



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 16 OF 2018

ZACHARY NJANJA MUGO.....1ST APPELLANT

BOLPAK TRADING COMPANY LIMITED.....2ND APPELLANT

VERSUS

KIMEMIAH GEOFFREY MAKUMI.....RESPONDENT

(Being an appeal from the Judgment of Onsarigo Resident Magistrate

on 23rd November, 2016, 2017, in Thika CMCC No. 470 of 2013)

RULING

1. This appeal emanates from the judgment of **Onsarigo**, Resident Magistrate in **Thika CMCC No. 470 of 2013**. By the Amended Plaint filed on 22/10/2013, the Plaintiff in the lower court and now the Respondent herein sued the Defendants, now Appellants, claiming compensation for severe bodily injuries he sustained on or about 11th October, 2012, when he was lawfully directing traffic along Nairobi-Thika Road, when the 1st Defendant so negligently drove motor vehicle registration number **KBH 493L** that he caused the same to lose control and violently knock him down, as a result of which he suffered loss and damage.

2. The Appellants filed their Amended Defence on 28th October, 2013, denying any liability for the accident. In the alternative, the Appellants averred that any alleged accident was solely caused by the Respondent.

3. The matter proceeded to a full hearing. In the judgement the trial court found liability at 100% against the Appellant. On quantum, the court entered judgment as follows:

a. General Damages	Kshs.	800,000/=
b. Loss of earning and earning capacity	Kshs.	458,256/=
c. Cost of future medical care	Kshs.	350,000/=
d. Special damages	Kshs.	60,9755/=
Total	Kshs.	<u>1,669,231/=</u>

2. The Appellants, dissatisfied with the lower Court’s judgment preferred the present appeal based on the following grounds:-

“a)That the Learned Trial Magistrate’s Judgment was unjust against the weight of evidence and relied on the wrong principles of law and thereby occasioning miscarriage of justice upon the Appellant.

a) The Learned Magistrate erred in law and in fact in awarding general damages of Kshs. 800,000/=, cost of future medical care of Kshs. 350,000/= and Loss of earning of capacity of Kshs. 458,256/= on injuries, which was excessive and unjust in the circumstances considering the injuries of the Plaintiff and in view of the conventional awards in relation to such claims.

b) That the Learned trial magistrate's decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice in awarding excessive damages on lost years.

c) The Learned Trial Magistrate erred in law and misdirected himself when he failed to consider the Appellant's submissions on quantum.

d) The Learned Magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the Appellant and by instead relying on the authorities cited by the Respondent which were excessive in relation to the facts in this matter."

3. The Court directed that the appeal be canvassed by way of written submissions. The Appellants submitted that the trial magistrate made a finding on quantum without due consideration of the injuries suffered by the Respondent. It was contended that on the evidence adduced, by the Respondent there was no permanent incapacity flowing from injuries sustained. The Appellants complain that the trial court disregarded the Appellants' submissions and authorities on quantum. The Appellants cited the case of **Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd. (2013) eKLR** where it was held that comparable injuries should be compensated by comparable awards. Thus in their view, the award of Kshs. 800,000/= for general damages was inordinately high. They tendered several authorities in urging an award in the sum of Sh. 350,000/-.

4. Concerning the award of damages for loss of earnings and earning capacity, counsel submitted that the same are distinct as explained in the case of **Mumias Sugar Company Limited vs Francis Wanalo (2007) eKLR** but that the trial court erroneously conflated the two. Counsel contended the Respondent did not adduce proof of his monthly earnings and in the event the claim in respect of lost earnings should have been dismissed. In respect of the award for loss of earning capacity, counsel submitted that the Respondent would regain full exercise of his functions and therefore has not been rendered unemployable. Hence, in the Appellants' view, there was no justification for an award for loss of earning capacity.

5. Further, counsel submitted that the award for future medical costs at Kshs. 350,000/= is inordinately high, unwarranted, unjustified and the same ought to be dismissed. In conclusion, it was submitted that the trial magistrate based his awards on the wrong principles of the law and the appeal should be allowed with costs to the Appellants.

6. The Respondent also filed his written submissions. In defence of the trial court's awards, he asserted that the trial magistrate exercised his unfettered discretion based on the evidence placed before him. It was submitted that the Appellants did not call any evidence to controvert that of the Respondent. In this regard, counsel cited the case of **Makario Makonye Monyancha vs Hellen Nyangena Kisii HCCA NO. 113 of 2012** where the court stated the Defendant who fails to call evidence to controvert the plaintiff's evidence on liability cannot contest the issue of liability at submission stage.

7. Counsel submitted that the burden of proving that the lower court improperly exercised its discretion lies on the person challenging the same, as held in the case of **Samken Limited & Another vs Mercedes Sanchez CIVIL APPLICATION NO. 21 of 1999 –NAIROBI**. The Appellants herein were said to have failed to discharge that onus in submissions and as such the Appeal must fail and be dismissed with costs.

8. The Court has considered the matters raised on this appeal as well as the record of the court below. By their memorandum of appeal and related submissions, the Appellants have vigorously challenged the trial court's award in respect of general damages for pain and suffering, damages for lost earnings and loss of earning capacity, as well as the award for future medical expenses. On their part, the Respondent's counsel support these awards.

9. The evidence of the respective doctors who testified in the trial is critical in determining the issues raised on this appeal. However, the evidence of the Respondent at the trial is essential too. In the course of preparing judgment, the court has realized that only a small part of the Respondent's evidence is reflected in the handwritten and typed record (see page 47 – 48 of the Record of appeal). It seems that though the Respondent testified as **PW2**, immediately after **Dr. Bhanji (PW1)**, the record of the Respondent's evidence is incomplete. From my own examination of the handwritten record, I have concluded that the first part of the Respondent's evidence was contained in some pages which are now missing therefrom.

10. Hence, while the last portion of Dr. Bhanji's evidence ends at the bottom of a certain page, the very next page commences with what I presume to be the last part of the testimony of the Respondent, as it starts with the following words :

"I proceed to have them marked for identification as MFI 1 – 2 and MFI – 3 ... I have gone to hospital for further treatment...I have attendance card from PCEA Kikuyu Hospital P Exh. 4a 4b". (sic)

11. The Respondent's testimony proceeds for a further two pages before cross-examination. Based on this record, it would seem, as if the Respondent did not give an account of the accident, his injuries or consequences thereof. In my view, in order for the court to reach a just determination of this matter, it is necessary that the full record of the Respondent's evidence at the trial be placed before it. It is unfortunate that the defect in the record of appeal only came to light at this late stage, and none of the counsels appearing for the parties seem to have noticed the anomaly.

12. In view of the age of this matter, the court is wary of ordering a new trial which might cause further delay and additional cost to the parties. Thus, mindful of the overriding objective and related duty of the court as prescribed in Section 1A and 1B of the Civil Procedure Act to facilitate the just, expeditious proportionate and affordable resolution of disputes, and the inherent powers of the court under Section 3A of the Civil Procedure Act, the Court moves itself *suo motu* under order 42 Rules 27, 28 and 29 of the Civil Procedure Act to direct as follows:

a) The lower court file, **CMCC 470 of 2013** be returned to the CM's Court Thika for the purpose of taking afresh the testimony of the Respondent. For the avoidance of doubt, this order is limited only to the testimony of the Respondent who earlier testified as

PW2.

b) The testimony of the Respondent is to be recorded in the usual manner, including cross-examination, in the lower court file and before a magistrate of the rank of Senior Resident Magistrate or above.

c) The record of the Respondent's evidence thus taken shall be typed and certified and thereafter, the lower court file is to be forwarded to this court.

d) Upon the receipt of the record in (c) above by this Court's Registry, any of the parties to the appeal herein may fix a mention date for the appeal before this court for purposes of receiving a new date for judgment on the appeal or any other necessary order.

e) In order to expedite the matter, this court directs that the lower court file be place before the Chief Magistrate Thika Law Courts on 5th March 2020 so that he may assign an early date for the taking of the Respondent's testimony, either before himself or before any magistrate of the rank specified in (b) above.

Costs will abide the outcome of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 13TH DAY OF FEBRUARY 2020

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C. MEOLI

JUDGE

In the presence of:

No appearance for Appellants

No appearance for the Respondent

Court Assistant - Kevin/Nancy