REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 119 OF 2018

PATEL PARVIN.....APPELLANT

VERSUS

BENSON KATIBI ALUCHELI.....RESPONDENT

[Being an Appeal from the Judgment and Decree of the Chief Magistrate, Kisumu in

KISUMU CMCC NO. 377 of 2015 delivered on 22nd October 2018]

JUDGMENT

By a judgment delivered on 22nd October 2018, the learned trial magistrate held the Defendant, **PATEL PARVIN**, 80% liable for the accident in which the Plaintiff, **BENSON KATIBI ALUCHELI**, sustained injuries. The trial court held that the Defendant was liable to the tune of 20%, as he was partly to blame for the accident.

1. As regards the quantum of General Damages, the trial court awarded the sum of Kshs 800,000/=, which was then reduced to Kshs 640,000/=, on account of the Defendant's contributory negligence.

2. The Plaintiff was also awarded the Special Damages of Kshs 6,300/=, as well as the costs of the suit.

3. Finally, the trial court awarded the Interest on the General Damages, the Special Damages, and the Costs of the suit.

4. Being dissatisfied with the Judgment, the Defendant filed the appeal herein, challenging the findings on liability, and also the damages awarded.

5. It was the Appellant's contention that there was no evidence that he had caused the accident. If anything, the Appellant was of the view that the available evidence did exonerate him from liability.

6. In the Appellant's opinion, a proper assessment of the evidence could only lead to the conclusion that he was blameless.

7. On the issue of Quantum, the Appellant expressed the view that the trial court had failed to properly take into account the evidence and the relevant authorities. In the result, the Appellant concluded that the learned trial magistrate had awarded an excessive quantum of damages.

8. Being the first appellate court, I am obliged to reconsider all the evidence on record and to carry out my own evaluation thereof.

9. However, when drawing my own conclusions from the said evaluation of the evidence, this Court will remind itself that it did not have the benefit of observing the witnesses when they were giving evidence.

10. Therefore, unless it appears that the findings of the trial court were clearly inconsistent with the totality of the available evidence, the appellate court would not upset findings which the trial court based upon the demeanour of the witnesses.

11. In the case of **PETERS Vs SUNDAY POST LIMITED [1958] E.A. 424**, the Court of Appeal said;

"An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally

reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court itself could have come to a different conclusion."

12. The Plaintiff's claim, as set out in the Plaint, was that the Defendant's driver drove his motor vehicle carelessly, negligently or recklessly, resulting in the accident in issue.

13. The Plaint set out a total of 13 particulars of the alleged negligence. Basically, the driver is said to have entered from a feeder road, whilst driving fast. At the material time, the Plaintiff was riding on his motor-cycle, along the main road.

14. It was in those circumstances that the Defendant's vehicle hit the Plaintiff's motor-cycle, causing the Plaintiff to sustain injuries.

15. The particulars of the injuries were set out as follows, in the Plaint;

"i. Damages of the left lower limb,with mid shaft tibia/fibula fracture in lateral displacement.

ii. Blunt chest injury, with damage of the rib-cage.

iii. Friction bruises on the left elbow region.

iv. Blunt abdominal injury.

v. Headache.

vi. Neck tenderness.

vii. Backache.

viii. Bruises on the right hand."

16. At the trial the Plaintiff called 4 witnesses, whilst the Defendant called one witness.

17. **PW1, Benson Katibi Olucheli**, was the Plaintiff. He said that he was riding his motor-cycle along Nyerere Road, heading from town, and heading towards Mamba Hotel.

18. At the junction of Paramount Road and Nyerere Road, the Defendant's vehicle overtook one vehicle which had stopped, and the Defendant's said vehicle entered onto the main road, from a side road. Nyerere Road, along which the Plaintiff was riding is the main road.

19. Upon entering the main road, the vehicle hit the Plaintiff's motor-cycle, causing it to crash on the opposite side of the road.

20. PW1 blamed the Defendant's driver for causing the accident. He said that the driver entered onto the main road at a high speed, and without checking for other road users.

21. PW1 also produced the Medical treatment notes; the X-ray report; the P3 Form and Medical Report, in evidence.

22. **PW2, MWAKWEKWE NYOKA**, is a Police Officer. His evidence was based upon the information contained in the O.B. The said information had been recorded in the O.B. by Constable Tanui. However, the said Tanui was on interdiction at the time of the trial.

23. PW2 told the court that nobody was ever charged, on account of the accident.

24. He also said that because he was not the investigating officer, his view was that it is Constable Tanui who was best placed to tell the Court how the accident occurred.

25. However, the Police Abstract indicated that Tanui was *"still dealing with the issue."*

26. **PW3, GEORGE MWITA**, was a Clinical Officer at Nyando County Hospital. He examined the Plaintiff on 20th May 2017, and he filled the P3 Form.

27. Amongst the injuries he noted was a fracture of the left leg. The said fracture was verified through an X-ray.

28. During cross-examination **PW3** noted that he had requested for an X-ray of the right leg.

29. **PW4, DR. WERE OKOMBO**, is a physician. Although the accident occurred on 18th March 2017, **PW4** examined the Plaintiff on 21st July 2017.

30. As the doctor said, he examined the Plaintiff almost 2 years after the suit herein had been filed.

31. During cross-examination he said that if the Plaintiff had been undergoing treatment he would have recovered. **PW4** added;

> ***"He did not get treatment, failed to properly adhere to medical instructions.***
>
> ***Treatment was in his decision, and he would have recovered. He has never come back to ask for treatment."***

32. The doctor noted that the Plaintiff's Treatment Notes mentioned the fracture of the right leg. However, the doctor's own report mentioned a fracture of the left leg.

33. During re-examination, **PW4** said that the X-ray report indicated that the fracture was on the Plaintiff's left leg. He also stated that the information in his report was based on the physical examination of the Plaintiff.

34. After **PW4** testified, the Plaintiff closed his case.

35. On his part, the Defendant called one witness, **JOHN OUMA OJWANG**. He testified that at the material time, the driver of the Defendant's vehicle was Lawrence Ochola.

36. At the time of the trial, Lawrence Ochola was no longer working at Shirji Petrol Station; but **DW1** produced the Master-roll which showed that Lawrence had been an employee at the said Petrol Station.

37. DW1 was with Lawrence in the Appellant's vehicle, when the accident happened. He testified that the Plaintiff's motor-cycle overtook 2 vehicles, and then bumped into the Plaintiff's vehicle.

38. He testified that the Plaintiff's vehicle stopped, upon getting to the junction.

39. DW1 denied the contention that the Plaintiff's vehicle had overtaken another vehicle at the junction.

40. After **DW1** testified, the Motor Vehicle Inspection Report was produced in evidence, by consent of the parties. The report indicated that the Defendant's vehicle had the following damage;

> ***"Front bumper bar damaged and Front RHS wing slightly dented."***

41. The learned trial magistrate held that from the evidence tendered;

> ***"…. set a rebuttable presumption that the defendants were negligent based on the fact that an accident occurred, that ordinarily would not happen without negligence.***
>
> ***In this case the defendant had a complete control and custody of the motor vehicle at all times to the accident; I thus find him liable."***

42. With utmost respect, I find that the learned trial magistrate did not take into account the evidence on record. I say so because the evidence shows that the Defendant was not at the scene of the accident. It is his driver, Lawrence Ochola who was driving the Defendant's car at the material time.

43. In any event, when a Plaintiff bases his claim upon the alleged negligence of the Defendant, the onus is upon the Plaintiff to prove the particulars of the alleged negligence, and the nexus between the said negligence and the accident.

44. In the case of **STATPACK INDUSTRIES V JAMES MBITHI MUNYAO HCCA NO. 152 OF 2003**, Visram J. (as he then was) held as follows;

> ***"Coming now to the more important issue of 'causation', it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a casual link between someone's negligence and his injury.***
>
> ***The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."***

45. Therefore, the Plaintiff was obliged to prove that the accident was caused by the negligence of the Defendant.

46. Having re-evaluated the evidence on record, I find that there is consensus about the fact that there was an accident between the Plaintiff's motor-cycle and the Defendant's vehicle.

47. The said accident happened on Nyerere Road. At the material time, the Plaintiff was riding his motor-cycle along Nyerere Road.

48. Meanwhile, the Defendant's car was being driven along Paramount Road, which is a *"side road"*.

49. In my understanding, as confirmed by the parties herein, a vehicle entering onto Nyerere Road, from Paramount Road was required to ensure that it was safe to enter onto the said main road. Indeed, **DW1** said that the Defendant's driver stopped at the junction.

50. On the other hand, the Plaintiff emphasized that the Defendant's vehicle did not stop at the junction.

51. In my considered view, whether or not the Defendant's driver had stopped at the junction is not particularly significant. What is significant was that the Defendant's vehicle entered from a side road, and onto the main road, where it had an accident with the Plaintiff's motor-cycle.

52. The first impression was that the Defendant's driver was not sufficiently careful, in ensuring that it was safe to enter onto the main road. But upon a further reflection, I have come to the conclusion that, (from the Motor Vehicle Inspection Report), the motor-cycle was not just hit from its side, by the vehicle's frontal part. I so find because if the accident occurred as described by the Plaintiff, the damage to the vehicle would have been wholly frontal.

53. The presence of damage to the right hand side wing of the vehicle implies that there was contact between the vehicle's said side, and the motor-cycle.

54. I also find that the vehicle was not being driven as fast as the Plaintiff suggested. If the vehicle was at a high speed, the injuries to the Plaintiff would probably have been more serious. Secondly, it would not make sense for any driver to enter onto a main road very fast, as it would be impossible align the vehicle onto the main road.

55. Thirdly, the pillion passenger on the Plaintiff's motor-cycle appears to have been able to see the probability of the accident happening, and she escaped unscathed, after jumping off, before the vehicle came into contact with the motor-cycle. In my considered view, if the vehicle was being driven as fast as suggested by the Plaintiff, there would have been no time for the passenger on the motor-cycle to take the action which enabled her to escape without any injuries.

56. The apparent point of impact appears to be about half-way into the main road. Therefore, if the Plaintiff had been keeping a proper lookout, he may have been able to take appropriate action to avoid the collision.

57. But the fact remains that it was the Defendant's driver who entered onto the main road when it was unsafe. I so hold because if it is true, as the Defendant's witness said, that their vehicle did not overtake another vehicle at the junction, that implies that the driver had a clear view of Nyerere Road. Accordingly, the driver ought to have seen the Plaintiff, who was riding on that main road.

58. As the Defendant's driver did not see the Plaintiff until his vehicle collided with the Plaintiff's motor-vehicle, the Defendant's driver was not keeping a proper lookout. He was negligent.

59. I find that the Defendant's driver bore more blame than the Plaintiff; and I find the Defendant 60% liable. In effect, the Plaintiff was 40% contributorily negligent. Accordingly, the appeal on liability is allowed.

60. On the issue of Quantum, I find that the doctor's assessment of the Plaintiff's disability at 35%, is not sustainable. I so hold because the basis for the said assessment was a statute that had been repealed.

61. In determining the issue of quantum, this Court reminds itself that it may only interfere with the award made if the same was either too low or too high he compared to awards made to other persons whose injuries were comparable to those of the Plaintiff.

62. The failure by the trial court to take into account a relevant factor, or the consideration of an irrelevant factor may also lead to the setting aside of the award that had been made by the trial court.

63. Otherwise, the appellate court must always refrain from upsetting the decision of the trial court, if the said appellate court feels that it could have arrived at a figure that was different from that awarded by the trial court.

64. In the case of **DANIEL OTIENO OWINO & ANOTHER Vs ELIZABETH ATIENO OWUOR, H.C.C.A NO. 18 OF 2019**, Aburili J. reduced the damages from Kshs 600,000/= to Kshs 400,000/=. In that case, the Plaintiff had sustained the following injuries;

(i) Compound fracture of tibia and fibula of right leg.

(ii) Deep cut wound and tissue damage of right leg.

(iii) Head injury and cut wound on the nose.

(iv) Blunt chest injuries.

(v) Soft tissue injury on the lower left leg.

65. In the case of **MOTREX CO. LIMITED & ANOTHER Vs FIDELIS NJOKI GACHOKA H.C.C.A NO. 205 OF 2011**, Mbogholi

Msagha J. (as he then was) upheld the award of Kshs 800,000/= as General Damages for the Respondent. The injuries in that case were;

(a) Open fracture of tibia and fibula of right leg. When surgery was done the fracture was fixed with external fixators.

(b) Non-displaced fracture of right jaw.

66. The Respondent's leg was in plaster of paris for 3 months; and she had to undergo a long course of painful treatment.

67. In the case of **ALPHONCE MULI NZOKI V BRIAN CHARLES OCHUODHO H.C.C.A NO. 141 OF 2011** Kasango J. upheld the award of Kshs 800,000/=. The Plaintiff has sustained;

(a) Compound comminuted fracture of tibia and fibula;

(b) Degloving injury of the medial aspect of the right leg and foot.

68. Having given consideration to the authorities above, I find that there is a little likelihood that any 2 cases would be exactly similar. Therefore, when the court is called upon to exercise its discretion, it does the best it can to award comparable compensation to those awarded in cases where the injuries sustained were comparable to those of the Plaintiff.

69. In my considered view, the award in **DANIEL OTIENO OWINO & ANOTHER Vs ELIZABETH ATIENO OWUOR, H.C.C.A. NO. 18 OF 2019**, appears to be out of sync with other comparable cases.

70. But I also find that the award of Kshs 800,000/= was inordinately high in the circumstances.

71. I therefore allow the appeal, set aside the said award and substitute it with an award of Kshs 650,000/=.

72. In the final analysis, based on the 60% liability, the Appellant shall compensate the Respondent with Kshs 390,000/=, as General Damages, and Kshs 6,300/= as Special Damages.

73. Although the appeal is successful, in principle, it did not grant the reliefs sought by the Appellant. In other words, the appeal was only successful in part.

74. In the circumstances, I order that each party will meet his own costs of the appeal.

75. The costs of the suit shall still be paid by the Appellant, to the Respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF NOVEMBER 2021

FRED A. OCHIENG

JUDGE