REPUBLIC OF ENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 50 OF 2019

KISII COUNTY GOVERNMENT...APPELLANT

VERSUS

BONFACE NYAMACHE ORWOCHI...RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Kisii

by the Honourable Magistrate S.K. Onjoro (SRM) delivered on 26th April, 2019

in KISII CMCC No 708 of 2016)

JUDGEMENT

1. The respondent, who was the plaintiff in the subordinate court, sued the appellant, the Defendant therein, seeking general damages, special damages, costs and interest. This was following a road traffic accident that occurred on 24th October 2016, involving the appellant's motor vehicle registration no. KBW 741H and motor vehicle registration No. 45CG 002A driven by the agent or driver of the appellant along Kisii Kilgoris road at Minyikwa area. According to the plaint, the respondent's vehicle was being driven negligently causing it to lose control, thus veering off its lane and colliding with the respondent's car.

2. The appellant in his defence filed a statement of defence on 23rd March 2017 denying the claim and in the alternative, attributed the accident to the negligence of the appellant herein.

3. The trial court after an elaborate hearing reached the conclusion that the appellant was 100% liable and entered judgment in favor of the respondent against the appellant awarding him general damages of Kshs 200,000/-, special damages of Kshs 6,500 including costs and interest.

4. The appellant dissatisfied with the judgment filed a Memorandum of Appeal on 23rd May 2019. In the said appeal the appellant complains that:

> *1. The Learned Magistrate erred in law and fact holding the Appellant 100% liable for the occurrence of the accident.*
>
> *2. The Learned Magistrate erred in law and in fact I awarding damages in favour of the plaintiff without any legal and/or evidential justification.*
>
> *3. The Learned trial magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion.*
>
> *4. The Learned Magistrate erred in law and fact in awarding Kshs 200,000/- as General damages without any legal and/or evidential justification.*
>
> *5. The Learned Magistrate erred in law and fact in law and fact (sic) in awarding Kshs 6,500/- as special damages without any legal and/or evidential justification.*
>
> *6. The Learned Magistrate erred in law and in fact in failing to appreciate as follows;*

i. That the evidence adduced in support of the plaintiff's case was incongruous with the pleadings.

ii. That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining damages awarded.

7. The learned Magistrate erred in law and fact in awarding excessive damages without regard to the Defendant's submissions.

8. The Learned Magistrate erred in law and fact by awarding excessive damages beyond the scope of evidence and legal entitlement.

9. The learned magistrate erred in law and fact in entering judgment in favour of the plaintiff against the defendant inspite of the plaintiff's miserable failure to establish her case more especially on damages.

5. The respondent with the leave of court filed a cross petition on 5th October 2019. The respondent contends that the award of general damages was insufficient considering the injuries sustained by the respondent.

6. I directed that the appeal be dispensed by way of written submissions and both parties complied.

7. I have considered the appeal, submissions by counsel for the parties and the authorities relied on. As a first appellate Court, I am obligated to re-evaluate evidence a fresh and reach my own conclusions bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was discussed in **Selle vs. Associated Motor Boat Co. [1968] EA 123** where the court observed that:

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has 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 demeanour of a witness is inconsistent with the evidence in the case generally."

8. Having considered the memorandum of appeal, the cross appeal, the evidence on record and the submission by parties, the issues that flow for determination by this court are on liability and quantum.

9. I will now turn on the issue of liability. The appellant submitted that it was incumbent on the respondent to prove his case to the required standard, balance of probabilities, and cited the case of **Statpack industries v James Mbithi, Nairobi Civil Appeal No 152 of 2003** and **Muthuku Kiema v Kenya Cargo Haunting Services Ltd (1991)**. The respondent maintained that the only conclusion to be arrived at upon evaluation of the evidence is that the appellant was to blame. In order to determine this hotly contested issue I will first consider the evidence that emerged at the trial before the subordinate court.

10. Bonface Nyamache Orwochi (Pw1) adopted his witness statement and on cross examination he maintained that he never caused the accident as he was driving at 40 Kph. He recalled that the appellant's vehicle hit his vehicle from behind. He explained that at the time of the accident there was a traffic jam and the appellant's agent was trying to overtake. Although he tried to swerve to avoid the vehicle the appellant's vehicle hit him.

11. Police constable Osodo (Pw2) testified that the matter was investigated by PC Ngeno and it was established that the motor vehicle registration No. 45CG 002A had hit the probox from behind damaging the vehicle and injuring passengers including the driver.

12. Paul Ogachi Biogi (Dw1) testified that he saw the respondent's vehicle suddenly entering the road. When Pw1 heard a siren he tried to go the overtaking lane, lost control and went to a ditch. On cross examination he testified that the hit the vehicle from the side.

13. The respondent's account of how the accident occurred was clear. On cross examination however Dw1 gave two versions of how the accident occurred. He first claims that the accident was a result of the respondent's car losing control and getting into a ditch but later, he admits to hitting the vehicle. In the circumstance, I find that the balance tilts in favour of the respondent in regards to who was responsible for the accident.

14. The appellant further faulted the trial's court on the issue of liability on account that the court did not take into account Pw1's admission that he had not fastened his seatbelt In **Titus Kamau Gachanga v Wahogo Edward & another [2019] eKLR 82** the court held that;

"Although the defendant tended to blame the plaintiff for failing to fasten the seat belt, it is clear that fastening of a seat belt cannot prevent the occurrence of an accident. Neither can failure to fasten a seat belt be a cause of an accident. It can only mitigate the injuries."

15. Secondly, on the issue of quantum I am alive to the well-known principle that an appellate court should not interfere with an award of general damage unless it is proved that the award was inordinately low or high or that the trial court used wrong principles in arriving at the decision. These parameters were clearly set out by the Court of Appeal in ***Bashir Ahmed Butt vs. Uwais Ahmed Khan*** **(1982-88)** where it held that;

‘An appellate court will not disturb an award for general 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...’

16. It is trite law that special damages must be, pleaded and proved. In this case the respondent pleaded a sum of Kshs 8,020 as special damages but only tendered his receipt of Kshs 6,500/- issued as evidence of payment for the medical report. The trial court cannot therefore be faulted for entering an award of Kshs 6,500/- in favour of the respondent.

17. It is now settled that the award of general damages must be considered in light with the injuries sustained by the plaintiff. The Court of Appeal in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** observed that:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

18. According to Dr Peter Morebu Momanyi (Pw3), a senior medical officer testified that he examined Pw1 on 5th November 2017, the respondent suffered the following injuries

· Abrasion of the skull

· Contusion on the chest

· Haematoma on right knee

· Contusion on right hip, neck, lower back and right shoulder

19. On cross examination Pw3 testified that the injuries were in the nature of soft tissue injuries. According to Dr Morebu’s medical report the injuries sustained by the respondent were in the process of healing.

20. The respondent before the trial court proposed an award of Kshs 400,000/- and relied on the case of **Catherine Wanjiku King’ori & Others v Gibson Theuri Gichubi Nyeri HCCC No. 320 of 1998.** The plaintiff in the said case was awarded Kshs 300,000/- after establishing that she sustained injuries on the left ankle, injuries on the legs and injuries on the chest.

21. The appellant on the other hand placed reliance on the case of **Eastern Produce (K) Ltd (Savani Estate) v Gilbert Mhunzi Makotsi (2013) eKLR** where the plaintiff therein had suffered a pricked wound on the left foot (dorsal aspect) which was tender and was awarded Kshs 70,000/-. They also cited the case of **Godwin Ireri v Franklin Gitonga (2018) eKLR** where the plaintiff was awarded Kshs 90,000/- after sustaining two cuts on the forehead, cuts on the scalp to the occipital region, bruises on the left ankle and bruises on the right knee.

22. Although the cases cited by both parties before the trial court were on soft tissue injuries, the injuries were not comparable to those suffered by the respondent herein.

23. In **Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 Others [2019] eKLR** the plaintiff sustained a deep cut injury on the scalp extending to the maxilliary area, blunt injury to the left side of the chest, contusion on the back and contusion on both legs and was awarded Kshs 90,000/-. In **Kebirigo Tea Factory Ltd v Elizabeth Nyabeta Moraro [2019] eKLR** the plaintiff was awarded Kshs 180,000/- after she proved that she suffered contusion on the chest, midleg and neck posteriorly. She also sustained Blunt trauma to both shoulders and lower back, bruises on the left arm and hand and on the right knee posteriorly as well as sublaxation of the left ankle.

24. Having considered the parties submissions and the general trends on awards for general damages for soft tissue injuries, I hereby allow the appeal to the extent that I set aside the judgment on general damages and substitute it with Kshs 150,000/-. The appellant shall have the cost of this appeal.

Dated and Delivered at KISII this 14th day of October 2020

A. K. NDUNG'U

JUDGE