REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 4 OF 2018

BOARD OF GOVERNORS, NAROK HIGH SCHOOL...1ST APPELLANT

SAMUEL KIPNGETICH KIRUI.....2ND APPELLANT

-VERSUS-

POLYCARP KAMAU IRORI.....RESPONDENT

(Appeal from judgment and decree in Nyeri Chief Magistrates Court Civil Suit No. 178 of 2015 (Hon. Ruth Kefa, Senior Resident Magistrate) delivered on 4 December 2017)

JUDGMENT

This judgment is delivered in rather unfamiliar and unprecedented circumstances. The entire world has been hit by a respiratory disease known as COVID-19 or corona virus. It is viral in nature spreading mainly through human contact although, lately, it has been suggested that it could be airborne as well. So far, it has no known cure but its spread can be contained if human contact or interactions can be restricted. Measures have been taken the world over towards this end in what is now popularly referred to as 'social distancing'. It is for this reason that this judgment is delivered via skype communication or video conferencing.

The respondent sued the appellants in the magistrates' court for, inter alia, special damages and general damages for pain, suffering and loss of amenities. The suit arose out of a road traffic accident which occurred on 7 March 2015 along Nyeri- Nyahururu Road; it involved the 1st appellant's motor vehicle registration number KAN 877 U, driven at the time by the 2nd appellant, and a motor-cycle registered as KMDL 360L on which the responded was riding pillion.

It was the respondent's case that the accident occurred as a result of the 2nd appellant's negligence in driving, managing or controlling the 1st appellant's motor-vehicle. As a result of this accident, the respondent is alleged to have sustained bodily injuries which he particularised as a fracture of the mid clavicle, multiple bruises on the knee, cut wounds on the right toe; he also pleaded that he suffered pain and psychological trauma.

The appellants filed a statement of defence in which they denied the accident occurred or occurred as alleged by the respondent. In the alternative, they averred that if the accident occurred, it was solely caused or substantially contributed to by the rider of the motor-cycle on which the respondent was riding.

At the end of the trial, the learned magistrate concluded that the appellants were wholly liable for the accident. She awarded general damages of Kshs. 400, 000/= and special damages of Kshs. 210. The respondent was also awarded costs of the suit and interest at court rates from the date of the delivery of the judgment. The appellants have now appealed against this decision. In their memorandum of appeal dated 24 January 2018, they have outlined the grounds against the decision of the trial court as follows:

> **"1. That the learned magistrate erred both in law and in fact when she failed to consider the fact that the plaintiff ought to have borne contributory negligence for riding on an insured motor vehicle thus exposing himself to the danger.**
>
> **2. That the learned magistrate erred both in law and in fact when she awarded a sum of Kshs. 400,000/= as damages for injuries suffered which amount is manifestly excessive and high in the circumstances and connotes an erroneous estimate of the damages suffered.**
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> **3. That the learned magistrate erred in law and in fact in failing to consider or even adequately adopt and appreciate the written submissions of the Appellants on record and the authorities annexed therein in support of the appellant's case.**

4. That the learned magistrate erred in fact and in law by failing to follow rules of precedents in awarding general damages.

5. That the learned magistrate erred both in law and in fact for considering irrelevant matters in arriving at the said decision in favour of the respondent as against the appellant."

They prayed for the appeal to be allowed and the judgment of the lower court set aside.

Only the respondent testified and his testimony was relatively brief. It was his evidence that on 7 March 2015, he was riding pillion on a motor-cycle on Nyeri-Nyahururu when the appellant's vehicle emerged from behind and hit them. As far as I understand his testimony, the vehicle attempted to overtake another vehicle ahead. However, there was another oncoming vehicle and therefore it had to backtrack. It is while it slowed that it hit the motor-cycle.

The respondent testified that he was injured. He broke his big toe and middle toe and had his collar bone broken. He also suffered several bruises on the right knee. He was initially taken to Mary Immaculate hospital at Mweiga for treatment but was eventually transferred to Nyeri Provincial General Hospital. He was put on a sling for six months.

It was his case that prior to the accident he worked as driver but he lost his job as a result of the accident. In support of his case, he produced treatment notes, the x-ray report and a police abstract. He also produced receipts, a police abstract and a statutory notice to the insurance company notifying it of his intention to sue. And with that he closed his case.

Neither of the appellants testified nor was any evidence given in their behalf.

Two primary questions that ordinarily emerge in claims on personal injuries are that of liability and damages payable.

On the first question, I must hasten to state that in the absence of any evidence contrary to that proffered by the respondent, the learned magistrate was entitled to rely on the respondent's version as probably representing a true account of how the accident happened. She properly directed herself on the law in this regard and cited the decisions in **High Court Civil Case No. 834 of 2002 Motex Knitwear Ltd versus Gopitex Knitwear Mills Limited** and, **High Court Civil Case No. 1243 of 2001, Trust Bank Limited versus Paramount Universal Bank Ltd & 2 Others** in which it was reiterated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere unsubstantiated statements of fact and that failure to call evidence in rebuttal means the evidence given is uncontroverted.

Damages, on the other hand, would be general and, where there is any expenditure as a result of the accident, special damages would also be granted subject, of course, to proof. The extent of the award in general damages is ordinarily tied to the nature and extent of the injuries suffered and loss of amenities, if any.

Proof of personal injuries is not just based on the testimony of the claimant; there is always the need for expert opinion, in this case, the evidence of a medical doctor. Where parties are in agreement, a doctor's report of his examination and opinion on the nature and extent of the injuries would be admitted in evidence without the doctor himself testifying or being cross-examined on his report.

The record shows that no doctor testified and neither was any medical report on the nature and extent of the respondent's injuries produced. The learned magistrate relied on the police medical examination report (P3 form) and the treatment notes, in particular, the outpatient card which the plaintiff himself produced in her conclusions on the nature and extent of the injuries sustained by the respondent.

But the appellants did not challenge the production of this evidence and neither have they challenged the learned magistrate's reliance on it at this stage. They effectively conceded that the respondent sustained the injuries particularised in his plaint. And if that is not an issue of concern to them and not raised as such in any of their grounds of appeal, I see no reason why I should venture into that area. Rather, I will do well if I restricted myself to their grounds of appeal.

The learned magistrate found as a fact that the respondent sustained a fracture of the mid clavicle; multiple bruises on the right knee; cut wounds on the right hulux toe pain and psychological trauma. Based on these findings, she relied on the decisions in **Eldoret High Court Civil Appeal No. 133 of 2010, Wareng Ndovu Enterprsies Ltd versus Kisanji and Eldoret High Court Civil Appeal No. 113 of 2006 Luke Osoro & Another versus Daniel K. Cheruiyot** and awarded the respondent Kshs. 400,000/= as general damages.

In the former decision, the claimant is said to have sustained soft tissue injuries of the right arm, fracture of the right humerus, laceration on the anterior aspect of the right shoulder, small cut on the right ear and soft tissue injury of the cervical spine; he was awarded the sum of Kshs. 350,000/=. In the latter decision, an award of Kshs. 250,000/= to the claimant who had sustained a mid-shaft fracture of the right humerus was upheld by this court.

The learned magistrate considered the decisions cited by both counsel for the appellant and the respondent and found them to be both extreme; the appellants counsel was of the view that a sum of Kshs. 200,000/= in general damages would be adequate. He relied on Johnson Mose Nyaundi (minor suing through next friend and father **Wilfred Mwadime Nyaundi versus Petroleum & Industrial Service Ltd (2014) eKLR** where an award of Kshs. 180,000/= in general damages and **Isaac Mwenda Micheni versus Mutegi Murango (2004) eKLR** where an award of Kshs. 100,000/= for such damages was made.

The respondent, on the other hand, sought for the sum of Kshs. 650,000/= in damages citing the decision in **High Court Civil Case No. 86 of 1998, Rosemary Bulinda versus Peter Kinyanjui Gakumu & 5 Others** where an award of a similar amount in general damages was made.

The picture that emerges is that the learned magistrate considered both sets of decisions vis-à-vis the injuries that the respondent sustained before coming to the conclusion that they were inapplicable to the respondent's case; she instead found an award of Kshs. 400,000/= was a near adequate compensation under the head of general damages and in support of this award, she cited a decision where a claimant had sustained similar injuries.

It is trite that the assessment of general damages is an exercise within the purview of the discretion of the trial court. For that very reason, the appellate court will not interfere with the trial court's determination unless it is shown that the court proceeded on wrong principles, or it misapprehended the evidence in some material particular, or the award is inordinately high or low as to represent an erroneous estimate.

This position has been reiterated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 and Kemfro Africa Ltd T/A Meru Express Service, Gathogo Kanini versus A.M. Lubia & Olive Lubia (1982-1988) 1 KAR 728**. In the former decision the Court of Appeal noted:

> **"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."**

And in the latter case, the same Court said at page 730 that:

> **The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.**

I am not convinced that, in exercising her discretion, the learned magistrate's assessment of general damages fell short of any these principles. In my humble view, the award made cannot be said to be either to high or to low. In short, there is absolutely no reason why I should interfere with it.

In the ultimate, I find and hold that the appellant's appeal has no merits; it is hereby dismissed with costs.

Dated, signed and delivered on this 9th day of April, 2020

Ngaah Jairus

JUDGE