



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 56 OF 2018

ALFRED CHIVATSI CHAI.....1ST APPELLANT

HASSAN SARO.....2ND APPELLANT

VERSUS

CECILIA TABU KITSAO.....RESPONDENT

(Being an appeal from the Judgment of Hon. Ondieki (SPM) in SPMCC No. 220 of 2011 at Kilifi delivered 1.11.2018)

CORAM: Hon. Justice R. Nyakundi

Cootow Advocates for the Appellants

Ombachi Moriasi Advocates for the respondent

JUDGMENT

Background

The respondent **Cecilia Tabu Kitsao** was on or about 21.5.2011 travelling as a lawful pillion passenger aboard motor cycle Registration Number KMCJ 404 along Takaungu – murram road. When the aforesaid motor cycle; duly owned by the 1st appellant and at the time being driven by the 2nd appellant was so carelessly driven that an accident occurred on the said road.

As a result of the accident, the respondent suffered personal injuries, loss and damage. The respondent filed a claim against the appellant on vicariously liability and breach of the duty of care by the 2nd appellant who was on the material day in control of the motor cycle. The alleged particulars of negligence are as pleaded in paragraph 5 of the plaint.

The appellants filed the statement of defence and denied being involved in the accident and in the alternative averred to blame the accident on negligence on the part of the respondent for failing to wear a helmet.

The evidence is such that it cannot be disputed as it depended mainly on the respondent testimony. By her filed statement which she adopted on oath, the respondent told the court that she was a pillion passenger on the motorcycle owned by the 1st appellant and on the material day being driven by the 2nd appellant.

The respondent at the time of the accident stated that the 2nd appellant failed to control the motorcycle as she could recall an accident occurred and as a consequence she sustained personal injuries to the forehead, loss of 2 teeth, cut on the tongue, laceration on both upper limbs and bruises on both knees.

At the close of the respondent case both counsels on behalf of the claimant and the defendants, agreed by consent to admit all the necessary documentary evidence in so far as they relate to the facts in issue. The list of documents included the medical reports by **Dr. Adede** and **Dr. Sheth**, witness statement of the 2nd appellant. With that Learned counsel also agreed to file written submissions to dispose off the matter on liability and quantum.

After considering the evidence and submissions, the Learned trial Magistrate reached a verdict and in his Judgment ruled as follows:

a). Liability at 100% in favor of the respondent

b). General damages for pain and suffering at Kshs.400,000/=.

c). Special damages at Kshs.2,500/=

being dissatisfied with the entire Judgment the appellants filed an appeal based on the 5 grounds in the memorandum of appeal:

1). The Learned Senior Principal Magistrate erred in law and fact in holding the appellant at 100% in negligence despite the evidence adduced before the court.

2). The Learned Senior Principal Magistrate erred in failing to take into consideration the evidence of the defence witness and the plaintiff himself while arriving at his decision.

3). The Learned Senior Principal Magistrate erred wholly in disregarding the appellant's counsel's submissions and the authorities submitted and proceeded to rely on his own view not backed by law.

4). The Learned Senior Principal Magistrate erred in law in awarding Kshs.400,000/= by way of general damages for the injuries sustained by the plaintiff/respondent which in the circumstances is inordinately high that it must be a wholly erroneous estimate of the injuries sustained by the plaintiff/respondent.

5). The Learned Senior Principal Magistrate erred in failing to analyze and synthesis the evidence before him and arrived at a completely erroneous and excessive finding.

Learned counsel for the appellant submitted and argued that the accident was not due to the fault of the 2nd appellant. That material day argued counsel the respondent and another lady assumed same level of risk by agreeing to board a motorcycle which was only destined to carry one passenger. Further, Learned counsel submitted that it is undisputed that inspite of the accident taking place, the police never blamed anybody for it, and therefore the 2nd appellant cannot be said to be blameworthy.

It was also submitted by counsel that the respondent failed to discharge the burden of proof as provided for under Section 107, 109 and 112 of the Evidence Act. In the circumstances argued and submitted Learned counsel that the finding on liability at 100% was erroneous in fact of and principle in absence of evidence to support negligence.

According to Learned counsel, the respondent was not entitled to the quantum of Kshs.400,000/= which assessment he considered excessive and an exaggeration of the injuries suffered in the alleged accident.

With regard to Learned counsel for the respondent he submitted that on both issues that the appellants have not shown what errors or misdirection was made by the Learned trial Magistrate for this court to interfere with the Judgment.

A further relevant point that Learned counsel submitted on was on the clear and credible evidence of the respondent on the nature of injuries justifying an award of Kshs.400,000/= for pain and suffering.

In all I have had the benefit of the record and submissions of both counsels to this appeal.

Analysis

The main issues on liability and quantum are still in contestation by the parties:

1). Whether the accident was caused solely by the negligence of the 2nd appellant or the respondent did contribute to its occurrence.

2). What is the measure and quantum of general damages if any are due to the respondent.

Issue No. 1 – On negligence and culpability

The rule of the road is that if you operate a machine or vessel on the highway or feeder roads the duty is to drive with reasonable care which is both provided for in the Traffic Act and Common Law principles on the duty of care. There are two elements in the assessment of liability namely causation and blameworthiness. Any person who drives a motorcycle or motor vehicle on a road and the speed was excessive in the circumstances, but the failure to keep a proper look out would seem to be a predominant factor. It is appropriate to mention at this juncture the principles in the persuasive case of **Devon Higgins & Shanice Brown v Uriah Gambell & Winston Campbell & Orvule Senar 2011 HCV 04465 2011** – where it was held that:

“A driver of a vehicle on the road owes a duty of care to take proper care and not to cause damage to other road users whom he reasonably foresees is likely to be affected by his driving. In order to satisfy this duty he should keep a proper look out, avoids excessive speed and observe traffic rules and regulations.”

In **Snell v Farrell 1990 SCR 311** “causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury.”

In addition **Prof Fleming (The Law on Torts 8th Edition 1992** observed that:

“the Law does not excuse the defendant from liability merely because other causal factors for which he is not responsible also helped to produce the harm.”

This Common Law position has been entrenched in our Law. In **Elijah Ole Kooi v George Ikunya Thuo 2001 eKLR**. The court held as follows on causation

“when will an act or omission be said to be the cause of the plaintiff’s injuries?”

A defendant will only be held liable for negligence if his act or omission is either the sole effective cause of the plaintiff’s injury or the act or omission is so connected with it as to be a cause materially contributing to it. The first case will rarely raise contentions.”

In the instant case, the facts as to causation are as set out by the respondent testimony that the driver miscontrolled the motor cycle. We are not told that the road surface was wet and the point of impact had something to do with the nature and surrounding of the road.

The driver though stated in his witness statement circumstances of the accident he opted not to give evidence on oath so that it can be challenged in cross-examination by the respondent. It was for the defence to rebut the presumption of negligence arising from *res ipsa loquitur*.

Sir New bold P in Embu Public Services Ltd v Riimi 1968 EA 22 stated:

“As I understand the Law, where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show in the words of Sir Alistar Forbes “ That there was a probable cause of the accident which does not connote negligence or in the words wake I have previously used that the explanation for the accident was consistent only with an absence of negligence.”

I have reviewed the evidence on record and submissions on appeal by the appellant counsel. I do not seem to find any evidence to suggest that the fact of the respondent as a second pillion passenger contributed to the accident. The subject matter of causation and blameworthiness is on the negligence acts that satisfy the reasonable test that in laying the foot in the accelerator the 2nd appellant did so in a manner which endangered the pillion passengers by the high speed which did not guarantee her safety. With regard to the pursuant case, it is clear that the respondent discharged the burden of proof to establish the imposed liability on the appellant by their fault of operating the motorcycle through the employee or servant or agent on the fateful day of the accident.

I respectfully concur with the extract from the Judgment of **Hon. Ondieki** on his findings on liability. Contrary to the claim by the Learned counsel that he misdirected himself in this issue it is evident that having observed the witness the Learned Magistrate was entitled to take the view on the matter. The discretion being judicial is exercised on the basis of evidence and sound legal principles. In the foregoing notwithstanding the misgivings by the learned counsel for the appellants, one must understand that judicial discretion is wide, provided its exercised judicially. Having been enjoined to consider this appeal on the impugned Judgment, I find nothing to alter the circumstances of the case as decided by the trial court on liability. Enough is enough with the issue on liability. The appellants fail to persuade me to invoke appellate jurisdiction.

Issue No. 2 - General damages

Learned counsel for the appellants vigorously contested the matter of the general damages awarded to the respondent for pain and suffering and loss of amenities. Principally it is well settled in Law on the guiding principles in relation to the assessment of damages.

In **Coolson v Knowles [1977] QB. 913 (1972) A.C. 556** the court stated inter alia:

“General damages are to be assessed at the trial and on the evidence available at the trial, the correct way in times of inflation was to divide the award into two parts, the first part being the actual pecuniary loss upto the date of the trial and the second part future pecuniary loss from the date of trial onwards.”

The circumstances to be manifested in assessment of damages are both subjective and objective. In the persuasive authority of **Kilda Osborne v George Barsed and Metropolitan Management Transport Holdings Ltd and another [2005] HCR** adopted the passage and the principles formulated by both **Lord Moms and Lord Denning H. West & Sons Ltd v Shephard [1963] 2 ALL ER 625** held that:

“The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with his injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.”

It should also be borne in mind that the assessment of damages is a discretionary jurisdiction pegged on the unique facts of each specific case of a claimant.

On appeal however, the duty is as expressly stated in the case of **Kemfro Africa Limited T/A “Meru Express Services 1976” & Gathogo Kanini v A. M. Lubia & Olive Lubia [1985] eKLR**, the Court of Appeal held:

“The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

The issue is whether the assessment on general damages for pain and suffering of Kshs.400,000/= was an erroneous exercise of discretion by virtue of the trial court not taking into account a relevant factor or prima facie wrong in principle.

According to the evidence the award was made based on the evidence by the respondent and the two medical reports by **Dr. Adede** and **Dr. Sheth**. The two consultants were both in agreement that the respondent sustained fractures of teeth Number 11 and 21, head injury, bruises on both hands and the right knee. In assessing damages the Learned trial Magistrate placed reliance on the principles in the case of **Uguya Bus Service v James Kongo Gachohi**.

In the instant case its plausible to make reference to similar awards to establish whether the trial Magistrate erred in law or fact in the assessment of damages.

a). In the case of Alexander Mutati v Hon. Attorney General & another HCCC 629 of 1982 The plaintiff suffered a head injury with concussion for about 2 days complained fracture of left tibia and fibula. The court awarded Kshs.120,000/=

b). Francis Ochieng v Gabriel Ongele Ogolla [2015] eKLR the appellant suffered multiple injuries without any fractures, lost 7 teeth, head injuries. The court awarded Kshs.350,000/= general damages.

c). Eddah Wangui Muremi v Nairobi Sports House Ltd HCCA NO. 11 OF 2003 The appellant was awarded Kshs.100,000/= for injuries to loss of 3 upper incisor teeth and multiple injuries.

The cases I have referred to were decided some years back. There is therefore need for provisional allowance for inflation any trends over time. In the case before this court, the even with factoring in inflationary trends the award of damages for injuries with no fractures to me is on a higher scale of the award.

It is quite obvious that the trial Magistrate in exercising discretion may have taken into account an irrelevant material of evidence.

The upshot I will allow the appellants appeal set aside the decree of the trial court on general damages by substituting with Kshs.250,000/= for pain and suffering and loss of amenities. The appeal therefore partially succeeds in so far as varying. The award of general damages is concerned, which I assess as indicated above to be paid by the appellants. The upshot of this appeal Judgment is has the following orders:

a). Liability at 100% as confirmed by the trial court.

b). General damages re-assessed at Kshs.250,000/= for pain and suffering and loss of amenities.

c). Special damages affirmed at Kshs.2,500/=

d). Cost of this appeal be equally apportioned between the appellants and the respondent.

It is ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF NOVEMBER, 2019.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Atyang for Cootow for the Appellant

Ms. Ombachi holding brief for Ms. Moriasi Advocate for the respondent