



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL 387 OF 2014**

**MOSES MAINA MUTARU.....APPELLANT**

**VERSUS**

**STEPHEN KAMAU GITAU.....RESPONDENT**

***(Being an appeal from the judgment Milimani Chief Magistrate's Court***

***Civil Case No. 7426 of 2008 delivered by Honourable Mrs. R. A Oganyo (SPM)***

***on 31<sup>st</sup> July, 2014)***

**J U D G M E N T**

The respondent was injured as a result of a road traffic accident that took place on 4<sup>th</sup> August, 2007. By a plaint dated 15<sup>th</sup> October, 2008, he brought a suit against the appellant claiming damages for the injuries sustained. According to the said plaint, the respondent was crossing the road when he was knocked down by a motor vehicle registration KAS 640F owned and/or being driven by the appellant at the time of the accident.

The appellant denied the respondent's claim and attributed the accident on the respondent for crossing the road negligently and failing to have any due care and attention among other issues.

After the trial however, the lower court found the appellant to be wholly to blame for the accident and awarded Ksh.300,000/- general damages, Ksh.72,000/- future medical expenses, Ksh.5,100/=, special damages and Ksh.5,000/- paid to the Police who testified as PW 2.

The appellant was aggrieved by the said judgement and lodged this appeal. In the memorandum of Appeal dated 25<sup>th</sup> August, 2014 the appellant faulted the lower court for holding that he was to blame at 100% yet it was the respondent who negligently crossed the road. The Appellant also complained that the award in general damages was inordinately high considering the nature of injuries and that the award for future medical costs was also high in the circumstances.

The appellant also complained that the lower court applied wrong principles of law in making the decision which was unjust and against the weight of evidence adduced.

As the first appellant court is my duty to evaluate the evidence adduced in the lower court to arrive at independent conclusions. This I have done.

The parties have also made their respective submissions which I have read alongside the authorities cited. The circumstances that led to the accident were brief going by the evidence adduced by the respondent in the lower court.

It is clear that the respondent was crossing the road when he was hit by the appellant's motor vehicle. It was his evidence that, whereas other vehicles had stopped for pedestrians to stop the appellant's motor vehicle did not. He added that he was knocked when off the road and therefore, the appellant was to blame.

Under cross-examination, however, the respondent told the court that he had crossed two lanes before he was hit. This is in contradiction to his evidence that he was knocked while off the road.

The police who gave evidence in this matter is not the one who visited the scene neither the investigating officer who was said to have passed

on a few days before the trial. The police accident abstract produced in the lower court has exhibit (i) showed that the case was still pending under investigation.

The defence did not offer any evidence after the respondent closed his case and only filed submissions to address the evidence of the entire trial.

In determining the issue of liability, the lower had the following to say.

***“Neither the defendant nor his driver of the material date came to testify and give an account of how the accident occurred. I, therefore, find the plaintiff’s evidence and that of the police officer to be credible that the driver of KAS 640F was to blame as he hit and ran and never made a report to the police nor came to court to testify.”***

It would appear that the appellant did not find favour with the lower court for failure to testify and therefore, had to bear full responsibility for the accident. Whereas it is true that the pleadings remain facts to be proved by evidence, it should be borne in mind that in cases of this nature an injured party has responsibility to take care of himself in view of the fact that roads are meant for the vehicular traffic save for zebra crossing reserved for pedestrians. There is no evidence that there was a zebra crossing at the point the respondent was knocked down.

In my assessment of the evidence, I find that the respondent was also to blame for the injuries he sustained and assign 20% contributory negligence in that regard.

There are two medical reports on record. One is dated 18<sup>th</sup> September, 2008 by Dr. Waithaka Njihia and the other by Dr. W. Wokabi dated 22<sup>nd</sup> September, 2008. The respondent had suffered bruises on the side of the face and lost two teeth. The two teeth left him with some cosmetic deficiency and both doctors were of the view that the two teeth should be replaced.

Dr. Waithaka gave the cost of replacement at ksh.96,000/- while Dr. Wokabi did not give any assessment.

Both counsel addressed the court on quantum in their submissions before the trial magistrate. I have reviewed the authorities cited and also considered the fact that the appellate court may not interfere with the awards made by the trial court unless the said awards are inordinately too high to too low and the trial court took into consideration irrelevant fact and left out relevant ones. See - ***Mbogo v Shah [1968]*** EA 93.

The injuries sustained by the Respondent in the form of bruises to the face can best be described as soft tissue injuries. Going by the authorities cited which included ***Isaac Muriungi Mataru Vs Silas Kalumani (2017) eKLR***, I believe the correct award should be Kshs.200,000/- general damages for pain and suffering. That award should be reduced by 20% contributory negligence on the part of the respondent leaving a balance of ksh.160,000/-.

I am unable to fault the reasoning of the trial court with regard to the award of Ksh.72,000/- for replacement of the two teeth lost by the respondent. Accordingly, this appeal is allowed in part by reducing the award for general damages from Ksh.300,00/- to Ksh.200,000/- which when subjected to 20% contributory negligence leaves a balance of Ksh.160,000/-

In the end, therefore, the respondent shall have judgment against the appellant in the sum of Ksh.160,000/- general damages, Ksh.72,000/- future medical expenses, Ksh.5,100/- special damages and ksh.5,000/- witness allowance. The Respondent is entitled to costs based on this judgment in the lower court plus interest at court rates. The parties shall bear their costs in this appeal.

**Dated, signed and delivered at Nairobi this 17<sup>th</sup> day of October, 2019.**

**A MBOGHOLI MSAGHA**

**JUDGE**