



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 686 OF 2013

PETER KAROKA aka NGIGE.....APPELLANT

- V E R S U S -

MBALUKA MALONZA aka ERIC1ST RESPONDENT

KYALO KIMWELI 2ND RESPONDENT

FARGO COURIER LIMITED..... 3RD RESPONDENT

(Being an appeal from the judgement and decree of Hon. C. Obulutsa (Mr) Ag. Chief Magistrate in Nairobi CMCC No. 2723 of 2012 delivered on 26th November 2013)

JUDGEMENT

1. Mbaluka Malonza aka Eric, the 1st respondent herein filed a compensatory suit before the Chief Magistrate's Court, Milimani Commercial Courts against Peter Karoka aka Ngige, Kyalo Kimweli, Fargo Courier Ltd and Car Master Ltd for the injuries he sustained from a road traffic accident which occurred on 10.9.2011 involving motor vehicles registration NO.KBA 165Z and KBJ 149N.

2. The 1st respondent was a passenger in motor vehicle registration no. KBA 165Z owned by Fargo Courier Ltd, the 3rd respondent herein which was being driven by Kyalo Kimweli, the 2nd respondent herein.

3. Peter Karoka aka Ngige, the appellant herein, was the registered owner and driver of motor vehicle registration no. KBJ 149N.

4. The suit was defended by the appellant and the 2nd and 3rd respondents.

5. Hon. C. Obulutsa, learned Chief Magistrate found the appellant and the 3rd respondent equally to blame for the accident.

6. On quantum the 1st respondent was awarded as follows:

<i>General damages</i>	<i>ksh.900,000/=</i>
<i>Special damages</i>	<i>ksh. 49,485/=</i>
<i>Doctors attendance</i>	<i>ksh. 5,000/=</i>
<i>Net total</i>	<i>ksh.1,029,485/=</i>

The 1st respondent was also awarded costs and interest.

7. Being aggrieved by the aforesaid decision, the appellant preferred this appeal and put forward the following grounds in his memorandum.

i. THAT the learned trial magistrate erred in law in failing to appreciate the evidence on liability and thereby reaching a wrong finding thereon.

ii. THAT the learned trial magistrate erred in law and in fact in making a finding on liability that was not supported by the evidence on record.

iii. THAT the learned trial magistrate erred in law and in fact in reaching a finding that the appellant was liable at 50%.

iv. THAT the learned trial magistrate erred in law and in fact in making an award on general damages that was inordinately high.

v. THAT the learned trial magistrate erred in law and in fact in failing to consider and/or appreciate the appellant's submissions.

8. When the appeal came up for hearing learned counsels recorded a consent order to have the appeal disposed of by written submissions.

9. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. The grounds put forward on appeal revolve around the twin issues of liability and quantum.

10. It is the submission of the appellant that the learned chief magistrate erred when he apportioned 50% liability against him. The appellant pointed out that the order on liability was not supported by evidence.

11. The appellant also stated that the 2nd respondent should be held wholly liable for the accident.

12. The 1st respondent submitted that the trial court arrived at the correct decision on liability hence the order should not be interfered with.

13. The 1st respondent pointed out that the two accident motor vehicles collided in the middle of the road therefore it was difficult to solely lay blame on one.

14. The 2nd and 3rd respondents submitted that the appellant should be held wholly to blame since he admitted that he saw the oncoming headlights of motor vehicle registration KBA 165Z and he did nothing to swerve. It is not in dispute that the learned Chief Magistrate stated in his judgment that it was difficult to determine who was at fault between the two drivers and for this reason he proceeded to apportion liability in equal measure between the appellant and the third respondent.

15. On my part, I have re-evaluated the evidence tendered before the trial court. It is the evidence of Mbaluka Malonza (PW2) that motor vehicles registration KBA 165Z collided with KBJ 149N head on. He stated that he was seated at the front of KBA 165Z and that the motor vehicle was moving at a speed of 40km/hr.

16. PW2 did not assign any blame on any of the drivers.

17. Peter Karoko (DW1) told the trial court that he met an oncoming motor vehicle and he was prompted to slow down. DW1 claimed that motor vehicle registration no. KBA 165Z moved to his lane and collided with his motor vehicle.

18. He claimed the driver of KBA 165Z appeared to be drunk. DW1 stated that he braked before the collision.

19. A witness by the name Benson Kipyegon (DW1) stated that he was on board motor vehicle registration KBA 165Z when the motor vehicle was hit by an oncoming motor vehicle when the driver wanted to swerve to the right. He confirmed that the impact was on the middle of the road.

20. After a careful analysis of the evidence it is clear in my mind that there was no clear cut evidence indicating any of the drivers was wholly to blame.

21. I am satisfied that the magistrate came to correct conclusion that in the circumstances of this case, liability should be equally apportioned between the two drivers. Consequently, the decision on apportionment cannot be faulted.

22. On quantum, the appellant was of the submission that the award on general damages was inordinately high. The appellant proposed that the figure should be reduced from ksh.900,000/= to ksh.500,000/=. The appellant cited the following cases.

i. NAIROBI CIVIL APPEAL NO. 133 OF 2005, PAUL N. NJOROGE VS ABDUL SABUNI SABONYO (2015) Eklr

The appellant suffered multiple comminuted fracture of the right femur causing severance of major vessels to the right leg and shortening of leg by 5cm, displaced fracture of the left shoulder blade and swelling and stiffened knee. He underwent several surgeries over a period of two months. Metallic implants were inserted on the fracture sites. The learned trial judge assessed general damages for pain and suffering at ksh.200,000/= but the same was enhanced to ksh.500,000/= on appeal (P. N. Nambuye and S.G. Gatembu Kairu, JJA on 27.2.2015)

ii. NAIROBI H.C.C.A. NO. 555 OF 2015, MICHAEL AEKA KHAEMBA & 2 OTHERS VS. RASSANGYLLO MULI KUMUYU (2018) eKLR

The respondent suffered a fracture of the right femur. The learned trial magistrate assessed general damages at ksh.600,000/= but the same was reduced to ksh.200,000/= on appeal (L. Njuguna, J on 19.3.2018)

iii. KISUMU H.C.C.A NO. 8 OF 2013, THOMAS OMBIMA VS. SAMSON ANINDO MWENJE (2018) eKLR

The respondent sustained a comminuted fracture of middle 1/3 of the left femur, back injury, dislocation left ankle, chest injuries, soft tissue injuries to the elbow joint and soft tissue injuries to the left knee joint. The learned trial magistrate assessed general damages at ksh.950,000/= but the same was reduced to ksh.400,000/= on appeal (T. W. Cherere, J on 1.3.2018)

iv. KIAMBU HCCA NO. 25 OF 2013, FA (minor suing through next friend and father AFWK VS. KARIUKI JANE & ANOTHER (2018) eKLR

The appellant suffered a degloving injury left ankle and fracture of the left distal femur. The learned trial magistrate assessed general damages at ksh.500,000/= and the same was upheld on appeal (B. Thurairaja on 6.7.2018)

v. EMBU HCCA NO. 25 OF 2013, FRANCIS MAINA KAHURA VS. NAHASHON WANJAU MURIITHI (2015) eKLR

The respondent suffered a segmental fracture of the mid-shaft right femur and a cut wound on the right knee. He was treated as an inpatient for about 3 months where he underwent surgery for reduction and internal fixation of the fracture. The fracture healed with permanent shortening of the leg by 2cm. The learned trial magistrate assessed general damages at ksh.850,000/= but the same was reduced to ksh.500,000/= on appeal (D.D. Majanja, J on 23.4.2015)

vi. KISUMU HCCA NO. 40 OF 2014, ELISHA AKELLO RAGA VS SHAJANAND HOLDINGS LIMITED AND ANOTHER

The appellant sustained a cut wound on the right orbital area, blunt trauma to the chest, contusion on the right hip joint leading to dislocation of the right hip, bruises on the right knee and fracture of the femur. As a result of the injuries the appellant had difficulty walking on the right limp and was using a walking stick. The fracture of the right femur malunited leading to shortening of the leg. As a result the appellant was expected to suffer post-traumatic osteoarthritis of the right hip joint and his permanent disability was assessed at 10%. The learned trial magistrate assessed general damages at ksh.450,000/= and the same was upheld on appeal (D.S. Majanja, J on 20.12.2016)

23. The 1st respondent on the other hand was of the submission that he sustained serious injuries. The 1st respondent stated that an award of ksh.900,000/= was within the range of comparable injuries hence it cannot be said to be inordinately high.

24. The 2nd and 3rd respondents were of the submission that the award on general damages of ksh.900,000/= was inordinately high and went ahead and proposed a sum of ksh.600,000/= to be sufficient.

25. I have considered the cases cited by the parties. It is not in dispute that the 1st respondent suffered as a result of the accident, a fracture of the left femur. The available cases cited show that for such an injury the courts have awarded sums of between ksh.200,000/= and ksh.750,000/=.

26. With respect, I think an award of ksh.900,000/= was abit high in the circumstances. I am satisfied that an award of ksh.800,000/= is sufficient.

27. In the end, the award of ksh.900,000/= as general damages for pain and suffering is set aside and is substituted with an award of ksh.800,000/=.

28. In the end, the appeal as against liability is dismissed and the appeal against the award of general damages of ksh.900,000/= is allowed. Consequently the aforesaid figure is set aside and is substituted with an award of ksh.800,000/=.

29. For the avoidance of doubt the decision on appeal is as follows:

i. The award of ksh.900,000/= as general damages is set aside and is substituted with an award of ksh.800,000/=.

ii. The awards on special damages and doctor's attendance fees to remain at ksh.49,485/= and ksh.5,000/= respectively.

iii. In the circumstances of this appeal a fair order on costs is to direct which I hereby do that each party meets its own costs.

iv. The 1st respondent to have costs of the suit based on the new figures given on appeal with interest at court rates from the date of judgment in the trial court until full payment.

Dated, Signed and Delivered in open court this 2nd day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents