



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 5 OF 2016

JUBILEE HAULIERS LTD.....1ST APPELLANT

VIPUL PATEL.....2ND APPELLANT

VERSUS

MARY WAITHERA WANJA.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Nakuru Chief Magistrate's Court Civil Case No. 435 of 2014 by Hon. J. N. Nthuku, S.R.M. delivered on 15th day of January, 2016)

J U D G M E N T

I N T R O D U C T I O N

1. This appeal arise from claim for general and special damages by the respondent against the appellants as a result of injuries she sustained when she was knocked by the 1st appellants motor vehicle registration number KBR 566N ZD5367 which was being driven by the 2nd respondent. The trial magistrate found the appellants 100% for the injuries sustained by the respondent. She awarded Kshs 200,000 as general damages and Kshs 80,080 special damages.

2. The Appellant being dissatisfied with the decision on liability filed this appeal on the following grounds:-

- i. That the learned trial Magistrate erred in fact in holding that the Defendant was 100% liable in the accident when there was clear evidence to the contrary.
- ii. That the learned trial Magistrate erred in fact and in law in holding that lack of an insurance cover on the third party's motor vehicle had no bearing on liability.
- iii. That the learned trial Magistrate erred in fact and in law in attaching undue weight on PW5's, the police officer's testimony when in essence he was not the investigating officer.
- iv. That the learned Magistrate erred in fact and in law in failing to conclusively and constructively, consider the facts adduced at the hearing and further erred in making an excessive award in general damages.

A P P E L L A N T S S U B M I S S I O N S

3. The appellant's counsel submitted that the trial magistrate erred by finding the appellant 100% liable for the accident against the defence evidence that he was on its rightful lane when the accident occurred. He further submitted after the accident, there were beer bottles in motor vehicle KAU 325B owned by the third party. He submitted that the trial magistrate concluded that the third party motor vehicle caused the accident after driving under the influence of alcohol.

4. Counsel further submitted that lack of insurance has a bearing on liability. He submitted that the police abstract indicated that motor vehicle KAU 325B was not insured and that the issue of insurance should contribute to liability. He quoted section 4 of Insurance Act, which bar uninsured vehicle from the road. He cited **Embu HCCA no.106 of 2009 Ndimia Tea Factory Vs Lydia Nyawera MURIUKI (Suing as personal representative of the Estate of John Wamai**

He argued that the trial magistrate should not have relied on PW5's evidence, as he was not the investigating officer.

On quantum, the appellant submitted that it was excessive as the nature of injuries were soft tissue.

RESPONDENTS SUBMISSIONS

5. Counsel for the respondent submitted that it is not disputed that two vehicles were involved in the accident herein. He further submitted that evidence on record is that motor vehicle KAU 325B was moving from Nakuru towards Eldoret direction and KBR 566N from Eldoret to Nakuru direction. He submitted as per sketch plan, the point of impact was on the part of motor vehicle KAU 325B, left side facing Eldoret from Nakuru.
6. Counsel submitted that the covering report that was prepared later was misleading as confirmed by the traffic officer who testified in court. He submitted that even the court wondered why place of occurrence changed in the covering report yet sketch plan had been done. Counsel attached a judgment of the High in respect of a claim arising from the same accident and submitted that the appellant was held 100% liable. He added that appeal to Court of Appeal was dismissed on ground that there was no arguable appeal.
7. The respondent urged court to disregard the investigators report which form part of the record of appeal as the investigator never adduced evidence in the trial court.
8. On drunk driving counsel for the respondent submitted that the driver of KAU 325 B was not tested for drunkenness and on insurance, he submitted that no evidence was adduced on that and further, it has no bearing on the accident.
9. Counsel for respondent that contrary to appellant's submission, the respondent suffered degloving injury, which involve loss of, flesh which is not soft tissue injury; he submitted that the respondent had asked for Kshs 500,000 but was awarded Kshs 200,000 which is fair. He urged court to dismiss the appeal on both liability and quantum.
10. In response to respondents, appellant's counsel submitted that there are two positions on place of impact from evidence in the lower court. He submitted that PW5 confirmed that it occurred on the lane of the vehicle from Eldoret. Further, it came out from evidence that the deceased was drunk. He urged court to allow the appeal.

ANALYSIS AND DETERMINATION

11. I have considered arguments by both parties herein. I consider the following to be in issue
 1. Whether the trial magistrate erred in finding the appellant 100%
 2. Whether award of damages is excessive to warrant interference by this court.
12. This being the first appellate court, I am required to reevaluate evidence adduced before the trial court and arrive at an independent determination. This I do knowing that unlike the trial court, I never got the opportunity to take evidence first hand and observe demeanor of witness. For that reason I am inclined to give due allowance.
13. On the first issue, the respondent testified that the lorry KBR 566N which was from the Eldoret direction moved in a zigzag manner and hit motor vehicle KAU 325B in which she was travelling in towards Eldoret direction. She said the collision was on the lane of KAU 325B. She said nobody was drunk in KAU 325D. PW4 who was in KAU 325B corroborated evidence of the respondent. He said he saw the lorry meander and collide with their vehicle. He said their driver tried to evade but their vehicle was hit on its lane.
14. PW5 a police officer testified that the driver of KBR moved to the lane of KAU. He said point of impact was 3 meters from the edge of the road as you face Eldoret direction. He said the investigation officer's report is not in the file but there is undated covering report, which blames driver of KAU 325B. He added that the sketch plan and covering report do not tally and that investigation was not complete.
15. The basis of this appeal is the variance of covering report and sketch plan. PW5 admitted that the covering report is undated. There is also no report by investigating officer as per PW5's evidence. Sketch plan was drawn immediately after the accident. It should have been the basis for preparing the covering report. It's not clear when the covering report was done as it is undated. The document that accurately show the correct place of impact would be the sketch plan. The sketch plan cannot be disregarded on account of being undated. The sketch plan is consistent with evidence of PW1 and PW4. I do not see reason to doubt place of impact. Evidence demonstrate that impact was on the left side of the road facing Eldoret, lane of motor vehicle KAU 325B.
16. As to whether liability should be apportioned on ground of lack third insurance and drunkenness, record do not show any evidence of drunkenness on driver of KAU 325D. Presence of beer bottles in the vehicle as alleged is not confirmation of drunkenness. The police should have tested the driver for drunkenness and avail report.
17. On insurance counsel has not demonstrated how failure to have 3rd party insurance in the vehicle contributed to the accident.
18. In respect of quantum, I confirm from the medical report produced in the lower court that the respondent suffered degloving injuries to the right elbow, multiple lacerations on the right arm, and soft tissue injuries on the chest; Cut wound on the tongue and bruises on the forehead. The doctor classified the injuries as grievous harm. He estimated temporary disability for 2 months.
19. The appellant did not produce a second medical opinion. It was therefore in order for the court to assess damage based on medical report produced by the respondent.
20. Contrary to the appellant's submissions, the injuries sustained by respondent are not soft tissue. Upon comparing the injuries observed

above, I do not find award given to the respondent as excessive.

21. From the foregoing, I see no reason to disturb both liability and quantum herein. I hereby dismiss this appeal with costs to the respondent.

FINAL ORDERS

1. Appeal is hereby dismissed
2. Costs of Appeal to the respondent

Judgment Dated, signed and delivered at Nakuru this 12th day of March 2019.

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RACHEL NGETICH

JUDGE

In the Presence of:-

Schola Court Assistant

Mutai Counsel for Appellant

Musili Counsel for Respondent