REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.78 OF 2018

ALEXENDER FORBES.....1ST APPELLANT

TSUSHO CAPITAL(K) LTD.....2ND APPELLANT

VERSUS.

STEPHEN BARASA WASIKE.....RESPONDENT

[*An appeal from the judgment and decree of Honourable L.N. Kiniale Magistrate delivered on 18/10/2018 in Sirisia SRMCC NO 24 /2017*]

JUDGMENT.

By plaint dated 11th October 2017, the respondent in this appeal sued the Appellants seeking general damages and special damages from injuries sustained in a road traffic accident involving motor vehicle registration number GKB 292E owned by the 2 ND appellant while the 1st appellant was beneficial owner of the suit motor vehicle and was driven by appellant's driver along Bungoma-Chwele road.

That Plaintiff avers in his plaint that on or about 18-7-2017 while the plaintiff was in a farm along Bungoma-Chwele road at Marakaru market the the said motor vehicle which was being driven by the defendants their servant, agent and/or driver so negligently, carelessly and recklessly drove the suit motor vehicle that the same lost control, veered off the road and knock the plaintiff causing severe personal injuries. The particulars of negligence on the part of the appellant were pleaded under paragraph 5 of the plaint as follows;

i. Employing an unqualified and reckless driver

ii. Driving at an excessive speed in the circumstance

iii. Failing to maintain the suit motor vehicle

iv. Failing to keep a proper look out while driving

v. Failing to keep safety of other road users.

The defendants filed their defence denying the plaintiff's claim and averred that if the said accident occurred it was caused by and/or contributed to by the plaintiff. The evidence before the trial court was that,Pw1,the plaintiff testified that on 18/7/2018 while untying his goat off Bungoma-Chwele road at Marakalu area.

He stated that the defendants' driver carelessly drove motor vehicle registration number GKB 292E causing it to lose control, veer off the road and knock the plaintiff causing him severe injuries. He blamed the defendant's driver for driving carelessly and that the suit motor vehicle left its lane veered off the road and knocked him on the right side of the road.

The defendants on defence hearing testified through the driver who testified as Dw1Richard Boit. In his evidence he testified that he is police driver and was driving suit motor vehicle from Cheptais. He did not dispute the accident having occurred, he stated that it was raining and the road was slippery, he testified that he kept on the left but since the road was slippery the motor vehicle swerved to the right and hit him. He blamed the plaintiff for grazing his goat on a road reserve.

After the close of the respective parties' cases their advocates filed written submissions both on liability and quantum and after consideration and determination the trial court entered judgement for the plaintiff on liability and awarded Kshs.303,495.30/= as quantum of damages.

The Appellant being aggrieved by the said judgement filed this appeal faulting the judgment on the following grounds:

> ***i. That the learned trial magistrate erred in fact and in law in adopting the wrong principles in assessment of the damages payable.***
>
> ii. ***That the learned trial magistrate erred in fact and in law in awarding excessive damages in view of the injuries pleaded and proved.***

This being a first appeal, this court is obliged to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. The powers of the appellant court were stated in **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

"This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif Vs Ali Mohammed Solan [1955] 22 EACA 270).

By consent of the parties, this appeal was canvased by way of written submissions. The appellant submitted through Advocate Onyinkwa that the award of damages awarded were excessive in the circumstance and the trial court used the wrong principles on arriving at the same. He relied on case law in ***Arrow Car Ltd Vs. Bimomo & 3 others 78/18(2204)EKLR 101.***

He submitted that the damages awards were excessive as compared to injuries sustained by the appellant and urged this court to set aside the award.

Mr. Omar for the Respondent submitted that the trial court rightly awarded the respondent Kshs.300,000/= which court saw the keloid scars on respondent face and evaluated the medical evidence before her.

He submitted that the award should be upheld as it is not inordinately high. He submitted that the cases relied on by the respondents are comparable and prayed that the appeal be dismissed. I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal is:

> ***i. Whether quantum damages were properly awarded in circumstance of this case by the trial court ?***

To determine issue at hand it is imperative to analyzed particulars of the injuries sustained and they were:

> **i. Blunt injury on the head**
>
> **ii. Bruises to the left forehead**
>
> **iii. Blunt injury to the neck**
>
> **iv. Cut wound around the left post auricular**
>
> **v. Blunt injury to the back.**

Two medical reports were produced and the 2nd report produced as exhibit 1 was prepared on 3/8/18, in the said report the doctor noted that plaintiff has hypertrophic scars in front of the ear that are of keloid formation and described the same as permanent in nature.

With this evidence on record it is my finding that the appellant it is important to note that general damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in ***Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR*** thus:

> ***1. "The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past".***

I have reviewed the entire record at trial and the judgment passed regarding assessment of damages and I have failed to find any error that would invite this courts interference with the discretion as exercised. I find no reason to interfere with the award and therefore I uphold the award by the trial magistrate. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed with costs.

Dated and Delivered at Bungoma this 6th day of February, 2020.

S.N. RIECHI

JUDGE