



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. E009 OF 2020

BETWEEN

KIRAN KUMAR SOMCHARD SHAH.....APPLICANT

AND

ISAAC KIMATHI KAAI.....RESPONDENT

(Being an Appeal from the Judgment and Decree in MERU CMCC No. 181 of 2018 by Hon. E. Mbicha (PM) on 29th February, 2021)

JUDGMENT

1. On 02nd February, 2018 at about 08.00 pm, an accident involving the Respondent and motor vehicle **KBA 859N (accident motor vehicle)** occurred along Kemu-Makutano feeder road as a result of which the Respondent suffered bodily injuries.

Respondent's case

2. Respondent stated he was walking off the road when the accident motor vehicle which as being driven at high speed knocked him down causing him injuries.

3. Everlyn Mpinda Kaai, Respondent's sister who was with the Respondent at the material time stated they were walking off the road when he accident motor vehicle which as being driven at high speed from behind them knocked down the Respondent causing him injuries. PC Daniel Chacha stated that the accident involving the Respondent and the accident motor vehicle was investigated and the driver blamed for the accident as evidenced by the police abstract PEXH.I.

Defence case

4. Martin Mureithi Murungi, the driver of the accident motor vehicle on the material date and time stated that he found the Kemu-Makutano feeder road blocked with stones and being apprehensive of an attack, he drove at high speed and knocked down a man who moved onto the lane of the vehicle.

5. At the conclusion of the trial, the learned trial magistrate found the accident motor vehicle was driven negligently found Appellant liable at 100% and proceeded to award damages as follows:

- | | | |
|--------------------|-------|-----------|
| 1) General damages | Kshs. | 850,000/- |
| 2) Special damages | Kshs. | 50,900/- |

The Appeal

6. The Appellant dissatisfied with the lower court's decision preferred this appeal on both liability and quantum.

Analysis and Determination

7. I have considered the evidence at the trial and the submission on behalf of the parties.

8. There are two elements in the assessment of liability, namely causation and blameworthiness. (See Baker v Willoughby [1970] AC 467). I have considered the principles on contributory negligence enunciated by the court in **De Frias v Rodney 1998 BDA LR 15** as follows:

“Contributory negligence required the foreseeability harm to oneself. A person is guilty of contributory negligence, if she ought reasonably to have foreseen that if she did not act as a reasonable prudent person she might be hurt and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff should have failed to take reasonable care for her own safety. I do not find that the plaintiff's conduct was in any way contributory negligence. In the agony of the circumstances she made an unsuccessful attempt to avoid the conclusion.”

9. The facts of this case have been fully set out hereinabove. The accident in this case and the fact that the Appellant's driver was driving at a high speed are not denied. The eye witnesses to the accident namely Everlyn Mpinda Kaai corroborated the Respondent's evidence that the point of impact was off the road and not on the road as stated by Appellant's driver. Having weighed the Respondent's and Appellant's cases, I find that the learned trial magistrate was in the circumstances, entitled to find as he did, that on the evidence before him the point of impact was off the road, that Respondent did not contribute to the accident and that the Appellant's driver was wholly to blame for the accident.

10. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See MBOGO v SHAH (1968) EA 93 and **Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor, No. 2 [1987] KLR 30**).

11. The Court of Appeal in Stanley **Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR** settled the principles to be applied in assessing damages and stated that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases. (Emphasis added).

12. The Respondent's medical report prepared by Dr.Koome Guantai on 17.05.2018 reveals that he suffered a left mid-shaft fracture. He was treated as an inpatient for 7 days and the fracture was fixed surgically with an implant which will require removal at a cost of Kshs. 50,000/-. As at the time of examination which was 3 months after the accident, the Respondent still had pain on the left thigh, could not walk long distances or carry heavy objects.

13. At the hearing, the Respondent prayed for Kshs. 1,500,000 and cited **Charles Mathenge Wahome V Mark Mboya Likanga & 2 others [2011] eKLR** where plaintiff in that matter suffered cut wound on the scalp and fractured right femur with assessment of 25% permanent disability which was informed by the permanent shortening of the leg.

14. Appellant offered Kshs. 500,000/- and placed reliance on Francis Maina Kahura v Nahashon Wanjau Muriithi [2015] eKLR where the court on appeal reduced the award for general damages to Kshs. 500,000/- for a segmental fracture of the mid-shaft right femur and a cut wound on the right knee.

15. The general consensus in awarding damages is that it is discretionary but must be reasonable and comparable with similar cases. The injuries suffered in the case cited by the Respondent are more severe than the ones suffered by the victim in this case whereas the one cited by the Appellant is comparable but is over 6 years old. Doing the best I can, I find that an award of Kshs. 550,000/- would be reasonable in the circumstances.

16. In conclusion, I find that the appeal has merit and is allowed in the following terms:

1) Liability is confirmed at 100% against the Appellant

2) The award of general damages in the sum of Kshs. 850,000/- is set aside and substituted with the sum of Kshs. 550,000/-

3) Each party shall bear its own costs

DATED AT MERU THIS 18TH DAY OF NOVEMBER 2021

WAMAE. T. W. CHERERE

JUDGE

COURT ASSISTANT - MORRIS KINOTI

FOR THE APPELLANT - MR. MUMA FOR MUMA NYAGAKA & CO ADVOCATES

FOR THE RESPONDENT - MR. MUTHOMI FOR JOHN MUTHOMI & CO ADVOCATES