REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL APPEAL NO. 41 OF 2017

MUNYAO MUSYOKA NGATI.....APPELLANT

VERSUS

MUTINDA RHODAH MUENI.....RESPONDENT

(Being an appeal from the Judgment of the Hon S.K Ngii SRM in Kitui (delivered on 11/11/2017) in Kitui PMCC No. 38 of 2016).

JUDGMENT

1. **Munyao Musyoka Ngati** the Appellant, had sued **Mutinda Rhoda Mueni** the Respondent in the lower court for general and special damages arising from injuries he suffered when the Respondent's motor vehicle registration No. KCC 142L knocked him on 11th December, 2015 along Mutomo – Syunguni road at Mutomo.

2. The plaint was filed by Musili Mbiti & Co. advocates. He pleaded negligence on the part of the driver of the said vehicle.

3. The Respondent denied the claim in her statement of defence filed by O. N. Makau & Mulei advocates.

4. After all the preliminaries, the matter proceeded to full hearing after which the Appellant's suit was dismissed with costs for having not been proved.

5. The learned trial Magistrate in his judgment stated that had the case been successful he would have awarded him-

a) Kshs.75,000/= as general damages

b) Kshs.5,840/= as special damages

6. The Appellant was dissatisfied with the dismissal of his case and so filed this appeal on the following grounds: -

a) That, the learned Magistrate took into account irrelevant issues and arrived at a wrong conclusion.

b) That, the learned Magistrate misdirected himself in both law and fact and arrived at a wrong conclusion dismissing the suit herein.

c) That, the learned Magistrate failed to consider the solid evidence tendered by the Plaintiff's witness.

d) That, the learned Magistrate failed to consider submission by the both counsels and arrived at a wrong conclusion on both liability and quantum.

7. After all the preliminaries had been finalized directions were taken for the appeal to be disposed of by way of written submissions which were filed.

8. During the trial, the Appellant who was the Plaintiff testified and called one witness. His evidence was that he works as a watchman at Peleleza Bar Mutomo. He was on night duty and on 11th December, 2015 at around 5:00 am as he went home, he was knocked down by the Respondent's motor vehicle. He was walking on the left side off the road.

9. The motor vehicle was also moving in the same direction with him and it knocked him from behind. He suffered injuries on his left leg around the knee joint and above the knee. He was taken to Mutomo mission hospital after reporting the accident.

10. He produced the police abstract, copy of records of the motor vehicle KCC 142L, demand letter, statutory notice, P3 form, letter from Mutomo hospital, medical report by Dr. Mutuku and receipts as PEXB 1-8.

11. In cross examination he said the accident occurred early in the morning before sunrise. There were no street lights and it was dark at the scene of the accident. He wore dark clothes without reflectors. By the time he testified (*24/4/2017*) he said he had not fully recovered as he felt pain when doing long distance walks or stepping down. He was however carrying on with his duties normally.

12. Pw2 **No. 33790 PC Stephen Oguka** investigated the case. He said he received a report of the accident and issued the Appellant with police abstract (PEXB1) and P3 form (PEXB5). He stated that the Appellant had been injured on his left leg.

13. Upon cross examination he said he had visited the scene later and even did a sketch plan. He confirmed that the driver had not been charged. From his investigations the driver hit the Appellant as he reversed from a parking. He blamed the driver for the accident. He said the issue of the driver reversing was raised by the driver and the loader when Pw2 interrogated them.

14. The Defendant closed her case without calling any witnesses. Counsel then filed their submissions and a decision was made.

15. Mr. Musili Mbiti for the Appellant in his submissions submits that the Appellant confirmed that indeed he was involved in a road traffic accident on 11th December, 2015 involving motor vehicle registration No. KCC 142L, as a result of which he was injured. He produced documents to support that. Secondly Pw2 supported the Appellant's evidence.

16. On liability he submits that the evidence of Pw1 and Pw2 was sufficient proof of the occurrence of the accident and the Appellant did not need to call more witnesses to prove that. The Respondent did not call any evidence to rebut the Appellant's evidence. Referring to sections 107(1) and 109 of the Evidence Act and the case of **Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Anor (2005) I E.A 334** counsel contends that the initial burden of proof lay on the Appellant (*Plaintiff*) but it later shifted to the Respondent (*Defendant*).

17. It is his submission that the Appellant discharged his burden of proof. He has referred to the cases of: -

i. William Kabogo Gitau –vs- George Thuo & 2 others (2010) I KLR 526.

ii. Kenya Akiba Micro Financing Ltd –vs- Ezekiel Chebii & 14 Others (2012) eKLR.

iii. Miller –vs- Minister of Pensions (1947) 2 ALL ER 372

iv. Trust Bank Ltd –vs- Paramount Universal Bank Ltd & 2 Others Nairobi (Milimani) HCC No. 1243 of 2001

v. Janet Kaphiphe Ouma & Anor –vs- Marie Stopes International (Kenya) KSM HCC No. 68 of 2007.

All these cases refer to evidential burden of proof and the rebuttal of evidence. It is his submission that the trial court should have found the Respondent to be 100% liable for the accident.

18. On the award of general damages, he submits that the Appellant suffered serious injuries. The proposed award of Kshs.75,000/= was not satisfactory as it is not commensurate with the injuries suffered. His submission on general damages had been Kshs.217,000/=. To support this, he relied on the following cases: -

i. Channan Agricultural Contractors Ltd –vs- Fred Barasa Mutayi (2013) eKLR *where Chitembwe J. awarded Kshs.150,000/=.*

ii. Patrick Mwiti M'Imanene & Anor –vs- Kelvin Mugambi Nkunja (2013) eKLR *where J.A Makau J. awarded Kshs.170,000/=*

iii. Catheringe Wanjiku Kingori & Anor –vs- Gibson Theuri Gichubi (2005) eKLR *where J.M. Khamoni awarded Kshs.350,000/=*

19. On the principles on award of damages he refers to the case of **Mutua Kaluku –vs- Muthini Kiluto (2018) eKLR where Nyamweya J.** stated thus:

"I am guided by the legal principles that apply to an award of damages in such circumstances, which are that a sum should be awarded which is in its nature of a conventional award, in the sense that awa4rds for comparable injuries should be comparable, and the amount of the award is influenced by the amounts of awards in previous cases in which the injuries appear to have been comparable, and is adjusted in light of the fall in the value of money since such awards were made.

See in this regard Kemp & Kemp on the quantum of damages, volume 1 paragraphs 1 – 003. In my view to be comparable, the previous cases must have been made at the time or close to the time the injuries were suffered by a claimant, hence the provision for adjustment.

20. O.N Makau & Mulei advocates for the Respondent in their written submissions oppose the appeal. They submit that liability is a question of evidence. Further that the evidence of Pw2 contradicted that of Pw1 on how this accident occurred. Referring to the case of **SAA (*minor suing through the father and next friend M.I.N*) –vs- Agroline Hauliers Ltd & Anor (2015) eKLR** counsel submitted that a pedestrian walking along a road should keep to the right so as to see the oncoming traffic.

21. In the said case Mrima J. stated thus;

> "***Be that as it may, the Kenya Highway Code also places a responsibility upon pedestrians using roads where there are no pavements or sidewalks. In such cases, a pedestrian is supposed to keep to the right hand side of the road so that he can see oncoming traffic and not to keep close to the side of the road.***
>
> ***As both the Appellant and the accident vehicle faced the same direction and Pw2 saw the Appellant moving to the left side and off the road, it is evident that the Appellant had not adhered to the above requirement under the Highway Code. In effect, the Appellant also contributed to the accident, I so find."***

22. He further submits that the Appellant ought to have been extra precautions since the accident occurred at night and he had worn dark clothes. Besides that, the Appellant did not call any witness to support his evidence on the occurrence of the accident.

23. This being a first appeal, this court is duty bound to reconsider and re-evaluate the evidence on record and draw its own conclusion. **See Selle & Anor –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123, Peter M. Kariuki –vs- A.G (2014) eKLR; Ngui –vs- R (1984) KLR 729.**

24. I have carefully considered the evidence on record, grounds of appeal, both submissions and the authorities cited. I find the following issues to fall for determination –

i. Whether the Appellant (Plaintiff) proved liability against the Respondent.

ii. If issue (i) is in the affirmative whether Kshs.75,000/= would be adequate compensation.

Issue (i) Whether the Appellant (*Plaintiff*) proved liability against the Respondent.

25. There is no dispute that the accident involving the Appellant and the driver of motor vehicle KCC 142L occurred on 11th December, 2015. The accident was reported at Mutomo police station vide O.B16/18/12/2015. The police abstract was produced by Pw2 a police officer who issued the abstract to the Appellant. The Respondent who filed a defence denying the claim did not testify nor call any witness to testify on her behalf.

26. The issue is who is to blame for the accident? This can only be discerned from the evidence of those who witnessed its occurrence. The Plaintiff in his testimony said he was walking on the left side of the road but off the road when he was hit by the Respondent's motor vehicle from behind. He fell and received injuries on his left leg. That is his version.

27. Pw2's evidence is that the Appellant was hit by a motor vehicle reversing from a building. He also claimed to have visited the scene but did not tell the court where the exact scene of accident was. He also claims to have visited the scene with the driver only in the absence of the Appellant.

28. Secondly, in further cross examination, he told the court that he got this version of the motor vehicle having caused the accident while reversing from the driver and his loader. That the Appellant told him the driver reversed abruptly. He however maintained that he found the driver liable for the accident. Pw2 did not produce the statements he recorded from the driver, the loader and the Appellant. The learned trial Magistrate elected not to believe Pw1's evidence because of what Pw2 had told the court.

29. One thing that is clear and which even Pw2 told the court the same is that he did not witness the accident and he not testify to the circumstances of the accident since he did not visit the scene immediately. Infact all that he told the court is not supported by any evidence either documentary or oral evidence. The driver and loader who told him about reversal of the vehicle and the driver who took him to the scene did not testify. The only person /persons who could have rebutted the Appellant's evidence would have been an eye witness or a properly drawn sketch plan of the scene.

30. The standard of proof in a civil case is lower than that required in a criminal case. This position is as stated in the case of **William Kabogo Gitau** (*supra*) by Kimaru J. when he said: -

> ***" In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."***

31. In **Mortex Knitwear Mills Ltd Milimani HCCC No. 834/2002 Lessit J. citing Autar Singh Bahra & Anor –vs- Raju Govindj HCC No. 548/1998** stated thus: -

> ***"Although the defendant had denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail ……." Where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged ……"***

32. The Appellant stated his case so clearly. He was not walking on the road on the left side. He said he was walking on the left side of the road but off the road when he was hit. The driver and loader should have come to testify and tell the court how the accident occurred.

33. For the trial court to ask why the Appellant did not call eye witnesses to support his case was going beyond the balance of probabilities rule. Pw2 was not an eye witness and so the trial court would not choose his evidence over that of an eye witness (Pw1).

34. My finding is that there is proof of the occurrence of the accident; The Appellant was knocked by the driver of motor vehicle KCC 142L. The evidence of Pw2 does not in any way exonerate the Respondent because whatever he told the court was given to him by the driver and loader of the Respondent who never testified.

35. My finding on this issue is that liability was proved on a balance of liabilities at 100%.

Issue no. (ii) whether Kshs.75,000/= would be adequate compensation.

36. From the plaint the Appellant suffered the following injuries: -

- Laceration on the left thigh extending to the knee region

- Tenderness and inability to use the leg.

The injuries were assessed as harm as per the P3 form (PEXB5). The medical report by Dr. P.N Mutuku PEXB7 dated 5th February 2016 confirms that he suffered the said injuries which were healed by then.

37. It is an established principle of law that an appellate court will only interfere with the quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor or where the award was too high or too low as to amount to an erroneous estimate or where the assessment is not based on any evidence (see **Kemfro Africa ltd t/a Meru Express & Anor –vs- A.M Lubia & Anor (1982 – 88) I KAR 727 and Bahshir Ahmed Butt –vs- Uwais Ahmed Khan (1982-88) I KAR 5.**

38. The injuries suffered by the Appellant were soft tissue injuries. His injured leg was unusable for a short while. In the lower court the Respondent's counsel submitted that an award of Kshs.80,000/= was sufficient for general damages. On the other hand the Appellant's counsel suggested Kshs.217,000/= for general damages.

39. In assessing damages, the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. Generally, the approach has been the court making a comparison of the injuries and awards made in respect thereof. It should however be borne in mind that no two cases exactly the same. See **Mbaka Nguru & Anor –vs- James George Rakwaru Nairobi Court of Appeal Civil Appeal No. 133 of (1998) eKLR.** The court also takes into account the appreciating or depreciating value of the Kenya shilling in reaching any award.

40. I have considered the authorities cited alongside the injuries sustained by the Appellant herein. I have considered a number of cases e.g.

i. Dickson Ndungu Kirembe –vs- Theresia Atieno & 4 Others (2014) eKLR *where the High court reduced an award of Kshs.255,000/= to Kshs.127,500/= for soft tissue injuries.*

ii. Purity Wambui Murithi –vs- Highlands Mineral Water Co. Ltd (2015) eKLR *where the Court of Appeal revised downwards an award by the High court of Kshs.700,000/= to Kshs.150,000/= for injuries to the left elbow, pelvic region, lower back and left knee.*

41. I find an award of Kshs.130,000/= to be adequate compensation for pain and suffering for the Appellant. There was no issue on the special damages awarded.

42. The result is that the judgment of the lower court dismissing the Appellant's suit is set aside. I hereby make the following awards to the Appellant.

- General damages Kshs.130,000/=

- Special damages Kshs.5,840/=

- **Total Kshs.135,840/=** (*One hundred and thirty five thousand, eight hundred and forty shillings*) for which I enter judgment for the Appellant against the Respondent with interest at court rates plus costs for both the lower court and the appeal.

Orders accordingly.

Delivered, signed & dated this 7th day of May 2020, at Makueni.

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H. I. Ong'udi

Judge