REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 103 OF 2019

MICHAEL MJOMBA.....APPELLANT

VERSUS

CHINANGO KUMBE GEREZA.....RESPONDENT

(Being an Appeal and Cross Appeal from the Judgment and Decree of the

Honourable S. K. Ngii – Senior Resident Magistrate delivered in Mariakani

SPMCC No. 111 of 2017 delivered on 20th November 2019)

Coram: Hon. Justice R. Nyakundi

Murimi, Ndumia, Mbago & Muchela Advocates for the appellant

Njoroge Mwangi Advocates for the respondent

JUDGMENT

This is an appeal against the Judgment and decree of the Senior Resident Magistrate Kilifi **(Hon. S. K. Ngii)** sitting at Mariakani which was read and delivered on 20.11.2019 in **PMCC 111 of 2017**. In that Judgment, both parties were found equally to blame for the accident. On quantum, the respondent was awarded general damages of Kshs.600,000/=, specials of Kshs.6,500/= with a net award of Kshs.303,250/= plus interests and costs.

An appeal to this Court lies on the following grounds:

> ***(1). That the Learned Senior Resident Magistrate misdirected himself in Law by assessing damages that were manifestly excessive and incomparable to the current judicial awards in analogous circumstances.***
>
> ***(2). That the Learned Senior Resident Magistrate erred in Law and fact in failing to take into account relevant factors in evaluating the evidence on record to determine the issue of liability to apportion it at 50%.***

In essence the appellant is dissatisfied with both liability and quantum.

Background

Reverting to what happened earlier, on 14.9.2016 the respondent was lawfully riding motor cycle registration number KMDF 133T along Mombasa-Nairobi. On reaching at Kibanda area there was a collision between his motorcycle and the appellants motor vehicle registration number KBP 209H. The respondent in his plaint contends that the collision was solely caused by the negligence of the appellant as pleaded in paragraph 5 of the Plaint. It was also the case for the respondent that he suffered injuries to the metatarsals, left ankle joint, cut wounds to the dorsum, right thigh, left shoulder and other multiple soft injuries. Due to the effect of the injuries its averred by the respondent that he sought to recover both general and special damages against the appellant.

The appellant in his defence filed on 31.3.2017 disputes that the subject motor accident was solely caused or in the alternative contributed to as pleaded by the respondent on the evidence at the trial. According to **Jackson Musera (PW1)** evidence on 14.9.2016 a traffic accident

report was made to Mariakani Police Station involving motor-vehicle registration number KBP 209H being driven by the appellant and motorcycle registration number KMDF 133J, being driven by the respondent. He recalls the collision that occurred resulted in the respondent personal injuries. Following the accident **(PW1)** told the trial Court that P3 Form was issued to the respondent duly filled at Mariakani Hospital.

In cross examination, he testified that the day of the accident its recorded, that motorcycle being driven by the respondent made a right turn and in the course of that maneuver a collision occurred. He could precisely state whether the appellant or respondent was wholly to blame for the accident.

The key witness **Chinago Kumbe Gereza** testified that on the day of the accident along Mombasa-Nairobi Highway while riding his motorcycle an oncoming motor vehicle being driven by the appellant knocked him from the rear. The impact threw him off balance and simultaneously suffered physical harm which necessitated him to be treated at Mariakani Hospital. He produced treatment notes, receipts for expenses incurred and a medical report by **Dr. Ndegwa** as exhibits. He blamed the appellant for the accident and consequential loss and damage.

In cross-examination he denied that the collision occurred in circumstances explained by **(PW1)** Inspector **Jackson Musera** of Mariakani Police Station. He also admitted noticing the appellants on-coming motor vehicle before he made a u-turn to the right side of the road. He maintained that the appellant was wholly negligent while driving descending Nairobi-Mombasa Highway. At the close of the respondent case it was incumbent for the appellant to give his side of the story but elected in the alternative to submit on issues raised in the claim.

The Appellant Submissions

The appellant counsel has asked the Court to reverse the Learned trial Magistrate Judgment on both liability and quantum. Further, that the witnesses **(PW1) IP Jackson** and **(PW2) – Chinago Kumbe** asserts Learned counsel did not discharge the burden of proof vested with the respondent. That it was the appellant to blame for the accident. Learned counsel also urged the Court to accept **(PW1)** testimony the investigating officer **PC (w) Selestine** established the respondent to have driven without due care and attention. Therefore, Learned counsel contended that the Court should not have considered the issue of contributory negligence, to apprehend liability on non-existence of facts. Thus counsel argued and submitted that respondent was the author of his own misfortune.

On quantum Learned Counsel submits that the nature of injuries suffered by the respondent were incapable of attracting an assessment of damages of Kshs.600,000/=. It is concluded by Learned counsel that minded of the cited authorities of **Rapid Kare Services Ltd v Hillary Ingwe M. {2016} eKLR and Tononoka Steel Ltd v Sylarius Esikun Toka {2016} eKLR** the Court could have awarded on or about Kshs.350,000/= as a fair compensation.

The Respondent Submissions

Learned counsel submitted that the respondent was also dissatisfied with the Judgment of the trial Magistrate on liability apportionment of 50% and assessment of damages which he considered to be at variance with the injuries and current judicial decisions.

Further, Learned counsel, in particular submitted that he did not appeal within the thirty (30) day period because he had to wait to be served with the appellant's memorandum of appeal. Further, Learned counsel submitted and opposed the line of arguments by appellants counsel that the cross-appeal was filed without leave of the Court. It was Learned counsel contention that count down on cross-appeal starts to run upon receipt of the memorandum of appeal by the appellant. He asked the Court to find that from the record his cross-appeal was filed within time and in compliance with Section 79G of the Civil Procedure Act. For this legal proposition counsel cited the principle in the case of **Kenya Bus Services Management Co. Ltd v Patrick Irungu Githire {2018} eKLR.**

On the main appeal argued and submitted together with the cross-appeal counsel submitted that the respondent's evidence indicated that he was knocked from the rear by the appellant's motor vehicle. Learned counsel for the respondent ventilated his arguments that from the evidence on liability there was no dispute as who was to blame between the two drivers. He pointed out that in absence of reliable evidence to exonerate the appellant it was imprudent for the Learned trial Magistrate to apportion liability. Counsel relied on **North End Trading Company Ltd v The City Council of Nairobi {2019} eKLR, Mary Njeri Muiregi v Peter Macharia & Another {2016} eKLR** to persuade the Court to exercise discretion in interfering with the findings on liability.

Learned counsel's case on quantum was on an assessment of an award which was too low and not reflecting the injuries suffered by the appellant. Learned counsel submitted that taking the queue from the guiding principles in **Njora Samwel v Richard Nyangau Orechi {2018} eKLR, Hussein Abdi Hashi v Hassan Noor {2004} eKLR, Samwel Mungai Njau v Wananchi Sanitary & Hardware Ltd {2004} eKLR** the Court to find the Learned trial Magistrate's discretion in assessment of damages was a misapprehension of the Law. Learned counsel submitted that the entirety of the evidence given by the respondent supported a different narrative with that appraised in the final decision of the Learned trial Magistrate.

Applying the aforesaid set out principles of Law and case Law cited Learned counsel urged the Court to interfere with the Judgment of the trial Court on both liability and quantum.

Analysis and Determination

The appellant's claim against the respondent case at the trial was obviously in tort of negligence and breach of duty of care in Road Traffic accident claims. The jurisdiction of an appeal Court is clear as reaffirmed in the case of **Sumaria & Another v Alhed Industries Ltd {2007} KLR, East Africa Portland Cement Co. Ltd v Tihikia Keloi {2016} eKLR.** The key principles thus:

> ***"The position of the Law as regards a first appeal is that the first appellate Court, this Court has a duty to reconsider the***

evidence, evaluate it and draw its own conclusions while appreciating that it did not have the advantage, like the trial Court had of seeing and hearing witnesses."

In view of what has just been submitted about the Judgment, it is not in dispute that both liability and assessment of damages are in issue in this appeal. On liability the contest is on apportionment founded on **50%:50% ratio** against each of the parties to the suit.

The Law

It must be recalled that the duty to discharge the burden of proof in respect of negligence rests with the plaintiff. In **Henderson v Harry E. Jenkins {1969} 3 A.E.R. 756:**

> ***"In an action for negligence, the plaintiff must allege, and has the burden of proving that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving Judgment at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants and if he is not satisfied the plaintiff action fails."*** **(See also Veronica Kanorio Sabari v Chinese Technical Team for Kenya & 2 others HCCC No. 376 of 1989 Henry Mwobobia v Muthaira Karauri & Another HCCC No. 104 of 1991)**

> ***"The onus is on the plaintiff to prove this case on the legal standard necessary. In a civil case the standard is on a balance of probability."***

In this appeal, it is simply a dispute over who was to blame for the accident. The scope and extent of the fundamental legal pricniples on this subject are said to be settled this far. In **James v Livox Quarnes Ltd {1952} 2 Q.B. 608** the Court held:

"A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable, prudent man, he might be hurt himself and in his reckonings he must take into account the possibility of being careless; once negligence is proved, then no matter whether it is actionable negligence of contributory negligence, the person who is guilty of it must bear his proper share of responsibility for the consequences."

So does the cases of **Nandwa v Kenya Kazi Ltd {1988} KLR 488 and Regina Wangechi v Eldoret Express Co. Ltd {2008} eKLR** the Courts on this issue held that:

> ***"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a primafacie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides same answer adequate to displace that inference."***

With regard to this issue on the nature and extent of it the Courts in **Nance v British Columbia Electric Ryco Ltd {1951} AC 601 at 611:**

> ***"Act that is necessary to establish contributory negligence is to prove to the satisfaction of the Court that the injured party did not, in his own interest, take reasonable care of himself, and contributed, by his lack of care, to his own injury where a person is part author of his own injury, he cannot call on the other party to compensate him in full."***

Further in **Rouse v Squires {1973} 2 ALL ER 903:**

> ***"Where the party guilty of the prior negligence has created a dangerous situation, and the danger is continuing to a substantial degree at the time of the accident, and the accident would not have happened but for this continuing danger, he is responsible for the accident, as well as the party who was subsequently negligent."***

It is necessary now with these principles to go into the evidence which was before the Learned trial Magistrate. The respondent himself said that he saw the appellants motor vehicle before crossing to the other side along Mombasa-Nairobi Highway. Further he blamed the collision on the appellant who hit him from the rear without hooting or warning. He denied that he was overtaking when the collision occurred. The Inspector of Police **(PW1)** called on behalf of the respondent was permitted to produce the police abstract though he never visited the scene to make observations on the point of impact. The trial Court had circumstantial evidence on the gouge marks on the road, the debris and the location of the two vehicles relative to the point of impact. According to the respondent own admission, there was an oncoming vehicle of the appellant when he made an attempt to cross the road.

My own appraisal of the evidence by **(PW1)** is only relevant as to proof of facts on the contents in the police abstract. That the document is genuine and the circumstances in which it was generated and the person signing was identified as an employee of the National Police Service.

It is not in dispute that the substantial evidence purporting to blame the respondent as relied upon by the Learned trial Magistrate is for all intents and purposes that of **(PW1)** and **(PW2)** respectively. With regard to the critical facts of the case, I have considered the rival contentions on this aspect in my view much credibility can be attached to the evidence as presented by **(PW1)** and **(PW2)** on account of the collision at Karianda area.

On this basis, extrapolating from the materiality and reliability of the evidence and issues emerging in cross-examination at the trial, I infer that the accident was caused or substantially contributed to by both drivers. Why do I say so?

Can the appellant escape liability from the inference of negligence that arises from the evidence of the respondent and the other evidence that the Learned trial Magistrate directed attention to?

It is a general principle of Law under Section 107(1) of the Evidence Act that the burden of proof on a balance of probabilities in this case is vested with the respondent to demonstrate that the accident was caused by negligence on the part of the appellant.

From analysis of the evidence and findings arrived at by the Learned trial Magistrate one can safely conclude that the respondent crossed from one side of the road towards the lane of the appellants motor vehicle. The point of impact presumably was on the appellant's side of the road. In the witness statement of the respondent he alleges to have noticed the appellant's vehicle in advance but on estimation began to make a u-turn to the other side of the road. Therefore, I find as a fact that for the respondent to be hit from the rear as he admits in his evidence there was a high probability of speeding on the part of the appellant.

On the same line of reasoning as arrived at by the Learned trial Magistrate the comparative precedent in **Podrebersek v Australian Iron & Steel Ply Limited {1985} HCA** the Court stated:

> ***"The making of an apportionment as between a plaintiff and a defendant on their respective shares in the responsibility for the damages involves a comparison both of culpability, that is of the degree of departure from the standard of care of the reasonable man…. and of the relative importance of the acts of the parties in causing the damage. It is the whole conduct of each negligence party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case."***

In the instant case, the Learned trial Magistrate weighed the evidence indicating the events of the collision. I am satisfied that the evidence given by the respondent of the on coming vehicle and the u-turn he made across did necessary put both of them at fault. In the resound of any evidence upon which to apportion the blame between the two negligent drivers, it was open to the Learned trial Magistrate to draw an inference that they were equally blameworthy. **(See Odunga's Digest on Civil case Law and Procedure 3rd Edition Vol. 7 pg 5054 para ©):**

> ***"When two parties on the highway are so moving in relation to another as to involve risk of collision, each owes to the other a duty to move with due care and this is true whether they are both in control of vehicles or both proceeding on foot or whether one is on foot and the other controlling a motor vehicle…."***

In this case, I proceed on the basis that the Learned trial Magistrate found the appellant to blame when he approached the respondent motorcycle turning right at the time and proceeded to hit him from the rear. From the observations made, in my view the appellant had sufficient time to yield or brake to prevent the collision. We are told by the Court in **Gakere v Ngigi {1981} KLR 307**:

> ***"Where an alert and reasonable, competent driver could have avoided the collision, the Judge is justified in finding some slight degree of negligence on the part of the plaintiff but the decision cannot be interfered with by the Appeal Court unless it can be proved that the Judge acted on the wrong principle or misapprehended the relevant facts while exercising this discretion."***

I therefore reject both the appellant's and respondent proposition that it was impossible to conclude with certainty apportionment of liability at 50%: 50% as founded by the Learned trial Magistrate. This ground of appeal fails.

On quantum, the approach of the Courts to such a situation like in the instant appeal is exemplified by the case of **Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja CA No. 2 of 1986 KLR 730.**

In the further case **Nyarangi J.A** stated that:

> ***"an appellate Court does not interfere with quantum of damages simply because in its opinion the damages awarded is excessive, it only interferes if there is evidence. That the damages have been assessed on wrong grounds or are unreasonable."***

As per **Hancox J. A in Southern Engineereing Co. case (supra):**

> ***"it is trite Law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated."***

The question confronting the Learning trial Magistrate was essentially a question of fact which was dependent upon consideration of the evidence by the respondent and the appellant. That evidence which I have not heard but solely depend on what has been transcribed on record. That due advantage by the trial Court must be weighed against the scrutiny by this Court.

Further, it should be noted at the outset that the Learned trial Magistrate had at his disposal important medical evidence by **Dr. Ndegwa.** The medical report documented the injuries suffered by the respondent involving compound fracture of the 1st, 3rd and 5th metatarsals on the left foot, sub-laxation of the left ankle, deep cut wound on the dorsum of the left foot, cut wound on the right thigh, blunt injury on the left shoulder and blunt injury to the chest. On assessment of damages and determining how much award, the Court in **Mohammed Mahmoud (supra)** had this to say:

> ***(a). Each case depends on its own facts.***

(b). Awards should not be excessive for the sake of those who have to pay premiums, medical fees or taxes the body politic.

(c). comparable injuries should attract comparable awards.

(d). Inflation should be taken into account and

(e). Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high, or low as to entirety erroneous estimate for an appropriate award leave it alone.

With regard to damages in tort, the purpose is to put the claimant in the position he or she would have been in if the tort had not been committed by the defendant. Learned counsel for the appellant submissions on this ground revolved around the qualification of damages and not giving weight to the relevant factors, which led the Learned trial Magistrate to fall in error in principle.

I have examined carefully the evidence, and arguments for and against the award of damages in the impugned Judgment. Nevertheless, the clear principles in **Butt v Khan {1981} KLR, Kitavi v Constill Builders {1985} KLR 470** are of significance in which the Court held interalia:

"That assessment of damages is concerned with judicial discretion and it is of the essence such discretion when exercised on the same evidence two different minds might react widely different decisions without either being appealable. It is only where the assessment of damages were predicated based on no evidence or on misapprehension of the evidence, or the Judge acted in wrong principles in making the findings." "That the appellate Court can interfere with the award."

It is plain from the Judgment of the Learned trial Magistrate that in the respondent's case the approach taken was compensatory. He did not award the respondent's to profit from the appellant's wrongful act of negligence. For this reason, on the question of damages, I take broadly the view the principles formulated for interference of such awards have not been met by the appellant. This ground as a basis of the appeal also fails.

Finally, on the category comprising cross-appeal, there is no question of existence of a conceptual difference between an original appeal and the respondent right to cross-appeal. The appeal referred to in Section 79(G) of the Civil Procedure Act on the reading of the provision strictly and properly includes a cross-appeal which could be made available in connection with the Judgment or order appealed or sought to be appealed by any of the aggrieved parties to a litigation. This Section confers an opportunity upon the parties to exercise their right of appeal within a period of 30 days from the date of delivery and pronouncement of the impugned order or Judgment.

It follows therefore that although Section 79 (G) does not mention a cross-appeal under any circumstances if the respondent intends upon consideration of the decision to lodge an appeal, a notice of such intention ought to be served upon the other party within the stipulated period.

In my view a case which both the plaintiff and defendants desire to reverse or vary that Judgment, each must proceed by way of an independent appeal by concisely stating the grounds of such contention. Since the cross-appeal is intended to vary or set aside the Judgment against the other is to be regarded as a equivalent appeal. I find no plausible or sufficient cause why the respondent had to wait that the appellant's file memorandum of appeal before contesting the Judgment of the trial Court. This was the only cause of action by the respondent against the appellant for relief in tort and award of damages. If he intended to appeal on liability or assessment of damages that right was available to him as provided for under Section 79 (G) of the Civil Procedure Act.

In a nutshell, the respondent's cross-appeal does not raise any new ground from what the appellant seeks in his appeal. The substance of it remains on the objection of apportionment of liability to the impugned order or decree.

My take is that in accordance with Section 79 (G) of the Act a cross-appeal lodged by the respondent notice is a separate appeal and the respondent assumes the role of an appellant to the trial Court Judgment and it does not override the requirement of leave provided for in Section 79(G) for the Court to enlarge time to file an appeal out of time.

It is therefore incumbent upon the respondent to independently file a notice of appeal for the Court to hear and determine the issues in his favour. In so far as the cross-appeal is concerned, or was filed out of time and without leave of the Court, my better view is that the purported appeal is fatally defective.

Therefore, the orders of this Court are that the appeal is denied and the findings of the trial Magistrate on apportionment of liability and final assessment on quantum affirmed. The cost of the appeal be equally shared by both parties.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Atiang holding brief for Ndumia advocate for the appellant/cross respondent

2. Mulwa holding brief for Wairagu advocate for the respondent/cross appellant