REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 228 OF 2016

GEORGE GICHANGA KARANJA.....1ST APPELLANT

JOMON AGENCIES LIMITED.....2ND APPELLANT

VERSUS

MWANGI NDERITU NGATIA.....RESPONDENT

JUDGMENT

1. The 1st and 2nd appellants were the defendants in a suit that was instituted in the lower court by the respondent (then the plaintiff) in which the respondent sought both general and special damages for personal injuries sustained in an accident which occurred on 21st July 2008 involving his motor vehicle registration number KAT 806V and motor vehicle registration number KAE 618J owned by the 2nd appellant which was being driven by the 1st appellant at the material time.

2. The respondent also prayed for damages for loss of business earnings and personal income; the cost incurred in repairing the material damage occasioned to his vehicle in the accident and other related expenses; costs of the suit and interest.

The particulars of negligence attributed to the 1st appellant as a servant and or agent of the 2nd appellant and the particulars of special damages claimed by the respondent were pleaded in paragraphs 5, 11, 12 and 13 of the amended plaint dated 30th November 2012.

3. In their joint amended statement of defence, the appellants denied each and every allegation made against them in the amended plaint and put the respondent to strict proof thereof. In the alternative, the appellants averred that if the accident in question occurred which was denied, the respondent being the driver of motor vehicle registration number KAT 806V solely caused the accident by negligently and recklessly driving the aforesaid vehicle.

4. After a full trial, the learned trial magistrate, *Hon. D W Mburu* (PM) rendered his decision on 8th April 2016 in which he entered judgment on liability in favour of the respondent against both appellants jointly and severally at 100%. The respondent was awarded damages as follows:

General damages for pain and suffering: KShs. 700,000

Loss of earnings: KShs. 210,000

Loss of user: KShs. 120,000

Special damages including costs of repair: KShs. 327,850

The respondent was also granted costs of the suit and interest at court rates.

5. Aggrieved by the trial court's decision, the two appellants lodged an appeal to this court vide a memorandum of appeal dated 4th May 2016 in which they challenged the learned magistrate's findings on both liability and quantum of damages. They relied on eight grounds of appeal which can be condensed into the following two grounds:

i. That the learned trial magistrate erred in law and fact in finding the appellants 100% liable for the accident while the respondent had not proved his case to the required legal standard.

ii. That the learned trial magistrate erred in law and fact in awarding the plaintiffs general damages which were excessive and which

did not have any legal or evidential justification.

6. The respondent was also dissatisfied with the trial court's findings on quantum of damages. He filed a cross appeal on 19th May 2016 in which he faulted the trial court for not finding that he was entitled to KShs.655,000 for loss of earnings and KShs.420,000 for loss of use of motor vehicle registration number KAT 806V and for failing to consider or appreciate the respondent's pleadings and submissions on quantum.

7. When the appeal came up for hearing, the parties consented to having the same prosecuted by way of written submissions. The appellants filed their submissions on 5th November 2018 while those of the respondent were filed on 19th November 2018.

8. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. I am fully alive to the duty of the first appellate court which is to revisit and reconsider the evidence tendered before the trial court and arrive at its own independent conclusions bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. See: ***Selle V Associated Motor Boat Company Limited, [1968] EA 123***.

9. I have carefully considered the grounds in the main and cross appeal, the evidence on record as well as the parties' rival submissions. I have also read the judgment of the learned trial magistrate.

10. Having done so, I find that the key issues that arise for my determination are twofold, namely, whether the learned trial magistrate erred in law and in fact in finding the appellants liable at 100% and secondly, whether the trial court erred in the assessment of damages that it awarded to the respondent.

11. On liability, the appellants have argued in their submissions that the evidence adduced in the trial court proved that the respondent greatly contributed to the occurrence of the accident; that they should not have been found liable at 100% simply because the 1st appellant was charged with a traffic offence for which he was convicted and sentenced on his own plea of guilty.

12. Given the evidence on record and the findings by the trial court, I am unable to accept the appellants' submissions that they were found 100% liable solely because the 1st appellant was convicted of the offence of careless driving on his own plea of guilty.

The judgment of the learned trial magistrate reveals that besides considering the plea of guilty to a charge of careless driving contrary to *section 49 (1)* of the *Traffic Act* as an admission by the 1st appellant that he was driving carelessly at the time the accident occurred and that he therefore caused the accident by negligently driving or controlling motor vehicle registration number KAE 618 J, the learned trial magistrate also considered the evidence that was adduced by PW1 and PW3 on the circumstances that surrounded the occurrence of the accident.

13. PW1 who was a police officer attached to the traffic department of Ongata Rongai Police Station and who can be said to have been an independent witness corroborated the respondent's evidence that the accident occurred because motor vehicle registration number KAE 618J veered off its lane and found the respondent's vehicle on its proper lane causing a collision. The respondent who testified as PW3 explained how he tried to swerve to avoid the collision in vain.

14. The 1st appellant's claim in his evidence that the respondent caused the accident by carelessly overtaking when his motor vehicle was approaching on the opposite direction was not supported by any other evidence including the contents of the police abstracts produced as Pexhibits 1 and 4.

I am therefore unable to fault the trial court's finding on liability and it is hereby upheld.

15. Turning to the appeal on quantum, I must start by pointing out that it is settled law that the award of damages is always at the discretion of the trial court. An appellate court should not interfere with the trial court's award on damages unless it is satisfied that in awarding the damages, the trial court misapprehended the facts or applied the wrong legal principles or that the award was either too high or too low as to lead to an inference that it was an erroneous estimate of the loss or damage suffered. See: ***Mariga V Masila, [1984] KLR 251***.

16. The appellants have complained that the award of KShs.700,000 as compensation for the respondent's pain and suffering was excessive given the injuries sustained by the respondent. According to paragraph 8 of the amended plaint, the respondent sustained the following injuries:

a) Fracture of the right tibia

b) Severe deep cuts on the thigh

c) Severe deep cut wounds on the left leg above the ankle

d) Extensive wound at the middle and lower $^{1}/_{3}$

e) Extensive loss of skin.

17. In his evidence, PW3 testified that following the accident, he was admitted at Kenyatta National Hospital for two months and three days and he was unable to work for three years.

The two medical reports from *Dr. Wokabi* and *Dr. R P Shah* which he produced as Pexhibit 14 (a) and Pexhibit 14 (c) confirmed these injuries. *Dr. Shah* who examined the respondent on 4th June 2012 about four years after the accident found that the injuries had healed well and apart from a temporary disability of about five to six months, they did not cause any permanent disability. *Dr. Wokabi* on the other hand examined the respondent about nine months later on 6th March 2013 and also found that the injuries had healed but left the respondent with permanent disability assessed at 12%.

The two doctors were not called to testify in the course of the trial and the disparity in their opinions regarding whether or not the respondent's injuries resulted in permanent disability went unresolved.

18. In his judgment, the learned trial magistrate considered the submissions made by the parties, their proposals on the general damages which in their view would have been reasonable compensation for the respondent's pain and suffering and the authorities cited for each proposal.

The appellants had proposed a sum of KShs.400,000 while the respondent proposed a sum of KShs.1,300,000. In my view, the proposal made by the appellants was too low and unreasonable given the nature of the injuries sustained by the respondent. From the two medical reports, it is obvious that the respondent sustained serious injuries which caused his hospitalization for slightly over one month and though it is not clear from the two doctors' reports whether or not the injuries healed with residual disability, there is evidence from Dr. Shah's report that he suffered temporary disability for about six months.

The award of KShs.700,000 was within the range proposed by both parties and in my view, it was reasonable in the circumstances of this case. I cannot say that it was inordinately low or high as to invite an inference that it was based on an entirely erroneous estimate of the pain and suffering that the respondent had endured as a result of the injuries sustained in the accident. There is also nothing to suggest from the record that the trial court acted on the wrong legal principle when making the said award.

In the premises, there is no basis for this court to interfere with the award and it is therefore confirmed.

19. Regarding the material damage claim, the appellants claim in their submissions that the amount of KShs.250,500 was wrongly awarded as it included a sum of KShs.32,000 which was allegedly incurred in fitting a speed governor and music system which were not included in the assessment report as parts of the vehicle which were damaged as a result of the accident.

20. I have scanned through the accident assessment report (Pexhibit 5) and considered the evidence of PW2 who produced the report. He confirmed in his evidence under cross examination that indeed the vehicle's speed governor and music system were not part of the parts of the vehicle that were damaged as a result of the impact of the accident. I have however not come across any evidence to prove that a sum of KShs.32,000 was wrongly included in the repair costs as alleged by the appellants. I have only come across a receipt of KShs.25,000 issued for the supply and installation of a speed governor. I find that this amount was erroneously included in the calculation of the repair costs since there is evidence that the vehicle's speed governor was not part of those parts that were damaged as a result of the accident. The amount that should have been allowed as repair costs was therefore KShs.250,475 and not KShs.250,500. I consequently set aside the amount of KShs.250,500 and substitute it with KShs.250,475.

21. The appellants did not contest the amounts awarded for loss of the respondent's income and business earnings in the sum of KShs.210,000 and KShs.120,000 respectively. The amount is however contested by the respondent in his cross appeal. He complained that the amounts awarded were wrong as in his view, he was entitled to KShs.655,000 for loss of income and KShs.420,000 for loss of use of his motor vehicle for the time it was under repair.

22. Starting with the amount awarded for loss of use of the motor vehicle, I note that in making the award of KShs.120,000, the learned trial magistrate reasoned that a period of 30 days would have been sufficient to repair the motor vehicle after which it should have gone back into operation as a public service vehicle (*matatu*).

23. Though the respondent claimed in his evidence that the vehicle resumed operations after 4 months, he did not adduce any evidence to substantiate this claim. The law is that he who alleges must prove. The accident assessment report indicated that repair work was estimated to take 7 days if 8 hours a day were expended on the repair work but no clear evidence was adduced to prove with certainty the length of time that was taken in repairing the vehicle. I therefore find the 30 day period adopted by the trial court to be reasonable in the circumstances. The award of KShs.120,000 for loss of use of vehicle is thus upheld.

24. With regard to the amount awarded for loss of personal income, the learned trial magistrate did not give any reason for calculating the award based on a period of 12 months as opposed to a period of 5 months proposed by the appellants or three years proposed by the respondent. As a general rule, though the trial court has discretion to award damages in civil suits, the discretion must be exercised judiciously on the basis of the law and evidence presented in a suit and not arbitrarily or capriciously.

25. In this case, there was medical evidence to confirm that owing to the injuries sustained in the accident, the respondent suffered a temporary disability of about 5 to 6 months meaning that he was incapable of working for that period of time. It is not disputed that the respondent was earning an income of KShs.700 per day as a driver of his vehicle. The medical evidence showing that he was incapacitated for 5 to 6 months was sufficient proof that for that period, he was unable to work which in turn means that he lost the income he would otherwise have earned had he not been involved in the accident. The learned trial magistrate failed to appreciate this evidence and proceeded to award the respondent loss of income for 12 months without give any reason for his decision.

26. The appellants' proposal to have the award based on a period of five months was prudent since it was supported by the evidence on record and ought to have been accepted by the trial court. Besides the error the trial court made in determining the period that should have formed the basis for the award for loss of earnings, the arithmetic in calculation of the award was also wrong. Given that it is not disputed that the respondent was earning KShs.700 daily, the amount payable for 30 days should have been KShs.21,000 and not KShs.210,000 as

calculated by the learned trial magistrate. The amount payable in five months works out as follows:

700 x 5 months (150 days) = KShs.105,000

27. In view of the foregoing, It is my finding that though the respondent had pleaded an amount of KShs.625,200 as loss of income, he was only able to strictly prove a sum of KShs.105,000 which is what he was entitled to. As the amount awarded in the sum of KShs.210,000 was clearly erroneous, the same is set aside and is substituted with an award of KShs.105,000.

Having made the above findings and award, I am satisfied that the respondent's cross appeal is not merited and it is hereby dismissed.

28. Turning now to the award of special damages, the appellants contend that the sum of SKhs.62,150 was not strictly proved and should be set aside as the receipts supporting the amount did not have revenue stamps. I have examined the said receipts and I confirm that they do not indeed have revenue stamps affixed to them. I have however noted that the receipts are issued on the letter head of Kenyatta National Hospital as an acknowledgement of payment received for services rendered. In my view, lack of revenue stamps does not of itself conclusively prove that the respondent did not pay for the various services that were rendered by the hospital in the course of his treatment. I think on this point I cannot do any better than to reproduce the holding of *Hon Janet Mulwa, J* in ***Benjamin Muela Kimono V Daniel Kipkirong Tarus & Another, (2015) eKLR*** when she held as follows:

> ***"Under the Stamp Duty Act, Chapter 480 Laws of Kenya it is not specifically provided that payment receipts in respect of services rendered must be stamped. Section 88 of the Act, in my opinion, it is the duty of the receiver of monies who has a duty to affix revenue stamps, not the payee – who cannot be penalised for omissions of the receiver. I am guided by the cases Benedetta Wanjiku Kimani V Chanaw Cheboi & Another, HCCC No 373 of 2008 and Irene Ngombo Mshingo V Miriam Kadogo, (2000)KLR where the Learned Judges held that a document does not cease from being admissible for lack of affixation of a revenue stamp in the latter case the court proceeds to admit payment receipts issued from Kenyatta national Hospital without Revenue stamp being affixed thereon.***
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> ***I am satisfied that the receipts for medical expenses are admissible as they also bear stamps of the doctors and medical institutions that issued them."***

I wholly agree. I thus find that the award of special damages in the sum of KShs.62,150 was rightly awarded and the same is maintained.

29. The upshot of this judgment is that the appellants' appeal on liability is dismissed while the appeal on quantum partially succeeds. The respondent's cross appeal is also dismissed. The judgment of the trial court on quantum is hereby set aside and is substituted with a judgment of this court in favour of the respondent against both appellants jointly and severally as follows:

General damages for pain and suffering: KShs. 700,000

Loss of earnings: KShs. 105,000

Loss of user of vehicle: KShs. 120,000

Repair costs: KShs. 250,475

Assessment fees: KShs. 5,000

Police abstract: KShs. 250

Towing charges: KShs. 10,000

Treatment expenses: KShs. 62,150

Total: KShs.1,248,375

The amount shall attract interest from today's date until full payment.

30. On costs, the respondent is awarded costs of the lower court but since the appeal has been partially successful, each party shall bear its own costs of the appeal.

It is so ordered.

DATED, DELIVERED and **SIGNED** at **NAIROBI** this 13th **day of December, 2018.**

C. W. GITHUA

JUDGE

In the presence of:

Mr. Karanja holding brief for Mr. Gathogo for the respondent

No appearance for the appellants

Mr. Fidel: Court Assistant