REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 114 OF 2018

JULIUS LITARI MUTENYA.....APPELLANT

VERSUS

PWANI OIL PRODUCTS LIMITED.....1ST RESPONDENT

DUNCAN GICHINI.....2ND RESPONDENT

(from the judgment and decree of J. K. Kwambai, R.M. Butali, SRMC

Civil Case No.135 of 2017 dated 1/8/2018)

JUDGMENT

1. The appellant had sued the respondent at the lower court claiming compensation in general and special damages after the appellant while riding a motor cycle along Kakamega-Webuye road was knocked down by a motor vehicle belonging to the 1st respondent which was at the time of the accident being driven by the 2nd respondent. The appellant blamed the 2nd respondent for driving the motor vehicle carelessly thereby occasioning the accident as a result of which the appellant was injured. The respondents had denied the claim. After a full trial the trial court dismissed the appellant's suit and held that he had failed to prove negligence on the part of the respondents. The appellant was aggrieved by the decision of the learned trial magistrate and fled the instance appeal.

2. The grounds of appeal are that:-

(a) The learned trial magistrate erred in law and in fact by finding and holding that the appellant did not discharge his burden of prove as required by the law and the decision made was made against the weight of evidence that was adduced thereby occasioning miscarriage of justice.

(b) The learned trial magistrate erred in law and in fact in absolving the respondents from blame which finding was against the evidence that was tendered thereby occasioning miscarriage of justice.

(c) The learned trial magistrate erred in law and in fact by dismissing the appellants claim.

(d) The learned trial magistrate erred in law and in fact by suggesting that an award of Ksh. 400,000/= could have been reasonable when such an amount is inordinately low.

(e) The learned trial magistrate erred in law and in fact by failing to appreciate that the appellant was entitled to special damages and never made a comment on special damages in his judgment.

3. The appeal was opposed by the respondents through the written submissions of their advocate, **Onyinkwa & Company Advocates**.

Case for appellant -

4. The evidence of the appellant was that he is a motor cycle taxi (boda boda) rider. That on the 6/2/2016 he was riding his motor cycle along Kakamega-Webuye/Kaburengu highway. He was heading towards Webuye direction. He had a pillion passenger. That while at Matete market a motor vehicle crossed the road from their right side of the road to the left side. The vehicle then knocked them down. They fell off the tarmac to their left side. He received fracture of the left leg. He was taken to Matete Health Centre where he was referred to Webuye District Hospital. He was admitted there for three months. He later sued. He blamed the driver of the motor vehicle for joining the highway without giving way to his motor cycle.

5. The appellant called one witness, P.C. Okere, PW1 of Kabras police station whose evidence was that the report of the accident was made at Kabras police station at 15.30 hours. He produced a copy of the OB extract of the report as exhibit. P.Ex1. He said that a police abstract was not issued in the case.

Defence Case -

6. The 2nd respondent was the only witness for the defence. His evidence was that he was working with the 1st defendant as a driver. That on the material day he was driving his motor vehicle towards Kakamega direction. That he made some deliveries at Matete market on the left side of the road. After making the deliveries, he wanted to cross the road to the right side as one faces Kakamega direction. He checked the road and found it was all clear. He crossed the road and parked the vehicle off the road. A motor cycle then rammed into the left side of the vehicle near the middle. The motor cycle rider was carrying a pillion passenger. They were heading towards Kaburengu from Matete. After the accident the motor cycle rider fled from the scene. The passenger was injured. He helped the pillion passenger to board another motor cycle to be taken to Webuye District hospital. He reported the accident to the police. He blamed the motor cycle rider as he is the one who left his lane and rammed into the motor vehicle which was parked off the road.

7. The appellant in his evidence denied that he escaped from the scene of the accident. He said that he was taken to hospital. He said that he reported the accident after he was discharged from hospital.

The judgment of the trial magistrate -

8. In dismissing the suit, the learned trial magistrate stated that the evidence of the appellant as to how the accident took place was not corroborated. He therefore found that liability against the respondents was not proved and dismissed the case.

Submissions -

9. The advocates for the appellant, **Mukisu & Company Advocates**, submitted that the trial court appears not to have been alive of the standard of proof in civil cases which is on a balance of probabilities. That since the appellant was riding on the tarmac the accident could only have happened because the motor vehicle entered into the road without undue regard to the presence of the motor cyclist.

10. The advocates for the respondent on the other hand submitted that the appellant did not prove the particulars of negligence stated against the respondents. That the police officer PW1 who testified in the case was not the investigating officer. That he stated that a police abstract was not issued in the case. That the appellant fled from the scene after the accident. That he could only have done so because he knew that he was the one to blame for the accident. That it is the appellant who lost control of his motor cycle and

rammed into the 2nd respondent's motor vehicle which was parked off the road.

Analysis and Determination -

11. This being a first appeal, the duty of the court was as stated by the Court of Appeal in **Abok James Odera T/A A. J. Odera & Associates –Vs- John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** that:-

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

12. The questions for determination in this appeal are –

1. Whether the trial magistrate erred in his findings on liability
2. Whether he erred in his suggested award on quantum

Liability –

13. The burden of proof was on the appellant to prove negligence on the part of the respondents. This burden was as stated by Ibrahim J. (as he then was) in **Treadsetters Tyres Ltd –Vs- John Wekesa Wepukhulu [2010] eKLR** where he held that:-

> ***"In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior(?) and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."***

14. There is no dispute that the 2nd respondent was involved in an accident with a motor cycle rider at Matete market. The advocate for the respondent took issue with why a police abstract was hot issued in the case. However a police abstract only confirms the occurrence of an accident. In this case, the occurrence of the accident was admitted. The 2nd respondent himself made a report of the accident to the police. The non-issuance of a police abstract was in that case of little effect. The question in the case was whether the accident took place as stated by the 2nd respondent or was as stated by the appellant.

15. The 2nd respondent stated in his evidence that the cyclist escaped from the scene of the accident. The appellant said that he had sustained a fracture of the leg and was taken to Matete Health Centre and then to Webuye District Hospital where he was admitted for three months. That he reported the accident after he left hospital. He produced a patient record book P.Ex.2 from Matete Health Centre which shows that he was seen there on 6/12/2016 with a fracture of femur. He also produced a discharge summary record P.Ex3 from Webuye District Hospital that shows that he was admitted there on 6/2/2016 and discharged on 3/5/2016.

16. From the said medical documents, it is evident that the appellant had sustained a fracture of the right femur. It is clear that he was rushed to Matete Health Centre immediately after the accident upon which he was referred to Webuye District Hospital. There was then no truth in the evidence of the 2nd respondent that the appellant had escaped from the scene of the accident. The 2nd respondent did not explain how a person who had suffered a fracture on his leg could have escaped from the scene. The appellant had no time to report the accident to the police when he had sustained such serious injuries. It is a total lie that he had fled from the scene.

17. There is no dispute that the motor vehicle crossed the road from the right side of the road to the left side of the road as one faces Webuye-Kaburengo direction. The appellant contended that the accident took place on his lane as the vehicle crossed the road. He blamed the driver of the vehicle for not giving way to him. The 2nd respondent on the other hand contended that he had already crossed the road and parked the vehicle off the left side of the road when the motor cycle came and rammed into his vehicle.

18. The 2nd respondent adopted his written statement as his evidence-in-chief in the case. In the said statement he stated as follows:-

> ***"After making sure the coast was clear, I drove towards the right side of the road for me to park. I had parked my vehicle when a certain motor cycle rammed into the left side of the vehicle near the middle. I was off the road. I had already embarked on parking the motor vehicle when the motor cycle rammed into the vehicle I was driving ….. I blame the motor cycle rider for the accident as he left his lane and rammed into the motor vehicle which was parked off the road."***

19. The statement that the appellant had "*already embarked on packing the motor vehicle*" suggests that the accident occurred when the appellant was in the process of parking the motor vehicle. It would mean that he had not stopped or reached the parking when the accident occurred. At the same time the appellant said in the statement that he had parked the motor vehicle off the road when the accident occurred. These are two different versions as to how the accident occurred - that he was in the process of parking the motor vehicle when the accident occurred and that he had already parked the vehicle when the accident occurred. It is then apparent that the 2nd respondent could not even explain clearly in his statement whether he was in the process of parking the motor vehicle when the accident occurred or whether he had already parked it when the accident occurred.

20. In his evidence-in-Chief in court the 2nd appellant stated as follows:-

> ***"….. I was already on the other side of the road. The motor cycle hit my motor vehicle near the middle on the left side of the motor vehicle. After the accident I stopped …"***

21. In cross-examination he stated that:-

> ***"I had already parked my motor vehicle. The accident took place about 3 minutes after I had parked."***

22. If the 2nd respondent had already parked the motor vehicle off the road as claimed why would he then say that he stopped the motor vehicle after the accident? More so, if he was hit by the motor cycle 3 minutes after he had parked the motor vehicle, why would he have stated in his written statement that he was in the process of parking the vehicle when the accident occurred?

23. The evidence that the 2nd respondent stopped the motor vehicle after the accident means that the vehicle was in motion when the accident occurred. This supports the evidence of the appellant that the accident occurred when the driver of the motor vehicle was crossing the road.

24. The policeman (PW1) who testified on behalf of the appellant produced the Occurrence Book report No. 4 of 6/2/2016 that contained the report the 2nd respondent made to the police. The report reads as follows:-

> ***"To station are Duncan Gichini Mbiyu C/o 0715-615917 and C of C TDB/AAD6867 and works with Pwani Oil based at Bungoma and works as a driver of motor vehicle of KCB 232A Nissan Advance AO. He is also accompanied by his workmate Philip Sirengo C/o 0714599896. They report that today at around 2.50 p.m. while at Matete Market and was in the process of crossing the main road a motorbike which they did not master its number came and hit them on the back left where the vehicle sustained a dent of the back left door even though none of the driver or his colleague sustained any injury. The pillion passenger of the motor bike sustained injury even***

though was assisted by some of the villagers to escape…."

25. The 2nd respondent did not challenge the police officer (PW1) on the contents of the report when the officer produced it in court. The report was received by other police officers in the cause of duty. It is then clear that the report that the 2nd appellant made to the police was that the accident occurred when he was crossing the road. He did not report that his vehicle was hit by the motor cycle when parked on the side of the road. The 2nd respondent must have changed his story of what he told the police to indicate that his vehicle was hit by the motor cycle when parked on the side of the road. There was then no truth that he was hit while parked on the side of the road.

26. The trial court dismissed the appellant's evidence because it was not corroborated. The standard of proof in civil cases is on a balance of probabilities. In law there is no particular number of witnesses required to proof a certain fact unless the law stipulates so. The learned trial magistrate did not endeavour to analyse the evidence before him to see whether there was evidence to support the evidence of the appellant. All the evidence before the court pointed at the 2nd appellant as the one who was to blame for occasioning the accident by crossing the road without giving way to the rider of the motor cycle. The appellant was on his correct lane when the accident occurred. I therefore hold that the 2nd respondent is the one who was to blame for occasioning the accident. The 1st appellant as the employer of the 2nd respondent was vicariously liable for the negligent acts of the 2nd respondent. The appellant had on a balance of probability proved his case against the appellants.

27. Having found that it is the 2nd appellant who was to blame for occasioning the accident the question is whether the appellant in any way contributed to the occurrence of the accident.

28. The appellant stated that he saw the motor vehicle at a distance and that he was not driving at high speed. He did not say what he did to avoid the accident. He must have contributed to the accident though to a small degree. I assess his contributory negligence at 10%.

Quantum –

28. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low – See Bashir Ahmed **Butt –Vs- Khan Uwais Ahmed (1982-88) KAR**.

29. The appellant had sustained blunt injury to the chest and closed fracture of the right femur. The trial court suggested a sum of Ksh. 400,000/= in general damages. The appellant had at the lower court asked for a sum of Ksh. 1 million in general damages and cited the case of **Charles Mwania & Another –Vs- Batty Hassan (2008) eKLR** where an award Ksh. 800,000/= was upheld in the year 2008 for fracture of right tibia and fibula and wounds on the right thumb, left wrist, right finger, right knee, right ankle joint and bruise on the forehead.

30. The advocates for the respondents on the other hand had submitted at the lower court that a sum of Ksh. 280,000/= was adequate compensation. They cited the case of **Samuel Kariuki Nyangoti –Vs- Johaan Disterberger (2017) eKLR** where the Court of Appeal enhanced the award from Ksh. 100,000/= to Ksh. 200,000/= for the appellant who had sustained a fracture of the left patella and blunt trauma on the chest, both shoulder joints and left knee. The advocates relied on the same authority in this appeal.

31. I have considered other cases where general damages were made for similar injuries to those sustained by the appellant. In **Mwavita Jonathan –Vs- Silivia Onunga (2017) eKLR** an award of Kshs. 400,000/= was made where the appellant had sustained a fracture of the femur with resultant limp. In **Jitan Nagra - Vs- Abidnego Nyandusi Oigo [2018] eKLR** court made an award of Kshs 450,000/= where the appellant sustained a compound fracture of the right femur coupled with further fractures of the metacarpal bones.

In **Pascal Iha Garama –Vs- Jackson Njeru Njoka [2019] eKLR** the court awarded an amount of Kshs 400,000/= where the appellant sustained a displaced fracture of the mid-shaft of the right femur leading to deformity of the right thigh, shortening of the right leg, stiffness of the right knee and difficulties in walking.

32. I am of the considered view that a sum of Ksh. 400,000/= is adequate compensation for the injuries sustained by the appellant and I so award.

33. It is trite law that special damages have to be specifically pleaded and proven - See **Hahn –Vs- Singh (1985) KLR 716**. The trial court did not suggest the amount it would have awarded the appellant. The appellant pleaded Ksh. 88,790/= in special damages. The same were proved by way of receipts and are accordingly awarded.

34. The upshot is that the appeal succeeds as follows:-

(1) Liability - 90:10 in favour of the appellant

against the respondents

(2) General damages - Ksh. 400,000/=

(3) Special damages - Ksh. 88,790/=

Total - Ksh. 488,790/=

Less 10% contribution

by the appellant - Ksh. 48,879/=

Award - Ksh. 439,911/=

35. Judgment is thereby entered for the appellant, jointly and severally against the respondents, to the sum of Ksh. 439,911/= with interest at court rates. The award on special damages to attract interest from the date of filing suit while the award on general damages is to attract interest from the date of this judgment. The respondents to bear costs of the suit at the lower court and for this appeal.

Delivered, dated and signed in open court at Kakamega this 4th day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

No appearance for appellant

Miss Mukhwana holding brief for Onyinkwa for respondents

Appellant - absent

Respondents - absent

Court Assistant - George

30 days right of appeal.