REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 238 OF 2016

MATHIU JOSEPH.....1ST APPELLANT

DENNIS MUGENDI MUGAMBI..... 2ND APPELLANT

VERSUS

TITUS CHARLES MWALILI.....RESPONDENT

(Being an appeal against the decree and judgment delivered on 7th April, 2016

by Hon. M Chesang (Mrs) Resident Magistrate at Milimani

Chief Magistrate's Court in CMCC 2933/2014)

J U D G M E N T

The Respondent was injured following a road traffic accident which took place on 18th December, 2011 along Ladhies Road, Nairobi. He was driving motor vehicle registration Number KBP 868G when he collided with motor vehicle registration number KBH 506Z said to be owned by the 1st Appellant and driven by the 2nd Appellant at the time of the accident.

The Respondent blamed the accident and subsequent injuries on the part of the appellants jointly and severally. It was his pleadings and evidence that the driver of motor vehicle registration No. KBH 506Z was negligent in the way drove the said motor vehicle leading to the said accident. He also pleaded that the doctrine of ***res Ipsa loquitor*** applied in the circumstances of this case.

In his pleading he set out particulars of injuries he sustained and claimed general damages plus special damages as a result. Further, in the amended plaint filed on 13th October, 2014 he pleaded that he was working as a tourist driver earning a net salary of Ksh.13,611/- but as a result of the accident he was not able to continue earning and therefore, claimed loss of future earning capacity.

The Appellants, while admitting the accident took place on the date and place set out in the plaint, denied the respondent's claim in their statement of defence. Further the 2nd Appellant is said to have encountered another vehicle which veered into his path and in the process of avoiding a collision, lost control and veered off to the other side of the road resulting in the collision of the two motor vehicles.

In the trial before the lower court the respondent called one Doctor and police officer in addition to his own testimony. Parties agreed that the report by Doctor W M Wokabi dated 27th May, 2014 be produced by consent without calling the maker. The Appellant did not call any evidence in the lower court.

In the judgment delivered on 7th April, 2016 the lower court found the appellants 100% liable, jointly and severally for the accident and proceeded to make an award of Kshs.1.5 Million general damages for pain and suffering, Ksh.1,260,000/= for loss of earning capacity, Ksh.1,216,062 /= special damages plus costs and interest at court rates.

The Appellants were aggrieved by that judgment and lodged this appeal. It is my duty as the first appellate court to consider and evaluate the evidence adduced before the trial court in order to arrive at independent conclusions. In the memorandum of appeal dated and filed on 6th May, 2016 the lower court was blamed for failing to consider submissions made by the appellants, thereby arriving at the erroneous conclusions. The lower court was also faulted for awarding general damages for pain and suffering which were excessive, given the nature of injuries sustained and that the special damages awarded were not entirely proved.

The award for loss of further earning capacity was also faulted for being manifestly high and was not proved. The appellants also complained

that in assessing damages awardable, the lower court took into consideration irrelevant factors and wrong principles thereby arriving at a wrong decision and excessive awards. Finally, the trial court was faulted for failing to consider and appreciate the evidence before finding the appellants 100% liable.

From the evidence, the two motor vehicles were being driven in opposite directions. The two roads were divided by a pavement which separated them. It was the respondent's evidence that the motor vehicle registration No. KBH 506Z which was coming from the opposite direction was being driven recklessly and the driver lost control, veered off the road, crossed over the pavement which separated the roads and came to his side thereby colliding with his vehicle. This evidence appears in the witness statement of the respondent which he adopted in evidence when he testified.

Under cross-examination the appellant told the court he was looking forward when he saw something like lighting and he tried to avoid the accident but the other car was very fast.

The trial court correctly observed in the judgment that the respondent was on his right side of the road, while the 2nd appellant was using the wrong side of the road. The fact that the 2nd appellant crossed over the pavement and collided with the respondent shows recklessness in the way he drove the motor vehicle. It is clear that the traffic flow along which the respondent was driving was towards one direction only. He was not expecting any vehicle from the opposite direction. He cannot be accused of not avoiding a collision in view of the sudden nature of that occurrence.

The Appellants had an opportunity to testify in support of their statement of defence but elected not to do so. Pleadings are statements of fact which require evidence for support. In the absence of such evidence no statement or submissions can be sufficient to dislodge the evidence of the respondent. The lower court, therefore, cannot be faulted for finding the appellant 100% liable for the accident.

On quantum, there is evidence from both doctors that the respondent suffered deep cut wound on the right forehead, fracture of the left seventh rib, bruises on both upper limbs, fracture of the neck of right femur, comminuted fracture of the mid shaft of the femur and deep cut on the left knee.

Dr. Okore called as a witness by the respondent produced his medical report and assessed his injuries at 30% permanent incapacity. He added that the implants installed into the respondent should not be removed because the injuries were very bad and if removed, the respondent was likely to suffer a re-fracture because the bones were shattered.

Dr. Wokabi on the other hand in the report produced in consent, he assessed the respondent's permanent incapacity at 25%. He was in agreement with Dr. Okore that the metal implants will not require removal, considering the age of the respondent and the fragile condition of his right leg.

The lower court considered the nature of the injuries the degree of permanent incapacity, the authorities cited and submissions made. I have looked at the authorities cited before the lower court and the submissions made by the parties in their submissions before me. Comparable injuries attract comparable awards. The Appellate court should hesitate to disturb the awards made by the trial court unless those awards are inordinately high or low so as to give a wrong assessment of the injuries sustained or if the court applied wrong principles in arriving at those awards.

Having gone through the authorities cited I am not persuaded that the award of general damages made by the lower court is inordinately high in the circumstances of the case. The injuries sustained by the respondent were very serious and left him with serious degrees of incapacity. He is going to live with metal plate in his leg for the rest of his life. I find no reason to disturb that award.

Special damages were specifically pleaded and strictly proved. The lower court however, did not include Ksh.11,000/- paid to PW 1 and PW 2 for the court attendance at the rate of Ksh.6,000/- and Ksh.5,000/- respectively. When this figure is added to Ksh.1,216,062/- the total comes to Kshs.1,227,062/-.

The Respondent pleaded loss of earning capacity in the amended plaint, in particular paragraph 6(b). He was 53 years old at the time of the accident earning a gross salary of 15,000/- per month. His net salary, 13,611/-. The respondent testified that as a result of the accident, his leg was cut and had a hip replacement as a result of which his leg was shortened, and going by the report by Dr. Wokabi, this was by 8cm. He could not therefore continue to work and was laid off. He did not have any other qualifications other than a driver.

The trial court used the gross figure of Ksh.15,000/- per month to calculate loss of earning capacity and I believe this was a misdirection. The respondent having pleaded his net salary was Ksh.13,611/- per month, that is the correct figure which would have been used. I agree that the multiplier of seven years was not unreasonable, considering the circumstances and the profession of the respondent. The loss of future earning capacity adds up to Ksh.13,611 x 12 x 7 = Ksh. 1,143,324/-. The respondent was entitled to costs of the suit and interest at court rates.

In the end, I find that this appeal must fail and it is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 7th day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE