REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 38 OF 2018

JAMES NGUGI..... APPELLANT

VERSUS

PATRICK KUNGU..... RESPONDENT

(An appeal from the judgment and decree of Hon. M. Chesang, RM, delivered on 25th October, 2018 in Kajiado CMCC No. 396 of 2016)

JUDGMENT

1. This is an appeal from the judgment and decree of the chief magistrate's court at Kajiado (**Hon Chesang, (Resident Magistrate),** dated 25th October 2018 in CMCC No. 396 of 2016.The respondent who was the plaintiff before the trial court, sued the appellant (the defendant in the lower court) for damages for injuries he sustained in a road traffic accident that occurred on 20th October 2015 along Loitokitok Email road involving motor vehicle Nos. KCC 849S and KBK 089G, blaming the latter vehicle for the accident. He was a passenger in motor vehicle registration No. KCC 849S.

2. After hearing the case, the trial court found in favour of the respondent in a judgment delivered on 31st October 2018 and awarded him general damages of Kshs.500,000, special damages of Kshs. 3,500 /=, cost and interest.

3. The appellant was aggrieved by the judgment on both liability and quantum and filed a memorandum of appeal dated and filed on 16th November, 2018 and raised the following grounds of appeal, that;

> ***1) The learned magistrate erred in law and fact in finding that the appellant was negligent or at all in the absence of any concrete evidence to demonstrate the same.***
>
> ***2) The learned magistrate erred in law and fact in failing to appreciate the defence of the appellant and thereby arriving at an erroneous conclusion of condemning the appellant to a 100% liability and no particulars of negligence has been proved or at all.***
>
> ***3) The learned magistrate erred in law and fact in failing to apportion liability against the parties and the third party despite the fact that an interlocutory judgment against the third party had been entered.***
>
> ***4) The learned magistrate erred in law and in fact in awarding excessive general damages for the soft tissue injuries in favour of the respondent without any legal or evidential justification.***
>
> ***5) The learned magistrate erred in fact in failing to appreciate the long established principle of stare decisis, and arriving at an erroneous conclusion relating to liability and damages***

4. The appellant prayed that the appeal be allowed with costs; the award in damages be set aside and an order be made substituting the said award on damages and that this court do make such further and other orders as it may deem just in the circumstances

Appellant's submissions

5. Miss Muragwa, learned counsel for the appellant, submitted highlighting their written submissions dated 7th October 2019 and filed in court on 14th October 2019, that the trial magistrate erred in finding that the appellant was negligent; that she also erred in finding that the appellant was 100% liable and that the damages awarded were excessive for the injuries the respondent sustained.

6. According to counsel, the trial court relied on an erroneous interlocutory judgment entered on 7th March, 2018 against the appellant for alleged failure to file a defence, when in fact he had entered appearance and filed defence on 20th March, 2016.

7. On the issue of negligence, counsel submitted that the respondent did not discharge the burden of proof that the appellant was negligent. He argued that according to the evidence, the respondent was asleep at the time of the accident and no material evidence was adduced to establish how the accident occurred.

8. Counsel faulted the trial court for holding the appellant 100% liable without any evidence and failing to apportion liability among the parties. In counsel's view, the trial court should have endeavoured to establish which party was to blame for the accident and at best, liability should have been apportioned equally amongst the appellant, the respondent and the 3rd party.

9. On quantum, counsel argued that the award of damages was inordinately high for the soft tissue injuries the respondent sustained with no permanent incapacity. The trial court awarded general damages of Kshs. 500,000 which, according to the appellant, was inordinately high and should be interfered with and set aside. Counsel further faulted the trial court for ignoring relevant decisions cited to it on the issue including ***Harrison Mbogo v The Attorney General*** [2004] eKLR where a plaintiff who sustained head injuries with concussions and loss of consciousness for 5 days, multiple cut wounds in left hands and scalp, and soft tissue injuries but was awarded less.

10. She urged the court to allow the appeal with costs and set aside the award of general damages, Kshs.500,000/=.

Respondent's submissions

11. Miss Matututu, learned counsel for the respondent, submitted also highlighting their written submissions dated 9th October 2019 and filed on 14th October 2019, in support of the trial court's judgment. Counsel submitted that the respondent gave uncontroverted evidence and the decision was made after the respondent proved his case on a balance of probabilities. According to counsel, the respondent proved negligence against the respondent for the occurrence of the accident.

12. It was counsel's submission that the default judgment entered against the Third party placed liability on them at 100%; that the appellant failed to call any evidence and, therefore, the decision on liability was based on the absence of any evidence. In counsel's view, the defence was unsubstantiated. Reliance is placed on ***linus nganga kiongo and 3 others vs. Town council of kikuyu*** [2012] eKLR for the submission that although the defendant has denied liability in the defence the fact that no witness was called to give evidence on his behalf means that respondent's evidence was unchallenged.

13. Counsel further argued that where a party fails to call evidence in support of its case, that part's pleadings remain mere statements of fact since the party fails to substantiate its pleadings. In that regard, counsel submitted, failure to adduce evidence meant that the respondent's evidence against appellant was uncontroverted and therefore unchallenged.

14. Regarding quantum, counsel submitted that the appellate court can only interfere with an award of damages if it is satisfies that the trial court took into account irrelevant factors or failed to take into account relevant factors in assessing damages, or that the amount of damages is so inordinately high or low as to amount to an injustice.

15. Counsel argued that the respondent sustained head concussion, deep cut wound at the frontal scalp, left temple, left hand and elbow and suffered pain and blood loss, a fact that was contained in the medical evidence including the referral letter from Loitokitok hospital, medical report and P3 form whose production were uncontested by the appellant during the hearing.

16. Miss Matututu argued that Kshs. 60,000/= proposed by the appellant is not adequate compensation; is inordinately low and that the case law relied on by the appellant, (***Harisson Mbogo v A.G.*** [2004] eKLR***)*** is not reflective of the true award for the injuries suffered by the respondent. In the view of counsel, the court exercised its discretion in making an award based on the injuries and prevailing awards on similar injuries.

17. According to counsel, the award of Kshs. 500,000 was reasonable in the circumstances and relied on ***Lucy Ntibuka v Benard Mutwiri & others*** [2007] eKLR where an award of Kshs. 500,000/= for comparable injuries. He also relied on ***Francis ochieng and another vs. Alice Kajimba*** [2015] eKLR where an awarded Kshs. 350,000 was made for injuries comparable to those the respondent in the present appeal sustained. Se urged the court to dismiss the appeal with costs.

Determination

18. I have considered this appeal, submissions made on behalf of the parties and the authorities relied on. This being a first appeal, it is by way of a retrial and this court has a duty to reanalyse, reconsider and reevaluate the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

19. In In ***Selle and Another v Associated Motor Boat Company Limited and others*** [1968] EA 123, the East African Court of Appeal held that:

> ***"An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appear either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."***

20. Further in ***Williamson Diamonds Ltd and another v Brown*** [1970] EA 1, the same court held that:

> ***"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."***

21. And in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] e KLR the Court of Appeal stated;

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"***

22. **PW1 Patrick Kungu,** the plaintiff in the lower court, adopted his statement filed together with the plaint. He told the court that he blamed the driver of motor vehicle KCC 840C for the accident. He told the court that there was also a probox vehicle that was also involved in the accident but he could not remember its registration number. He told the court that he was it on the head and hand; that he had not healed and that the hand cannot do anything. He produced his documents in the list of documents as Pex 1-7.

23. In the statement, the witness stated that on 20th October 2015, he was travelling as a passenger in motor vehicle KCC 846S along Loitokitok Emali road when the driver of motor vehicle registration No. KBK089G negligently and recklessly drove the said motor vehicle at high speed , lost control and caused it to collide with motor vehicle KCC846S as a result of which he sustained injuries, namely; head concussion, deep cut wound on the frontal scalp, deep cut wound on the left temple, deep cut wound on the left hand and left elbow, pain and blood loss. He stated that he blamed the driver of motor vehicle registration no. 089G.

24. At the close of the respondent's testimony, the appellant's counsel did not cross examine him. The respondent then closed his case and so did the appellant's counsel without offering evidence. The trial court then fixed the matter for mention on 21st August 2018 to confirm filling of written submissions. On that day, nothing happened. According to the record, on 11th September the matter was mentioned and judgment reserved for 24th September 2018.

25. Judgment was finally delivered on 25th October 2018. In a brief judgment, the trial court stated;

> ***"The plaintiff avers that he was a passenger in the motor vehicle registration No. KCC 849S when the driver of motor vehicle registration No. KBK 089G negligently drove the said motor vehicle at a high speed, lost control and as a result, the same collided with motor vehicle registration No. KCC 849S, at paragraph 6 of the plaint, and corroborated by Dr. G.K. Mwaura, P3 form and a hospital referral from Loitokitok hospital. The said documents are not disputed.***
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> ***I have considered the submissions on record filed by both parties, the injuries suffered and the authorities cited.***
>
> ***There was no testimony adduced, or witness statement filed by the defendant herein. As such, and also for the reason that interlocutory judgment was entered against the third party herein, the defendant and the third party are held liable for the accident, jointly and severally."***

26. The appellant was represented during the hearing when the respondent testified but opted not to put questions to him. The appellant did not also call evidence once the respondent closed his case. Whatever the respondent told the court was therefore not challenged. According to the respondent, the driver of motor vehicle KBK 089G drove that motor vehicle at a high speed and in a reckless and negligent manner and caused it to collide with motor vehicle KCC 849S in which he was travelling as a passenger and as a result, he sustained injuries.

27. The respondent blamed the driver of motor vehicle KBK O89G for the accident. Although he was recorded as blaming the driver of motor vehicle KCC 849S, his statement which he adopted as his evidence, clearly referred to motor vehicle registration No. KBK 089G and this was not challenged by the appellant.

28. According to the record of the trial court, the appellant entered appearance and filed a defence dated 13th July 2016 and filed on 20th July 2016. He denied the respondent's claim contending that the accident was caused by the plaintiff's negligence or that of the driver of motor vehicle, registration no. KCC 849S. According to the defence, the respondent was blamed for failing to fasten or fasten properly the seat belt, failing to take care and precaution while driving in that motor vehicle, causing the accident or contributing to the accident.

29. The respondent was a passenger in motor vehicle registration No. KCC849S and for that reason, he was not in control of the vehicle and therefore he could not have caused or contributed to the occurrence of the accident. Secondly, the appellant or his witness did not testify to establish their allegations of negligence against the respondent. Not even questions were put to the respondent in cross examination to show that he somehow caused or contributed to the occurrence of the accident. The appellant's argument that the respondent was to blame for the accident had no basis either before the trial court or in this appeal.

30. The respondent's alternative contention was that the driver of motor vehicle registration No. KCC849 caused the accident. The appellant pleaded particulars of negligence he attributed to the driver of that motor vehicle, including; driving the motor vehicle in a careless manner and at an excessive speed; failing to slow down, apply brakes, stop or control the vehicle in a manner that would have avoided the accident. It was also contended that he failed to keep a proper look out, failed to have regard to other road users, failed to prevent the accident, driving without due care and attention and causing the accident.

31. These were facts that the appellant was required to prove against the respondent or the driver of motor vehicle KCC 849S. However as already pointed out, the appellant did not call evidence of his own to prove his allegations against the driver of that particular motor vehicle. The respondent's counsel did not even cross examine the respondent on whether the vehicle he was travelling in was being driven carelessly, negligently or at high speed or at all.

32. The law places on the person who asserts the burden to prove his assertion. Section107 through 109 of the Evidence Act are clear on

this. Section 107 states at subsection (1)that; "***whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*** The section further states in subsection (2) that; "***When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."*** The section placds the burden of proof of the contention that the respondent or driver of motor vehicle KCC849S were to blame for the accident on the appellant.

33. Similarly, section 108 provides that the of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side, while section 109 is clear that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless any law places that the burden proof of that fact on any particular person. In that regard, the respondent bore the burden of proving the fact that the accident was solely caused or substantially contributed to by the respondent and or the driver of motor vehicle registration No. 849S which he did not do. For that reason, the allegations of contributory negligence on the part of the respondent or the driver of the motor vehicle he was travelling in were not proved.

34. That done, I now turn to consider the issue of liability. The trial court found that liability had been established against the appellant. The respondent was a passenger in motor vehicle Registration No. 849S. He gave evidence on how motor vehicle registration KBK 089G was negligently driven and as a result it lost control and collided with motor vehicle KCC 849S. He produced documents, including a police abstract to confirm that indeed an accident occurred involving the two vehicles and that he was injured as a result of that accident.

35. As already shown above, no questions were put to the witness to cast doubt to his testimony that motor vehicle KBK 089G was being driven recklessly and that it lost control. That being the case, I am satisfied that the issue of liability was not seriously contested and I therefore see no reason to interfere with the trial court's finding on this issue.

36. Before concluding on this, there is the issue of the third party. An application was made by the appellant to join Mburu Mbuthia Zakayo as a third party in the suit before the trial court. The reason was that the third party's motor vehicle KCC 849S contributed to the occurrence of the accident. Leave was granted and service effected through substituted service.. The third party did not enter appearance or file a defence.

37. The respondent applied for interlocutory judgment which was entered against the appellant and the third party despite the fact that the appellant had in fact entered appearance and filed a defence. The respondent did not however call evidence to establish his claim against the third party. that being the case, no liability was established against the third party and the interlocutory judgment could not mean much without proof of negligence against the third party.

38. Regarding quantum, the appellant has argued that the award of damages by the trial court was excessive and should be interfered with by this court. According to the appellant, general damages of Kshs 500, 000/= were excessive considering the injuries the respondent sustained. In their view, Kshs. 60, 000/= would have been adequate compensation. He relied on a number of decisions and urged this court to set aside the trial court's award.

39. The respondent on his part argued that the trial court was right and took into account relevant factors, including the nature of the injuries and recent decisions on similar awards for similar injuries, and urged the court not to interfere with the trial court's award.

40. When the hearing took place before the trial court on 31st July 2018, the respondent adopted his witness statement and produced his list of documents as exhibits. This was not objected to by the appellant's counsel who was present. The respondent testified that he was injured on the head and hand and that the injuries had not healed. The appellant's counsel did not cross examine him on the extent of the injuries and whether or not they had healed. That left only the respondent's evidence on record.

41. The respondent produced a medical report by Dr. Mwaura dated 26th January 2016. This was about three months after the accident. According to that report, the respondent sustained deep cut wounds on the frontal scalp, left temple, left hand and left elbow. He also suffered head concussion and pain and blood loss. The Doctor's findings at the time of examination were that the healing progress was fair, but the respondent complained of bouts of headaches, had residual scars on the frontal and left temporal regions, left hand and left elbow.

42. The trial court considered this evidence and awarded the respondent Kshs. 500,000/= general damages for pain and suffering which the appellant has termed excessive while the respondent maintains it was fair in the circumstances based on the injuries the respondent sustained. The appellant has urged this court to interfere with that award while the respondent has pleaded that the court should not.

43. The principles upon which an appellate court may interfere with a trial court's award are clear. An appellate court should not disturb quantum because, as the appellate court, it is of the opinion that had it heard the case in the first instance it would have given either a higher or lower award. That is, an appellate court will only disturb an award where it is inordinately high or inordinately low as to represent an erroneous estimate of damages.

44. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal stated;

> ***"[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

45. In ***Butt v Khan*** [1981] KLR 349, ***Law, J.A*** observed that:

> ***"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."***

46. And in ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (***1982 –88) 1 KAR 727, it was held that;

> ***"The principles 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 that 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***

47. in assessing quantum, the applicable principle is that similar injuries should as much as possible attract similar awards and therefore maintaining a level of similarity and predictability in awards. This is because assessment of damages is a difficult exercise. This was appreciated in ***Ugenya Bus Service v Gachiki*** (1976-1985) EA 575, where the court observed that general damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables and the imponderables which vary enormously making it a very heavy task. When the court struggles to make a reasonable award, it does not aim for precision or to give complete satisfaction but do the best it can in the circumstances of each case.

48. In ***Gicheru Morton and Another*** [2005] 2 KLR 333, the court opined that in assessment of damages, it must be borne in mind that each case depends on its own facts and that no two cases are exactly similar, and that awards of damages should not be excessive. This principle had been emphasized in ***Mohamed Juma v. Kenya Glass Works Ltd,*** CA NO. 1 of 1980, where the court again observed that an award of general damages should not be miserly but should also not be extravagant. The award should be realistic, reasonable and satisfactory.

49. I have gone through the trial court's record, considered and re-evaluated the evidence on record. The trial court awarded Kshs. 500,000/= for the injuries the respondent suffered. These were deep cut wounds on the frontal scalp, left temple, left hand and left elbow; head concussion, pain and blood loss. According to the Doctor's examination done about 3 months after the accident, the injuries were healing well but the respondent complained of bouts of headaches. He had residual scars on the frontal and left temporal regions, left hand and left elbow. There was no permanent incapacity assessed by the doctor.

50. The respondent relied on ***Francis Ochieng and another vs. Alice Kajimba*** [2015] eKLR where an award of Kshs. 350,000 was made for comparable injuries.

51. I have considered the injuries the respondent sustained and the award made by the trial court. From the medical evidence, the respondent suffered soft tissue injuries that were healing well and there was no suggestion that they were likely to cause permanent incapacity or were likely to recur or that they needed specialised treatment. At the time of hearing, in July 2018, there was no second medical report to show that the injuries had not healed to warrant such an award. The trial court did not take these factors into account when making the award of Kshs. 500,000/=.

52. In that regard the court failed to take into account relevant factors that injuries were healing. The trial also failed to appreciate that awards should not be miserly but also not be extravagant. An award should as much as possible be satisfactory and reasonable. The award of Kshs 500, 000 was, in my respectful view, inordinately high as to represent an erroneous estimate and amounted to injustice. An award of Kshs. 250,000 is, in my view, reasonable and appropriate for the injuries the respondent sustained.

53. For the above reason, I am satisfied that there is a basis for interfering with the trial court's discretion. Consequently, this appeal partially succeeds. The trial court's finding on liability against the appellant is upheld. Liability against the third party is set aside. The award of Kshs 500,000 is hereby set aside and replaced with the sum of Kshs. 250,000 against the appellant only. The amount on special damages is upheld. The respondent will have costs of the suit before the trial court and interest from the date of the judgment of the trial court.

54. Since the appeal has only partially succeeded, I order that each party bear their own costs of the appeal.

E C MWITA

JUDGE