



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL APPEAL NO. 12 OF 2017**

**ELIJAH OBARE.....APPELLANT**

**=VRS=**

**THOMAS NYAKAMBA.....RESPONDENT**

**{Being an Appeal from the Judgement and Decree of Hon. E. K. Nyutu – PM dated and delivered on  
the 25<sup>th</sup> day of April 2017 in the original Nyamira Chief Magistrate’s Court Civil Case No. 13 of 2015}**

**JUDGEMENT**

By a plaint dated 9<sup>th</sup> February 2015 the respondent sued the appellant seeking compensation for personal injuries which he alleged to have sustained in an accident which he claimed occurred on 28<sup>th</sup> February 2010 while he was lawfully travelling in a motor vehicle KAV 966X belonging to the appellant. He alleged that the accident had taken place at Gesore area along Nyamira – Konate Road and blamed the driver of the vehicle for the accident.

In his written statement of defence, the appellant while admitting ownership of the vehicle vehemently denied that an accident involving the said vehicle had occurred on the date, place and time and put the respondent to strict proof. However, after hearing and considering evidence from both sides the trial magistrate found that the accident had occurred; that the driver of the appellant’s motor vehicle was wholly to blame and that the respondent had in fact sustained injuries for which he was entitled to compensation. She then quantified the general damages at Kshs. 250,000/= and further awarded him special damages of Kshs. 6,500/= and costs of the suit.

Being aggrieved by the finding on liability and the quantum of damages the appellant preferred this appeal. The appeal is premised on the following grounds: -

- “1. That the learned trial magistrate erred in finding that the respondent’s vehicle had been involved in a road traffic accident when in fact had not.**
- 2. That the learned trial magistrate erred in her analysis of evidence tendered before her thereby arriving at wrong findings of fact.**
- 3. That the learned trial magistrate erred by equating the appellant’s articles as a failed trial on the respondent’s character**
- 4. That the learned trial magistrate erred in awarding a whopping sum of Kshs. 250,000/= as general damages purporting the same to be “normal”.**
- 5. The learned trial magistrate failed to make a nominal award of damages in consonance with her finding that the respondent was only entitled to a nominal award of damages.**
- 6. That the learned trial magistrate treated the appellant’s submissions perfunctorily.”**

The appellant has by the appeal urged this court to set aside the judgement and/or decree of the lower court and substitute it with an order dismissing the case.

The appeal was canvassed by way of written submissions.

As the first appellate court I am enjoined to reconsider and evaluate the evidence adduced in the trial court so as to arrive at my own conclusion. In **Jabane Vs. Olenja [1986] KLR 661** Hancox J stated: -

**“I accept this proposition, so far as it goes, and this court does have the power to examine and re-evaluate the evidence and the findings of facts of the trial court in order to determine whether the conclusion reached on the evidence should stand – see *Peters Vs. Sunday Post* [1958] EA 424. More recently this court has held that it will not likely differ from the findings of facts of a trial judge who had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see – in particular *Ephantus Mwangi Vs Duncan Mwangi Wambugu* (1982 – 88) 1 KAR 278 and *Mwana Sokoni Vs Kenya Bus Sevice* (1982 – 88) 1 KAR 870.”**

The issue for determination is whether liability was proved against the appellant and if it was whether the measure of damages was reasonable.

On liability the appellant has faulted the trial magistrate for finding that the appellant’s motor vehicle was involved in an accident on the date and place alleged. Having considered the evidence, myself I am satisfied that the fact of the accident was proved on a balance of probabilities. The respondent’s evidence that an accident occurred involving the appellant’s motor vehicle KAV 966X in which he had travelled to a burial on 28<sup>th</sup> February 2010 was very consistent. He adduced evidence that the appellant’s driver was charged for failing to report an accident and although the charge was withdrawn under Section 87 (a) of the Criminal Procedure Code, the respondent’s evidence that the accident in fact occurred was very steadfast and it is clear that the appellant’s driver was not acquitted on the merits but on a technicality. In a civil case the standard of proof is on a balance of probabilities and I am satisfied that the respondent discharged that burden. To rule otherwise would be tantamount to raising the standard of proof that was expected of the respondent to that beyond reasonable doubt. The accident was self-involving and the learned trial magistrate was correct in finding liability against the appellant at 100%.

On the quantum of damages, the appellant’s complaint is that the award was inordinately high. The respondent adduced medical evidence and proved on a balance of probabilities that he sustained: -

- (a) Deep cut wound on the right cheek below the right eye.
- (b) Deep cut wound on the right forehead.
- (c) Left chest lateral haematoma and
- (d) Right and left knee multiple injuries.

The doctor’s description of the injuries confirmed the respondent’s evidence that he sustained injuries on the head, injuries on the chest and injuries on the leg. It is my finding that there was no contradiction in their testimonies.

The appellant has cited several cases in support of the submission that the award ought to be reduced to Kshs. 50,000/=. Counsel has submitted that the trial court proceeded on a wrong principle or misapprehended the evidence in some material respect. I have considered the authorities cited and noted they were more than two years old. In assessing the quantum of damages the trial magistrate was guided by the principle set out in **Jackline Syombua Vs BOG & Ekalakala Secondary School, Embu HCCC No. 118 of 2006 (UR)** that a court must bear in mind relevant precedents and that damages ought to be reasonable. The trial magistrate also considered the nature of the injuries as well as the passage of time. I am not persuaded that she acted on the wrong principle or even misapprehended the evidence in some material respect. I am also not satisfied that the award is so excessive as to warrant this court to disturb it. Accordingly, I find that this appeal lacks merit and it is dismissed. The judgement/decree of the lower court is upheld and the costs of this appeal are awarded to the respondent. It is so ordered.

**Signed, dated and delivered in Nyamira this 14<sup>th</sup> day of February 2019.**

**E. N. MAINA**

**JUDGE**