REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 158 OF 2019

JAMES GIKUNDI MARETE..... APPELLANT

VERSUS

GREGORY MBAABU KIBUA.....RESPONDENT

(An appeal from the Judgment and Decree of Hon. J. Irura (P.M) in Nkubu

PMCC No. 64 of 2016 delivered on 20/11/2019)

JUDGMENT

1. Before the trial court was a claim commenced by a Plaint dated 06/07/2016 in which, the respondent sued the appellant seeking general damages, exemplary damages for cost of future treatment, special damages and costs of the suit.

2. The gist of the claim was that on 26/12/2013, the respondent was a pillion passenger aboard Motor Cycle Registration No. KMDA 328T Tiger, along Meru-Nkubu Road near Thingithu Bridge, when the same was involved in an accident with the appellant's Motor Vehicle Registration No. KBX 977 F Toyota Caldina. It was pleaded that he suffered extensive and serious injuries, and was admitted and treated at several hospitals. Following the said accident, he has been rendered almost a cripple.

3. The appellant denied the claim by his statement of defence dated 22/12/2016 and prayed for the respondent's suit to be dismissed. He however closed his case without calling any witnesses. To that extent there was no evidence to be weighed by the trial court against that by the respondent.

4. After the conclusion of the trial, the trial court found that the respondent had proved his case and awarded him Kshs 2,500,0000, Kshs 5,000,000 for Loss of earning capacity and special damages of Kshs1,197,676.

5. Aggrieved by the said decision, the appellant filed his Memorandum of Appeal on 09/12/2019 setting out twelve (12) grounds of appeal. The said grounds can be coalesced under two heads as follows; the apportionment of liability at 100% against the appellant was not supported by the evidence and the monetary awards made not merited and in any event excessive under the three heads.

6. In support of his case, the respondent, **PW1** testified that at the time of the accident, he was in Kenya on long vacation. As a result of the said accident, he was unable to go back to work, as a security officer, in Qatar. He was a pillion passenger aboard motor cycle registration No. KMDA 328 T. They were on their lane when, they were hit on the right side by Motor vehicle Registration No. KBX 977 F and thrown in the bushes.

7. Following the said accident, he sustained injuries on the hip joint and several bone fractures. He has been hospitalized for a cumulative duration of 7 months and undergone about 6 surgeries. He confirmed that the appellant was subsequently charged with careless driving. He produced numerous payslips to prove that he was earning about Kshs 45,000 per month. He went on to state that he has become a member of persons living with disability, as a result of the said accident. During cross examination, he maintained that he was in Kenya on leave at the time of the accident. In disputing that NHIF has settled his medical bills, he maintained that the same was paid by his family members. **PW2 PC Daniel Chacha** of Meru Police Station, produced the charge sheet, the proceedings and the ruling therein and the police abstract. He stated that the criminal charges were withdrawn because the respondent, who was unable to attend court, was then still in hospital. During cross examination, he stated that it was the appellant who was to blame for the accident. During re-examination, he clarified that the evidence he had given was in consonance with what had been recorded in the Occurrence Book.

Submissions

8. The court on 27/7/2019 directed that the appeal be canvassed by way written submissions. The appellant filed his submissions on 10/09/2020 while the respondent filed his on 18/11/2020. He submitted that, the acquittal of the driver in traffic case No. 1166 of 2013 was

prima facie evidence of his innocence. In his view, liability should have been apportioned at the ratio of 70:30, due to the contradictory evidence adduced by the respondent. The trial court is faulted for awarding Ksh.5,000,000 for loss of earning capacity, and Ksh.1,197,676 for special damages, as the same were not proved. The court is urged to substitute the said award with one of Kshs 500,000. In support of such submissions, he cited the decisions in **Isca Adhiambo Okayo v KWFT (2016) eKLR, Gitobu Imanyara & 2 others v Attorney General (2016) eKLR, SJ v Francesco Dinello & anor (2015) eKLR, Mumias Sugar Company Limited v Francis Wanalo (2007) eKLR and Abdi Werdi Abdulahi v James Royo Mungatia & anor (2019) eKLR.**

9. For the respondent, submissions were offered to the effect that in the absence of any contradicting evidence, the trial court was justified to find the appellant 100% liable for the accident. The court is urged not to disturb the sums awarded by the trial court, as the same were neither excessive nor unjustified. The cases of **Sabina Nyakenga Mwanga v Patrick Kigoro & anor (2015) eKLR, William J. Butler v Maura Kathleen Butler (1984) eKLR and West Kenya Sugar Company Limited v Luka Wafula Namasaka (2020) eKLR** were relied on in support of his submissions.

Determination

10. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. See ***Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR.*** The question is not what the appellate court would award, but whether the trial court acted on wrong principles. See ***Gitobu Imanyara & 2 others v Attorney General (2016) eKLR***.

11. Whereas the appellant contends that liability should have been apportioned in the ratio of 70:30 due to the inconsistent evidence adduced by the respondent, the respondent contends that the appellant was wholly to blame for the occurrence of the accident. After carefully weighing the evidence of PW1 and PW2, I do not see any contradiction whatsoever. The evidence led by the respondent resonated well with the reiterations made by PW2 as recorded in the Occurrence Book.

12. In its judgment, the trial court, at page 179 of the record of appeal, deeply analyzed the evidence and stated that;

> **"Again, with regard to liability, the evidence of the eye witness on record is only that of the plaintiff who described how the accident occurred. In his statement and testimony, he stated of how the suit vehicle left its lane and came to their lane thus hitting them. The defendant never controverted his evidence. Having evaluated all the evidence on record, I find that it was the driver of the suit vehicle who was to blame for the accident. With the plaintiff's evidence not controverted, it is my view that it cannot be disbelieved as I find his evidence credible and hold the defendant 100% liable for having caused the accident herein."**

13. That is a very accurate and proper appreciation of the evidence on record by the trial court. In that regard, I totally agree with the respondent that the appellant was wholly to blame for the accident. I find that the apportionment of liability at 100% against the appellant was properly made.

14. The next issue is whether the sums awarded by the trial court under the various headings were excessive. It is still trite that assessment of damages is discretional and purely vested on the trial court. In ***Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another*** **[2017] eKLR** the court said that –

> ***"On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision.***

15. I take guidance and persuasion from the decision of the English court in ***Lim Poh Choo v Health Authority (1978)1 ALLER 332*** where the court held as follows:

> **"But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional."**

16. I am convinced by the record filed that the trial court took into account the seriousness of the injuries suffered by the respondent and the prolonged duration of specialized hospitalization in awarding Kshs 2,500,000 for pain and suffering. In my view, that award was commensurable with the injuries suffered and therefore, it was fair and reasonable in the circumstances. In any event, compensation for personal injury claims are designed to compensate and not just assuage. In awarding damages this court is often reminded of the words of Madan, j as he them was, in **Ugenya Bus Service v James Kongo Gachohi**, **Civil Appeal No. 66 of 1981** that '*the days of small and stingy awards are long gone'*.

17. For special damages, the respondent not only pleaded a specific sum, more than the sum the court awarded, but also exhibited numerous receipts in support thereof. Even though the trial court did not carry out actual arithmetic calculations, on how she reached the sum of Kshs 1,197,676, the evidence led and captured at pages 170 -171, remained unchallenged, and show that a sum slightly more than the sum awarded was proved. I uphold the decision of the trial court and find that there was strict proof of the sum awarded as special damages. For

that reason, there is no legal reason to disturb that award.

18. I now turn to the sum of Kshs 5,000,000 awarded for loss of earning capacity. It is clear from the averments in paragraph 9(a)(ii)) of the plaint that, the respondent herein sought damages for loss of earning capacity. He exhibited 4 pay slips and a 5 year work visa from 2010 to 2016, to prove that, he was working as security officer in Qatar before the accident. To that extent, I am satisfied that the respondent was gainfully employed and earning a living.

19. The court of Appeal in ***Mumias Sugar Company v Francis Wanalo(2007)eKLR*** , stated;

> **"The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in the labour market, while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in the future. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity nevertheless the Judge has to apply the correct principles and take the relevant factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."**

20. The question I must ask is whether the disability suffered by the respondent entirely restricts his ability to earn a living as a security officer. In his testimony, the respondent stated that the accident has rendered him a cripple because; he has to walk with the aid of crutches. I have looked at the two medical reports dated 3/2/2016 and 22/8/2016. The doctor's opinion therein was that, the respondent had a shortening of the right leg by about 2cm, and had not recovered fully. *Although* the law has always been that comparable injuries should attract comparable damages, it is also evidently clear that no injuries can be similar. Each case must therefore be treated on its own facts and merits.

21. In my considered view, it was adequately proved that the disability suffered by the respondent has substantially diminished his competitiveness in the labour market, thereby affecting his capacity to earn a living. In fact, I take notice from the usual adverts for such positions that it is a basic requirement that one is able-bodied people. As it were the respondents frame has been distorted and deformed. The medical report depicts him as disabled. He is thus, without doubt entitled to loss of earning capacity. To that extent, the finding and award of damages is beyond fault.

22. Even on the question of the quantum assessed, the law must remain that the award is part of general damages whose assessment is at the discretion of the trial court and it calls for a strong case for an appellate court to interfere. I have appreciated that the trial court, rightly and within its right, chose to award a global sum, rather apply the multiplier formula. I have equally taken note of the fact that it was established that the respondent's salary as at the end of 2012 was Kshs 58,652.63, or thereabouts. With that figure, even if one was to go the multiplier formula way, and say use a multiplier of say 10 years, the calculation would still give about Kshs 7,000,000. It is thus my finding that the award was properly made and the assessment was indeed modest far away from being exorbitant or excessive.

23. The upshot is that I find no merit in the entre appeal and I order that it be dismissed with costs to the respondent

24. After doing comparative analysis with varied decisions on this issue, I believe the trial court should have awarded Ksh.2,000,000 under this head.

25. Save for the substitution of the award of Ksh.2,000,000 for loss of earning capacity, the appeal should otherwise be dismissed.

DATED, SIGNED AND DELIVERED AT MERU BY MS TEAMS THIS 09TH JULY, 2021.

PATRICK J.O OTIENO

JUDGE

In presence of

Mrs. Ochieng for appellant

Mr. Kaumbi Kioga for the respondent

PATRICK J.O OTIENO

JUDGE