



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.192 OF 2014

KURIA SAMUEL CHEGE & ANOTHER.....APPELLANT

-VERSUS-

JOHN IKUA MWANGI.....RESPONDENT

(An Appeal against a judgment delivered by Hon. R. Amwayi, R.M. on 10th December, 2014 in Nakuru CMCC No.1000 of 2012)

JUDGMENT

INTRODUCTION

1. This appeal arise from suit filed by the respondent in the lower court seeking general and special damages for injuries resulting from an accident involving his motor vehicle registration number KYU 357 and the 2nd respondents motor vehicle registration number KAQ 927A.
2. The trial magistrate found that the appellant 100% liable for the accident and awarded kshs.1,200,000 as general damages and kshs.99,690 special damages.
3. The appellant being dissatisfied with determination on quantum filed this appeal on the following grounds:-
 1. The learned trial magistrate erred both in law and in fact by finding the Appellant's wholly to blame for the accident subject matter hereof.
 2. The learned trial magistrate erred both in law and in fact by failing to make any finding on the counter-claim filed by the appellants.
 3. The learned trial magistrate erred both in law and in fact by awarding the respondent a sum of Kshs.1,200,000.00 general damages which sum was excessive in the circumstances thereof.

SUBMISSIONS BY APPELLANT

4. The appellant submitted that it was the duty of the respondents to prove that the appellant's driver caused the accident due to negligence on his part. He quoted **Section 108** of the **Evidence Act** that provide that the burden to proof lies on the party who would fail if no evidence is given on either side.
5. Appellant submitted that there was no evidence of negligence on the appellant's driver and that the trial magistrate shifted the burden of proof to the appellant by circumventing the evidence on record and that finding of 100% liability was based on no evidence.
6. Appellant urged court to set aside judgment on liability and substitute with apportionment of liability at 50:50.
7. In respect to quantum, the appellant submitted that award of kshs.1,200,000 was excessive and that the trial magistrate erred in dismissing the counterclaim. The appellant propose an award of kshs.500,000.

RESPONDENT'S SUBMISSIONS

8. Respondent submitted that the trial court analyzed evidence adduced by PW1, PW2 and PW4 who testified that the accident occurred on the lane of respondent's vehicle. He submitted that the accident occurred at 8pm and the vehicles were moving from the opposite directions and that the trial court correctly rejected the evidence of 2nd appellant who said he saw a yellow object at a distance of 20 meters before the

collision and that the object was the respondent's vehicle.

9. Respondent further submitted that both drivers could have only seen light from the oncoming vehicle. Further, the trial magistrate was right in concluding that the 2nd appellant could not have seen anything after the accident as he testified that he went into a coma and it is indicated when he regained consciousness.

10. The respondent submitted that the appellant has not demonstrated that the finding of the trial court was based on no evidence.

11. On counterclaim, the respondent submitted that at page 197 of the record the trial court made a determination on counterclaim.

12. On quantum, the respondent submitted that he sustained 40% disability and that hip operation was done and he would be required to undergo another hip replacement in future. He submitted that an award of kshs.1,200,000 is just and reasonable; and that the appellant has not met conditions required to persuade this court to interfere with the award.

ANALYSIS AND DETERMINATION

13. This being the first appeal I am required to reevaluate evidence adduced in the lower court and arrive at independent determination. This position was held in **Madrugada Ltd Vs Cosmas Kipkweli Civil Appeal No.54 of 2012 [2016]eKLR** where the court of appeal held as follows:-

“we have already intimated that this is a first appeal. Briefly put, our role herein is to reconsider the evidence, evaluate the same and draw our conclusions therefrom, bearing in mind that we did not get to see or hear the witnesses as they testified, due allowances is called for this regard.”

14. Counsel for the respondent indicated to the court that the appeal is on quantum alone but from grounds of appeal and submissions, I note that the appellant is challenging both liability and quantum. I will therefore proceed to consider both.

15. PW1/respondent testified that he was up the slope towards Kiamunyi from Nakuru as the Appellants vehicle was moving down the slope when it lost control, veered off to its lane, and collided with his vehicle. He testified that after the collision, the appellant's vehicle faced Kabarak meaning the direction it was coming from. He said the impact was on the driver's side to the right front tyre. PW2 the wife to PW1/respondent who was travelling with PW1 confirmed that the collision occurred on the side of their driver. She said that she saw the oncoming vehicle at a distance of 10 metres; and that the road is straight.

16. PW4 the police officer who produced police abstract testified that the appellant changed lane and his vehicle collided with the respondent's vehicle. In cross-examination, he said that he was not the investigating officer, he did not have the police file and no one was charged with traffic offence. He only confirmed that the accident occurred and people were injured.

17. 2nd Appellant confirmed that he was driving downhill from the opposite direction. He said he saw something yellow about 20 meters ahead then he noted that they had collided and went into a coma. He said he later learnt that the yellow object was the pickup. He confirmed the people in appellant's vehicle were injured. The 2nd respondent blamed the respondent for the accident. He said he sustained injuries and his vehicle was damaged.

18. In cross-examination, the 2nd defendant said his vehicle had not been assessed and that he did not get estimate of repair costs. He said he could not recall the amount he paid for repairs. He denied having gone to Bermuda Auto Garage and that Oduor gave him the receipts of kshs.4,900. In reexamination, he said that he took the vehicle to Oduor's garage.

19. The 2nd appellant in his testimony said that he saw the respondent's vehicle at a distance of 20 metres. Evidence on record show that the road was straight and there was therefore nothing to obstruct both drivers from seeing oncoming vehicle. The respondent said he saw the 2nd appellant's vehicle at a distance of 10 meters. 2nd respondent has not denied evidence to the effect that collision occurred on respondent's lane and that his vehicle turned to the direction he was coming from after collision. This is indication of high speed and he must have moved to the lane of the oncoming vehicle.

20. On the other hand, the respondent never mentioned any efforts he made to avoid the accident upon seeing the oncoming vehicle move to his lane. Even though he was in his lane, he should have tried to avoid the collision. My view is that lesser percentage of blame is attributed to the respondent. I am inclined to disturb the finding on liability. I apportion liability at 10:90 as against the appellants. Appellants to shoulder 90% and respondent 10% liability.

21. In so far as quantum is concerned I note from the medical report that the respondent sustained:-

- i. Fracture of acetabulum,
- ii. fracture of the head and neck of the right femur
- iii. right hip joint dislocation

22. The doctor indicated that the head of right femur was excised and hemiarthroplasty was done on the right hip; further at the time of examination, the respondent could not walk without crutches; that function of his lower limb was reduced and that he would undergo hip

replacement in future at a cost of kshs 200,000. He assessed temporary disability at 40%.

23. I have considered the injuries sustained by the respondent and upon comparing with injuries sustained by claimants in cited authorities, and find the award under pain and suffering reasonable. Under special damages, the trial magistrate awarded damages proved by receipts availed to court. I will not therefore interfere with the award.

24. In respect to counterclaim, the 2nd appellant never produced inspection or assessment report to prove damage to the vehicle neither was any medical report produced to prove injuries to himself.

25. FINAL ORDERS

1. Appeal on liability allowed; Plaintiff to shoulder 10% liability and defendant 90% liability
2. Appeal on quantum dismissed
3. Appeal on counterclaim dismissed
4. Each party to bear own cost of appeal.

Judgment dated, signed and delivered at Nakuru this 18th day of July 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Situma holding brief Mrs. Cheloti Counsel for Appellant

Ms. Wambui holding for Ndubi Counsel for Respondent