REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.3 OF 2018

MAINA ONESMUS……APPELLANT

VERSUS

CHARLES WANJOHI GITHOME…….....……. RESPONDENT

(Appeal from the Judgment and decree of Hon. W. Kagendo-Chief Magistrate in CMCC No.421 of 2014 delivered on 6th December 2017.)

JUDGMENT

The appellant herein was aggrieved by the judgment delivered by the trial court on 6th December 2017 where she found the appellant 100% liable and awarded the respondent the sum of Kshs. 600,000/- General Damages and Kshs. 30,100/- Special Damages.

He filed 5 grounds of appeal: -

> *1) THAT the Learned Magistrate erred in both law and in fact when she failed to consider the fact that the plaintiff ought to have borne contributory negligence for riding on an uninsured motor cycle thus exposing himself to danger.*
>
> *2) THAT the Learned Magistrate erred in both law and in fact when she awarded a sum of Kshs.600,000/- as damages for injuries suffered which amount is manifestly excessive and high in the circumstances and connotes an erroneous estimate of the damages suffered.*
>
> *3) THAT the Learned Magistrate erred in law and in fact in failing to consider or even adequately adopt and appreciate the written submissions of the Appellant on record and the authorities annexed therein in support of the Appellant's case.*
>
> *4) THAT the Learned Magistrate erred in fact and in law by failing to follow rules of precedents in awarding general damages.*
>
> *5) THAT the Learned Magistrate erred both in law and in fact for considering irrelevant matter in arriving at the said decision in favour of the Respondent as against the Appellant.*

Basically that the trial Magistrate ought to have found that the respondent contributed to the accident, that the General Damages were manifestly excessive considering the injuries sustained by the respondent, and that she failed to appreciate the submissions filed, apply the precedents cited, and considered irrelevant materials.

Parties agreed to proceed by way of written submissions J. K. Kibicho & Co. Advocates for appellant, and Andrew Kariuki (A.K) for respondent.

Pleadings

From the plaint filed on 16th December 2014, the plaintiff respondent was a pillion passenger on motorcycle Reg. No. KMDD 590E on 1st July 2014 along Nyeri-Nyahururu road when the defendant/appellant drove motor vehicle Reg. No. KBW 716J so carelessly that he caused an accident whereby the plaintiff/respondent was injured: -

a) Fracture of the midshaft humerus

b) Fracture of the condyles

c) Fracture of the shoulder gird.

d) Pain and psychological trauma

The plaintiff sought general damages for pain and suffering, and special damages of Kshs. 35,000/- plus costs and interest. He blamed the defendant for the accident.

In his defence filed on 13th May 2015 the defendant denied being the driver/owner of motor vehicle KBW 716J at the material time, blames the plaintiff/respondent for the accident for failing to wear protective gear, trying to hijack the rider of the unregistered motor cycle causing it to veer off the road, disembarking from the motor cycle, causing the Road Traffic Accident, exposing himself to danger so he could claim, negligently allowing himself to be ferried on an uninsured motorcycle.

The defendant/appellant also blamed the rider for riding recklessly, failing to heed hooting from motorists on the said road, failing to ensure the road was clear before joining the road getting into the way of KBW 716J among others. He denied that the doctrine of *res ipsa loquitor* was applicable and sought to rely on the doctrine of *maxims volenti non fit injuria causa non*. He put the plaintiff/respondent to still proof.

The Evidence

The plaintiff respondent testified and called one witness a police officer from Nyeri Traffic Base. The plaintiff/respondent told the court he was a pillion passenger on 1st July 2014 at 10:00am – a lorry came from behind and wanted to overtake them. However, on noticing an oncoming motor vehicle the lorry tried to retreat back to its lane, and in the process, hit him on the right side. They fell down. The lorry did not stop but the rider got up and followed the lorry noting its registration number. He sustained injuries and was admitted in hospital for 10 days. He later reported to the police and recorded a statement, facts that were confirmed by PW1, the police officer. He conducted search for the motor vehicle and got to know the owner of the motor vehicle.

He produced the requisite documentary evidence- medical reports, discharge summary ,P3, and receipts for medical expenses.

The defendant/appellant did not call any witness.

In this appeal the issue for determination are whether the trial magistrate ought to have found contributory negligence on the part of the plaintiff/respondent, and whether , the damages awarded were manifestly excessive in the circumstances of this case.

Analysis

This being a first appeal this Court is guided by the ratio in **Selle vs. Associated Motor Boat Company**

Ltd (1968) EA 23 at page 126 where it was held: -

> *"Briefly put they (the principles) are that the Court must reconsider the evidence, evaluate 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 that respect.*
>
> *In particular, this Court is not bound necessarily to follow the Trial Judge's finding of fact if it appears that he clearly failed on some points to take account of particular circumstances or probabilities materially to estimate the evidence; of if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally"*

For the appellant it was submitted that: -The court in failing to find contributory negligence on the part of the plaintiff/respondent it erred that the respondent was carrying his tea selling apparatus a flask and bucket of snacks which he held against his body. That his hand was bulging out of the sides of the motorcycle and that it was his hand that was hit- that he ought to have exercised duty of care for other road users.

It was submitted that these issues had been addressed in the submissions made in the Lower court.

A perusal of the court records shows that the plaintiff/respondent testified on cross-examination that he was indeed carrying tea and mandazi on his laps. There is no evidence that his hands were bulging outside the motorcycle and nothing on record to lead to that deduction. True he said he was hit on the right hand, but from behind. The defendant/appellant did not give any evidence to contradict this evidence and hence the rest is evidence from the bar as it is. Secondly, the defendant/appellant did not plead contributory negligence, did not give any testimony to show that the plaintiff in any way contributed to the accident. Hence the ground and contribution- there is nothing to support the same it must fail.

The submissions in the lower court that the plaintiff's case was full of contradictions is not supported by the record. The police officer testified on the records that he produced. He was not at the scene, and he was not the Investigating Officer. He therefore could not have contradicted the plaintiff/respondent on how the accident happened.

The conviction and sentencing of the rider of the motor cycle for riding an uninsured motorcycle surely cannot have any effect on the manner in which the Road Traffic Accident happened. There is no relationship between careless/reckless driving and being uninsured.

On the issue of quantum of damages, the defendant/appellant did not challenge the medical evidence produced in support of the injuries sustained but that the Dr. Victor Omondi's report indicated that he had made positive recovery. He relied on **Said Abdullahi & Another Vs Alice Wanjira (2016) eKLR** where Sergon J reduced General Damages for Kshs. 600,000/- to Kshs. 300,000/- for similar injuries, and **Boniface Waiti & Another Vs Michael Kariuki Kamau (2007) eKLR** where Nambuye J awarded the 2nd plaintiff Kshs.295,000/- for similar injuries.

The plaintiff/respondent had relied on **HCC.No.1853/1998 at NBI- Doughlas Mwangangi Ngutu vs Charles Mwangi Njeri & Anor** on issue of rebuttal of evidence and **HCC 37/1992 (NBI) Leonard Kinuthia Vs William Sirma Kiboros & Another** where the plaintiff was awarded Kshs. 700,000/-. The plaintiff sought Kshs. 800,000/-.

It is trite as submitted by counsel for respondent that an appellate court will not interfere with quantum of damages unless it is very high/immediately low and founded on where principles of law and out of sync with comparable court awards.

I have carefully perused the medical reports. The P3 completed on 11th August 2014 indicated that the defendant/respondent sustained the injuries: - fractures of the mid shaft humerus, and condyles, and fragment fracture of the shoulder girdle. The degree of injury was assessed as harm. The medical report

by Dr. Victor Omondi from Aga Khan Hospital also confirmed that the degree of injury sustained by respondent was harm these are the same injuries that were noted on the discharge summary dated 11th July 2014.

I have looked at the authorities cited-

In **W.K (minor suing thro' next friend and Another L.K) vs Ghalib Khan & Another (2011) eKLR**- the Court of Appeal awarded the sum of Kshs.600,000/- for *fracture of the pelvis, and osteoarthritis* with slow healing due to the extent of the injury.

In Said Abdullahi –Justice Sergon awarded the sum of Kshs. 300,000/- for the fracture of right humerus. In that case several authorities are cited.

The defendant/appellant proposed the sum of Kshs. 250,000/-

The plaintiff/respondent cited one to case – where the Kasango Mativo J awarded the sum of Kshs. 700,000/- for fracture of the right ankle and comminuted fracture of the lateral malleolus – with 10% in capacity. This is a High Court judgment and is of persuasive value to this court.

I have considered the authorities cited and it is clear to my mind that the defendant/respondent sustained fractures of the right arm- which were not serious injuries as both the doctor who filed the P3 and the one who examined him subsequently considered the degree of injury to be harm – meaning that there was no permanent damage and the injuries healed well. This cannot be compares to the injuries in **Postal Corporation of Kenya & Another Vs Dicksons Munayi (2014) eKLR** where the respondent sustained compound fracture of the skull, loss of 2 teeth and was awarded General Damages of Kshs. 500,000/- or in **W.K** where the Court of Appeal awarded Kshs.600,000/- for a very serious pelvic fracture injury.

I am persuaded that the injury sustained by the defendant/respondent was not serious enough as per the authorities available to warrant the sum of Kshs.600,000/-.

Determination

On issue of contributory negligence on the part of the defendant/respondent I find none was proved.

The appeal succeeds in part.

On the issue of quantum on general damages, I find that the award of Kshs.600,000/- was excessive. I set aside the trial Magistrate's award and substitute it for the sum of Kshs.350,000/-. The other awards remain undisturbed, special damages of Ksh.30,100/-.

I enter judgment for the respondents against the appellants:

Liability: 100%

Damages total Ksh.380,100/-

Plus half the costs of this appeal and interests at court rates from the date of the judgment in the lower court.

Dated, delivered and signed at Nyeri this 8th Day of February 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Mr.Ombongi for Nyangati for appellant

Nyakio holding brief for Andrew Kariuki for respondent

Mumbua T Matheka

Judge

8/2/19