



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL APPEAL NO. 64 OF 2018

ROBINSON NJOROGE.....APPELLANT

VERSUS

DANIEL OMBASA.....RESPONDENT

(Being an appeal from the Judgment of the Hon. M. Mutua (RM) delivered on the 16th November, 2018 in Naivasha CMCC No.156 of 2017)

JUDGMENT

1. The brief facts in this matter are that on 29th October, 2015 at 1.30am the Plaintiff was injured in a road traffic accident as a passenger in vehicle registration number KBK 258M. The other vehicle involved was registration number KBB 638M. In the trial court it was not disputed that the injuries suffered were:

- a. Deep cut wound on the head leading to soft tissue injuries.
- b. Soft tissue injury to both hands.
- c. Blunt injury to right hip joint leading to severe soft tissue injuries.

2. The Plaintiff's case was that the driver of vehicle KBB 638M was to blame. However PW1, PC Gitare gave evidence that the driver of vehicle registration KBK 258M Probox was to blame as he was overtaking a fleet of vehicles which it was involved in a multiple accident with vehicle registration numbers KCD 385D and KBB 638M. PC Fredrick Gitare also admitted that he was not the Investigating Officer. PW3, the Plaintiff, testified that he was travelling in KBK 258M when it collided with a lorry. The driver died instantly. PW2 Dr. Omuyoma testified as to the injuries.

3. After hearing three Plaintiff's witnesses and no defence witnesses being availed, the trial court found in favour of the Plaintiff. Liability was awarded at 100%; general damages were awarded at Kshs 300,000/=; special damages at Kshs 7,760/= with costs and interests.

4. The appellant's grounds of appeal are that the trial magistrate erred in law and in fact:

- a) In finding the appellant 100% liable in absence of cogent supporting evidence;
- b) In the manner he assessed general damages which were excessive; and
- c) In failing to consider the appellant's submissions and the authorities thus arriving at an erroneous assessment of damages.

5. This court's role is to review and re-evaluate all the evidence on record and to come to its own conclusions taking into account that it did not itself hear the testimony nor see the demeanour of witnesses. Further the court may not interfere with the judgment unless the award is manifestly excessive or based on wrong principles of law.

6. In submissions, the appellant argued that the Police Abstract produced at P. Exhibit 2 relied on by the Plaintiff merely stated that the accident was pending under investigations, and that no blame had been apportioned to any party; that at the hearing PC Gitare testified that the Investigating Officer had blamed the driver of KBK 358M yet the trial court did not take this evidence into account.

7. On that issue, the trial magistrate stated that the testimony of the police officer:

“.....blamed the accident on the driver of the Probox. However his testimony is an opinion which is not binding on the court as he was not at the scene as it was held in David Kajoji M’Mugaa & Another v Francis Muthomi (2012) eKLR page7.”

8. The trial court correctly, I think, treated the evidence of PC Gitare as opinion evidence. He was not an eyewitness. No investigation report or documentation or sketches were availed by him to show who was at fault. The trial court thus relied on the evidence of the plaintiff as to the events that occurred. Was that evidence persuasive?

9. PW3, the Plaintiff, adopted his witness statement filed on 17th March, 2017 as his evidence-in-chief. In it, he stated that he was a passenger in vehicle KBK 258M when it collided with KBB 638M and he was injured. He stated:

“I blame the driver of motor vehicle Registration Number KBB 638M as he is the one who failed to keep a proper lookout. Had he been careful he would not have had a head on collision with the driver of our vehicle.”

10. In cross-examination PW3, the victim who was an eyewitness stated:

“Our vehicle was hit by a lorry travelling from the opposite direction. I saw the lorry from a distance of about 10 metres and it came to our lane and caused the accident.....our driver died on the spot.....”

11. That was the only probative eyewitness evidence available as to the cause of the accident. The evidence was that the lorry came into the lane of the vehicle KBK 258M. The police abstract, P. Exhibit 2, did not indicate any fault, merely stating that the case was pending under investigation. There can therefore be no basis to find a conclusion for blaming the driver of Registration KBK 258M, the probox.

12. I would agree with the trial court on liability at 100% as against the defendant/appellant as there is no other evidence availed as to blameworthiness. Courts rely on evidence placed before them. They are persuaded by probative material adduced.

13. On the question of damages, the appellant argues that the award of Kshs 300,000/= was excessive. He cited the following cases:

- **Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 others [2019] eKLR** where the Plaintiff had sustained deep cut on the scalp, blunt injury to the left side of chest, contusion to back and contusion to both legs, tenderness on chest and scar on right temporal maxillary area, and some severe soft tissue injuries. Here the plaintiff was awarded Kshs 90,000/= as general damages.

- He also cited the case of **PF (Suing as next friend and father of SK (Minor) v Victor O Kamadi & another [2018] eKLR** where the court awarded Kshs 100,000/= for cut wound to the forehead, multiple small abrasions to the face, blunt injury to the head leading to loss of consciousness for some time, abrasions to the back, abrasion wounds to dorsum of the right hand and cut wound to right leg.

14. The respondent contested the appeal and cited the case of **Multiple Hauliers v Patricia Anyango & Another [2012] eKLR** where the court found liability on 50:50 basis and awarded damages of Kshs 300,000/=. The injuries were: Blunt injury to the chest, Deep cut wounds to lower left limb and right upper limb, dislocation of left knee and loss of three (3) teeth.

15. I note that the **Multiple Hauliers** case was the only one availed to the trial court on the question of quantum. The trial court stated that it “*did not find any submissions for the defendant on record*”. I have perused the lower court file and also find no submissions for the defendant there; nor is there any indication that such submissions were filed; and the Record of Appeal prepared by the appellant does not include such submissions.

16. A perusal of cases in which damages have been awarded for a deep cut wound, blunt injuries and other soft tissue injuries and hip movement restriction largely similar to the injuries in the present case reveals as follows:

- In **Francis Ndungu Wambui & 2 others v Benson Maina Gatia [2019] eKLR** Kshs 305,090/= was awarded.

- In **Veronicah Mkanjala Mnyapara v Charles Kinanga Babu [2020] eKLR** Kshs 300,000/= was awarded.

- In **Kitale Hauliers Ltd vs Winston Wanyonyi Lugulu, Bungoma HCCA No. 106 of 2011 the Lower Court award of Kshs 600,000/= reduced to Kshs 300,000/=.**

17. In the cases such as **George Kinyanjui T/A Climax Coaches & Another v Hussein Mahad Kuyale [2016] eKLR** a high award of Kshs 650,000/= was reduced to Kshs 120,000/= for soft tissue injuries that did not involve a cut wound and residual complications. Similarly in **Hantex Garments (EPZ) Ltd v Haron Mwasela Mwakawa [2017] eKLR**, an award of Kshs 100,000/= was upheld for injuries trauma and swelling without a cut wound or residual complications.

18. In the present case, in addition to the cut wound, there were restrictions in movement. Ultimately, therefore, I find that no basis has been laid for me to interfere with the award of the lower court which is not inordinately high.

Disposition

19. In light of the above, this appeal is dismissed in its entirety. Liability is confirmed at 100% against the appellant and the quantum awarded by the lower court is also confirmed.

20. Costs of appeal to Respondent

Administrative directions

21. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

22. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

23. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 12th Day of July, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. No representation for the Appellant
2. Ms Amboko for the Respondent
3. Court Assistant - Quinter Ogutu