REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 9 OF 2019

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the Judgment of Hon. H. Ng'ang'a (S.R.M) Delivered on 8th November 2018 in Narok CMCC No. 57 of 2017)

EVANS OSUGA MBOI.....APPELLANT

-VERSUS-

JAMES LESAAYA.....1ST RESPONDENT

CHARLES ORONI.....2ND RESPONDENT

JUDGMENT

Impugned judgment

[1] This appeal challenges the judgment of the Senior Resident Magistrate's Court at Narok in Civil Suit No. 57 of 2017 delivered on the on 8th November 2018 in which the trial court: -

a) **Apportioned liability; 1st and 2nd defendants to bear 50% liability jointly and severally; and the rider 50% for injuries sustained by the Plaintiff.**

b) Awarded General damages in the sum of Kshs 800,000/=, and special damages of Kshs 28,050/=; a grand total of Kshs 828,050/=.

c) Ordered the defendants to pay costs of the suit with interest at court rates from the date of the judgment.

[2] The appellant was aggrieved by the said judgment and filed a memorandum of appeal dated 8th April 2019 citing two (2) grounds of appeal all of which relate to liability.

[3] The respondent was also aggrieved by the said judgment, and filed a cross appeal vide a reply to memorandum of appeal dated 16th April 2019 citing two (2) grounds of cross appeal but all of which relate to quantum of damages.

APPELLANT'S CASE

[4] The Appellant called two witnesses. PW1 –, the Appellant herein. He testified that on 10th November 2016 he was travelling as a pillion passenger aboard a motorcycle from Total area, headed to Narok Town. He stated that at Maasai Mara Junction, a vehicle registration number KAS 536Q which was headed to Bomet turned to the right and hit the motorcycle. The driver of the motor cycle stopped and took him to Narok County Referral Hospital from where he was referred to the Nakuru County Referral hospital. He stated that the driver of the motor vehicle was to blame for causing the accident as he abruptly turned to the right without stopping and indicating. He sustained a fracture of the right leg and was admitted in hospital for two days.

[5] PW2, C. I. Jane Nyagah, Narok County Traffic Base Commander. She testified in accordance with the records held at Narok traffic base. As per police abstract issued to pw1, an accident was reported to have occurred on 10/11/2016 along Narok- Bomet road at Maasai Mara University junction involving motor vehicle registration number KAS 536Q Toyota land cruiser and a motor cycle. The driver of the motor vehicle reported that he was heading to Bomet but upon reaching at the junction an unknown motorcycle ridden by an unknown rider hit his car's right head bumper and he lost control of the vehicle as a result of which a pillion passenger sustained a fracture.

[6] She further told the court that the 2nd Respondent did not indicate if there was any other motor vehicle on the road. He did not indicate if there was any overtaking. He indicated on reaching at junction heading to Maasai Mara University if he was heading to Bomet, the rider going to Narok would not have hit left front bumper. He also did not indicate he was turning right to enter the junction.

[7] The Appellant submitted that the evidence of the 2nd Respondent was an afterthought since his testimony in court did not tally with the report he made at the police station.

[8] The Appellant submitted that the trial magistrate erred in apportioning liability between the 2nd Respondent and unknown motor bike rider. That the rider was not a party to the suit. That the Respondents ought to have enjoined the rider as a third party if at all he thought that the rider contributed to the occurrence of the said accident by overlapping. Therefore, the finding that the rider was liable when not sued was totally erroneous.

[9] The Appellant urged this court to find the respondents 100% liable and allow the appeal with costs to the Appellant.

[10] The Appellant on quantum submitted that the award of Kshs. 800,000/= was quite reasonable and not inordinately high as claimed by the Respondents. He cited the case of ***Godfrey Wamalwa *& Anor V Kyalo Wamba [2018] eKLR*** where the plaintiff sustained a fracture of the femur and soft tissue injuries and was awarded Kshs. 700,000/=. He also relied in the case of ***Benjamin Muela Kimono V Daniel Kipkirong Tarus & Another [2015] eKLR*** where the court awarded Kshs 600,000/= for fracture of the right femur. He therefore urged this court to dismiss the cross appeal with costs to the Appellant.

Respondents' Case

[11] The 2nd Respondent DW1 testified that on 10/11/2016 he was driving motor vehicle registration number KAS 536Q from Narok Town to Total Area. He stated that he was driving on his lawful left lane. Upon reaching the Maasai Mara University junction he indicated to show its intention to turn right. He stated that there was an oncoming traffic and he flashed the car in front of him to allow him to take the right turn. As he entered the junction a motor cycle which was overlapping and which he had not initially seen, hit his car's left front bumper causing a pillion passenger to jump and the motorcycle fell on him. He stopped his car and with the help of members of the public he took the injured passenger to the Narok District Hospital. However, the rider of the motorcycle disappeared. He later reported the incident to the police at about 7 P.M on the same day. He therefore, blamed the rider of the motor cycle for overlapping carelessly and speeding. He blamed the pillion passenger for jumping and failing to wear a helmet and a reflector jacket.

[12] The Respondents submitted that the Appellant having seen the motor vehicle more than 5 meters before the accident means the rider of the motor cycle had seen the said vehicle too and therefore had a duty to take measures i.e. swerving to his right side and or stop to avert the accident. But instead he chose not to do anything. That the rider of the motor cycle failure to avoid the accident means he was in high speed and could not control the motor cycle hence the reason why contributory negligence had to be attached to the rider of the motor cycle.

[13] The Respondents submitted that had the rider not have been to blame for the accident he would not have fled from the scene of the accident. The 2nd Respondent took the Appellant to the hospital and made a report at the police station.

[14] The Respondents submitted that the trial court was proper in finding that indeed the rider of the motor cycle was to blame at 50% considering also that there is no dispute that the accident involved the suit motor vehicle and the rider of the motor cycle which could not be enjoined in the proceedings as he disappeared after the accident and could not be traced. They therefore urged this court to uphold the findings of the trial court on liability.

[15] On quantum, the Respondents submitted that the trial magistrate failed to consider their proposal that Ksh 200,000/= and relied on the Appellant's submission.

[16] They submitted that the award was high considering that the Appellant had sustained only a fracture of the right femur and soft tissue injuries of the right thigh. That the trial court failed to appreciate the injuries sustained by the Appellant making the award which is an error of the principle. They therefore urged this court to interfere with the findings of general damages as it was not granted on any established principle of law.

[17] The Respondents cited the cases of ***Makau Mulwa Vs Harriner Singh Kulah HCCC No. 3277 Of 1984, TAM (A Minor Suing Through Her Father Next Friend JOM) Vs Richerd Kirimi Kinoti & Another Nrb Hcca No 82 Of 2008 [2015] eKLR and Bhachu Industries Limited V Peter Kariuki Mutura Nrb HCCA No. 503 Of 209 [2015] eKLR*** where the awards range from **Kshs. 150,000/=** to **Kshs. 300,000/=.**

[18] The Respondents urged this court to find that this appeal has no merit and dismiss the same with cost and allow the cross appeal with costs.

[19] Directions were given that both the appeal and cross appeal be disposed of by way of written submissions. The Appellant and the Respondents filed their respective written submissions, which I have read through and noted the arguments advanced.

ANALYSIS AND DETERMINATION

[20] In law, first appellate court is under an obligation to re-evaluate the evidence and come to own conclusions, except, it must give allowance of the fact that it neither saw nor heard the witnesses; matters of demeanor are best observed by the trial court. See **: SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In re-evaluating the evidence, the court is not beholden or compelled to adopt any particular style. Nonetheless, it must avoid mere rehashing of evidence or trying to look for a point or

two which may or may not support the finding of the trial court. Of greater concern is to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permissible) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Thus, a good style would be one that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, making of the final impression of the evidence and facts of the case and the applicable law will be with little or no difficulty at all. I shall so proceed

Issues

[21] The appeal and the cross-appeal raises the following two issues for determination of which fully determines the appeal and the cross-appeal: -

(i) Where does blame for the accident lie? And;

(ii) is the award of damages herein excessive in light of the injuries sustained?

Liability

[22] The accident herein involved a motor vehicle and a motorcycle. Where does blame lie?

[23] The court will draw upon the evidence in its determination. PW1 blamed the driver of motor vehicle registration No. KAS 536Q for causing the accident, for he failed to stop and indicate that he turned to enter a junction on the right leading to Mara University. His testimony was that there was no any other vehicle at the scene at the time. Pw2 produced the police abstract which showed that the accident occurred on the material day and the appellant was injured. The abstract shows that the matter is still under investigations. PW2 also stated that in the OB it was recorded that the 2nd respondent reported that a motorcyclist had hit his car's right head bumper-which according to PW2 was not possible as the vehicles were going on different direction. She did not however produce a copy of the OB extract or the police investigations file.

[24] The 2nd Respondent DW1 testified that he stopped and indicted to show his intention to enter the junction and flashed the oncoming vehicle to give way. The oncoming vehicle flashed back which was a sign that it had given him permission to enter. But, on entering the junction and as he was just entering the murram road, a motor cycle which was overlapping on the left side hit his car's left bumper.

[25] The investigating officer was not called. PW2 stated that the case was pending police investigations. The 2nd Respondent sought summons to the base commander to produce the police file and which the court allowed but this option was abandoned by the defence counsel. Therefore, the occurrence book extract and Dw1's statement recorded at the police station was not produced to compare the same with the version of the pw1 in court. Whereas the driver recorded that the motor cycle hit his car's right head bumper, in court he stated that the motor cycle hit his car's left bumper. It was not disputed that that the motor vehicle was making turn to join Maasai Mara University junction on the right as you face Bomet direction. DW1 indicated that he had been given way by the car in front. PW1 disputed the same stating that there was no car in front and DW1 turned without indicating.

[26] The parties have given quite varied accounts as to how the accident occurred. How should the court resolve such tension between the account rendered by the Appellant and 2nd Respondent on liability?

[27] The established judicial method, which rests on the singular dependability of the *fact-base*, and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the *account from the other side*; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result.

[28] The appellants account is that the 2nd Respondent failed to indicate before joining the junction. The 2nd respondent stated that he indicated as required. The appellant bore the onus of proving his case. Notably, important evidence to support this allegation would have been the result of the police investigations, OB extract, statement recorded by DW1 with the police and the inspection report. None of these pieces of evidence was produced. PW2, simply read over the contents of the OB and stated that if the parties wanted a copy of the OB they should write to the provincial commander. In light of such insufficient evidence, the court is left with mere possibility that the 2nd respondent may or may not have indicated that he was entering the junction.

[29] On the other hand, the account by the 2nd respondent blamed the motorcycle rider for overlapping on the left. The 2nd respondent stated that he stopped and flashed an oncoming vehicle for way and the vehicle flashed back for clearance to enter. I need to state here, that the habit of drivers and riders relying on flash of headlights to as signification of request, and permission to enter a junction is very dangerous, for there are other drivers who flash back head lights to warn you not to enter. Accident have happened because of this misunderstanding. I doubt this practice is a standard sign under the traffic laws. The proper way is to stop and enter only when the oncoming vehicle has stopped to give you way. That notwithstanding, despite denial by the appellant, I do not find evidence to disapprove the account of the 2nd respondent on the presence of another vehicle at the time of the accident. Here, I feel compelled to state that overlapping on the left by motorcycles is quite notorious in Kenyan roads. This is most dangerous affair on our road as, where circumstances demand, drivers instinctively swerve to the left for safety for they do not expect anyone to be driving or riding on the left. Ordinarily, there is no anticipation of the presence of a motor vehicle or motor cycle on the left side except in multiple lanes. A careful driver or rider should never drive or ride on the left shoulder of the road; such is overlapping and is a traffic offence.

[30] The evidence in support of each of the opposing accounts is barely sufficient. Accordingly, the trial magistrate exhibited aptness and made a conscientious decision to draw upon the case of ***Baker vs. Market Harborough Co-operative Society Ltd 1953 1 WLR 1472*** to decide the issues between the parties by blaming both the 2nd respondent and the rider equally for the accident. The circumstances of, and

evidence presented in this case warrant a 50:50 contributory negligence between the respondents and the motorcycle rider. I therefore, do not find anything on which to rattle the apportionment of liability by the trial court. The appeal on liability fails and is dismissed.

[31] Before I leave this point, I see an attempt by the appellant to force the respondent to take out third party proceedings against the rider in whose motor cycle the appellant was a pillion passenger.

Of Quantum

[32] According to the Court of Appeal in ***Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR : -***

> ***'An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the 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...'***

[33] The trial magistrate awarded Kshs 800,000.00 as general damages; the Respondents regards the award as inordinately high. The Appellant agrees with the trial magistrate that the award is commensurate to the injuries sustained.

[34] I will apply the test laid down by the Court of Appeal observed in ***Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR*** that –

> ***"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."***

[35] Emphasis is made to the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained. The Appellant herein sustained the following injuries-

i) fracture distal 1/3 of the right femur and

ii) Severe soft tissue injuries of the right thigh.

[36] The Appellant cited authorities with the awards ranging from **Kshs 600,000/=** to **Kshs 700,000/=.** The authorities cited by the 2nd Respondent in his submission range between **Kshs. 150,000/=** and **Kshs. 300,000/=.** I do also note that the said authorities are not recent as compared to those cited by the appellant.

[37] The doctor assessed incapacitation at 20 %. From the authorities cited by the appellant, it is clear that the trial magistrate made a commensurate and fair award in view of the injuries sustained by the Appellant. An award of **Kshs 800,000.00** is fair compensation for pain and suffering. The trial court did not commit any error of principle or made excessive award. I dismiss, the cross-appeal.

[38] In the upshot, I find that the appeal and the cross-appeal lack merit and are dismissed. Given the result of my analysis, each party to bear own costs of the appeal and cross-appeal. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 21ST DAY OF JULY, 2021.

F. M. GIKONYO

JUDGE

In the presence of:

1. Ombui for the Respondents and cross appeal

2. Omboga for appellant

3. Mr. Kasaso – CA

F. M. GIKONYO

JUDGE