



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 289 OF 2016

LINOS SHISAKHA ANDAKALU.....APPELLANT

VERSUS

GEORGE KANGETHE MBUGUA.....1ST RESPONDENT

PETER NJENGA.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. In his judgment delivered on 4th May, 2016, the Learned Trial Magistrate Hon P Muholi (Mr) Resident Magistrate dismissed the Appellant's suit with costs.
2. Being dissatisfied with the said judgment, the Appellant filed the present Appeal dated 30th May, 2016. He relied on six (6) grounds of Appeal. His Written Submissions were dated 8th October 2016 and filed on 9th October 2018 while those of the Respondents were dated 19th January 2019 and filed on 24th January 2019.
3. Both the Appellant and the Respondents asked this court to render its decision based on their respective written submissions which they relied upon in their entirety. The judgment herein is therefore based on the said written submissions.

LEGAL ANALYSIS

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.
5. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

6. Having looked at the grounds of appeal, it appeared to this court that the only issues that had been placed before it for determination were:-

(1) Whether or not the Learned Trial Magistrate erred in law and fact in not finding if the Respondents have been to blame for the accident.

(2) Whether or not the Learned Trial Magistrate erred in law and fact in not finding that the Appellant was entitled to damages.

7. This court considered the two (2) issues under the following heads:

I: LIABILITY

8. In his Examination-in-chief, the Appellant told the Trial Court that on 20th December 2011, he was riding his motorbike when he was hit at the rear by Matatu Registration Number KBK 522U (hereinafter referred to as the “subject Matatu”).

9. During his Cross-examination, he stated that he had already joined the main Parklands Road and was about ten (10) metres from the junction when he was hit. He admitted that the person joining the main road ought to have given way. He was emphatic during his Re-examination that the subject Matatu came from behind (Sic).

10. On his part, No. 76532 PC Genye Mugoti from Parklands Police Station “(hereinafter referred to as “DW 2”) testified that on the material date, the Appellant was riding motorcycle Registration Number KMCC 682A (hereinafter referred to as the “subject motorcycle”) when he failed to give way to the subject Matatu as a result of which he was hit and sustained severe injuries. He stated that the Motorcycle was detained.

11. The Learned Trial Magistrate found that the Appellant wholly caused the accident as he may have joined the road without ascertaining that it was safe to do so and miscalculated the speed at which the subject Matatu was moving. He concluded that the Appellant was the author of his own misfortune.

12. The Learned Trial Magistrate determined that before one joins a road (sic), he must ensure that the road is free and that he must always give way to vehicles on the road. He also stated that such person had to exercise proper look out. This court presupposed that he meant that when a person joins a main road from a feeder road, he must ascertain that the main road is clear by exercising proper workout, a position that this court entirely agreed with.

13. However, this court took a different view from his in that just because the Appellant herein failed to exercise due care, he ought to bear liability wholly. Indeed, the 1st Respondent could not drive oblivious to the folly of other drivers who were joining main roads from feeder or minor roads. He was also expected to exercise due care and attention to avoid colliding with those who were careless on the roads. The Respondents could not therefore escape liability completely. The fact that the 1st Respondent hit the Appellant’s Motorcycle at the rear and caused him such severe injuries was evidence that he was driving the subject Matatu at an excessive speed in the circumstances.

14. It is reasonable to expect that even if the 1st Respondent had right of way and he was driving at a reasonable speed, the Appellant would not have sustained the serious injuries. Bearing in mind that the subject Matatu was a larger automobile than a motorcycle, that the subject Matatu hit the motorcycle at the rear and that the Appellant sustained very severe injuries and the Appellant’s motorcycle was ahead of him, the 1st Respondent’s driver ought to have done all he could have done to have avoided hitting the Appellant. It was the considered opinion of this court that apportionment of liability at 70% - 30% as against the Appellant and both the Respondents respectively would be fair and reasonable in the circumstances of the case. Notably, the 2nd Respondent was vicariously liable for the 1st Respondent’s negligence. The fact that the police detained the Appellant’s motorcycle and that he was hit about ten (10) metres from the junction pointed to the fact that he was more to blame for the accident herein.

II: QUANTUM

15. According to Dr Maina Ruga (hereinafter referred to as “PW1”), the Appellant sustained chest injuries with multiple rib fractures “haemothorax,” comminuted fracture right tibia, pelvic injuries with fracture of the iliac bone and right hip acetabulum, injury to the right ankle with fracture of medial malleolus, abdominal injuries with peritoneal haematoma, upper gastrointestinal bleeding, kidney disease and uremic encephalopathy. He stated that the injuries left the Appellant with permanent incapacity at thirty (30%) per cent and walking with crutches.

16. During Cross-examination, he admitted that there was a possibility that the Appellant may have had a chronic kidney disease stage V prior to the accident herein.

17. Dr Leah Wainaina (hereinafter referred to as “DW 1”) testified on behalf of the Respondent herein. She confirmed the injuries that were sustained by the Appellant as set out by PW1. She opined that the Appellant had other conditions that were most likely the cause of the chronic kidney disease. She stated that although the Appellant was walking with the aid of crutches, there was no indication of disability and that he was in a healing process.

18. The Appellant relied on several cases amongst them **Lei Masaku vs Kalpama Builders [2014] eKLR**, where the common thread was that even where a court finds that liability was not established, it ought to assess damages, a position that this court completely agreed with.

19. However, while asking this court to assess the general damages, he did not cite any case law in support of the damages to be awarded. The Respondents did not also cite any cases in the event this court were to find them to have been liable for the accident. It was therefore left to this court to consider what would have been reasonable compensation.

20. Having considered the severe injuries that the Appellant sustained and taking the inflationary trends into consideration it was the view of this court that a sum of Kshs 3,000,000/= would be reasonable compensation.

21. In arriving at the said figure, this court had due regard to the following cases:

(1) In the case of **Christine Mwingina Akonya vs Samuel Kairu Chege [2017] eKLR**, the plaintiff therein sustained fracture of the right femur, fracture of ribs 3 – 6, pain in the right side of the right knee. In 2017, Ngugi Joel J awarded her general damages in the sum of Kshs 4,000,000/=.

(2) In the case of **James Gathirwa Ngugi vs Multiple Hauliers (EA) Ltd. & Another [2015]eKLR**, in 2015 the court therein awarded the plaintiff who had sustained compound comminuted fracture of the right tibia, compound comminuted fracture of the right libula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the panetal region about four (4) centimeter, soft tissue injury, bruises on both hands, multiple facial cuts and lacerations and pathological/re-fracture of the right leg a sum of Kshs 1,500,000/=.

(3) In the case of **P. M. Mashru vs Omar Mwakoro Makenge [2018] eKLR**, this very court upheld an award of Kshs 1,200,000/= general damages where the plaintiff therein had sustained fracture of the distal third fracture of the temporal bore with haemotoma, head injury to the right frontal parietal bene with brain oedema and left subdural haemotoma.

22. Turning to the issue of special damages, this court noted that it is trite law that they must be specifically proven – See **Maritim & Another VS. Anjere [1990 - 1994] EA 372 at 316** where the court of Appeal rendered itself as follows:-

“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”

23. Turning to the issue of special damages, a perusal of the Plaint showed that the Appellant claimed special damages in the sum of Kshs 20,700/=. However, copies of the receipts in his Record of Appeal were to the tune of Kshs 12,200/=. He was bound by his pleadings and could not therefore be awarded more than what he had pleaded in his Plaint.

DISPOSITION

24. For the foregoing reasons, this court found merit in the Appellant’s Appeal that was lodged on 2nd June 2016. The effect of this is that the judgment that was delivered by the Learned Trial Magistrate, Hon P Muholi (Mr) Resident Magistrate is hereby set aside and/or vacated. In its place, this court hereby directs that judgment be and is hereby entered in favour of the Appellant against the Respondents jointly and severally for the sum of Kshs 903,660/= made up as follows:-

General Damages Kshs 3,000,000/=

Special Damages Kshs 12,200/=

Kshs 3,012,200/=

Less 70% C. N Kshs 2,108,540/=

Kshs903,660/=

Plus costs and Interest. Interest on general damages will be from date of judgment while interest on special damages will be from date of filing suit.

25. It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of June, 2019

J. KAMAU

JUDGE