REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 221 OF 2013

PETER KIMANI NJEHIA .....1ST APPELLANT

MAGDALEN WANGUI NJIHIA ..... 2ND APPELLANT

-V E R S U S –

PETER MURIITHI MBOGUA .....RESPONDENT

(Being an appeal from the judgement of the Senior Resident Magistrates Court at Kikuyu, Hon. Doreen Mulekyo, delivered on 19th March, 2010 in SRM No. 201 of 2005, Nairobi)

JUDGEMENT

1. Peter Muriithi Mbothua, the 1st respondent herein, filed a compensatory suit in the Senior Resident Magistrate's Court, Kikuyu against Peter Kimani Njehia and John Kaharu Njau, the 1st appellant and the 2nd respondent herein respectively for the injuries he sustained on 24.8.2002 in a road traffic accident off the Kikuyu-Wangige road. Hon. Doreen Mulekyo, learned Principal Magistrate heard the suit and entered judgment in favour of the 1st respondent and against the appellant and the 2nd respondent. The 1st respondent was awarded ksh.150,000/=.

2. Being aggrieved, Peter Kimani Njehia and Magadalen Wangui Njihia, the 1st and 2nd appellants respectively preferred this appeal and put forward the following grounds:

i. THAT the learned trial magistrate erred in law and in fact in failing to find that the 2nd defendant was wholly to blame for the subject road traffic accident.

ii. THAT the learned trial magistrate erred in law and in fact in finding that the 1st and 3rd defendants were 40% jointly liable for the subject accident without any supporting evidence.

iii. THAT the learned trial magistrate erred in law and in fact in assessing general damages in the sum of ksh.150,000/= which was excessive in the circumstances.

iv. THAT the learned trial magistrate erred in law and in fact in failing to find that the driver of motor vehicle registration number KAB 142L, owned by the 2nd respondent, was wholly to blame for the subject accident.

v. That the learned trial magistrate erred in law and in fact in failing to take into account the fact that the driver of motor vehicle registration number KAB 142L, owned by the 2nd respondent was charged and convicted for careless driving in respect of the subject accident in Traffic Case no. 1156 of 2002 – Kikuyu, when apportioning liability between the defendants.

vi THAT the learned trial magistrate erred in law and in fact in failing to dismiss the suit against the 1st and 3rd defendants due to lack of sufficient evidence against them.

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have further considered the rival submissions. Though the appellants put forward a total of six grounds of appeal, those grounds revolve around the twin issues of liability and quantum. It is the submission of the appellants that the trial magistrate erred when she failed to hold John Kaharu Njau, the 2nd respondent herein, wholly liable for the accident.

4. It is argued that the matatu driver could not have by any chance caused the accident were it not for the lorry which veered of the road. It was pointed out that it was therefore wrong to apportion 40% liability on the 1st and 2nd appellants.

5. The 2nd respondent is of the submission that the trial Principal Magistrate did not err in apportioning liability as against the appellants. The 1st respondent was of a similar argument as that of the 2nd respondent that the trial magistrate committed no error in apportioning liability. It was pointed out that the matatu was moving at high speed that when it was hit by the lorry it lost control and hit the 1st respondent.

6. It is apparent that the learned Principal Magistrate apportioned as follows:

a. 1st and 2nd appellants 40% liability

b. 2nd respondent 60%

7. The 1st respondent told the trial court that he was standing at a bus stop waiting to board a matatu when he saw lorry registration no. KAB 142L hit the matatu registration no. KAP 245V from behind and the matatu lost control as a result and hit him. The learned Principal Magistrate stated that she is persuaded that had the lorry not hit the saloon car, the 1st respondent would not have been knocked by the saloon car. She therefore placed greater liability of 60% on the 2nd respondent while the appellant shoulders 40%. It should be noted that the 1st respondent was the only party who testified while the defendants (1st appellant, 2nd respondent and the 2nd appellant) did not testify.

8. Liability was therefore determined on the basis of the evidence of the 1st respondent who stated that he was off the road at Muthure bus stage waiting to board a vehicle when he saw motor registration no. KAB 245V being hit by lorry registration no. KAP 142L which in turn made KAP 245V hit him. The 1st respondent further stated that the lorry rammed into the saloon car from behind. He further stated that motor vehicle registration no. KAP 245V approached as if to enter the stagebefore it was knocked.

9. After analysing the evidence tendered, I am convinced that the learned Principal Magistrate arrived at the correct decision in apportioning liability. The appellant cannot escape blame for the accident. It is clear from the evidence of the 1st respondent which evidence was never controverted that motor vehicle registration no. KAP 245V which was in front of the lorry registration KAB 142L had approached as though to enter the bus stage and that is when it was hit.

10o. In fact in cross-examination the 1st respondent stated that motor vehicle registration no. KAP 245V had slowed down as if it was coming to stop before it was hit. I am satisfied the trial magistrate gave the appropriate percentage on liability.

11. On quantum, the appellants are of the submission that the award of ksh.150,000 to the 1st respondent is excessive. The 1st respondent urged this court not to disturb the award arguing that the same is commensurate with comparable awards for similar injuries.

12. It is not disputed that the 1st respondent suffered a fracture of the humerous which eventually healed. It is also the evidence of the 1st respondent that he has not regained full use of his arm due to the persistent pains on the part which was injured. The parties submitted authorities indicating that the court has in the past given awards ranging between ksh.100,000/= and ksh.150,000 for such injuries.

13. The case which was appeared relevant to this matter is that of **Bernard Muga Nyahoro =vs= James Mutiti Ngugi & Others Nairobi H.C.C.C 584 of 2002** where the plaintiff was awarded ksh.150,000/= as damages for a fracture of the left humerous and soft tissue injuries. The decision was made in 2003 about 15 years ago. In the circumstances I find the award of ksh.150,000 not excessive.

14. In the end, I find no merit in this appeal. It is dismissed in its entirety with costs to the 1st respondent as against the appellants.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents