



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 586 OF 2016

KENYA NUT INDUSTRIES LIMITED.....APPELLANT

VERSUS

ALEXANDER MWANGI MWAI.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable Ms. L.

W. Kabaria Resident Magistrate at Milimani Commercial Courts delivered on 19th August 2016)

JUDGEMENT

1. **Alexander Mwangi Mwai**, the Respondent herein, by a plaint dated 8th February 2008 and an Amended Plaint dated 12th May 2011 filed his claim before the Chief Magistrate's Court at Nairobi against KENYA NUT INDUSTRIES LIMITED, the appellant. He pleaded that on 4th July 2007 he was riding motor cycle Registration KAS 789B along 4th Parklands Avenue when the appellant's driver in control of motor vehicle Registration KAR 597P lost control veered off its lane and hit the respondent thereby occasioning him severe injuries. He sought for general damages for pain, suffering and loss of amenities, special damages, cost and interest.

2. The appellant denied the respondent's allegation contained in his plaint and pleaded in the alternative that the accident was wholly contributed by the negligence of the respondent.

3. The matter proceeded to a full hearing and the trial court found the appellant 100% liable. It proceeded to award the respondent general damages for pain and suffering in the amount of Kshs 900,000/- and future medical expenses of Kshs 100,000/-.

4. The appellant dissatisfied with the finding of the trial court has lodged a memorandum of appeal dated 14th September 2016 with 8 grounds attacking the trial court's judgment on the issues of liability and quantum. The appellant submitted that the testimony of the respondent was contradictory and ought to be disregarded. They argued that the respondent maintained that he was riding his motorcycle behind the appellant's lorry and that when the appellant's driver switched to the right lane he hit him as he was passing the appellant's lorry. They advanced that the evidence was clear that the respondent was in breach of **Rule 73 (2) and (5) of the Traffic Rules**. The traffic rules bars drivers from overtaking on the left lane and argued that the respondent was overtaking on the left lane. In addition the appellant submitted that liability should be apportioned at 50:50. The appellant cited the case of **Said Swaleh Said & Another vs Tabitha Njeri Kinuthia (2018)eKLR** where the court held that the appellant was to shoulder 50% liability as the motorcyclist tried overtaking from the left side. They urged that the general damages awarded were excessive and that an award of Kshs 800,000/- would have been sufficient. They cited the case of **Orion Hauliers Limited vs Michael Semper Esikhati (2012) eKLR** where the court awarded Kshs 800,000/- for a plaintiff who sustained a fracture of the hip joint which stiffened and resulted in a permanent incapacity of 20%. In **Julius Edwin Muriuki & another v George Kithinji Mwiandi(2014)** the plaintiff therein was awarded Kshs 800,000/- where he had sustained a dislocation of the left hip with acetabulum fracture which resulted in shortening of the leg, permanent incapacity was assessed at 30%. They also urged the court to reduce future medical expenses to 100,000/- on the basis of Dr. Wambugu's report.

5. The respondent supported the decision of the trial magistrate that the appellant was entirely to blame for the accident and that the respondent's evidence was not contradictory. He advanced that he had proved his case on a balance of probabilities and cited the case of **Kirugi & Another v Kabiya & 3 Others (1987) KLR 347**. He added that the trial magistrate in her judgment after considering the evidence of the appellant held that it was not consistent with the injuries sustained by the respondent. He relied on the case of **Nakuru HCCC No 202 of 2009 Michael Maina Gitonga vs Serah Wanjiku Mungai** where the plaintiff therein suffered multiple fracture of the pelvis, dislocation of the right hip with displaced fracture of the right acetabulum, comminuted fractures of the right tibia and fibula on the proximal end with fracture of the tibia plateau and soft tissue injuries of the chest. The plaintiff therein was awarded Kshs 1,500,000/- for general damages. He urged the court to consider Dr. Wangata's estimate for future medical expenses which was at the estimate of Kshs 100,000/-.

6. Being the first appellate court, I am required to re-evaluate the evidence independently and come to my own conclusion bearing in mind

that I neither heard nor saw the witnesses testify (See *Selle v Associated Motor Boat Co. [1968] EA 123*).

7. The respondent testified as Pw2. He recalled that on 4th July 2007 while driving his motorcycle, the appellant's vehicle KAR 597P was right ahead of him. The driver of the car then turned right and thereafter suddenly turned left hitting him. He explained to court that the driver wanted to enter a gate then he suddenly came back to the left without warning. On cross examination he testified that when the driver of the motor vehicle took a right turn he proceeded past the vehicle but it suddenly came back to the left lane and hit him from the left on the bonnet. Dr Theophilus Wangata (PW1) testified that he examined PW 1 and formed the opinion that he suffered a fracture of patella and right hip and underwent surgery to fix the fractures, he estimated future medical expenses would cost Kshs 100,000/- as the plaintiff would need surgery to remove metal plates as well as physiotherapy because of the stiff joint. Justus Shebewe PC No 45751(PW 3) testified that Parklands Police Station issued an accident abstract in respect of the injury arising out of the road traffic accident that occurred on 4th July 2007. On cross examination told court that he was not the investigating officer.

8. Joseph Maina Macharia (DW2) testified that on the material day they were delivering goods to a client and he was in the appellant's motor vehicle. He testified that as they entered their client's gate the motorcycle tried overtaking. On cross examination he testified that the vehicle was waiting for the client's gate to be opened and part of the vehicle was by the road. He testified that the respondent on high speed attempted to overtake the vehicle from the left side.

9. Of note is that DW 2 on cross examination indicated that he did not record a statement with the police because it is the driver of the motor vehicle who was in charge. He confirms that their vehicle was not on the left side.

10. Dr Wambugu Mwangi (DW 1) testified that when he examined the respondent he had fractures of surgical intervention around the knee and hip joint. The hip joint had achieved a complete range of movements but beneath the scars of the knee were palpable metal implants. He formed the opinion that he was highly predisposed to osteoarthritis across the hip joint and assessed permanent incapacitation at 6% and also recognized that the right patella implants would require removal at an estimated cost of Kshs 40,000/- at a private institution.

11. After considering the evidence before the trial court, the memorandum of appeal and the rival submissions, the issues for determination are whether the appellant was liable for the accident at 100% and whether the quantum of damages as assessed was correct.

12. The sum total of the evidence of the respondent is that he was behind the appellant's lorry when the lorry turned right to gain entry to a gate and suddenly turned left as the respondent moved on to bypass it on the left. That explanation is consistent with the evidence of point of impact. To counter that evidence DW 2, Joseph Maina Macharia testified for the appellant. He said he was a passenger in the lorry. He suggests that the lorry had already turned to the left when the respondent hit it while attempting to overtake on the left. From the point of impact and the intensity of impact, it is quite clear that the respondent was riding on what was now a free lane after the lorry turned right only for it to turn left suddenly leading to the collision.

13. There is uncertainty whether DW 2 was in the motor vehicle as through his own admission he did not record a statement with the police. The failure to call the driver of the subject motor vehicle does not help the appellant's case. An adverse inference can be drawn that the said driver was likely to give adverse evidence to the respondent.

Nobody was in a better position to explain the events of the day than the driver who was in control of the lorry at the material time.

14. In the end, I find the finding of the trial magistrate on liability sound based on the evidence before her.

15. I shall now turn to the other issue raised by this appeal, quantum. Before I consider the contesting arguments by the parties, I must keep in mind the general principle upon which this Court, as an appellate court, will interfere with an award of damages. It was stated in *Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5* as follows;

“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”

16. From the evidence presented before the trial court the respondent's injuries were not disputed. The injuries suffered by the respondent were soft tissue injuries, dislocation of the right hip joint, fracture of the right acetabulum and comminuted fracture of the right patella. PW 1 testified that he formed the conclusion that the respondent sustained 2 fractures – fracture of the right patella and the acetabulum. DW 1 testified that when he examined the respondent he confirmed that he had fractures of surgical interventions around the knee and the hip joint. He arrived at the opinion that the fracture has united but with residual stiffness across the right knee joint and that the right hip joint is highly predisposed to early onset osteoarthritic changes. The treatments notes presented by the respondent also show that the radiology department at the Aga Khan University hospital found that the respondent suffered fractures of the posterior and the superior acetabular lips and comminuted fracture of the patella.

17. The appellant seeks to have the trial court award on general damages for Kshs 900,000/- be reduced to Kshs 800,000/-. The cases by the appellant *Orion Hauliers Limited vs Michael Semper Esikhati (supra)* and *Julius Edwin Muriuki & another v George Kithinji Mwiandi* are for plaintiffs who only had fractures on the hip joint. In the current case the respondent had two fractures and in the circumstance the trial court cannot be faulted for making an award of Kshs 900,000/- to compensate the respondent.

18. The respondent had claimed in his pleadings that a sum of Kshs 100,000/- would be required for future medical expenses. PW 1 gave evidence that Kshs 100,000/- would likely be the amount to be paid by the respondent if the procedure for removal of the metal plates was carried out at Aga Khan University Hospital. DW 1 was of a contrary opinion that Kshs 40,000/- would be sufficient for the removal of the metal plates at a private hospital. The respondent having been treated at Aga Khan Hospital where he expects the surgical plates to be

removed I find no reason to reduce the amount to Kshs 40,000/- as per the opinion of DW 1.

19. The upshot is that the appeal has no merit and is hereby dismissed. The respondent shall have the cost of the appeal.

Dated, Signed and Delivered at Nairobi this 20th day of January, 2020.

A. K. NDUNG'U

JUDGE