REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 371 OF 2017

SYMPLICIOUS NYAMENA MUSEBE.....APPELLANT

VERSUS

CANON ALUMINIUM FABRICATORS LTD.....1ST RESPONDENT

DAVID MWANGI MULWA.....2ND RESPODNENT

(Being an appeal from the judgment of Hon. D.A. Ocharo (Mr.) Senior Resident magistrate

at Nairobi Milimani commercial Court in CMCC No. 2288 of 2016

dated 29th June, 2017)

JUDGMENT

The appellant herein was involved in a road traffic accident that took place on 11th August, 2015 along Eastern by pass involving motor vehicle registration No. KBR 830L when the said motor vehicle collided with him while he was cycling along the road. The motor vehicle belonged to the 1st respondent and was being driven by the 2nd respondent at the time of the accident. The appellant blamed the accident on the negligence of the 2nd respondent in the way he drove and managed the said motor vehicle. The respondents denied the appellant's claim and pleaded that the appellant was to blame for the same.

After the trial, the lower court found that both the appellant and the respondents were equally to blame for the accident and went ahead to award Kshs. 200,000/= general damages, subject to 50% contributory negligence on the part of the appellant, Kshs. 3,110/= special damages, costs and interest. The appellant was aggrieved the said judgment and filed this appeal.

In the memorandum of appeal the appellant has complained that the lower court ignored the evidence and submissions alongside the authorities cited, failing to consider the extensive injuries sustained by the appellant and failing to award costs for future treatment. The court was also faulted for failing to appreciate that the appellant suffered 80% permanent incapacity, and for awarding inordinately low general damages.

Having considered the evidence adduced before the trial court, submissions by counsel and the authorities cited, the irresistible conclusion on liability is that it was the word of the appellant as against that of the 2nd respondent.

It is standard practice that the appellate court does not have the liberty to depart from the discretion of the trial court and for good reason. The trial court had the opportunity to see, hear and observe the demeanour of the witnesses who testified before him. That is an advantage that this court does not have. The trial court had a bold conclusion on liability when it stated,

> **"From my assessment of the evidence I note that the plaintiff was not exactly truthful as to how the accident occurred."**

Citing some of the authorities presented by counsel, and making specific reference to the 2nd defendant, the court observed as follows,

> **"As for the defendant, he too did not appear to have been as cautious as would be expected of a reasonable driver driving in those circumstances. I find and hold each of the two to be 50% liable to the accident."**

It must be accepted that it was the duty of the appellant to prove his case against the respondents. It was alleged that the accident occurred at

4 am. The cyclist, that is the appellant, was ahead and appeared to be cycling on the left side of the road. He was caught by the side mirror of the motor vehicle and fell. It was alleged that the appellant was negligent in that he had no reflectors neither did he wear a helmet. The court must have considered all the circumstances to arrived at the degree of lability attributed to either of the parties. I have no reason, going by the evidence, to disturb that assessment.

On quantum, there are two conflicting medical reports. The first medical report is by Dr. Theophilus Wangata which showed that the appellant was examined on 10th September, 2015. He appellant had sustained a mild head injury, brachial plexus injury to the right upper limb resulting in limb weakness, multiple facial lacerations and dental injuries/broken teeth and blunt abdominal injury. Having been involved in an accident on 11th August, 2015 it means that the appellant was being examined just one month thereafter.

After the examination, the doctor assessed total permanent incapacity at 80% while placing the costs for future medical attention at Kshs. 500,000/=. I note that the report showed the appellant was admitted at Kenyatta National Hospital for about ten days where he was treated.

The second report is by Dr. Ashiwn Madhiwalla dated 17th January, 2017. That was about two years from the date of the accident. According to that report, the appellant had sustained cut wound on the head, cut wound on right forehead and above right eye, cut wound on the upper lip, injury on the right upper limb, broken lower 3 teeth lower jaw, loss of 3 teeth upper jaw and abdominal injury.

The opinion of the doctor was that the injuries had resolved well and the appellant was left with mild headache and difficulty in eating hard food because of broken and loss of teeth. Dental treatment was going to cost approximately Kshs.75,000 to Kshs.80, 000/=. The scars would be permanent in nature and permanent disability was assessed at 5%.

It was more likely than not that the doctors would come to different opinions, considering the time the appellant was examined in relation to the date of the accident. With respect, it could not have been very possible for Dr. Wangata to have made conclusive assessment of the appellant only one month after the said accident. His assessment of 80% permanent incapacity gives a marked contradiction to what Dr. Madhiwalla found two years thereafter at 5%. It was more likely that the appellant's condition would improve with time and the court has been left with no alternative but to adopt the latter report.

I observe in passing that permanent incapacity of 80% must be so grave as to either render a patient incapable of movement or closer to that. Yet, when the appellant appeared for examination by Dr. Madhiwalla two years after the accident, he was not on any medication. There was no neurological deficit found. He was said to be walking and working normally. There was no limping or weakness, and the power and grip of his right hand was normal. Abdominal examination was also normal.

This latest report must have been exchanged with the appellant's counsel. There was an opportunity to ask for a further medical report in the event that there was any doubt about that assessment. No request was made in that regard. Otherwise the court would have been made aware.

An appellate court may not interfere with the discretion of the trial court in the award of damages unless it is shown they were inordinately high or low, or wrong principles were used or adopted leading to an erroneous estimate. The trial court correctly observed that comparable injuries attract comparable awards, and it is always a balancing act to achieve the right award. The trial court looked at the authorities cited, and guided by the medical reports, made the award in the judgement. I have no reason to depart from the said assessment in view of the injuries sustained by the appellant. However, the two reports having referred to the dental injury sustained by the appellant, the lower court ought to have addressed the cost of replacement which the respondent's doctor placed at Kshs. 80,000/= on the maximum. I make that award in favour of the appellant.

On loss of earnings or earning capacity, I agree with the trial court that the appellant did not prove the same and in any case, the latest medical report discounted any disability in that regard. Taking everything in totality, except for the award of dental care, of Ksh. 80,000/= added to the lower court judgment, this appeal stands dismissed. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 10th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE