REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NUMBER 8 OF 2019

MOHAMED MUYUNGA.....APPELLANT

VERSUS

VINOTH ABWOLET ESHEPET.....RESPONDENT

(Being an appeal from the judgment and decree in original Bungoma CMCC 2010/2017 delivered on 16th January, 209 by Hon. S O Mogute, Senior Resident Magistrate)

J U D G M E N T

Vinoth Abwolot Eshebet (the respondent) filed a suit in the magistrate's court against Mohamed Muyunga (the appellant) seeking general and special damages for pain and suffering as a result of an accident involving motor vehicle Registration KBQ 767R Scania Lorry owned by the appellant which occurred on 3rd May, 2016. The Respondent (the plaintiff) claim against the appellant (the defendant) was that on 3rd May, 2016, while the Respondent was a fare paying passenger in motor vehicle KBA 745V Toyota matatu along Kimilili – Bukoli Raod, the Appellants driver, driving motor vehicle Registration No. KBQ 767R Scania Lorry so negligently drove the said lorry that it rammed into the matatu causing the said matatu to roll, whereby the plaintiff sustained serious bodily injuries. The particulars of negligence and injuries sustained were indicated in paragraph 4 of the plaint.

The Appellant filed statement of defence dated 17th August, 2017 in which he denied the claim and any liability. In the alternative and without prejudice the appellant averred that if the said accident occurred, that the same was due to the negligence of the driver of motor vehicle Registration No. KBA 745V Toyota matatu where the Respondent was a passenger. The appellants averred that the driver of the matatu Registration No. KBA 745V Toyota Matatu was the correct party to be sued by the Respondent. In paragraph 5 of the statement of defence the appellant stated the particulars of negligence on the part of driver of the matatu and the respondent who was a passenger in the said matatu.

The Respondent Vinoth Abwolet Eshepet PW 1 adopted his witness statement dated 16th June, 2017 as his evidence in Chief. He testified that he was a passenger in motor vehicle registration No. KBA 745V Toyota Matatu from Bungoma to Kitale. On the way along Kimilili-bukoli Road at Kibande area while their vehicle was climbing a hill there was on an on-coming lorry which was being driven at high speed down-hill. The lorry which was being driven in a zig zag manner, came to the lane of the matatu and rammed into it. He sustained injures and only found himself in Bungoma District Hospital where he was later transferred to Mt. Elgon Hospital Kitale. As a result of the accident he sustained head injury, laceration on tongue, bleeding from hand and wrist. He also sustained fractures on right thigh, right femur, midshaft and fibula bones. He also sustained fracture of left hid femur, tibia and fibula leading to deformation of left leg. He underwent surgery on both legs where fixation was done. He blamed the driver of the lorry for the accident. On being cross-examined by Mr. Mukisu for appellant, the Respondent stated that the accident involved a head-on collision of the two vehicles which occurred on the lane of the matatu.

PW 2 No. 100272 PC Kiilu Kilonzo attached to Kimilili Traffic Base was not the investigating officer. He produced the Traffic file relating to the accident. According to the police records the lorry was heading to Bungoma from Kimilili when the driver lost control and rammed on an oncoming motor vehicle registration No. KBA 745V matatu. As a result of the accident 5 (five) people died on the spot. The driver of the lorry was charged in Mililiki Traffic Case No. 188 of 2016 which was still pending hearing. From the records, he said the driver of the lorry was to blamed for the accident.

The Appellants called Sifuna Otuku the diver of the motor vehicle Registration no. KBQ 767R Scania Lorry. He adopted his witness statement dated 8th November, 2017 as his evidence in chief. He testified that on the material day he was driving the said lorry at Kibunde Area along Kimilili – Bungoma Road when he saw an on-coming vehicle. The driver was driving at high speed and he swerved to his lane to avoid hitting a pot-hole. The witness slowed down and served to his right side to avid hitting the motor vehicle; on returning to his lane it was too late as the driver of the matatu was unable to return to his lane and there was a head-on collision due to the high speed. As a result of the accident he noticed many occupants of the matatu were injured and others died on the spot including the driver of the matatu. He confirmed in cross-examination that he was charged in Traffic case NO. 188 of 2016 with the offence of careless driving.

Upon considering the above evidence the learned trial magistrate found the appellant liable. In his judgment he stated: -

"I have duly considered the pleadings by both parties, the evidence on record and the submissions by both counsel. It's my finding that the driver of motor vehicle registration No. KBQ 767R (DWI) was wholly to blame for the accident herein. The police carried out investigations and concluded that he had committed a traffic offence and charged him at Kimilili law Court. DW1's evidence contained in the police file. The evidence adduced by PW 1 was well corroborated by the evidence tendered by pw 2 who relied on what the police file contained in regard to the accident in question.

The findings by the police as per the police file were that the lorry left its lane and went to the lane of the matatu and rammed into it. This is exactly what PW 1 told the court in her evidence which is on record. DW 1 failed to control and/or manage the lorry in such a manner as to avoid the collision. He is to blame for the accident. The defendant herein held vicariously liable for the negligence of his driver and or employee."

On quantum the learned trial magistrate stated: -

"The object of damages in personal injury cases is not to attempt to compensate or to bring the person back to the level they would have been. Nor is it to pay for the injuries for as stated by Lord Morris in H. West and Sons ltd Vs Shepherd (1964) AC 326; money cannot renew a physical frame that has been buttered and shattered. All the judges can do is to award sums which must be regarded as giving reasonable compensation.

In the case of Charles Mathenge Wahome & another Vs Fina Bank Ltd, Civil Appeal No. 87 of 2005 the court awarded ksh.1,500,000/- to the plaintiff who had a broken right upper leg.

In Jackson Mutuku Ndetei, Civil Appeal No. 6 of 2003 – an award of Ksh.2,000,000/- was made in the year 2007 for compensation of a leg and fracture of the other leg.

In NBI HCCC 410 of 2006 an award of Ksh.3,000,000/- was made for multiple fractures with permanent incapacity of between 24% and 25% per both doctor's assessment. This was in April, 2014.

It is desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavoring to award the plaintiff a just amount, so far as money can never compensate and entering the realms of very high awards, which can only in the end have a deleterious effect. See the case of Rosemary Wanjiru Kungu Vs Elijah Macharia Githinji & another (2014) eKLR. Simon Tarete Vs Mercy Mulitu Njeri (2014) eKLR. Doing the best I can in the circumstances of this case I ward the plaintiff a sum of Ksh.2,000,000/- as general damages for pain suffering and loss of amenities."

Dissatisfied with the finding on liability and quantum the appellant preferred this appeal on the following grounds: -

1. That the learned trial judge erred in law and fact in finding the Appellant 100% liable notwithstanding overwhelming evidence to the contrary.

2. That the learned trial magistrate erred in law and fact in finding that the Respondent had proved his case against the Appellant on a balance of probabilities despite evidence to the contrary.

3. That the learned trial magistrate erred in law and fact in using the wrong principles in determining the damages awardable/payable to the Respondent in view of the injuries pleaded and evidence adduced.

4. That the learned trial magistrate erred in awarding Ksh.2,000,000/- as general damages which damages were excessive, unjustified and inordinately high.

5. That the learned trial magistrate erred in law and fact in awarding Ksh.116,000/- as special damages which claim was not specifically proved

By consent the appeal was canvassed by way of written submission. Counsel for the parties filed respective written submissions. Mr. Onyinkwa for the appellant submitted that there was evidence that there was a head-on collision of the two vehicles and that according to the appellant's driver, it was the driver of the matatu who swerved to the appellant's driver's lane. He without prejudice submitted that where there is a collision of vehicles as in this case, both vehicles must be at fault and liability ought to have been apportioned between the two vehicles. He submitted that the fact that appellant's driver was charged with a traffic offence is not a reason enough to hold the appellant liable for the accident.

On quantum, counsel for the appellant submitted that the trial magistrate applied wrong principles in assessing the same in view of the injuries sustained. He submitted that one of the principles of assessing general damages is that as much as possible comparable injuries should attract comparable awards. He submitted that the learned trial magistrate considered authorities and/or decisions whose circumstances were different in the nature and extent of injuries sustained which were not comparable to those sustained by the Respondent. He submitted that those authorities relied on were neither submitted by the appellant or the Respondent. Counsel submitted that the authorities relied on were where more serious injuries were sustained. Counsel analyzed the authorities on the injuries sustained and the damages awarded. Finally, counsel urged the court to find the quantum of damages awarded excessive and proposed an award of between Ksh.800,000 – Ksh.1,000,000/- as reasonable.

Mr. Omar for the appellant filed submissions in opposing the appeal. He submitted on liability that the finding by the trial magistrate was based on evidence adduced. He submitted that the appellant did not take out 3rd party proceedings against the owner of the matatu and that

the evidence tendered by the driver of appellant was questionable and was properly rejected.

On quantum counsel submitted that in arriving at an award of Ksh.2,000,000/- the trial court cited its own authorities other than those laid before him and in particular those cases where injuries were of nature of fractures. He submitted that the award of Ksh.2,000,000/- is not excessive. Finally counsel urged the court to be guided by the decision in **Kemfro Africa Limited t/a Meru Express Services Gathogo Kanini A. Jubia and Olive Lubia [1982 – 88) 1 KAR 727** which sets out the grounds for appellate court to disturb the assessment of damages of a trial court: -

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123 where Sir Clement De Lestang** stated that:

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions 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 (see Abdul Hammad Sarif v Ali Mohammed Solan (1955, 22 EACA 270)."***

From the record of appeal and submissions the counsel for both parties, the issue for determination in this appeal are: -

> ***a) Whether the appellant was 100% liable or would liability be apportioned.***
>
> ***b) Whether the trail magistrate considered irrelevant factors in assessment of damages and if so what is the appropriate quantum of damages to be awarded.***

Counsel for the applicant on liability submits that as there was evidence that two vehicles collided, the trial court erred in finding the appellant's driver liable at 100%. He submitted that the trial magistrate ought to have apportioned liability to the drivers of the two vehicles equally. Counsel submitted that the trial magistrate ignored the appellants driver's evidence on how the accident occurred and was unduly influenced by the fact that appellants driver had been charged in a traffic case arising from the accident.

The evidence as to how the accident occurred was by the Respondent who was a passenger in the matatu and the appellant's driver who was driving the lorry and the police officer who produced the accident investigation file. The driver of the matatu did not testify as he died in the accident.

The evidence of the appellant's driver and the Respondent is not materially different. Both agree that there was a collision of the two vehicles, the matatu ascending the hill and the lorry descending from the on-coming direction. The appellant's diver explained the occurrence of the accident in his witness statement stating: -

> ***"I was involved in a road traffic accident with motor vehicle registration Number KBA 745V Townace at Kibunde area. The said motor vehicle was headed to the opposite direction i.e. from Bungoma to Kimilili. It was being driven at an excessively high speed. The driver of the aid motor vehicle swerved to the right side (On my lane) to avoid hitting a pothole. Upon seeing that, I slowed down and swerved on my right side to avoid hitting motor vehicle KBA 745V. On returning on my line, it was too late as the driver of the said motor vehicle was unable to return to his lane as a result causing a head on collision due to the high speed."***

P C Kiilu Kilonzo testified from the record in the Traffic file: -

> ***"The lorry registration NO.KBQ 767R was heading to Bungoma from Kimilili on reaching Kibunde area the driver lost control and rammed on the oncoming motor vehicle registration No. KBA 745V.***
>
> ***It killed 5 people on the spot after the collision. The lorry driver was to blame for the accident. He was charged with the offence of causing death by dangerous driving at Kimilili Law Courts in Traffic Case No. 188 of 2016. It is still pending in court."***

The evidence before the trial court that he found credible was that the two vehicles collided on the lane where the matatu rightly was and that it is the appellant's driver who had left his proper side of the road to where the matatu was. That was a piece of negligent driving.

The Appellant submits that the trial magistrate ought to have apportioned liability to the owners of the two vehicles equally. The owner of the motor vehicle KBA 747V Toyota matatu was not sued by the Respondent. The appellant in his defence gave particulars of negligence of the driver of the matatu in paragraph 4 of the defence. Where, however, a defendant seeks to claim against another person who is not already a party in the suit, he bought to file an application to enjoin a third party under the provisions of Order 1 Rule 15 of the Civil Procedure Rules, 2010 which states: -

> ***15. (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —***
>
> ***(a) that he is entitled to contribution or indemnity; or***

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.

(3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.

(4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions "third party notice" and "third party" shall respectively apply to and include every notice so issued and every person served with such notice.

(5) Where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.

From the above provision of order 1 rule 15 Civil Procedure Rules, a 3rd party is enjoined in a suit at the instance of the defendant through the procedure set out in the rules. Once 3rd party has been enjoined then the court will determine liability as between the defendant and the 3rd party. Where a defendant has not enjoined a 3rd party as in the case, he cannot be heard to complain that the court did not apportion liability with a person or entity that is not a party to the proceedings. The 3rd party procedure is a process to enable the trial of questions between the defendant and the 3rd party on the liability of the 3rd party to make a contribution or indemnity. It is only after such proceedings and a 3rd party is enjoined when an order to bind that person can be made.

From the evidence tendered, the collusion occurred at the lane where the motor vehicle registration No. KBA 745V Toyota matatu was correctly being driven. The appellant's direr had moved from his lane to the lane of the matatu where the two vehicles had a head-on collision. That swerving of the lorry to the lane of the matatu was in my view evidence of negligent driving on the part of the appellant's driver. I, therefore, find that the trial magistrate rightly found the appellant's driver 100% liable.

On quantum, the appellant submits that the award of Ksh.2,000,000/- general damages is excessive. Appellant's, therefore invites the court to interfere with the award of the trial court. The principles to guide an appellate court in disturbing award of the trial court were set down in **Kemfro Africa Ltd t/a Meru Express Services Vs Gathogo Kanini A. Jubia & Olive Lubia 1982 – 88 KAR 272** as follows: -

"The principles 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 that 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 damage."

The assessment of quantum of general damages in personal injury claims is at the discretion of the trial court. An appellate court should be slow to interfere with the discretion, unless it has been shown that the same was not exercised judiciously or that wrong principles were applied in the assessment. The factors that guide the court in the assessment of quantum of damages have been set down in several judicial decisions. In **Kigaragari Vs Axn (1985) KLR 273** the Court of Appeal stated:-

"a) In awarding damages personal injury, the courts should consider that there is need for consistency in the awards and that the awards should both be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public.

b) In order for the appellate court to interfere with the High Court award on general damages it had to be shown that the sum awarded was demonstratively wrong or that it was based on a wrong principle or was so manifestly excessive or inadequate that a wrong principle may be inferred.

In assessing awards in personal injury claims, the trial court must bear in mind the objective of award of damages. The award of damages is not to punish the defendant but to compensate the plaintiff. The court should thereon be guided by the following: -

1) That the award should put the plaintiff to the state he would have been before the injury.

2) That money cannot render a physical frame that has been injured or fractured limb.

3) That the compensation must be fair to both the plaintiff and the defendant.

4) That as far as possible the awards should be comparable with recent awards in comparable cases or decisions.

5) Factor in the element of inflation.

6) Bear in mind that high or excessive awards will affect the body politic and make insurance cover unaffordable to the public.

In **Tayab Vs Kinau (1983) KLR 114 at 115** the Court of Appeal stated: -

(a) The money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional. West (h) & Son Ltd V Shephard [1964] AC 326 at 345.

(b) 'in considering damages in personal injury cases, it is often said: "the defendants are wrongdoers, so make then pay up in full they do not deserve any consideration". That is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error such as may befall any one of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who have to foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.

(c) Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life …. You are not to consider the value of existence as if you were bargaining with an annuity office… I advise you to take a reasonable view of the case and give what you consider fair compensation..."

(Lim Poh Choo V Camden and Islington Arew Health Authority [1979] IAILER 332 at 339).

(d) "I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a national health service. But the health authorities cannot stand huge sums without impeding their service to the community. The funds available come out of the pockets of the tax payers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

(LimPoh Choo V Camden and Islington Arew Health Authority (ibid).

(e) In awarding damages, the court ought to assess the general picture, the whole circumstances, the effect of the injuries, the particular person concerned and uniformity. The court must also be guided by recent awards in comparable cases in the local courts. In this case the High Court award was wrong in principle when measured against awards in other cases. (Bhogal V Burbidge [1975]EA 285)."

The Respondent as a result of the accident sustained the following injuries: -

a) Head injury leading to concussion.

b) Cut would on upper eyelids of both eyes.

c) Laceration on the tongue.

d) Bleeding laceration on the dorsum of his right hand and wrists.

e) Multiple fractures on the right thigh.

f) Fractures of the right mid shaft femur leading to deformation of the right leg.

g) Fracture of the right mid shaft tibia and fibula bones.

h) Fracture of the left mid shaft femur.

i) Fracture of the left mid shaft tibia and fibula bone leading to deformation on the left leg.

j) Psychological trauma.

The second medical report, defence exhibit 2, done on 12th October, 2017 about 1 ½ years later while confirming the above injuries noted that the respondent still had fixation plates and screws on the right thigh and both legs, pus discharging sinus

(wound) on the lateral lower aspect of the left thigh and he still walked on armpit crutches."

That these are the injuries sustained by the Respondent is not in dispute what the appellant disputes is that the award of Ksh.2,000,000/- is excessive and not comparable to the awards in cases with comparable injuries. The trial magistrate cited several past decisions. These included: -

a) **Charles Mathenge Wahome Vs Fina Bank – Civil Appeal No. 87 of 2005 (2011) eKLR**.

b) **Jackson Mutuku Ndetei Vs Buyusuf & Sons (2007) eKLR**.

Counsel for the appellants submitted that these authorities cited by the trial magistrate were not comparable as the plaintiffs in those cases suffered more serious injuries. In **Charles Mathenge Wahome Vs Fina Bank** (supra) the plaintiff developed pulmonary embolism and was in ICU for several days. In **Jackson Mutuku Ndetei Vs Buyusuf & Sons**, the plaintiff suffered above knee amputation. These conditions were in my view more serious than those sustained by the respondent in the appeal. While the trial magistrate appreciated that comparable injures should be compensated by comparable awards, he felt in error when he based his assessment on authorities where the plaintiffs suffered more serious injuries than the Respondent.

Consequently, I set aside the award of Ksh.2,000,000/- general damages. I substitute thereof the sum of Ksh.1,200,000/- general damages. The special damages were proved and are therefore, upheld. Each party to bear its own costs.

Dated, signed and delivered at Bungoma this 21st day of July, 2020.

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S N RIECHI

JUDGE