



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 114 OF 2015**

**PETER WAINAINA KINYUA.....APPELLANT**

**ALIAS KINYUA PETER**

**VERSUS**

**PETER GITHENDI NJERI.....RESPONDENT**

**(Being an appeal from the Ruling delivered on 24<sup>th</sup> February, 2015**

**by Hon. A. W. Mwangi (Principal Magistrate)**

**Senior Principal Magistrate's Court at Kikuyu**

**in**

**SRMC No. 265 of 2010).**

**JUDGMENT**

1. Vide a plaint dated 30<sup>th</sup> August, 2010 the Respondent filed suit in the Lower Court claiming damages arising out of a Road Traffic Accident in which he was injured. The accident was attributed to the alleged negligence of the Appellant, his agent or servant.
2. The claim was denied as per the statement of defence dated 7<sup>th</sup> October, 2010. In the alternative, it was pleaded that the accident was solely caused by the Respondent.
3. The Respondent filed a reply to the defence and joined issues with the defence. The Respondent reiterated the contents of the plaint.
4. The trial court entered judgment in favour of the Respondent on a 100% liability basis. An award of Ksh.600,000/= was made as general damages and Ksh.2,500/= special damages.
5. The Appellant was dissatisfied with the said judgment and appealed to this court on the following grounds:
  - a. **That the holding on 100% liability was against the weight of the evidence.**
  - b. **That the trial magistrate disregarded the evidence that the Respondent was riding on unregistered motorcycle and without a driving licence and arrived at a finding that was against public policy.**
  - c. **That an award of general damages was excessive.**
6. The appeal was canvassed by way of written submissions which I have considered.
7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

8. The Respondent’s (PW2) evidence was that he was riding his motorcycle from Gitaru shopping centre heading towards Kikuyu. That the Appellant’s motor came from the opposite side at a high speed and attempted to overtake a matatu. That the Appellant’s motor vehicle hit a pothole, lost control and headed to where the motorcycle was off the tarmac. That the Respondent tried to swerve to his right hand side but the motorcycle was hit and thrown off the road to the left. The Respondent further testified that he sustained fractures of the right hand, right leg and lost consciousness.

9. During cross-examination, the Respondent maintained his line of evidence and stated that the motorcycle had not yet been registered but had lodged his registration documents which come out after the accident and he took the same to the police station two years later. The Respondent further testified that at the material time he had worn a helmet and a reflective jacket. The Respondent gave the time of the accident as about 6-7 p.m. and described the road at the scene of the accident as a two way traffic.”

10. PW1 PC Peter Mwanje Mburu produced the aforesaid police abstract No. 0117213 as an exhibit. The same reflects that the accident was still “pending under investigations.” However, the police abstract issued to the Appellant reflects that the rider was to blame for the accident and investigations were still pending. Confronted with the two police abstracts with different contents, PW1 who was not the investigating officer could not explain why the rider was to blame. His evidence was that rider was not charged with any offence.

11. DW1 Peter Karanja the driver of the motor vehicle on the other hand blamed the accident on the cyclist. His evidence was that he was driving from Wangige towards Kangemi using the Wangige – Kikuyu road. That he was in the process of joining the highway while overtaking some matatus while using the “accelerating lane” when his motor vehicle collided with the motorcycle. He blamed the motorcycle for using the wrong side of the one lane road, riding towards the wrong direction and not wearing a reflective jacket.

12. During cross examination DW1 described the “accelerating lane” as having no yellow line and meant for use by traffic going both ways and wide enough for two motor vehicles to use at the same time. DW1 testified that he did not see the motorcycle because of the matatu that was ahead of him.

13. The trial magistrate who visited the scene observed that the scene of the accident was on a two way traffic road. Thus both the motor vehicle and the motorcycle moving in opposite directions were still using their correct side of the road. The moving to the right by the motor vehicle to overtake the matatus on his left meant that he moved unto the path of the motorcycle which was from the opposite direction and on its correct side of the lane. The Appellant was therefore on the wrong side. The Appellant was overtaking in a careless manner bearing in mind that his evidence was that he could not see what was ahead of the matatu. In the circumstances, the same police abstract No. 0117213 that the Appellant was issued which states “pending under investigations” (the rider to blame) is not supported by any cogent evidence. Having evaluated the evidence, I am in agreement with the holding by the trial magistrate that the Appellant was 100% liable for the accident.

14. The Respondent’s evidence confirmed that the motorcycle had not been registered at the material time. The Respondent did not have any registration documents in court or the driving licence. The Respondent further testified that the motorcycle was registered later and he took the registration documents to the police. If a traffic offence had been committed in that regard, it was the duty of the police officers to charge the Respondent with a traffic offence. The failure to charge the Respondent with any traffic offence is of no import to the compensatory proceedings for the damages suffered by the Respondent. Indeed, one may wonder why the Appellant was also not charged in respect of the accident.

15. The medical evidence as per the medical report dated 2<sup>nd</sup> February, 2011 prepared by Dr. G. K. Mwaura which was produced as an exhibit reflects that Respondent sustained the following injuries.

- i. Communitted fracture – right femur
- ii. Proximal (elbow) communitted fracture right ulnar bone and a dislocation.
- iii. Cuts –forehead
- iv. Bruises arms and lower limbs

16. Admission was for one week. Treatment given included reduction and immobilization. The Respondent healed with residual scars on the forehead and right thigh with Metal implants *in situ*. Estimated costs of removal of the implants was given at Ksh.70,000/= in a low cost hospital and Ksh.180,000/= at a high cost hospital. There was a bony deformity at the elbow with limitations of movements at the elbow and pain when exerted. The doctor assessed the degree of permanent incapacity of the said elbow at 20%.

17. The trial magistrate disallowed the claim for further medical expenses and assessed the general damages at Ksh.600,000/=. I find the said award to be reasonable and within the range of comparable injuries and will not interfere with the same. (See for example **Florence Njoki Mwangi v Peter Chege Mbitiru [2014] eKLR** , **Joseph Musee Mua v Julius Mbogo Mugi & 3 others [2013] eKLR** where the awards made for injuries comparable to the case at hand ranged between Ksh.700,000/= to 1,300,000/=).

18. As stated by the Court of Appeal in case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**

**“...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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”**

19. In the upshot, I find no merits in the appeal. The appeal is dismissed with costs.

**Date, signed and delivered at Nairobi this 5<sup>th</sup> day of July, 2018**

**B.THURANIRA JADEN**

**JUDGE**