he sustained injuries on the head, leg and back and produced treatment notes marked as PEXH2. The Appellant submitted that the Respondent had testified that he was still undergoing treatment but he however did not produce any treatment notes to that effect. The Appellant further submitted that (2) years after the accident**, PW1 Dr. Sokobe** had examined the Respondent and confirmed that the Respondent sustained soft tissue injuries which he should have recovered. The Appellant further submitted that **PW3 Dr. Rono** confirmed that Respondent had sustained soft tissues injuries and no fractures were noted. The Appellant submitted that the disability noted by PW1 was also mild and would not curtail the Respondent from engaging in his daily routine engagements.

11. On general damages, the Appellant maintained that the trial magistrate's award of Kshs. 450,000/= was excessive as compared to the injuries suffered by the Respondent. The Appellant submitted that the Respondent had pleaded for general damages of Kshs.800,000/= whereas the Appellant had urged court to assess general damages at Kshs. 80,000/= as the Respondent only sustained soft tissue injuries which he had recovered from as per the evidence of Dr. Sokobe. and Dr. Aluda. According to the Appellant Kshs. 80,000/= will sufficiently compensate the Respondent as general damages. The Appellant urged court to set aside the trial court's award on general damages and substitute it with an award of Kshs.80,000/=

Respondent's submissions

12. On whether the Respondent had proved his case to the required standard, the Respondent submitted that PW2 Laban Ngetich an independent eye witness had given evidence which was found to be credible and uncontroverted even on cross-examination. The Respondent submitted that on cross-examination he had in fact confirmed that an accident had occurred at Kesses. It was his contention that even though he did not see the vehicle that hit him, other people saw it and told him about it. The Respondent submitted that from the totality of the evidence on record, it is not in dispute that an accident had occurred on 20th November, 2014 in which he was serious injured and that the Appellant was the cause thereof.

13. On whether the award of damages was commensurate with the injuries sustained by the Respondent. The Respondent submitted that that though he had sustained soft tissue injuries as enumerated in the report of Dr. Sokobe, it is apparent that he complaining of persistent backache, frequent epistaxis and persistent right ankle joint pains. According to the Respondent in its discretion and wisdom, the trial court had awarded Kshs.450,000/= which it deemed fit despite of the severity of the injuries. The Appellant case is that the said award was inordinately law and that this court should enhance it to Kshs. 800,000/= owing to the severity of the injuries which are commensurate to those sustained by the Respondent in **Mumias Sugar & Company Ltd V. Kweyu Shaban [2018] eKLR.**

14. In conclusion the Respondent submitted that the trial court was seized with facts and properly analyzed the evidence on record before making its finding on liability.

15. The Respondent's is case that, this appeal is bereft of merit and it should be dismissed with costs. The Respondent urged this court to

award him both costs for the lower court and this court and that the award of damages be enhanced to reflect the severity of the injuries sustained.

Determination

16. I have considered this appeal, submissions by parties and the authorities relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal, it is by way of a retrial, and parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record in order to reach its own conclusions on that evidence. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

17. In ***PIL Kenya Limited v Oppong*** [2009] KLR 442, it was held that:

> ***"It is the duty…of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that".***

18. In the present appeal and cross appeal, the issues for determination are:

> ***a) Whether apportionment of liability of 100% against Appellant had any basis.***

The starting point on this discourse raised by the appellant on liability are the principles in ***Haybourhill –V- Young (1942) 2 ALL ER 396*** *in which Lord Porter distilled the neighbourhood maxing thus;*

> ***"The duty is not to the world at large it must be tested by asking with reference to each several complainants was a duty hold to him or her. If no one of them was in such a position that direct physical injury could reasonably be anticipated to them or other relations or flames, normally I think no duty would be owed. In the same court Lord Macmillan expressed himself as follows "on the duty in terms of proper care it connotes avoidance of excessive speed, keeping a good lookout, observing traffic rules and signals and so on. Then to whom is the duty owed? To persons to placed that they may reasonably expected to be injured by the omission to take such care. The duty to take care is the duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as it is reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."***
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> *I also mindful of the provisions under* ***Section 40, 46, 47, 49 of our Traffic Act Cap 403*** *of the Laws of Kenya which emphasizes that the driver of a motor vehicle shall observe the following rules* ***"to drive the motor vehicle with due care and attention, not to drive on the road recklessly or at a speed or in a manner which is dangerous to the public, in a manner so as to overtake traffic unless the driver has a clear and unobstructed view of the road ahead."***
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> *In the instance appeal the duty to proof negligence rested with the respondent. In* ***Kiema –V- Kenya Cargo Handling Services(1999)eKLR "the court held that the onus of proof is on who alleges and where negligence is alleged. The position is as yet no liability without fault and a plaintiff must prove some acts of negligence against the claim if based on negligence."***
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> *As Dennis in his* ***BOOK law of evidence 2nd edition reprinted 2004*** *observes* ***"when a party has discharged an evidential burden and raised an issue for the court to consider, there arises a tactical onus on the other party to respond with some rebutting evidence. There is no legal obligation to adduce(further) evidence on the issue, but the party against whom the evidence has been adduced increases the risk of losing on the issue if nothing is done to challenge the evidence when a judge is deciding whether an evidential burden has been discharged, he looks only at the evidence favouring the party who bears the evidential burden. The question for decision is whether the favourable evidence is sufficient by itself to raise for the court to consider; the fact that there may be substantial other evidence contradicting the favourable evidence is immaterial at this stage. When a fact-finder (judge, jury or bench of magistrates) is deciding whether a legal burden has been discharged, the fact-finder looks at all the evidence adduced in the case. Thus the fact-finder evidential burden plus any other evidence which tends to confirm or rebut it. The discharge of an evidential burden does not involve a decision that any fact has been proved. All it signifies is that a question has been validly raised about the possible existence of a material fact; the decision is only that enough evidence has been adduced to justify a possible finding in favour of the party bearing the burden. The discharge of the legal burden occurs at a later stage in the trial, when the fact-finder is required to decide on the existence or non-existence of facts whose possible existence is in issue(Emphasis added)."***
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> *The conceptualization of the above principles lies at the heart of the contestation on liability between the appellant and the defendant. This implies that the appellant is aggrieved of the failure by the respondent to discharge the burden of proof on a balance of probabilities on the accident he caused as alleged in his evidence. The reason for the division between the appellant and the respondent is on the proposition that the fact of the accident was wholly to blame by the appellant whilst he maintains that not to be the case. For purpose of this appeal one of the main characteristic that differentiate the burden of proof on liability with the complaint raised by the appellant is the evidential variety found in the testimony of PW 1 and PW 2. The trial court having reflected on the strength of both the appellant and respondent case in his judgment it is clear that the degree of confidence was qualitatively on the part of the respondent. In any judicial proceedings in which there is a dispute about the facts of some earlier event the trial court can never acquire unassailably knowledge of what happened. All he/she can acquire is a belief about what probably happened. The strength of this believe can vary with knowledge, experience and appreciation of the facts to the Law. First in the impugned judgment besides the appellant denying occurrence and breach of duty of care of the said accident there is no corresponding probative evidence to rebut the testimony of PW 1 and PW 2. The rule prescribing the standard of proof as a matter of law before the judge also in certain circumstances goes hand in hand with the principle on corroboration. My combined review of the evidence shows no anomaly on the testimony of the respondent which was further corroborated by an independent witness*

particularly cycling around the scene of the accident. The general obligation of the appellant was to controvert that evidence to alter the balance of probability which was an essential safeguard of the respondent case. Unfortunately the trial magistrate who had the feel of the case exercised his discretion to rule on liability tilting in favour of the respondent. Within this basic duty, the trial magistrate has a wide discretion in deciding how to sum up the facts in issue and their application to arrive at a judgment which is the subject matter of this appeal. The appellant apparently seems to invite the court to draw an influence of a finding made by the trial court without any iota of evidence. The object was to request this court to dismiss the suit in its entirety. However what is submitted is not dependent upon the facts of this case for the interest of justice to call upon this court to interfere with the judgment of the lower court by setting it aside and granting the relief of allowing the appeal as intimated by the appellant.

The primacy of this court to me does not even relate to the issue on contributory negligence. ***In Defrais –V- Rooney 2002 BDA LR 21*** *the court held as follows* ***"contributory negligence required the foreseeability of harm to oneself. A person is guilty of contributory negligence if she ought necessarily to have foreseen and if she did not act as a reasonable prudent person she/he might be hurt and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff's should have failed to take reasonable care for her own safety. I do not that the plaintiff conduct was in any way contributory negligent. In the agony of the moment she made unsuccessful attempt to avoid the collision."*** *I consider therefore on assessment and scrutiny of the evidence it is crystal clear and beyond peradventure that the accident occurred in the manner described by the respondent and his independent witness (PW 2). It involved the maneuvers made by the appellant motor vehicle and as a result the respondent was injured. The duty of care in this case was owed to the respondent by the appellant driver. It is on record that the appellant driver maintained that he never committed any such breach of duty.*

In that regard the concerns he raises are categorically answered by the well settled principles in the cases of ***Pandya –v- R 195(7) EA 366 Charles –V- Uganda (1998) LLR 8 (SCU Seller and another associated motor company limited (1968) EA 123****. The gist is that when a question of fact has been tried by a lower court presided over by a magistrate of competent jurisdiction an appellate court in reviewing the evidence should attach greatest weight to the findings of that court. The rational being that the trial magistrate had the advantage of evaluating the credibility and demeanor of witnesses whom she saw and heard at that trial. The model of adducing evidence both in examination in chief and cross-examination gives an opportunity to the trial court to make observations from which to draw conclusions as to the veracity of a witness in proving the fact in issue. In this appeal I find no evidence from the appellant that the trial magistrate misdirected herself as to the existence of the facts in dispute on the occurrence of the accident and causation. So far as the case stands on liability the judgment of the trial court weighted against the grounds of appeal and the legal perspectives fails the threshold in which this court can exercise jurisdiction to interfere with the findings as urged by the appellant.*

b) Whether the amount awarded to the Respondent as general damages constituted a fair assessment for purposes of compensation.

Again the issue of damages was severely contested by both parties to this appeal. I ask myself the question whether the core and essential factors on assessment of damages were never taken into account by the learned trial magistrate. This court has to bear in mind the elucidated principles in **Gitobu Imanyara –v- the AG 2016 EKLR Loise Kagunda –v- Julius Gachau CA 142/2003. Kemfro Africa Ltd T/A Meru Express Service –v- A.M Lubia(1982-1988 1KAR 727)**

In the above cases the courts are in agreement; **That the assessment of damages is a matter of judicial discretion. The appellate court should not interfere with the assessment of damages by trial court unless evidence shows application of wrong principles, the award was excessive or so low that no reasonable tribunal would have awarded it. In addition the settled principles which provide a yardstick in exercise of discretion includes the following;**

a) That an award of damages is not meant to enrich the victim but to compensate such a victim for the injuries sustained.

b) The award should be commensurate with the injuries sustained.

c) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

d) The award should not be inordinately too low or high.

In my view although the basic principles on which damages are assessed and defined there is a challenge with consistency, proportionality and predictability in most instances becomes the trigger to an appeal's court. Whether one talks of a claim that arises out of personal injury or death assessment of damages is one of the most difficult tasks of trial judges. The parties must therefore give room to an element of the arbitrary in any award assessed at the discretion of the trial court. The inherent difficult with this appeal is the failure by the appellant to illustrate the circumstances which demonstrate that the learned trial magistrate misdirected herself in applying the principles to determine the impugned award. The purpose of an award of damages for personal injuries so far as money can do is to restore the injured person to the same position as if the injury had not occurred. The court has therefore to embark on an inquiry as to whether the plaintiff before court incurred a recognizable physical or non-physical injury as a result of the accident.

Similarly to this inquiry normally proved by way of cogent evidence is extent of the disability or loss of amenity. It is a fact that in cases of permanent disability no award of damages can practically reverse the plaintiff condition. That is the very reason that any capping of award of damages would be considered unconscionable. As a consequence it seems that the argument by the appellant never added weight which the court should adopt to interfere with the assessment of the trial court. I see no reason to disagree with the learned trial magistrate and I feel constrained to say that the issues on liability and assessment of damages appear to have been fairly dealt with a measure of discretion. I would therefore dismiss the appeal and affirm the judgment in the court below. As to the cross-appeal based on the consideration on enhancement no compelling evidence was submitted to that extent, those grounds to challenge the award lack merit. The court accordingly orders that each of the parties to bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14th DAY OF FEBRUARY, 2022.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Wambani for Kitiwa for the appellant

2. Kinyanjui for the respondent