



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 103B OF 2013**

**CAROLINE WANGOI.....APPELLANT**

**VERSUS**

**NICHOLAS NG'ANG'A MWANGI.....RESPONDENT**

*(An Appeal from the Judgment of the Principal Magistrate Honourable F. N Kyambia in Eldoret CMCC No. 103 of 2013, dated 19<sup>th</sup> July, 2013)*

**JUDGMENT**

The appellant filed a suit in the trial court seeking special damages of Kshs. 17,928/-, General Damages, future medical expenses, damages for loss of earnings in Eldoret CMCC No. 791 of 2010. The cause of action was an accident that occurred along Elgon View Road on 29/7/2010. The defendant was found 100% liable and the plaintiff was awarded the sum of Kshs. 717,028 plus costs.

The appellant appealed against liability and quantum.

**APPELLANT'S CASE**

The appellant submitted that from the investigation the appellant was not to blame for the accident. The abstract, P-Exb-9 does not indicate who was to blame for the accident. The respondent never called any eye witness to support his testimony to the effect that the appellant was to blame for the accident. She cited Section 107 of the Evidence Act on the burden of proof.

The appellant submitted that DW1's testimony was confirmed by the respondent who testified that DW1 indeed hooted. Further that the respondent was carrying a luggage which knocked the appellant's vehicle resulting in the respondent losing control of the bicycle hence the accident. The appellant did all that was possible to avoid the accident but the negligence of the cyclist led to the accident. The negligence on the respondent's part is that he failed to adhere to the road use regulations as per the Traffic Act which the magistrate failed to consider. The respondent failed to affix a red cloth on the wide luggage he was carrying. Further he was riding a defective and unroadworthy bicycle on the road. The bicycle had no side mirror and the rider was not wearing a reflective jacket.

It is undisputed that the accident occurred at a narrow, sharp corner. The appellant further submitted that she ought not to have been held liable since there was no negligence proven against her.

On quantum she submitted that the amount awarded in damages was excessive and unreasonable. She relied on the case of *Odinga Jactone Ouma v Moureen Achieng Odera (2016) eKLR* where the injuries suffered were similar and the court awarded Kshs. 180,000/-. She also cited the case of *Abdulrahim Ebrahim v Charles Mwai Ndegwa (2016) eKLR* where the respondent was awarded Kshs. 230,000/- in general damages.

The plaintiff did not produce an x ray to prove he suffered a pelvic fracture and dexb1 being a medical report put the respondent's permanent disability at 2%. She submitted that the award be set aside and substituted with an award for Kshs. 200,000/-.

**RESPONDENT'S CASE**

The respondent submitted that the evidence of PW1 at page 94 of the record indicates that the appellant hit the respondent from behind where he sustained injuries on the right leg and a fracture of the pelvis. That both parties were headed in the same direction and he was riding on the extreme left.

PW2 testified that the rider was on the extreme left of the road when he was hit and blamed the driver of KAJ 827F for the accident. From the evidence it is evident that there was an accident involving a motor vehicle and a cyclist and that the respondent, a pedal cyclist, was hit from behind.

The respondent submitted that the accident happened at 8:30am when it was broad daylight and therefore the appellant should have seen the cyclist. The respondent was driving on the left side of the road and similarly as per *Moi University Benevolent Staff Fund v John Keya (2015) Eklr*, the driver must have been driving at a high speed without keeping a look out for the respondent and thus failed to slow down in time to prevent the accident.

He cited the case of *Bhupinder Singh Bangra v Joel Thei Koech, Eld HCCA no. 128/2002* where the driver was held liable for knocking a respondent from behind as he had an opportunity to slow down and did not do so. The appellant also failed to keep good distance from the respondent which could have made the accident be avoided.

The negligence was proven and the burden of proof satisfied. The appellant was at fault and her actions amounted to negligence. The court considered the evidence tendered in court and the testimony of the witnesses and correctly found that the respondent had proven his case on a balance of probabilities. The evidence was recorded at pages 91-110 and therefore the court did not disregard any of the evidence.

The appellant was in a better position to slow down as she was the one following behind. She foresaw the accident and did not stop in time. The respondent did not foresee the accident and could not avoid it for the reason that he was ahead. He is not liable for any negligence.

On quantum the respondent submitted that the injuries were enumerated in paragraph 7 of the plaint and further reiterated in the p3 form at page 43 and in the medical report by Dr. Cleophas Kubasu at page 47 of the record of appeal. The doctor classified the injuries as grievous harm. The award based on the injuries was reasonable.

The respondent cited the cases of *Stephen Kihara Gikonyo v peter Karimi King'ori, Nakuru HCCC No. 109/2002* where the plaintiff was awarded Kshs. 800,000/- damages for a similar injury and the case of *Catholic Diocese of Mere (Registered Trustees) v Regina Munane Mutinda (2009) eKLR* where damages of kshs. 912, 230 were awarded on similar injuries.

On special damages the respondent submitted that he pleaded kshs. 17,028/- and the same was proven by the respondent. The trial court awarded the same which was in tandem with the law.

#### ISSUES FOR DETERMINATION

- a) Whether the trial court erred in finding the appellant 100% liable
- b) Whether the quantum was excessive

#### WHETHER THE TRIAL COURT ERRED IN FINDING THE APPELLANT 100% LIABLE

The evidence of PW1 indicates that the defendant hit the plaintiff from the rear whilst driving KAJ 827F. It is clear that the cyclist was hit from behind. The appellant did not have any corroboration of the allegation that the plaintiff was in the middle of the road. The main fact remained that the defendant was behind the cyclist.

In *BHUPINDER SINGH BHANGRA v JOEL TUWEI KOECH [2008] eKLR* the court held;

**From the facts, I find that the trial court's finding on liability to be fair and sound. The Plaintiff was riding his bicycle on the correct side of the road. He was on the left side. The Defendant's driver was driving from behind. He was in control of the vehicle and he could see well ahead. He overtook the cyclist when there was a vehicle ahead of him and another trailer passing towards the opposite direction.**

I do find that the respondent was in no position to see the appellant's vehicle or prevent the accident and thus the trial court correctly found that the appellant was 100% liable.

#### WHETHER THE QUANTUM WAS EXCESSIVE

In *Morris Mugambi & another v Isaiah Gitiru [2004] eKLR* the court of appeal held;

**We have considered the material placed before the learned Judge by way of medical reports and the legal submissions and we wish to state that in assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases.**

In *B.G. Saint vs Kevin Hogan [1953] E.A.C.A 85*, the predecessor of the East Africa Court held: -

**"1) Although as a general rule an appeal court will not disturb assessment of damages made by the trial court, where there are no reasons stated by the trial court, the Appeal Court can make its own assessment of damages.**

**2) In assessing damages for personal injuries, whilst the special facts of the case under consideration must be borne in mind the assessment should accord with the general run of assessments made over a substantial time in comparative cases".**

The medical reports on record stated that the plaintiff had sustained the following injuries;

- a) Severe fracture of the pelvis
- b) Severe soft tissue injuries to the right hip
- c) Soft tissue injury to the left hip

The trial court considered the case of *Sister Margaret W. Chege and Anor. v Margaret W. Gichimu, Eldoret HCCA 49/2005* where the court awarded Kshs. 550,000/- for similar injuries.

In *Catholic Diocese of Meru (Registered Trustees) V Regina Munanie Mutinda [2009] eKLR* the court awarded Kshs. 912,320/- for similar injuries although they were a little bit more severe.

The appellant has not shown that there was anything that the trial court failed to take into consideration in awarding the quantum and as such, I have no cause at all to disturb the awarded sum in damages. The appeal therefore fails with costs to the respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 22<sup>nd</sup> day of October, 2019**

In the absence of:

Mrs Odua for the Appellant

Mrs Munyaga for the Respondent

Ms. Abigael – Court Assistant