



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 21 OF 2012

BALOCH FAISAL.....1ST APPELLANT

JAMES NJUGUNA MWAURA.....2ND APPELLANT

VERSUS

ELLOY KAWIRA NTHIIRI.....RESPONDENT

(Being an appeal from the Judgment delivered on 23rd January, 2010 by Hon. B.J Ndeda (Senior Resident Magistrate) Chief Magistrate's Court in CMCC No. 525 of 2009).

JUDGEMENT

1. The 1st Appellant, Baloch Faisal and the 2nd Appellant, James Njuguna Mwaura were sued by the Respondent who was involved in a road traffic accident on 30th January, 2007. The Respondent attributed the accident to the negligence of motor vehicle registration KAU 992X owned by the 1st Appellant as the registered owner and the 2nd Appellant as the beneficial owner and driver of the said motor vehicle.
2. The Appellants in a joint statement of defence denied ownership of the motor vehicle but conceded to the occurrence of the accident. The Appellant blamed the accident as wholly caused or substantially contributed to by the Respondent.
3. The Respondent filed a reply to the defence, joined issues with the Appellants and reiterated the contents of the plaint.
4. After hearing the case, the trial magistrate held the Appellants 90% liable for the accident. General damages were assessed at Ksh.360,000/= and special damages at Ks.13,500/=.
5. The Appellants were dissatisfied with the said judgment on both the question of liability and the quantum of damages and appealed to this court.
6. The appeal was canvassed by way of written submissions which I have considered.
7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

8. During the hearing of the case, the Respondent (PW1) testified. Her evidence was that she was crossing the road while carrying some luggage and as she was putting down the luggage at the centre Island between the duo carriageway she heard people shouting and before she could look up she was knocked down by the motor vehicle and lost consciousness. That she came to while at Nazareth Hospital with injuries to her mouth, face, knees and right hand.
9. PW2 Stephen Kimani Njuguna whose evidence was that he was at the scene of the accident at the material time testified that he heard

people shouting and he saw the speeding motor vehicle go off the road and knock down a pedestrian.

10. PW3 PC McDonald Ngoloma produced a police abstract which reflected the name of the driver of the motor vehicle in question as Paul Kuria Ndungu who made the report at the Police Station. The abstract reflects that the accident is “pending under investigations”.

11. The Appellants closed their case without calling any evidence. Two medical reports were to be filed together with the written submissions.

12. The evidence of the Respondent on what transpired at the scene was corroborated by that of the eye witness (PW2). The evidence of the aforesaid two witnesses reflects that it was the motor vehicle that left the road and went to where the Respondent was. The evidence of PW1 further shows that the motor vehicle was at a high speed. This evidence is uncontroverted by any other evidence. The finding that the motor vehicle was 90% to blame for the accident cannot therefore be faulted.

13. The Respondent produced a copy of records from Kenya Revenue Authority as an exhibit. The said document reflects the registered owner at the material time as the 1st Appellant, Baloch Faisal.

14. The police abstract produced by PW3 reflects the owner of the motor vehicle as James Njuguna Mwaura. Paul Kuria Ndungu who reported the accident as the driver of the motor vehicle according to the evidence of PW3 is reflected in the police abstract as a witness.

15. As stated by Court of Appeal in the case of **Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR**, this court in the case of **Joel Muga Opinja v East Africa Sea Food Ltd [2013]**

“We agree that the best way to prove ownership would be to produce to the court a document from Registrar of Motor Vehicles showing who he registered owner is but when the abstract is not challenged and is produced in court without any objection, the contents cannot later be denied.”

16. With the foregoing, I find that the trial magistrate correctly held that the 1st Appellant was the registered owner and the 2nd Appellant the beneficial owner thereof.

17. There are two medical reports which form part of the Record of Appeal herein. That is the report by Dr. W.M. Wokabi dated 8th December, 2008 and the report by Dr. Maina Ruga dated 28th July, 2011. Both medical reports are generally in agreement that the Respondent sustained soft tissue injuries to the head, both knees, chest, back and injury to upper incisor teeth. The injuries healed but left scars on the forehead and upper lip. The P3 form produced also reflects more or less the same injuries.

18. On the quantum of general damages, the Appellants had submitted for an award of Ksh.60,000/= and relied on the following cases:

- **Moses Gerald Odongo v Julius Birundu Mokaya Kisii C.A.No.32/2002** where an award of Ksh.50,000/= was made as general damages for a cut wound on lower lip, loosening of two teeth, injuries on the chest and lower limbs.
- In **Lillian Achieng (a minor suing through Rusalina Atieno Omay) v Nation Media Group Ksm C.A. 18 of 2005** where an award of Ksh.60,000/= was made as general damages for soft tissue injuries to the chest and left leg.

19. The Respondent on the other hand submitted for an award 400,000/= as general damages and relied on the following cases:

- **HCCC No. 681 of 1987 Msa. Martin Adungosi v Ibrahim Muhawa Absallah** where an award of Ksh.180,000/= was made as general damages for a cut, lacerated wound on the left scalp and left cheek, bruises and abrasions on both elbows, left abdomen, left glottal region and both knees.
- **HCCC No 3403 of 1986 Nrb Pyrali K. Sayani v Stephen Karanja & another** where an award of Ksh.200,000/= was made as general damages for a concussion, laceration of the scalp (7 cm) injury to the left middle finger, chest injuries and multiple bruising and abrasions.
- **HCCC No.5060 of 1987 Nrb Julius Kunia Kieru v Gilbert Gachangua Gitachu & another** where an award of Ksh.200,000/= was made as general damages for head injury with concussion, abrasions on the chest and abdominal wall and severe contraction of the elbow.

20. I have on my part looked at cases with similar injuries for example:

- **Isaac Muriungimbataru v Silas Kalumani [2017] eKLR** where an award of Ksh.200,000/= was made as general damages for soft tissue injuries on the right side of the face – there were swelling/lacerations and bruises, loss of 2 incisors (upper teeth) and Tenderness and swelling of lower back.
- **Daniel Njagi Mwai & another v Jenniffer Wanjiku John [2014] eKLR** where an award of Ksh.200,000/= was made as general damages for head injury, fractured tooth and multiple soft tissue injuries.

21. Taking into account the aforesaid, cases I find the award of general damages to be on the higher side and outside range of similar awards. I reduce the same to Ksh.200,000/=. I am guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727**, where the Court of Appeal observed:-

“...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....”

22. Special damages pleaded comes to a total of Ksh.13,500/= for medical expenses and obtaining the police abstract, P3 form and copy of Records from Kenya Revenue Authority. These expenses were proved as per the receipts produced for Ksh.10,500/= for Medical Expenses, Ksh.2,000/= for Medical Report, Ksh.300/= for P3 Form and Ksh.500/= for the copy of Records. The police abstract was produced as an exhibit.

23. With the foregoing, I allow the appeal on the issue of quantum and substitute the sum of Ksh.360,000/= with a figure of Ksh.200,000/= (on 100%) basis. The appeal having been partially successful each party to bear own costs of the appeal. Lower court costs to the Respondent.

Dated, signed and delivered at Nairobi this 8th day of April, 2019

B THURANIRA JADEN

JUDGE