REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 141 OF 2017

BENARD GITHINJI KABURU.....-1ST APPELLANT

MARY NGUGI.....2ND APPELLANT

=VRS=

FELIX OTIENO OMONDI alias FELIX OTIENO WAMEIYA....RESPONDENT

{Being an appeal against the Judgement of Hon. J. W. Onchuru – SRM Kiambu dated and delivered on the 18th day of September 2012 in the original Kiambu Chief Magistrate's Court Civil Case No. 149 of 2010}

JUDGEMENT

The respondent sued the appellants for compensation for personal injuries sustained in a motor vehicle accident involving him as a cyclist and a motor vehicle Registration No. KAL 086G Isuzu pick-up allegedly belonging to the 2nd appellant. He attributed the accident to the negligence of the 1st appellant who was driving the motor vehicle. He also sought special damages in the sum of Kshs. 4,550/-, costs of the suit and interest.

After considering and evaluating evidence from both sides the trial Magistrate found the appellant wholly liable for the accident and awarded the respondent general damages in the sum of Kshs.350,000/=, special damages of Kshs. 4,550/=, costs of the suit and interest. Being aggrieved by the trial magistrate's finding on liability and the quantum of damages the appellant preferred this appeal. The appeal is premised on two grounds, to wit: -

> **"1. THAT the learned magistrate erred in law and in fact in assessing liability at 100% as against the appellants and in not dismissing the plaintiff's suit in the circumstances of the accident.**
>
> **2. THAT the learned magistrate's award of Kshs. 350,000/= to the plaintiff by way of general damages for pain and suffering is so excessive in the circumstances as to amount to an erroneous estimate of the damages payable under this head."**

I have a duty as the first appellate court to re-consider and evaluate the evidence in the court below so as to arrive at my own independent conclusion **(see Selle & Another v Association Motor Boat Company Ltd [1968] EA 123).** I am also guided by the principles that an appellate court will not interfere with a judge's findings of fact based on his assessment of the credibility and demeanour of witnesses who gave evidence before him, **unless it was wrong in principle** ***(see Butler Vs. Butler [1984] KLR 225 at 277)*** and further **that "the appellate court will not disturb an award for damages unless it is inordinately**

high or inordinately low as to represent an entirely erroneous estimate of the damage or that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low" – *(see Butt v Khan [1977] 1 KAR.*

The respondent testified that he was cycling on the left side of the road and on reaching Kamuti corner a vehicle appeared from Kamiti corner and attempted to overtake another vehicle that was headed in the same direction and it hit him. He called a police officer who however contradicted his evidence and attributed blame to him. The police officer stated that the respondent joined the main road without due care hence causing the collision with the vehicle.

I have considered the evidence in the court below carefully. My finding is that the version given by the police officer rather than corroborate the respondent's account as to how the accident occurred seemed to support the 1st appellant's version. Be that as it may, it is not clear how the police officer arrived at the decision that the respondent was to blame. This is given that it was his evidence that the accident was never investigated. It was also clear from the 1st appellant's testimony that contrary to the evidence of the officer he was subsequently charged with careless driving. Whereas the fact that he was charged per se may not be proof that he was negligent, it is nevertheless in the circumstances of this case very telling. My own analysis of the evidence is that both the respondent and the 1st appellant were negligent, the respondent for entering the main road without confirming that it was safe to do so and the 1st appellant for driving at such a high speed that he was unable to stop or to control his vehicle despite that he had seen the cyclist entering the road. Had he been driving at a more moderate speed while approaching and entering the main road he would have avoided the accident. I would apportion liability between the parties in the ratio 50%:50%.

On the quantum of damages I see no good reason to interfere with the award of the trial Magistrate. From the evidence the respondent sustained serious injuries which saw him spend a cumulative seven days in hospital. Thereafter he suffered temporary incapacity for three months and when Dr. Jane Ikonya (Pw3) examined him six months later he was still suffering the effects of the accident. He was left with a huge scar and taking everything into account and also considering the passage of time, **the award of Kshs. 350,000/= was not inordinately high. It was adequate.**

The special damages awarded was what was specifically pleaded and strictly proved and so the Magistrate did not err. Accordingly, the appeal succeeds only to the extent that the finding of **liability at 100% is set aside and substituted with a ratio of 50%:50%.** The damages awarded are affirmed but the same shall now be apportioned to the parties equally and as the appellants have succeeded only partially, **I shall order that they shall be entitled to only have the costs of this appeal.** The respondent shall be entitled to interest on specials at court rates from the date of filing suit and on general damages at court rates from the date of the judgement in the court below. It is so ordered.

Signed and dated this 4th day of November 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 14th day of November 2019.

C. W. MEOLI

JUDGE