



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 517 OF 2014

NGOORO TIMOTHY 1ST APPELLANT

JAMES WAHOME.....2ND APPELLANT

VERSUS

DANIEL MUTUGA WANGECHIRESPONDENT

(Being an appeal from the judgment of Hon. Mr. C. Obulutsa delivered on 21st October, 2014 in CMCC No. 2098 of 2013 at Milimani Commercial Courts)

JUDGMENT

This appeal arises from the judgment of the lower court delivered on 21st October, 2014. The respondent had sued the appellants following injuries sustained in a road traffic accident that took place on 22nd January, 2013 involving motor vehicle registration No. KAY 382M owned by the 1st appellant and driven by the 2nd appellant at the time of the accident. The said motor vehicle collided with motor cycle registration No. KMCW 066R which was being ridden by the respondent and carrying a pillion passenger.

The respondent blamed the accident on the negligence of the driver of the motor vehicle, and pleaded that the owner was vicariously liable for the negligence of his driver. The appellants denied the respondent's claim but after a full trial the court found the appellants 100% liable for the accident and proceeded to make several awards in terms of damages.

The appellants were aggrieved by the said judgment and filed this appeal faulting the lower for failing to evaluate the evidence properly, thereby concluding that the appellants were 100% liable, when there was no evidence to support that finding. The lower court was also faulted for failing to appreciate the principles applicable in awarding damages, which in any case were inordinately excessive.

It is my duty to assess and reevaluate the evidence on record with a view to arriving at independent conclusions. Both parties have filed submissions to address the appeal and cited some authorities.

There is no dispute that the respondent was knocked by the motor vehicle from behind. He alleged that the driver of the motor vehicle hit him without any warning whatsoever. In his evidence he adopted his witness statement and relied on the documents filed. I have looked at that statement which was in fact his evidence in chief. At the place where the accident took place, the respondent was waiting to turn right to join a feeder road.

He had stopped to give way for oncoming traffic to pass when motor vehicle registration No. KAY 382M came and hit him and pillion passenger from the right hand side. He had given an indicator but the motor vehicle tried to overtake him. There was no hooting and the motor vehicle was speeding. The pillion passenger was also called to give evidence. Her evidence was in line with what the respondent had stated.

On the other hand, the driver of the motor vehicle also gave evidence stating that while he was driving, he saw the motor cycle cross the road and suddenly enter the feeder road. He swerved to the right to avoid a collision whereby the motor cyclist rammed into his car. The rider did not indicate he was crossing the road. Under cross examination however, he admitted that the rider had slowed down but had not indicated the intention to turn right. There was no time to hoot as it was sudden.

It is clear from the evidence that both the rider and the driver were blaming one another for the accident. I have considered the circumstances and notice that the accident took place at about 7.30 p.m when no doubt darkness had set in. Whereas the rider said he had indicated his intention to turn right and had stopped, the motor vehicle driver said that he turned suddenly. It is true that the driver did not hoot and he said as much, neither did he apply any brakes otherwise he would have said so. On the contrary, he said the cyclist was turning right and that he also swerved towards the same direction resulting to the collision. That was negligent, in my assessment of the occurrence.

On the other hand, if the rider was giving way to oncoming traffic, although he had the right of way and had his indicator on, he turned into the feeder road without looking behind to see if any vehicle was coming behind him. To that extent, he was also negligent but in my assessment, only 10% negligence can be attributed to him. I therefore find that that the appellants were 90% to blame for the accident while the respondent contributed 10% to the occurrence.

As a result of the accident, the respondent suffered serious injuries as more specifically set out in the two medical reports contained in the supplementary record of appeal, and more particularly the medical reports prepared by Dr. Theophilus Wangata. The respondent suffered a degloving injury/crush injury of the right foot resulting to below knee amputation of the right limb. He was admitted to hospital for about two weeks and discharged on crutches.

As at the time of examination on 14th February, 2013 he was still walking with the aid of crutches. It was the doctor's conclusion that as a result of the amputation, he is permanently incapacitated and would never be able to ride a motor cycle as he used to before the accident. He would require an artificial (prosthetic leg) estimated to cost about Kshs. 200,000/=. The extent of permanent and functional incapacity as a result of injuries sustained was estimated at 40%.

The trial court assessed general damages for pain and suffering at Kshs. 3 Million. This was after reference to several authorities that had been cited to the court. I have looked at the said authorities and some that have been cited in the submissions made before me. There is no doubt that respondent suffered serious injuries that led to amputation of his right leg as stated by the doctor. Comparable injuries should attract comparable awards.

The appellate court does not interfere with the awards made by the trial court unless such awards are so inordinately high or low as to represent an entirely erroneous estimate. Further, the aggrieved party must show that the court proceeded on wrong principles in assessing such damages. – see **Butt vs. Khan (1982-88) I KLR 727 and Kemfro Africa Limited T/a Meru express service & Another vs. A.M. Lubia & Another (1985) e KLR.**

I have looked at the years when the cited cases were determined, and considered the erosion of the currency based on inflation. I find that the trial court cannot be faulted for making an award of Kshs. 3 Million in general damages for pain, suffering and loss of amenities.

At the time of the accident the respondent said he was a business man and was also using his motor cycle to transport passengers at a fee commonly known as 'boda boda'. There is no evidence provided of any other business. On the other hand, there was no doubt raised by the appellants about his business using his motor cycle.

The trial court considered Kshs. 600/= per day as reasonable earnings for that business. As usual, no receipts may be available for such a business and none were demanded by the appellants. However, he must have been spending some money to service the motor cycle and buy fuel. I therefore consider a sum of Kshs. 400/= per day should be the reasonable figure. That is the figure that should be used to calculate earnings and loss of earning capacity.

Before the filing of the suit he lost that money and I agree the computation comes to 78 days which adds up to 78 x 400 = Kshs.31,200/=. The respondent was 29 years old at the time of the accident. It is true with the amputation to his right leg, he will not be able to ride a motor cycle for any living therefrom. However, at 40% incapacity, he can still open a shop or any other business that does not require a lot of physical movement. The business he was doing was risky as manifested in the accident that led to the serious injuries he suffered. I will assign 25 years multiplier in the calculation of loss of earning capacity.

I consider that he needed time for his family, church going, some rest associated with the nature of the business, and even servicing his motor cycle due to mechanical breakdown. In one month I will deduct 5 days in that regard, leaving a balance of 25 days in a 30 days month. Therefore damages for loss of earning capacity add up to 25 x 400 12 x 25 = Kshs.3,000,000/=. Proved special damages amounted to Kshs. 88,400/= and the cost of prosthesis Kshs. 200,000/=.

At the end this appeal is partly allowed and judgment entered in favour of the respondent as follows,

- a. General damages Kshs. 3,000,000/=
- b. Loss of earnings Kshs. 31,200/=
- c. Loss of earning capacity Kshs. 3,000,000/=
- d. Special damages Kshs. 88,400/=
- e. Cost of prosthesis Kshs. 200,000/=
- Sub Total.....Kshs. 6,319,600/=
- Less 10% (Contributory negligence.....Kshs. 631,960/=
- TOTAL.....Kshs. 5,687,640/=

The respondent shall have the costs of the suit and interest at court rates in the lower court, while in this appeal each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 7th Day of May, 2020.

A. MBOGHOLI MSAGHA

JUDGE