

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 01 OF 2016

GEORGE MAINYA OMWERI.....APPELLANT

=VRS=

JOHN MAGARA MUGUMO.....RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. N. Kahara – RM

dated and delivered on the 15th day of January 2016 in the original Keroka

Principal Magistrate’s Court Civil Case No. 235 of 2013}

JUDGEMENT

This is an appeal against the decision of the lower court on the issue of liability as well as the quantum of damages awarded to the appellant. It is the appellant’s contention that since the driver of the respondent’s motor vehicle admitted he was overtaking another vehicle when the accident occurred, then he should have been found wholly liable for the accident. On the quantum of damages, it is the appellant’s submission that the award of Kshs. 120,000/= was inordinately low for the injuries sustained by the appellant. Counsel for the appellant proposed an award of Kshs. 500,000/= and urged this court to consider inflation and the nature of the injuries.

The appeal is opposed. Counsel for the respondent submitted that the injuries in this case were soft tissue in nature and therefore the award was not so inordinately low as to amount to a wrong estimate on the damage.

On the issue of liability, Counsel for the respondent submitted that the trial magistrate did not err in apportioning liability between the appellant and the respondent and that in any event the appellant was wholly to blame; that the respondent braked to avoid the collision but because the appellant entered the road abruptly the vehicles collided. Counsel submitted that traffic rules require motorists joining the highway to give way and that the respondent had the right of way but the appellant did not stop to allow the road to clear before he entered the road. Counsel contended that the trial court’s decision was proper, just and fair. He urged this court to consider the principles that an appellate court must consider before disturbing such a decision and find that the appeal has no merit and dismiss it with costs to the respondent.

The principles upon which this court can interfere with the trial court’s findings of fact and also liability are well settled and authorities on that are legend. Some of them have been cited by Counsel for the parties in this appeal. Suffice it to say that I have as is my duty considered the evidence in the lower court so as to arrive at my own conclusion. That is not to say that I have ignored the submissions by Counsel which I summarized in the beginning of this judgement. Neither the appellant nor the respondent called independent witnesses who could attest to the manner in which the accident occurred. The appellant did not call the police officer who investigated the accident but another officer who merely produced a police abstract which merely indicated that the accident was still under investigation. It was therefore his word against that of the respondent being that the respondent suddenly entered the road from the left and cut into his path and much as he tried to avoid hitting him he still hit the motor cycle. The case for the appellant on the other hand was that the respondent found him waiting to join the main road and rammed him at the back. This is what **Spuy VP** referred to as **a conflict of evidence in Lakhamsi Vs. Attorney General [1971] EA 118, 120** and opined that in such circumstances, it is proper to divide the blame equally between the drivers. I am therefore satisfied that the trial magistrate exercised her discretion on the apportionment of liability correctly and see no good reason to interfere with her decision.

I have also considered the nature of injuries sustained by the appellant. They were soft tissue injuries. In her judgement, the trial magistrate considered the authorities cited by both sides as a guide, the nature of the injuries and their effect and arrived at an award of Kshs. 120,000/=. It is my finding that the award was based on the evidence before the trial court and was not so inordinately low as to amount to an erroneous estimate of the damage.

In the end I find no merit in this appeal and the same is dismissed with costs to the respondent.

Signed, dated and delivered in Nyamira this 7th day of March 2019.

E. N. MAINA

JUDGE