REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 150 OF 2014

PERIS NDUTA KANGAU .....…….1ST APPELLANT

KENETH MUCHENE KIMANI ..... 2ND APPELLANT

VERSUS

JOSEPH MWAURA NJOROGE.....……... RESPONDENT

(Being an appeal from the judgement of Hon. D. K. Mochache Principal Magistrate delivered by Hon. Chepseba on the 28th March 2014 in Milimani CMCC No. 8034 of 2010)

JUDGEMENT

1. By an amended plaint dated 14th January 2013, Joseph Mwaura Njoroge, the respondent herein sued, before the Chief Magistrate's Court, Milimani Commercial Courts, Peris Nduta Kangau and Keneth Muchene Kimani, the 1st and 2nd appellants respectively and sought for payment of both special and general damages for the injuries he sustained in a road traffic accident which occurred on 30th June 2010 along Rongai-Kiserian Road. Hon. D. K. Mochache, learned Principal Magistrate heard the suit and on 28th March 2014 she gave judgement in favour of the respondent by awarding a sum of ksh.1,500,000/=.

2. The appellants felt aggrieved by the aforesaid decision hence they preferred this appeal and put forward the following grounds:

> ***i. THAT the learned Trial Magistrate erred in law and in fact by finding the appellant 100% liable in negligence in disregard of the sum evidence adduced at the hearing in regard to the plaintiff's evident contributory role in the road accident.***
>
> ***ii. THAT the learned Trial Magistrate erred in fact and in law by holding the appellants wholly liable for causing the accident while in context and fact, the respondent negligently and or directly contributed to the occurrence of the accident.***
>
> ***iii. THAT the learned Trial Magistrate erred in law and in fact by awarding general damages for pain and suffering at kshs.1,500,000/= which award was inordinately high and excessive and not commensurate with the injuries allegedly sustained by the plaintiff.***
>
> ***iv. THAT the learned Trial Magistrate erred in law and in fact by reaching a decision contrary to the principle of stare decisis, that comparable injuries should be compensated by comparable awards.***
>
> ***v. THAT the learned Magistrate misapprehended the severity of the injuries and further erred in law and in fact by arriving at an award that is so manifestly high as to amount to an erroneous estimate of any loss or damage suffered by the respondent.***

3. Though the appellants put forward a total of five grounds of appeal, it is apparent that those grounds revolve around the twin issues touching on liability and quantum.

4. On liability, the appellant is of the submission that the trial Principal Magistrate fell into error when she found the appellants wholly liable yet there was credible evidence that the respondent was to blame. The appellants are of the submission that the respondent is guilty of contributory negligence.

5. The respondent on the other hand is of the submission that the 2nd appellant is wholly to blame for the accident. It is argued that the 2nd appellant was charged with the offence of reckless driving of a motorcycle which charge the 2nd appellant pleaded guilty. I have re-evaluated the evidence that was presented before the trial court and further considered the rival submissions. The charge sheet and proceedings in **Kibera Traffic Case no. 3816 of 2010 R = vs= Kenneth Muchene Kimani** were produced as exhibits in evidence.

6. The 2nd appellant faced a charge of reckless driving contrary to Section 47(1) of the Traffic Act (Cap 403 Laws of Kenya). The particulars of the charge are that;

> **"On 30th day of June 2010 at about 8.00pm along Magadi Road in Kajiado North District of the Rift Valley Province being the driver of motor cycle registration no. KMCB 041B make SKYGO drove the said motorcycle recklessly by swerving to the left side of the road and knocked down one male adult pedestrian namely Joseph Mwaura Njoroge causing grievous injuries to the said pedestrian."**

7. The recorded proceedings show that the 2nd appellant pleaded guilty to the charge and confirmed the facts as outlined on the charge sheet and as read in court to be correct. The 2nd appellant was therefore convicted on each count and was sentenced to a fine of ksh.5,000/= in the first count. There is no evidence that he has challenged the conviction and sentence on appeal.

8. The respondent (PW1) stated before the trial court that on 30.6.2010 at around 8.00pm he alighted from a matatu which had parked at the extreme left. He said he was knocked down by a motor cycle which had overtaken on the wrong side of the road. PW1 further stated that instead of riding on the main road, the motorcyclist rode off the road where he was alighting. One Patrick Mantai Ndegwa (DW1) testified and stated that the 2nd appellant had requested him to ride him to Rongai on the motocycle. He stated that he rode on the left hand side of the road. He said that he saw the respondent suddenly emerge from matatu the left side of the road. He claimed he tried to apply brakes but it was too late. He is of the opinion that the passenger was wholly to blame.

9. In my view it is clear that the motorcycle rider rode on the wrong side of the road. It would appear he was in high speed hence he could not avoid knocking down the respondent. The 2nd appellant who was the motocycle rider pleaded guilty to the charge of reckless driving. The trial magistrate in my humble view came to the correct decision on liability therefore that decision cannot be disturbed.

10. On quantum, the appellants are of the submission that the award of ksh.1,500,000/= as general damages for pain and suffering was high and excessive. The respondent is of the submission that the award is neither low nor high therefore the same should not be interfered with.

11. It is not in dispute that the respondent sustained the following injuries as a result of the accident.

Fracture of the scapula

Fracture of the tibia and fibula

Cuts and bruises to the body

Deep cut wounds to the right maxilla over the left leg.

12. The respondent had asked the trial court to award him ksh.2,900,000/= and cited two cases vizly:

Samuel Mwangi Kamau =vs- Joseph Kimemia & Another (2001) eKLR where the claimant was awarded ksh.1,000,000/=.

Nairobi HCCC no. 220 of 1997 Timo Kalevi Jappinene & Another, where this court awarded a sum of kshs.1,750,000/=.

13. The appellants on the other have proposed the respondent to be paid ksh.250,000/=. The respondent relied on **Nairobi H.C.C.A no. 13 of 2001 Mastermind Tobacco Ltd =vs= Felix Okello** where a sum of kssh.250,000/= for a fracture of the lower leg.

14. The record shows that the learned Principle Magistrate considered the nature of injuries and the authorities cited before her court. She noted that in the authorities cited the injuries were slightly different compared to those the respondent sustained. She therefore found a figure of ksh.1,500,000/= to be reasonable.

15. Having re-evaluated the proposals made by the parties before the trial court and having considered the rival submissions before this court, I am convinced that the learned Principal Magistrate made an award which is neither high nor low. The same appears to be within the range of similar awards. I find no merit in the appeal against quantum.

16. In the end, this appeal is found to be without merit. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 13th day of November, 2019.

…….……

J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent