



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

CIVIL APPEAL NO 78 OF 2020

EASY COACH LIMITED.....APPELLANT

VERSUS

JOYCE MORAA ASIAGO.....RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. Nathan Shiundu Lutta, Chief Magistrate, Kisii, delivered on 25th November, 2020 in Kisii CMCC No 565 of 2020)

JUDGMENT

1. This Appeal arises from the judgment and decree of N.S Lutta (CM), dated 4th September 2018 at the Chief Magistrate Court, Kisii. In that suit, respondent sued the appellant for damages arising from a road traffic accident that occurred on 18th July, 2018 along Kisii-Kisumu Road in which she sustained bodily injuries. The appellant denied the claim leveled against him.
2. The trial court found in favor of the respondent and awarded general damages of Kshs 600,000/- and Kshs 8,120/- for special damages. The trial court also awarded costs of the suit and interest.
3. That decision occasioned the appeal currently before this court. The memorandum of appeal dated 2nd December 2020 constitutes a total of 11 grounds touching on liability and quantum.
4. This court directed parties to file written submissions and the parties have both complied.
5. The appellant submitted that the evidence adduced by the respondent was inconsistent and cited the case of **Stephen Njoroge Thuo v Hellen Muhia Maina [2017] eKLR** where the court overturn the lower court's decision over material inconsistencies and contradictions. It was also submitted that the evidence of Pw1 was wholly unfounded and amounted to hearsay as he was not the investigative officer. The appellant cited the case of **Easy Coach & Another v Gideon Otieno & Another [2021] Civil Appeal No 165 of 2019**. It was further submitted that the failure by the respondent to produce the occurrence book which was in the possession of her witnesses entitles this court to draw an adverse inference against her. The appellant argued that the respondent failed to prove on a balance of probability that the appellant's driver caused the accident. In the alternative it was submitted that the respondent should be held to have contributed to the occurrence of the accident. She had no helmet and did not have a reflective jacket. She also aggravated her injuries as she failed to have surgery as advised by her doctors.
6. The respondent supported the trial court's finding apportioning the appellant liability at 100%. It was submitted that the appellant having failed to initiate third party proceedings against the owner of the motor cycle then it should be wholly culpable for the accident. The respondent cited the case of **James Gikonyo v DM (Minor Suing through his Mother and next Friend, IMO) [2016] eKLR**. It was argued that the police abstract produce corroborated the fact that the accident did occur.
7. This being the first appellate court, my duty is to reexamine and re analyze the entire evidence adduced before the trial court and come up with own findings and conclusion, see **Selle –v- Associated Motor Boat Co (1968) EA 123 and Kiruga –v-Kiruga & Another (1988) KLR 348**.
8. The only direct witnesses who saw how the accident occurred were Joyce Moraa Asiago (Pw2), Horace Mboya Ochola (Dw2) and Moffat Muthama Ndungu (Dw3).
9. Pw1 testified that on the fateful night she was a pillion passenger and the accident occurred because the appellant's motor vehicle was being drive at a very high speed thus knocking the motorcycle. Pw1 on cross examination maintained that she was on the motorcycle with its rider and she was carrying a basin and some milk heading home. She did not have a helmet and she recalled that the bus knocked them from

behind and they fell in a ditch. According to the history taken when the patient went to Kisii Teaching and Referral Hospital, it was noted that the respondent was involved in a road traffic accident after the bus hit the motorcycle from behind.

10. According to the witness statement of Dw2 on the material night he saw the motor vehicle carrying one pillion passenger but as the 2nd passenger was about to board, her weight exceeded that of the rest and they fell down. On cross examination he testified that the motorbike was stationary by the side of the road. He further testified that the bus was not damaged in any way. Dw3 testified that he was also driving a car and was behind the bus that was alleged to have been involved in the accident. Dw3 in his witness statement stated that he saw the motorcycle carrying two pillion passengers and the said motorcycle fell down independently. He explained that the motorcycle had stopped to give way to the motor vehicle and in the process it fell. On cross examination he testified that they fell down as the lady tried to board the *boda boda*.

11. Having considered the evidence by both parties, I find that the version presented by Pw2 was more plausible as her evidence remained unshaken even after cross examination. The version by the appellant was contradictory and inconsistent. Dw2 in his statement stated that the accident occurred when the second pillion passenger was about to board the motorcycle while Dw3 testified that the accident occurred when the motorcycle had stopped to give way to the motor vehicle. The only inference that can be drawn from the evidence of Dw3 is that the motorcycle was in motion as opposed to being stationary as claimed by Pw1. However, on cross examination Dw3, abandoned his evidence in chief and stated that the motorcycle fell as the appellant tried to board it.

12. I however agree with sentiments of the appellant that since the respondent was travelling at night she ought to have worn a reflective jacket for her own protection and to notify other road users of their presence on the road. In this regard I apportion the respondent 10% liability.

13. I now turn to the issue of quantum. In dealing with an appeal on quantum, I am guided by the decision of the Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** where it held that;

“An appellate court will not disturb an award of 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”

14. The main most contested issue by the parties relate to the injuries sustained by the Appellant. According to the plaint the respondent sustained the following injuries:

- Facial bruises
- Tenderness on the right upper quadrant
- Tenderness on the 8th – 10th ribs anteriorly
- Fractures to the 3rd, 4th, 5th, 6th and 7th ribs.
- Bruises on both elbows.
- Bruises on both knees.
- Left neck femur fracture

15. The appellant submitted that the trial court did not consider the evidence of the medical report by Dr. Mohammed Shabir Malik (Dw1) and the report by the radiologist Dr. Zablon Okola Ogutu (Dw4). It was submitted that the respondent's expert witness Dr. Peter Momanyi Morebu, Pw3, crafted a biased report. It was further argued that there was compelling evidence that the respondent did not suffer any fracture.

16. According to the treatment notes from Kisii Teaching and Referral Hospital, the respondent was taken to hospital following the accident and Dr. Muiruri Kimani's treatment plan was that chest and shoulder joint x-ray be conducted and an abdominal ultrasound be done. The respondent went back to the hospital on 24th July 2018 and it was noted that the x-ray revealed that she suffered 5 fractures of the ribs and a fracture of the neck femur. It was noted that the respondent had bruises on her face, elbows and both knees. According to the treatment the respondent was advised that she considers admission but rejected the said advice on grounds that she was financially constrained. The respondent also filed a report prepared by (Pw3). According to the report the respondent had sustained fractures to the 3rd, 4th, 5th, 6th and 7th ribs, left neck femur fracture as well as multiple bodily injuries. Dr. Morebu concluded that recovery was expected to take a very long time. He testified on cross examination that he did not capture the fact that the respondent had difficulty in walking in his report. However his findings were a reflection of the injuries sustained by the respondent as per the treatment notes. The P3 form produced indicates that the respondent had the x-rays done on 19th July 2018.

17. Dw1 on the other hand testified that he examined the respondent on 7th May 2019 and formed the opinion that the respondent could not have sustained any of the fractures. He explained that it was not possible for the respondent to walk with such pain resulting from a comminuted fracture. According to the evidence by Dw1 a chest x-ray was done and it revealed that there was no fracture.

18. In **Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR** the court held that the treatment notes were filled immediately after the accident by the treating medical practitioner without any interest in the case. From the treatment notes the respondent saw two doctors who in my view were independent. In the treatment notes it was noted that the respondent could not afford the treatment offered by the hospital. The testimony by Dr. Mohammed Shabir Malik and Dw4 paint quite a different picture with the injuries noted in the initial treatment notes. In my view, treatment notes are the basic documents as they are made immediately after the accident by the treating medical practitioner on the injuries sustained (see **Johnstone Koech v Ibrahim Abdi Maalim [2021] eKLR**) and are more credible compared to medical reports made long after the occurrence of the accident. It is on this basis that I make a finding that the respondent proved on a balance of probabilities that she sustained the injuries noted in the initial treatment notes.

19. The appellant in his submissions also argued that the general award was excessive and submitted that because the respondent only suffered soft tissue injuries she ought to have been awarded Kshs 80,000/=. It was further submitted that the respondent only proved special damages of Kshs 6,500/=. The respondent on the other hand argued that Kshs 600,000/- was commensurate to the injuries sustained and urged the court to award Kshs 6,920 being the special damages pleaded and proved.

20. In **Blue Horizon Travel Co Ltd v Kenneth Njoroge [2020] eKLR** the plaintiff having sustained soft tissue injuries and fracture of the 3rd and 9th ribs was awarded Kshs 400,000/- as general damages. In this case the injuries sustained by the respondent were more severe as they included soft tissue injuries, 5 fractures of the ribs and fracture of the neck femur. I therefore find no reason to interfere with the award of the trial magistrate. Special damages proved was Kshs 6,800/-.

21. The award should therefore be as follows: -

Special damages.....	Kshs 6,800/-
General damages.....	Kshs 600,000/-
Total.....	Kshs 606,800/-
Less	
10% contribution.....	Kshs 60,680/-
Net award.....	Kshs 546,120/-

22. I therefore set aside the judgment of Kshs 608,120/- and substitute it with a judgment of Kshs **546,120/-** . Half costs of appeal to the Appellant.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF SEPTEMBER, 2021

R.E OUGO

JUDGE

In the presence of:

Mr. Karanja For the Appellant

Mr. Omotto For the Respondent

Mr. Orwasa Court Assistant