



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 58 OF 2017**

**(CORAM: F. GIKONYO J.)**

**HEZRON WAITHAKA NDARWA.....1<sup>ST</sup> APPELLANT**

**MOSES MBURU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**EZEKIEL RUHENI MAINA.....RESPONDENT**

**(An appeal from the judgment of the Hon. D. Mbeja, SRM delivered on 31<sup>st</sup> January 2017 in Milimani CMCCC No. 376 of 2015)**

**JUDGMENT**

[1] The appellants being the respondents in the trial court were sued by the respondent for special damages of Kshs. 447,492/-, general damages and future medical expenses, loss of earnings, costs of the suit and interest On 31<sup>st</sup> January 2017 the trial court entered judgment in favour of the respondent as follows:

- a) **Liability ..... 100%**
- b) **Special damages ..... Kshs. 447,292/-**
- c) **General damages .... Kshs. 1,200,000/-**
- d) **Future medical expenses.....Kshs. 200,000/-**

**TOTAL..... Kshs. 1,847,292/-**

- e) **Cost plus interest at court rates**

[2] The appellant being aggrieved by the decision filed his appeal based on ten (10) grounds which may be summarized into two issues: **whether the trial magistrate erred in the apportionment of liability and assessment of damages.**

**Submissions**

[3] The appeal was canvassed by way of written submissions. The appellant submitted that the respondent did not prove that he owned motor vehicle KUJ 569 therefore he lacked the legal capacity to sue and recover damages. On the issue of damages the appellants argued that the award of general damages was inordinately high. As for special damages, it was submitted that the court should set aside the award of Kshs. 447,492/- and substitute it for Kshs. 99,462/- being the sum pleaded and strictly proved.

[4] The respondent on the other hand submitted that the trial court did not err in finding the appellant liable and in its award. On the issue of ownership of motor vehicle KUJ 569 he submitted that he had proved ownership through his bank statements and the document produced by the expert witness. The respondent also urged that the general damages awarded by the trial magistrate were commensurate with the injuries suffered by the respondent and were not in any way excessive. It was also submitted that the trial magistrate did not err in awarding future medical costs.

**ANALYSIS AND DETERMINATION**

[5] As the first appellate court, this court will evaluate the evidence on the record and make its own determination except having in mind that it did not have the advantage of hearing witnesses. See: Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.

[6] The issues for determination are:

- a) **Whether the appellant was liable**
- b) **Whether the trial court adopted wrong principles in assessment of damages**

[7] The first issue is on liability. According to **PW1 Ezekiel Ruheni Maina**, on 20<sup>th</sup> July 2013 at 8. 30AM he was driving his pick up motor vehicle registration KUJ 596. When he reached Githurai towards Zimmerman at Kamiti road he was on the left hand side of the road when he saw an approaching vehicle KBG 206M, Toyota Allex, moving in a zigzag manner. He moved to the far left but the vehicle knocked his right tyre on the front side. The engine and gear was damaged extensively causing his vehicle to be a write off. He too was injured as he had broken ribs, his right leg was fractured twice and a fastened by a metal.

[8] The police abstract produced by the respondent stated that the 1<sup>st</sup> appellant was found liable for careless driving and fined Kshs. 30,000/- . The appellants did not call any witness to challenge the evidence adduced that the 1<sup>st</sup> appellant was negligent in the manner he drove, managed or controlled his motor vehicle thus allowing it to veer off its lane and ram into the respondent's motor vehicle head on. Consequently, the trial magistrate did not err when it held the appellants 100% liable for the accident.

[9] The second issue is whether the trial court adopted wrong principles in assessing the damages. The appellate court ought not to interfere with the findings of the trial court on an award of damages unless it is convinced that the trial magistrate acted on wrong principles of law or took into account irrelevant factor or left out of account relevant factor or that the award was so high or so low as to be an erroneous estimate of the damages due to the plaintiff. See the renown case of **Butt v Khan [1981] KLR 349** where it was held as per Law, JA as follows:

**“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown 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.”**

[10] The respondent pleaded that he suffered multiple right rib fractures 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup>, multiple left rib fractures 4<sup>th</sup> and 5<sup>th</sup>, fracture right acetabulum, fracture right talus bone and right hemothorax. These injuries were confirmed in medical reports by Dr. Mangoli and Dr. Moses Kinuthia. Dr. Kinuthia's opinion was that the metal plates placed will require surgical removal followed by rehabilitative physiotherapy at a cost of Kshs. 200,000/-. Further that he is predisposed to posttraumatic osteoarthritis of the right hip and ankle joints and has suffered permanent incapacity of 20%. These injuries are serious and the need for future medical expenses was proved by expert evidence. In this case the doctor was able to give fair estimate of the quantum of the cost of future medical expenses. A party should not be denied future medical expenses where expert evidence confirms that need. The trial magistrate considered all these relevant factors in making the award of Kshs. 200,000/- as future medical expenses. The basis of this award is the medical report and expert evidence. Therefore, the trial magistrate did not err in making the said award. I reject the ground of appeal in relation thereto.

[11] Of general damages: in light of the injuries sustained herein, I find the following cases to be relevant in providing a range of comparable awards on general damages:

- a) **HCC NO. 188 of 2009 Hellen Atieno Odour vs S.S. Mehta & Son LTD and Muthitunanua (2015) eKLR** the plaintiff who sustained fracture of the right tibia and fibula multiple fractures of the ribs on the right side of the chest (3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> rib) chest injury and hemothorax, blunt abdominal trauma, fracture of the right scapula and surgical scars on the right knees, anteriorly, and right ankle joint medially was awarded Kshs. 1,500,000/-
- b) **Ahmed Mohammed vs Abdulhafidh Mohammed Banragah [2004]eKLR** the plaintiff who sustained a fracture of the left femur subtrochanteric and compound fracture of the left tibia and fibula was awarded Kshs. 750,000/-;
- c) **Hellen Atieno Oduor v S S Mehta & Sons Ltd & Muthitu Nanua [2015] eKLR** the plaintiff had sustained fracture of the right tibia and fibula, multiple fractures of the ribs on the right side of the chest (3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> ), chest injury and hemothorax, blunt abdominal trauma, fracture of the right scapula and surgical scars on the right knees anteriorly and right ankle joint medially was awarded general damages of Kshs. 1,500,000/-

Accordingly, I am of the considered view that the award of Kshs. 1,200,000/- was not inordinately too high or low as to be an erroneous assessment of damages. There is nothing to support any interference with the trial court's discretion thereto.

[12] For special damages the respondent pleaded Kshs. 447, 492/- made up as follows:

- a) Towing fees ..... Kshs. 10,000/-
- b) Assessors fees ..... Kshs. 5,000/-
- c) Search fee ..... Kshs. 500/-
- d) Medical report..... Kshs. 3,000/-

- e) Taxi (cab) charges ..... Kshs. 25,000/-
- f) Medical expenses ..... Kshs. 183, 792/-
- g) Police abstract..... Kshs 200/-
- h) Pre accident value less salvage Kshs. 220,000/-

[13] Special damages need to be specifically pleaded and proved. In **Provincial Insurance Co East Africa Ltd versus Nandwa 1995-1998 2EA 288** the Court of Appeal expressed that:

**“It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.”**

All the receipts for the above pleaded items were produced in evidence. However, some of the damages relate to motor vehicle KUJ 596 whose ownership according to the appellants has not been proved. It was urged that the respondent failed to produce any logbook, copy of records from registrar of motor vehicles or any other document. To them, the respondent lacks legal capacity to sue and recover damages for the value of the motor vehicle. These arguments throws me to the case of **Nancy Ayemba Ngaira v Abdi Ali [2010] eKLR** where Ojwang J. (*as he then was*) held and rightly so, that -

**“There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the *de facto* owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: *actual ownership; beneficial ownership; possessory ownership*. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1<sup>st</sup> defendant was one of the owners of the *matatu* in question.”**

In the case **Charles Nyambuto Mageto & another v Peter Njuguna Njathi [2013]eKLR** the High Court in its appellate capacity, Emukule J stated:

**“From the interpretation of Section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership need not necessarily produce a log book or a certificate of registration. The courts recognize that there are forms of ownership, that is to say, *actual, possessory and beneficial*, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report even, as held in the Thuraira and Mageto cases (*supra*) that the Police Abstract Report is not, on its own, proof ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the Police Abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership.”**

The police abstract did not indicate the respondent as the owner of the motor vehicle. However, the Respondent claims ownership. He called **PW2 John Wanyoike** from Leone Motor Assessors who produced the assessment report he had prepared with regard to motor vehicle KUJ 596. According to the report it states that the respondent is the insured. Only a person with an insurable interest in a property could insure such property. The Respondent therefore proved ownership of KUJ 596. Consequently, I am satisfied that the respondent pleaded and proved his claim of special damages.

[14] Accordingly, I find this appeal to lack merit and is dismissed with costs to the respondent.

Signed and dated at Meru this 7<sup>th</sup> day of November, 2019

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**F. GIKONYO**

JUDGE

Dated, signed and delivered in open court at Nairobi this 20<sup>th</sup> day of November 2019

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**L. NJUGUNA**

JUDGE