REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 86 OF 2015

PETER MAINA KIONGO.....APPELANT

VERSUS

FRANCIS MONYO KIMERE.....RESPONDENT

(Being an appeal from the judgment made on 15th September, 2015 in Naivasha

CMCC No 727 of 2012 – Hon E Kimilu Senior, Resident Magistrate)

JUDGMENT

Background

1. The respondent suffered the following injuries in an accident which occurred on 23rd April 2011 along Nairobi - Naivasha road: Right hip dislocation; Right acetabulum fracture posterior wall; Blunt trauma of the right elbow joint. In the lower court, she was awarded damages.

2. The accident occurred when the respondent was driving his vehicle Registration No KBC 349D Rosa Bus when the appellant's driver, John Karanja, negligently drove vehicle Registration number KAQ 067G Isuzu Canter which collided with the respondent's vehicle.

3. This is an appeal against both liability and the quantum of damages following the lower court's judgment which granted the following award:

a. Liability : 100%

b. General damages: Kshs 1,000,000/=

c. Special damages : Kshs 32,765/=

Total Kshs 1,032,765/=

4. The appeal raises the following grounds:

1. The trial Magistrate erred in law and in fact and misdirected herself in delivering judgment in the Plaintiff's favour when the Plaintiff had not proved his case to the required standards.

2. The trial Magistrate erred in law disregarding and discrediting the evidence of the Defence witness without legal basis.

3. The trial Magistrate erred in law and in fact in finding that the Defendant's evidence was a mere denial.

4. The trial Magistrate erred in law in holding that the Defendant was 100% liable.

5. The trial Magistrate erred in failing to take into consideration the submissions tendered on behalf of the Defendant.

6. The trial Magistrate erred in law and in fact by entering Judgment in General damages in the sum of Kshs1,000,000/= which was manifestly excessive.

7. The decision was arrived at on consideration, to the extent that this was done of the wrong principles of law.

The appellant seeks that the judgment be set aside and that costs of this Appeal be awarded to the Appellant.

5. The issues to be addressed are therefore liability and judgment. As a first appellate court, this court's role is to re-assess and reconsider the evidence and arrive at its own conclusions taking into account the fact that it did not have the benefit of hearing the witnesses and seeing their demeanour. In **Okeno v Republic (1972) EA 32** the East Africa Court of Appeal stated:

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"**

6. The court will, however, not interfere with the exercise of the inferior court's discretion on an award of damages unless it is satisfied that the decision is clearly wrong because that court misdirected itself in some material respect or the award is so inordinately high or low as to represent an entirely erroneous estimate. **(Mbogo & Another v Shah [1968] EA 1993; Butt v Khan (1977) 1 KAR).**

Liability

7. The appellant has combined grounds 1,2,3,4 and 5 on this issue. He does not dispute the accident. However, he states that the respondent testified that at that material time, it was raining and the road was slippery. Thus, that the court erred in failing to consider the bad state of the road and finding him entirely liable for the accident. He further states that at the police station he was informed that it was a non-injury claim and therefore to him, the respondent was not injured.

8. Further, the appellant argues that the respondent, equally, had a duty of care to other motorists and he did not take any evasive steps to avert the collision. He states that the police abstract relied on by the plaintiff did not blame him for the accident, it showed that the matter was pending investigations. The appellant states that despite all the above issues being brought out in his submissions, the trial court failed to address them. He argues that there were serious discrepancies in the medical records produced which cast doubts on whether the plaintiff was truly injured in the alleged accident.

9. The respondent/plaintiff gave evidence as PW2. He was the only eyewitness. He testified that he was driving to Nairobi at 2.30pm on the material night. At the junction of Naivasha, he saw the defendant's vehicle driving in a zigzag manner and at high speed. He thus stopped in his lane but the canter hit his vehicle violently. He and other passengers were rushed to hospital by good Samaritans. He blamed the accident on the driver of the defendant's vehicle, since he had been driving at 40kph as it had been raining.

10. In cross examination he said he came to know of the defendant's vehicle registration number when he left hospital. He also obtained a P3 form after treatment, but no search of the vehicle was conducted. He said the police are the ones who obtained the details of the accident vehicle, and the driver was charged in a traffic case.

11. The defendant's driver, Karanja, was not called to testify. However, Peter Maina (DW1), the only defence witness, testified that he was called by the driver after he had been involved in a traffic accident on the material day. DW1 then went to Naivasha traffic base the following day where he was told it was a non-injury accident. He did not go to the scene. Later, he received a demand letter from the plaintiff concerning the accident.

12. In cross examination, DW1said he did not know whether his driver was charged in court, but when shown the police abstract he admitted that it indicated that the driver was charged with an offence. He also admitted that after he received a demand notice he never went to the police station.

13. I agree with the appellant that no certificate of search was produced to prove the defendant was the owner of Motor vehicle Reg. No. KAQ 067G. I agree that the plaintiff failed to call the investigating officer or any police officer in proof of contents of the abstract. However, what is the evidence available? The eyewitness testimony of the plaintiff, and that of the police officer are intrinsically uncontroverted. The accident is not disputed. The appellant did not challenge the content of the police Abstract or its production. Further he did not produce any evidence to counter the allegation that he was the owner of the said motor vehicle. In cross-examination he confirmed that his vehicle was reg. no. KAQ 067G and that he became aware of the said accident when his driver Karanja notified him of it.

14. It therefore beggars understanding as to why the appellant would move this court on appeal on the ground that the plaintiff did not prove ownership of his lorry. **In Samuel Mukunya Kamunge v John Mwangi Kamuru CA 34/2002 Okwengu J.** stated:

> **"I find that the trial magistrate was wrong in holding that only a search certificate from the Registrar of Motor vehicles could prove ownership of motor vehicle. I find a police abstract report having been produced showing the respondent as the owner of motor vehicle KAH 264 A, and evidence having been adduced that letter of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the <u>respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that the MV was owned by the Respondent</u>."** (emphasis added).

15. In Wellington Nganga Muthiora v Akamba Public Road Services and Another [2010] eKLR the Court of Appeal, **Kisumu,** held that:

> **"...where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it is challenged by evidence or in cross examination the plaintiff would need to produce certificate from the registrar of motor vehicles or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary."**

16. In the case of **Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR,** the court of Appeal relied on the case of **Joel Muga Opinja v East Africa Sea Food Ltd [2013] eKLR and** restated this position as follows:

> **"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 the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied"**

17. Looking at the evidence at the evidence as a whole, I am satisfied that the learned trial magistrate correctly assessed the evidence on liability, and that on balance of probabilities the plaintiff's evidence shows that the defendant's actions were the sole cause of the accident.

Quantum

18. On the issue of quantum, the appellant submitted that the plaintiff relied on a P3 which, in cross-examination, he stated was filled by the police officers in his presence. He further submits that plaintiff called PW1, Dr. Kimani Mwaura who produced his medical report as PEX B1. That report was prepared in reliance of the discharge summary from Kijabe Hospital and a medical report by Doctor Wambugu but Dr. Wambugu's report was not produced as an exhibit. Further, that the discharge summary and the plaintiff's evidence contradicted each other in that the plaintiff stated that the accident occurred on 23rd April 2011 while discharge summary showed the date of admission of the plaintiff to AIC Kijabe was 24th April 2011. The appellant seeks that the court should re-assess the evidence afresh.

19. Further, the appellant submitted that although the injuries suffered by the plaintiff herein are similar to those suffered by the plaintiff in **Julius Edwin Muriuki & Another v George Githinji Miwandi** – the case relied on by the trial magistrate – the court failed to consider that the injuries in the authority were more serious. Thus, the appellant urged that the assessment of incapacity at 30% compared to the plaintiff's 25% should have led to a lower award.

20. The respondent submitted that the discrepancy in dates was a minor one and such an error cannot take away the fact that the accident occurred on 23rd of April and that he suffered injuries which required hospitalization.

21. I have perused the Discharge Summary from AIC Kijabe Hospital. It is true that it indicates the admission date of the plaintiff by hand as 24th April 2011. The computer generated Invoice from the same hospital, however, indicates the admission date as 23rd April, 2011 and the discharge date as 11th May, 2011. Similarly, the Ortho Clinic Note from the same Kijabe Hospital states that the plaintiff was involved in an accident on 23rd April 2011. The P3 form and the Police Abstract also show the same date: 23rd April 2011.

22. In the case of ***Philip Nzaka Watu v Republic [2016] eKLR*** the Court of Appeal, approving the Tanzania court of appeal case of **Dickson Elia Nsamba Shapwata & Another v The Republic, Cr. App. No. 92 of 2007** stated as follows:

> **"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."**

23. On the aforesaid legal principle, I accept and find that the contradiction in dates was a minor one, if not a slip of the hand by the nurse or officer who hand-wrote the admission date in the discharge summary. The error or contradiction did not go to the root of the matter as there was other evidence confirmatory of the date of the accident.

24. As for the injuries, it must be appreciated that the assessment of damages is not an exact science achieved by a calculus. What courts seek to do is to approximate the compensation due by comparing with damages awarded for similar injuries and trying as much as possible to maintain uniformity and certainty of awards.

25. It is true that Dr Kimani Mwaura did not produce a written medical report. He testified that he examined the plaintiff and also relied on the previous medical treatment reports and discharge summary. In his testimony, he concluded that the plaintiff had suffered 25% incapacitation. In addition, the Orthopedic Clinic at Kijabe Hospital where the plaintiff was treated issued a note indicating the injuries and surgery and treatment given to him. Similarly the P3 form signed by the Medical Superintendent at Naivasha District Hospital indicated the injuries suffered by the plaintiff.

26. Finally, the trial court recorded the demeanour of the plaintiff and noted:

> **"(Court makes the observation of the limping gait of the plaintiff whose right leg is now shorter")**

27. I note that the trial magistrate considered all authorities availed by the parties and also the condition of the respondent. The Defendant's submissions proposed an award of Kshsha150,000/= for pain, suffering and loss of amenities based on the case of **Kennedy Okongo Odhiambo v James Kariuki [2011] eKLR**, which the defendant relied on.

28. Equally, the trial magistrate considered the plaintiff's submissions seeking an amount of Kshs 2,000,000/= and relied on the cases of **Julias Edwin Muriuki & Another v George Githinji Mwandi [2014] eKLR and Orion Haulers Limited vs Michael Semper Esikhati [2012] eKLR** where the plaintiff was awarded 800,000/= for pain and suffering for similar injuries, an award confirmed on appeal.

Disposition

29. I therefore see no basis for interfering with the award of the trial court as it was neither so inordinately high or low as to represent an entirely erroneous estimate of the damages.

30. Accordingly, the appeal fails and is dismissed with costs.

31. Orders accordingly.

Dated and Delivered at Naivasha this 10th Day of July, 2019

_____

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Mukungu for the Appellant

2. Mr. Njuguna holding brief for Burugu for the Respondent

3. Court Clerk - Quinter Ogutu