REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.101 OF 2010

MALDE TRANSPORTERS LIMITED.....1ST APPELLANT

IBRAHIM WANDERA.....2ND APPELLANT

VERSUS.

MOSES MUKWA NAMUNABA.....RESPONDENT

(An appeal from the Judgment and decree and Ruling of Senior Principal Magistrate J.K.

Ngarngar at Bungoma SPMC delivered on 12th May, 2010 & 21st July, 2010 In C.M.C.C. No.752/2003)

JUDGMENT.

By way of amended plaint dated 28.10.1996, the appellant in this appeal sued the appellant for general damages and special damages for a road traffic accident that occurred on or about 23rd December 1992 along Kitale-Webuye Road. The Accident involved motor vehicle registration number KZB owned by the 1st defendant when the said lorry was so negligently driven and or controlled that it caused an accident by hitting plaintiff's motor vehicle KDL 123V/W beetle from the rear as the same was being lawfully driven by the plaintiff.

The particulars of negligence on part of the appellant and/or its driver were set out in paragraph 5 of the amended plaint as follows;

a) Driving too fast without considering nature of the road

b) Failing to keep sufficient distance to avoid hitting the plaintiff's car from rear

c) Failing to overtake the plaintiff's motor vehicle to avoid the accident.

d) Driving without regard to other road users.

The Defendant/Respondents entered appearance and subsequently filed its amended statement of defence dated 14th June 1999 denying the Plaintiff's claim and setting out particulars of negligence on part of the Plaintiff/Respondent under paragraph 5 of statement of defence as follows;

i. Driving without due care and attention

ii. Driving without proper look out for other motor vehicles

iii. Crossing at T-Junction without due care

iv. Stopping in the middle of a T-Junction.

The matter went to full hearing and PW1, Moses Mukwa the Plaintiff/Respondent testified that on 23/12/1992 while driving his car Registration Number KDL 123 V/W Saloon along Kitale to Webuye when he got hit by a lorry. He testified that the lorry hit him from rear and he reported the accident at Webuye Police Station. He testified that the police looked for and identified the 1st defendant as owner of the motor vehicle that hit him and the 2nd defendant as the driver

He testified that he was issued with a police abstract and treated at Webuye District Hospital. He had cut on the head and lost teeth and had dislocation of left leg, neck and the chest. He testified that he paid Kshs.3500 at the hospital but misplaced the receipt. He produced

discharge summary as PEXH.2.

He also testified that he was admitted at Mission Hospital from 10/3/1993 and paid Kshs.289,000/= by insurance and produced PEXH No.3, PEXH.No.4 as Xray, PEXH.5 as medical report. PEXH.6 as P3 form, Photograph as PEXH.7, report of motor vehicle as PEXH.8 and inspection report as PEXH.9.

The defendants did not offer evidence in their defence and the defendants case was deemed closed. After close of hearing the plaintiff filed their written submissions on liability and quantum and after consideration the trial magistrate found defendant 100% liable and awarded the plaintiff general damages of Kshs.300,000/= for personal injuries and Kshs.190,000/= being value of motor vehicle registration KDL 123 V/W Beetle.

Subsequently the appellant/Defendant filed an application dated 29th May 2010 for orders that the execution of ex-parte judgement be stayed; that the judgement delivered be set aside and defendant be allowed to defend this suit; that all further proceedings consequently be stayed until hearing of this suit and costs be provided for. The application was premised on the grounds in the affidavit sworn by Advocate Pramod Patel. He deponed that the defendant had a genuine and credible defence. He stated that former Advocate on record agreed to settle plaintiff's case through negotiation on out of court settlement since 2008.

That upon hearing the application the trial court dismissed that application on ground that it does not see any serious talk on issue of settlement and there is no evidence to show that the parties were having negotiations to settle the claim.

The appellant been dissatisfied with both the judgement and ruling he then filed this appeal on the following grounds:

> ***i. That the learned Senior Principal Magistrate misdirected himself in awarding grossly excessive damages for Kshs.300,000/= for soft tissue injuries;***
>
> ii. ***That learned magistrate misdirected himself in declining to set aside judgement when there was a meritorious defence and sufficient reasons given for non-appearance.***

By consent of the parties and court directions, this appeal was canvassed by way of written submissions. Mr. Pramod Patel for appellant submitted that trial court misdirected itself in holding the appellant liable and failed to consider at all the issue on contributory negligence. He submitted that the respondent had failed to take any evasive action and was guilty of contributory negligence. He relied on case law in ***Simba Clothing Factory Ltd and Another V Virdee(1976)KLR 291 Paragraph H and I.***

He urged the Honourable Court to hold the Plaintiff to at least 20% to 25% contributory negligence. He submitted that an award of Kshs.300,000/= was excessive in this case for soft tissue injuries. He submitted that the award was made in 2010. He submitted that awards during this period were in the range of Kshs.80,000/= to Kshs.100,000/= relying on ***TIMSALES LIMITED =VS= PENINA ACHIENG OMONDI NAKURU H.C.C.C NO. 192 OF 2008.*** He submitted that an award given was high and should be reduced to Kshs.100,000/=.

He submitted on the claim of material damages that the amount awarded was of Kshs.190,000/= was done on basis of unchallenged evidence and he urged this court to review it downwards. Mr. Simiyu for Respondent submitted on damages awarded that the respondent produced several documentary exhibits and that according to P3 form produced as exhibit 6 the respondent suffered bruises on right side of exterior chest, bruises on right knee and crack on right ankle joint, cut wounds on forehead, depression and bruises on right side of the neck.

He submitted that the said injuries were also contained in the discharge summary and medical report. He submitted the trial court relied on this documents in arriving at his decision. he submitted that the award of Kshs.300,000/= as general damages was not excessive which award was commensurate with the injuries suffered. He submitted on decline by trial court to set aside judgement and stay further proceedings that the trial court categorically stated that the application stated that parties were negotiating which ground had no evidence to show the same and also the application was based on wrong provisions of law which can not afford any remedy as such and dismissed the application.

He submitted on liability that since the respondent was hit from rear there is no way the respondent could have guarded against the possibility of any danger which was not reasonably apparent. He submitted that liability was proper and should be maintained.

He submitted on material damage that the respondent produced valuation report dully prepared by authorized valuer as exhibit 8 and inspection report as exhibit 9 and the said amount of Kshs.190,000/= was proper. He submitted that the appeal lacks merit and should be dismissed.

This being a first appeal, this court is obliged to re-evaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **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 V Ali Mohammed Solan [1955] 22 EACA 270).***

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 whether the appellant was liable and whether the quantum of damages awarded by trial court properly awarded.

On issue one of liability it is not in dispute that accident the accident occurred, the issue that arise is whether liability was properly apportioned at 100% liability to the appellants. To determine this issue it is imperative to look at how the accident occurred. It is the respondent testimony that on 23/12/1992 while driving his car registration number. KDL 123 V/W Saloon he was involved in a road accident along Kitale -Webuye road when he got hit from the by a lorry KCB 036 belonging to the 1st defendant.

In his evidence in support of his case that is he produced police abstract, discharge summary, license, X-ray forms, P3 Form, Photograph of the Vehicle, Inspection report in respect of his motor vehicle. This documents confirmed the accident occurred and the injuries sustained by the defendant and the damage on his motor vehicle.

The Defendants did not tender any evidence to rebut the Plaintiff's claim or confirm contributory negligence by plaintiff as they alleged in their pleadings. In absence of such evidence I find that the defendants were properly held 100% liable for the said accident. In respect to second issue on the quantum of damages awarded. The appellant submitted that the injuries sustained were soft tissue injuries and therefore quantum awarded was excessive in nature. The respondent on the other hand submitted that the damages awarded were properly accessed by the trial court.

To determine issue it is imperative we refer to the nature of injuries sustained by the respondent. The P3 form produced as PExh.6 and dated 8/4/1993 together with discharge summary and 2nd medical report dated 7.10.1994 by the Plaintiff's Doctor the plaintiff sustained the following injuries;

a) Head injury

b) Pain in the right front chest

c) Pain in the right side of neck

d) Injury on right knee

e) Pain in the left lumber region

f) Loss of left upper central incisor tooth.

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".*

The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

The trial court awarded plaintiff Kshs.300,000/= as compensation for injuries sustained. I have failed to find any error that would invite this courts interference with the discretion as exercised. In regard to motor vehicle damage he awarded of Khs.190,000/=. I find that the plaintiff produced inspection report, valuation report and a photograph that showed the level of damage his motor vehicle was damaged by the appellant. Therefore, the respondent proved his case on balance of probability of the same.

In the circumstance, 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 I find that the appeal lacks merit and is hereby dismissed with costs.

Dated and Delivered at Bungoma this 18th day of February, 2020.

S.N. RIECHI

JUDGE