REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 39 OF 2018

JOHN WANJOHI KURIA.....1ST APPELLANT

COUNTY GOVERNMENT OF NYERI.....2ND APPELLANT

-VERSUS-

PAUL WANJOHI NYAGA.....RESPONDENT

(Being an appeal from the judgment and decree in Nyeri Chief Magistrates Court Civil Case No. 18 of 2017 (Hon. P. Mutua, Senior Principal Magistrate) delivered on 3 July 2018)

JUDGMENT

By a plaint dated 27 January 2017, the respondent sued the appellants for general damages for lost income and loss of earning capacity, special damages; costs of future treatment; costs of the suit and interest. The suit arose out of a road traffic accident that occurred on 23 September 2016 and which involved motor vehicle registration number KCD 948G (herein after referred to as "the fire engine") that belonged to the second appellant but which was being driven at the time by the first appellant.

The respondent contended that on the material date, he was attending a funeral at Thuguma village when the first appellant drove, managed or controlled the fire engine so negligently that it lost control and ploughed into a crowd of people with whom he was attending the funeral and in the process caused serious injuries and harm to him. As the first appellant's employer, the second appellant was held vicariously liable for the first appellant's negligence. The respondent also averred that the first appellant was charged with the offence of causing death by dangerous driving in the Chief Magistrates Court Criminal Case Number 66 of 2016 as a result of the accident; apparently, apart from the respondent there were other victims of the accidents who, unlike the respondent, sustained fatal injuries in the accident.

The respondent particularised the injuries he sustained as a fracture of the right distal tibia and fibula bones and a friction wound on the same leg. As a result of the accident, so he pleaded, the respondent was unable to continue with his business; he therefore claimed damages for loss of earnings and earning capacity.

The appellants contested the respondent's claim. In particular, they denied ownership of the fire engine or that it was involved in a road traffic accident as alleged or at all.

Nonetheless, they contended that if an accident involving the particular vehicle ever occurred, it was caused or substantially contributed to by the respondent's negligence; accordingly, they were not responsible for the injuries that the respondent may have sustained or the loss or damages that may have ensued.

At the conclusion of the trial the learned magistrate found for the respondent; he awarded him Kshs. 900,000/= in general damages for pain and suffering; Kshs. 50,000/= for future medical expenses; he also awarded Kshs. 307, 293/= as special damages. The respondent was also awarded costs and interest on both general and special damages calculated at court rates from the date of judgment and the date of filing suit respectively.

The appellants were not satisfied with the judgment and so on 30 July 2018, they filed the present appeal. In their memorandum of appeal, they raised twelve grounds of appeal; some of the grounds appear to me to be repetitive but I understand them to be as follows:

1. The learned trial magistrate erred both in law and in fact in his finding that the appellants were liable for the injuries sustained by the respondent.

2. The learned trial magistrate erred in law and in fact by failing to properly scrutinise and evaluate the evidence tendered by the appellant and correctly relate the same to the cases cited in court; accordingly, he failed to arrive at a fair and reasonable assessment of liability and the compensation due to the respondent.

3. The learned magistrate erred both in law and in fact by making an award on liability which was not supported by relevant facts, evidence and authorities; that the award on liability was against the weight of evidence before court and was made without regard to the submissions of both parties.

4. The magistrate erred both in fact and in law when he awarded Kshs. 900,000/= as general damages in favour of the respondent and against the appellants.

5. The learned trial magistrate erred in law and in fact in awarding the respondent of Kshs. 900,000/= as general damages; considering the nature of the injuries sustained by the respondent, the award was excessive.

6. The learned magistrate erred both in law and in fact in awarding special damages at Kshs. 307, 293/= which sum though pleaded was not proved.

7. The learned magistrate erred both in law and in fact in failing to take into account the submissions of the appellants' counsel while making the award.

8. The learned magistrate erred both in law and in fact by disregarding the doctrine of precedent.

9. The learned trial magistrate erred both in law and in fact in making an award on quantum which was too high and was neither supported by relevant authorities nor was commensurate to the injuries sustained by the respondent.

10. The award on general damages was against the weight of the evidence before the court and was without any consideration to the submissions of the defence counsel.

The appellants urged this honourable court to assess their liability and also reduce both general and special damages to a level they regarded as 'a fair sum'. They also sought for the costs of the appeal.

The record shows that police constable **Wilson Gitonga (PW1)** of Nyeri police station testified first. It was his evidence that a road traffic accident involving the fire engine and motor vehicle registration number KUH 411 (a Toyota pickup), was reported at the station. According to the police records, the two vehicles were travelling in the same direction when the fire engine hit a bump and lost control; it hit motor vehicle registration number KUH 411 and apparently veered off the road and hit several pedestrians, some fatally, in the process. The respondent was among other pedestrians who survived the accident but with serious injuries.

According to the police records, the first appellant was the fire engine's driver at the material time; he was subsequently charged with the offence of causing death by dangerous driving. The officer produced an abstract of the report made to the police.

The respondent himself testified that he used to work as a driver but due to the injuries he sustained, he was no longer engaged as such.

On 23 September 2016, he was on his way back home together with other pedestrians who had apparently been attending a burial ceremony. The fire engine came speeding towards the direction of a house that was on fire. It hit a vehicle ahead and lost control. It also hit him. His right leg was fractured.

He testified further that he was taken to Nyeri Provincial General Hospital where he was admitted for treatment. He was fitted with metal implants at Kikuyu hospital. He also got treated at Jamii Hospital.

The appellant also testified that he incurred medical expenses of Kshs. 191,743/=. The metal implants would be removed at a cost of Kshs. 50 000/=. Apart from the medical expenses, he also spent Kshs. 112,000/= on transport; Kshs. 3000/= for medical examination and Kshs. 550/= for obtaining the records of the ownership of the fire engine.

The respondent blamed the driver of the fire engine for the accident**.** It was also his evidence that he had not fully recovered at the time he testified. He walked with the help of a crutch. The injured leg was shorter than the other. Nonetheless he admitted that prior to the accident he had suffered a stroke.

Although the appellants denied it in their statement of defence, the first appellant admitted that he was the driver of the fire engine at the material time and as at the date of the accident he had 24 years' experience as a driver.

The fire engine, according to him, was in a sound mechanical condition at the time of the accident. He produced an inspection report to that effect. It was his evidence that the respondent did not give way yet he was responding to an emergency when the accident occurred.

He conceded that he hit bumps but that they were unmarked. Again, there were people who were throwing stones at the fire-engine complaining that the fire engine had arrived late. He therefore lost control because he hit the bumps and was distracted by the stoning from members of the public. He admitted that his vehicle hit several people but he couldn't tell how many of them were injured. He also admitted that two people had died in the accident as a result of which he was charged with the offence of causing death by dangerous driving.

He also testified that he hit the respondent when he swerved to the right to avoid hitting other pedestrians who were on the road. It is when he swerved that he hit the respondent. It was his evidence that he had not seen him at the time he swerved.

In cases of personal injury claims, two primary questions are always inevitable: the question of liability for the negligence out of which an

accident such as the one in question arose and the question of quantum of damages.

The answer as to who was negligent in the respondent's case against the appellants would appear to be as obvious from the testimony of the first appellant as it was clear from the respondent and the police officer who produced the police records with regard to the accident. Their testimony pointed to the only conclusion that one could possibly make that the accident arose out of the negligence of the first appellant in driving, managing or controlling the fire engine; at the very least, the respondent did not contribute to the occurrence of the accident in any way.

If anything, contrary to the appellants' pleadings, the first appellant gave the clearest evidence that he was solely to blame for the accident. His evidence that he swerved to the side of the road to avoid hitting pedestrians but then ended up hitting others whom he allegedly could not see before he swerved, including the respondent, and who were not on the road, is clear proof that the first appellant was not only negligent but also that the respondent was an innocent party. It is inconceivable that the first appellant would have attempted to avoid hitting pedestrians on the road and only ended up hitting those innocent pedestrians who were not on the road.

I would agree with the learned magistrate that the first appellant was solely responsible for the road traffic accident from which the respondent sustained injuries. Suffice it to say, going by the first appellant's own evidence, there was no factual basis upon which to apportion liability between the appellants and the respondent.

On quantum of damages, the appellants urged this honourable court to review downwards the awards made in damages, both special and general.

There is ordinarily no much debate on the award of special damages where they have been properly pleaded and proved; where this is done, they would be awarded as a matter of course. The record shows that the plaintiff produced receipts for the expenses he incurred and which he particularised in his plaint. The same record shows that before the receipts were admitted in evidence, Mr. Gaya, the learned counsel for the appellants, had no issue with this piece of the respondent's evidence. He raised no objection to their production or challenged the expenses in any way. Simply put, the respondent's claim for special damages was not controverted and was proved to the satisfaction of the trial court. In the absence of any dispute that the respondent had incurred expenses particularised in his plaint and in the absence of any dispute on the proof he provided in support of his claim under this head the learned magistrate was justified in awarding the special damages as prayed.

There is another limb of these damages awarded to the respondent that deserves some mention; this was the award made to cater for the respondent's future medical expenses. Such expenses, though not incurred and therefore cannot be proved, are usually treated as special damages and, in appropriate cases, are usually awarded; however, they must be pleaded and must be seen to represent a reasonable estimate of the expenses to be incurred.

In ***Michael Hubert Kloss & another v David Seroney & 5 others [2009] eKLR*** **the Court of Appeal** said of these future expenses as follows:

> ***"We think the cost of future treatment, where pleaded and reasonably estimated, ought to be awarded and in this case, the doctors' reports were produced with the consent of the parties and without challenge on the reasonableness of their estimates for future medical treatment costs in respect of the three respondents. We reject the complaint made in that regard."***

And in **Kenya Bus Services Ltd versus Gituma (2004) E.A. 91** the same court stated:

> ***"And as regards future medication (Physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principal that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded."***

In the instant case, future medical expenses were not only specifically pleaded but the respondent also produced a medical report from none other than the appellants' own doctor who estimated the cost for removal of the plates from the respondent's leg would be Kshs. 50,000/=. The learned magistrate was therefore entitled to make an award of this sum in favour of the respondent.

As far as general damages are concerned, the general principle on the extent to which this honourable court can, in exercise of its appellate jurisdiction, interfere with assessment of damages by a subordinate court is that while such an assessment is a function of the discretion of the trial court, the appellate court will be called upon to interfere with it if, in the exercise of its discretion, the trial court either took into account an irrelevant factor or left out a relevant factor or that the award it made was too high or too low as to amount to an erroneous estimate, or, that the assessment is based on no evidence, in any event. The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** said of the discretion of the trial court in assessing damages in the following terms: -

> ***"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.***

This point was earlier captured by Lord Morris of Borth-y-Gest in **West (H) & Son Ltd versus Shepherd (1964) AC 326** in the following words:

> ***"The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best***

that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award by himself would have made. Having done so, and remembering that in his sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment." (see page 353).

With that in mind, I note that the learned magistrate considered the decisions cited by both the learned counsel for the appellants and the respondent on the proper award to be made under this head; he had this to say about these decisions with respect to the respondent's injuries:

> ***"The above are fairly serious injuries. The authorities cited by counsel for the defendants are not relevant because the injuries are not similar and the same were based on injuries sustained long time ago. Similarly the authorities cited by counsel for the plaintiff are not relevant as they relate to more severe injuries. This leaves the court with absolutely no help from the parties in terms of authorities. However it is the duty of the court to make its own decision."***

He went further to cite this honourable court's decision in **Nairobi HCCC No. 86 of 2008 (Unreported) Joseph Musee Mua versus Julius Mbogo Mugi & 3 Others** where the claimant was awarded Kshs. 1,300,000/= in general damages for fractures of the left tibia fibula and nerve injuries that resulted in shortening of the leg. He considered that the award was made in 2013 and though the injuries sustained in that case were severer, he found them to be nearly comparable to those sustained by the respondent and proceeded to award him Kshs. 900,000/= in general damages for pain and suffering.

I am satisfied that the learned magistrate took the right course and arrived at the correct decision as far as the award of general damages is concerned. There is nothing in his assessment that would suggest that he either took into account an irrelevant factor or left out a relevant factor. Neither is there anything to suggest that the award made was too high as to amount to an erroneous estimate, or, that the assessment was based on no evidence, in any event. In short, the learned magistrate properly exercised his discretion in assessment of the general damages for pain and suffering.

In the final analysis, I find that there is no merit in the appellants' appeal; it is hereby dismissed with costs. It is so ordered.

Signed, dated and delivered on 2 October 2020

Ngaah Jairus

JUDGE