



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 622 OF 2019

ANN ROTICH KWAMBAL.....1ST APPELLANT

PATRICK JUMBA KWAMBAL.....2ND APPELLANT

-VERSUS-

AMOS KIARO ROTIKEN.....RESPONDENT

(Being an appeal against the judgment and decree delivered by A.N. Makau (Ms.) (Principal Magistrate) on 11th October, 2019 in Milimani CMCC no. 10199 of 2018)

JUDGEMENT

1. The respondent herein filed a suit against the 1st and 2nd appellants by way of the plaint dated 16th November, 2018 and sought for both general and special damages in the amount of Kshs.3,750/= plus costs of the suit and interest thereon.
2. The 1st appellant was sued in her capacity as the registered owner of the motor vehicle registration number KBU 447L (“the subject motor vehicle”) while the 2nd appellant was sued as the driver of the subject motor vehicle at all material times.
3. The respondent pleaded in his plaint that sometime on or about the 26th of November, 2017 he was lawfully walking along Limuru Road near Village Market when the subject motor vehicle being driven by the 2nd appellant veered off the road and knocked him down, causing him to sustain serious injuries.
4. The respondent attributed the accident to negligence on the part of the 2nd appellant directly and vicariously, the 1st appellant, by setting out the particulars in his plaint.
5. Upon entering appearance, the appellants filed their statement of defence jointly to deny the allegations set out in the plaint.
6. At the hearing of the suit, the respondent testified as the sole witness whereas the 2nd appellant testified for the defence case.
7. Upon considering the evidence and the written submissions, the trial court delivered judgment in favour of the respondent and against the appellants jointly and severally in the following manner:

Liability	100%
a) General damages	Kshs.450,000/=
b) Special damages	<u>Kshs.3,550/=</u>
Total	Kshs.453,550/=

8. The aforementioned judgment is now the subject of the appeal before this court. To challenge the judgment, the appellants have put forward the following grounds of appeal vide their memorandum of appeal dated 29th October, 2019:

i. THAT the learned trial magistrate erred in law and in fact in finding the 2nd defendant 100% liable for negligence.

ii. THAT the learned trial magistrate erred in law and in fact in not finding that the plaintiff failed to prove negligence on the part of the 2nd defendant.

iii. THAT the learned trial magistrate erred in law and in fact in awarding excessive and exorbitant damages to the plaintiff.

9. This court directed the parties to file written submissions on the appeal.

10. On liability, the appellants contend in their submissions that the respondent was unable to tell the manner in which the subject motor vehicle was being driven prior to hitting him from behind and that he did not call any independent witnesses to corroborate his testimony therefore he did not prove the particulars of negligence against the 2nd appellant. The appellants cited the case of **Samuel Kimani & another v Mary Wanjiku Kamau & another [2019] eKLR** where the court held that in the absence of proof of negligence by the respondent, the appellants therein could not be held liable.

11. The appellants further contend that the oral testimony of the 2nd appellant regarding the manner in which the accident occurred was not controverted by the respondent, and yet the trial court disregarded this fact.

12. On quantum, the appellants are of the view that the award made under the head of general damages for pain, suffering and loss of amenities was inordinately high and ought to be interfered with.

13. The appellants submit that an award of Kshs.250,000/= is a more suitable award in the circumstances, supported by the case of **H. Young Construction Company Ltd v Richard Kyule Ndolo [2014] eKLR** where the court reduced an award of Kshs.350,000/= to that of Kshs.250,000/= for degloving injury to the left leg with loss of skin over the calf muscles and blunt injury to the left ankle joint; and the case of **Mutuku Stanley & another v Stephen Mwongela Maweu [2017] eKLR** involving injuries in the nature of cut wound on right elbow, degloving injury to left hand with deformed fingers, blunt injury to left shoulder with laceration among others. In that case, the High Court sitting on appeal substituted an award of Kshs.700,000/= with one in the sum of Kshs.300,000/=.

14. The respondent replied by submitting that the trial court correctly considered the evidence which was placed before it and therefore arrived at a proper finding on liability.

15. In respect to the general damages, the respondent is of the view that the award made by the trial court was proper and reasonable.

16. On that basis, the respondent submits that the appeal must fail.

17. I have considered the contending submissions on appeal. Moreover, I have re-evaluated the evidence which the trial court had the opportunity to consider.

18. It is clear that the appeal lies against the findings on liability and quantum. It is thus appropriate for me to address the appeal under the two (2) heads.

19. On *liability*, what has been challenged is the finding of the learned trial magistrate on liability in respect to the 2nd appellant.

20. At the trial, the respondent adopted his signed witness statement and testified that he was walking beside the road when he was knocked by the subject motor vehicle from behind.

21. In cross-examination, the respondent stated that he did not see the subject motor vehicle approaching and that he was in the company of his colleagues at the time.

22. The 2nd appellant on his part gave evidence that he was the driver of the subject motor vehicle on the material date and that the respondent was in the middle of the road when the accident occurred.
23. In cross-examination, it was the testimony of the 2nd appellant that he was charged with careless driving and fined a sum of Kshs.30,000/ in relation to the accident.
24. Upon hearing the parties, the learned trial magistrate reasoned that the evidence of the 2nd appellant that the respondent was in the middle of the road was unfounded, and given the criminal charge and conviction of the 2nd appellant, a finding of 100% liability was proper in the circumstances.
25. Upon my re-evaluation of the evidence tendered before the trial court, I observed that the same confirms the occurrence of the accident on the date earlier referenced.
26. It is not controverted that the accident involved the respondent and the subject motor vehicle being driven by the 2nd appellant. It is equally not controverted that the 1st appellant was the registered owner of the subject motor vehicle at all material times.
27. On the subject of the police abstract, upon my re-examination I note that the same indicates that the 2nd appellant was charged in a criminal court in relation to the accident and convicted by way of a fine. This was confirmed in his oral testimony.
28. It is noteworthy that the contents of the police abstract were not challenged by the appellants. Moreover, the law is well settled that the standard of proof in criminal cases is much higher than that in civil cases.
29. Further to the foregoing, I find as the learned trial magistrate did, that the 2nd appellant did not bring any credible evidence to demonstrate contributory negligence on the part of the respondent.
30. In the circumstances, I affirm the finding of the learned trial magistrate that the respondent proved his case against both appellants on a balance of probabilities and therefore entered a correct finding on liability.
31. Concerning *quantum*, as earlier noted, the award that has been challenged on appeal is that on general damages for pain, suffering and loss of amenities.
32. On the one part, the respondent suggested an award in the sum of Kshs.800,000/ and cited the case of **Hilltop Motors Enterprises Ltd & 2 others v Rebecca Naiga [2017] eKLR** where the court made an award in the sum of Kshs.500,000/ for injuries particularized as degloving wound on the right thigh, cut wound occipital region and soft tissue injury on left leg.
33. The appellants on their part did not suggest any sums but quoted among others, the case of **James Amariati Stanley v Devki Steel Mills Limited [2017] eKLR** in which the court awarded a sum of Kshs.120,000/= to a plaintiff who had sustained a cut wound on the left fifth finger and bruises on the left ring finger.
34. The learned trial magistrate gave an award of Kshs.450,000/= to be reasonable in view of the injuries sustained by the respondent, but did not cite any guiding authorities.
35. Upon my re-examination of the pleadings and the medical evidence tendered at the trial, it is clear that the respondent herein sustained degloving injuries on the left thigh and forehead, blood loss and soft tissue injuries. In the medical report prepared by Dr. Roger Hannington Kyo and dated 8th June, 2018 the injuries were classified as harm.
36. I note that the authorities cited by the appellants bore less serious injuries in comparison to those suffered by the respondent in the present instance, while the case of **Hilltop Motors Enterprises Ltd & 2 others v Rebecca Naiga** (supra) cited by the respondent was more comparable in terms of the injuries suffered.
37. I also considered the case of **Easy Coach Limited v Emily Nyangasi [2017] eKLR** in which the court upheld an award in the sum of Kshs.700,000/ in the instance of soft tissue injuries and degloving injuries to the right

hand and right leg.

38. In view of the foregoing, I am satisfied that the award made by the learned trial magistrate was reasonable and within range of awards made in respect to related injuries.

39. The upshot therefore is that the appeal is dismissed for lack of merit, with costs to the respondent. The judgment delivered by the trial court on 11th October, 2019 is hereby upheld.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st and 2nd Appellants

..... for the Respondent