REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 740 OF 2016

JOSEPH KYALO MAUNDU.....APPELLANT

VERSUS

MOSES MUSAU MULELA.....1ST RESPONDENT

ANTHONY MWANGI KAMAU.....2ND RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgement of the Senior Resident Magistrate in Nairobi CMCC No. 4642 of 2012 delivered on the 25TH November 2016.

2. The appellant instituted suit against the respondents jointly and severally for special damages for personal injuries sustained on the 8th June 2011, the appellant was cycling alongside Enterprise road, Nairobi when he was hit by motor vehicle registration number KAW 360Y driven and owned by the respondents respectively.

3. The trial court apportioned liability in favour of the appellant against the respondents at the ratio of 70:30 and proceeded to award Kshs. 350,000 as general damages.

4. The appellant being dissatisfied with the trial court's decision appealed the decision on the following grounds;

a) The learned magistrate erred by apportioning liability in the ratio 70:30.

b) The learned magistrate erred by making an award of Kshs. 350,000 for pain and suffering which was too low and failed take into account relevant factors.

5. The parties consented to dispose off the matter by way of written submissions.

B. Appellant's Submissions

6. On liability, the appellant submitted that the trial magistrate erred by apportioning him liability of 30% as there was no defence or rebuttal evidence against his testimony. He relied on the case of **Isaac Katambani v Firestone E.A (1969) Ltd.** He further invoked the doctrine of *res ipsa loquitor* in regards to a motorist hitting a handcart or bicycle from behind and relied on the case of **Ndirangu Githuga v Sophie Musembi Njue HCCC No. 2412 of 1987,** He thus urged the court the court to find the respondent 100% liable.

7. On damages, he submitted that the damages awarded were extremely low and urged this court to alter them to Kshs. 450,000.

C. Respondents' Submissions

8. On liability, the respondents submitted that it was upon the appellant to prove the negligence of the respondents as he had alleged. It was further submitted that despite the respondent not calling any witnesses, the appellant had failed to prove the respondents' negligence and thus the trial court was right in considering the evidence before it in determination of liability.

9. On damages, it was submitted that the trial court award of Kshs. 350,000/= was right and fair. Relying on the cases of **Malindi Court of Appeal Civil Appeal No. 14 of 2014; Paul Muthui Mwavu v Whitestone (K) Ltd** and that of **Jane Wambui Kamau & 4 Others v Douglas Njue Kuria; Embu High Court Civil Cases Nos. 28 of 1996, 35,40 & 41 of 1995 and 4 of 1996** where the plaintiffs suffered

similar injuries to the appellant but also multiple injuries to the appellant, the respondents argued that the award was adequate.

D. Analysis & Determination

10. I have considered the written submissions of the appellant's advocates and the submissions of the respondents' advocates. I have also considered the authorities relied on by the respective counsel.

11. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others [1968] EA 123*** in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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, this 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 (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."***

12. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424.*** The appropriate standard of review established in these cases can be stated in three complementary principles:

> ***a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
>
> ***b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and***
>
> ***c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.***

13. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

14. The respondent's case was founded on the alleged negligence of the Appellant. As such, they were by law required to establish on a balance of probabilities that:

> a. ***The Appellant owed the deceased a duty of care;***
>
> ***b. The Appellant breached that duty, and;***
>
> ***c. The deceased suffered injury as a result of that breach.***

15. The respondent's case as it emerged from trial was that on the 8th June 2011, he was cycling along Enterprise road in Nairobi when the driver of motor vehicle KAW 360Y hit him from the rear and he sustained a fracture of the right tibia malleolous and painful elbows and wrist joints.

16. From court record and the evidence of the appellant it was revealed that the appellant's bicycle had a side mirror and that the appellant was aware of the lorry behind him.

17. The appellant testified that he was hit from the rear by the lorry which had come to the pavement. The magistrate apportioned liability at 70:30 ratio on grounds that the appellant was aware of the lorry and did not do anything to avoid the accident. This was based on the fact that the bicycle had a rear mirror.

18. The respondent did not adduce any evidence on liability. It was not in dispute that the appellant was hit from the rear and that the lorry passed him and stopped ahead of him after some people intervened. The magistrate was in agreement that the appellant proved negligence against the respondent.

19. A close scrutiny of the evidence does not justify the apportionment of liability at the ratio of 70:30. Even if the appellant's bicycle had a side mirror, he was not to blame for the accident since no evidence was tendered by the respondent.

20. I reach a conclusion that the magistrate erred in the apportionment of liability without any basis. Consequently, I find the respondent fully liable and set aside the finding of the lower court on liability.

21. Regarding the damages awarded, the principles upon which this court should proceed are those stated in the case of ***Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini Vs A. M. M. Lubia & Another [1998] eKLR***.

> ***"…. It must be satisfied that either 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."***

22. The same principle was reinstated in ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5*** where the Court of Appeal in held:

> ***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 ….***

23. The appellant has questioned the basis for the award of Kshs. 350,000/= as general damages for pain and suffering, terming them to be very low. The injuries sustained by the respondent are not contested; he suffered a fracture of right tibial malleolus and painful elbows and wrist joints.

24. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in ***Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR*** thus:

> ***"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past".***

20. For this court to interfere with the trial court's decision on quantum, it must be established that the trial court acted on wrong principles and or misapprehended the law. See **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** the Court held:

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)"***

25. The appellant has not established that the trial magistrate made any erroneous estimate or misapprehended the legal principles applicable in awarding damages. Perusal of the trial court's judgment reveals that the learned magistrate stated that she considered the submissions and the authorities placed before her by the parties. I see no reason to interfere with the findings of the trial magistrate on quantum. Furthermore, it is my opinion that the most comparable case in terms of injuries suffered by the appellant herein are those cited by the respondent.

26. The award payable to the appellant is as follows: -

a) General damages Ksh. 350,000/=

b) Special damages Kshs. 4,950/=

Kshs. 354,950/=

27. Each party to meet its cost of this appeal as the appellant meets those of the court below.

28. The appeal is only partly successful.

29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2019.

F.N. MUCHEMI

JUDGE