



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 60 OF 2016

GILANIS SUPERMARKET.....1ST APPELLANT

RICHARD KIPLANGAT CHEBON.....2ND APPELLANT

-VERSUS-

KENNEDY SWANYA MWAYAKA.....RESPONDENT

(Appeal from the judgment of Honourable Doreen Mulekyo, Chief Magistrate, delivered on the 27th April, 2016 in Nakuru Cmcc No. 1246 of 2012))

JUDGMENT

1. The Respondent was a pillion passenger on motorcycle Reg. number KMCS 896Y on the 22nd June 2012 along Nakuru-Eldoret Highway at Njoro turn off when the said motorcycle collided with the 1st Appellant's motor vehicle that was being driven by the 2nd Appellant as the duly authorised driver. The Respondent was seriously injured. He thereafter sued the Appellants for damages for pain and suffering and other consequential losses in his plaint dated 8th October 2012.

2. The appellants denied the occurrence of the said collision, the injury and the loss. In the alternative they pleaded contributory negligence on the part of the respondent in the statement of defence dated 28th February 2003.

3. Upon full trial the court found the appellants jointly and severally wholly liable in negligence and awarded the Respondent general damages in the the sum of Kshs.2,500,000/= Kshs.360,000/= future medical treatment costs and Kshs.572,611/= as special damages plus costs and interest.

The appellants being dissatisfied with the said judgment lodged this appeal on both liability and *quantum* of damages.

4. Liability

It is alleged that the trial magistrate failed to consider evidence of the appellants witnesses and submissions thus arrived at findings that were against the weight of evidence.

5. Being the first appeal the court is enjoined to re-analyse and re-evaluate the evidence adduced before the trial court and come up with own findings – **Stanley Maore -vs- Geoffrey Mwenga Nyeri Civil Appeal No.147 of 2002** and cited in the **Stephen Gachau Githaiga &Another -vs- AG (2015) e KLR**.

6. The Respondent's evidence before the trial court is that the appellants pick-up Reg No. KSG 135 knocked down the motorcycle he was riding on causing him to sustain serious injuries. He narrated the events before the collision that the appellants vehicle made a U-turn at the said junction to face Nakuru causing the collision.

7. He testified that:

“---On reaching Njoro junction, he made a U-turn to face Nakuru. The vehicle on the inner lane facing Eldoret hooted to avoid colliding with this vehicle and entered into the lane of the vehicles heading to Nakuru. There was also another vehicle on the inner lane as one faces Nakuru and to avoid colliding with this vehicle as well, he swerved onto our lane and hit the motorcycle I was riding on---”

8. It was his further testimony that the driver of the vehicle was charged with a traffic offence in Traffic case No. 1374/2012 for careless

driving. He however did not know the outcome.

9. On behalf of the appellants one **Tabuli Gitonga Babu** testified as **DW1**. His evidence was that he was in the appellants vehicle when the accident occurred.

He testified that at the Njoro junction there was a motorcycle which was speeding and immediately made a U-turn to turn towards Njoro while they were approaching the junction to head towards Nakuru.

10. He further testified that the Respondent seeing that there was going to be a collision the motor cycle rider jumped off leaving it to loose control, skidded towards the vehicle and the Respondent was swept beneath the vehicle. He blamed the motorcycle rider for overspeeding and making a u-turn on the wrong lane. He did not state the speed that the motorcycle was being driven at.

11. On cross examination this witness testified that when the rider jumped off the respondent remained seated on the motorcycle, but made as if to stand to save himself. He confirmed that the accident occurred when the vehicle was making a u-turn to Nakuru.

12. The Police officer PC Samson Okello Juma was not the investigating officer but only produced the police abstract. He offered no evidence as to the causation of the accident.

13. I have considered the trial court's findings in the judgment. The evidence is well capture and analysed. I noted that both the rider of the motor cycle and the driver of the vehicle did not testify. The trial court rendered that their testimony would have, from a first hand point of view been able to explain what happened. The court came up with a finding that the respondent's evidence was more credible having taken note that the defence witness(DW1) who stated to have been in the vehicle did not record a statement with the police.

14. Although the appellants blamed the motorcycle rider for causing the accident in their defence, they did not enjoin him as a party in the primary case thus leaving blame squarely upon themselves - **Simba Commodities Ltd -vs- Citibank N.A (2003) e KLR**.

15. Motor vehicle collisions do not just happen. There must be some human error. The court's task is to determine which between the two caused the accident. It is either one of them or both – Simba Commodities case above.

16. A party who alleges negligence on another is under a duty to discharge the burden of proof to the required standard, upon a balance of probability – **Section 107 Evidence Act** – See Court of Appeal decision in **Nyeri Civil Appeal No. 215 of 1995** and cited at **Kiema Mutuku -vs- Kenya Cargo Handling Service Ltd (1991) KAR 464**.

17. The appellants blame the rider of the motorcycle, not the respondent who was a pillion passenger. He could not have contributed to the accident as he was not in control of the motorcycle. No liability can therefore attach to him.

The blame can only be placed upon the 2nd appellant or the rider who was not a party to the suit. A court cannot condemn a party unheard.

18. It was incumbent upon the appellants to enjoin the rider to the proceedings if they thought he was to blame. They failed to do so -

In **Brian Muchiri Waihenya -vs- Jubilee Hauliers Ltd & 2 Others (2017) e KLR**, in very similar circumstances held that a party who fails to call evidence to support its allegations in the defence or enjoin the party it blames in the proceedings can only blame itself. See also **Simba Commodities case** (supra).

19. The appellants did not call its driver to testify. No reason was given for the failure.

Visram J in **Amalgamated Saw Mills Ltd -vs- Stephen Murutinguru HCC 75/2005** stated:

“that the burden of proof of any fact or allegation is on the plaintiff and a casual link between someones negligence and his injury and that the evidence adduced must be on a balance of probability to connect the two.”

20. If a party fails to call evidence to support its allegations either in the plaint or in the defence their statements remain as mere statements with no evidential value. See also **Order 2 Rule 1 of CPR and Trust Bank Ltd – Paramount Universal Bank Ltd, and James Kiarie Kimemia -vs- Mary Wangari Mwangi (2016) e KLR**.

21. The defence witness is noted to have not recorded a statement at the police station. It is probable that he did not even witness the accident because if he did, no explanation was offered as to why he did not record a statement, a finding that was alluded to by the trial magistrate.

22. It is quite unfortunate that the investigating officer failed to testify and produce a sketch map to show the point of impact. That would have shed light to the court as to which between the two (driver and rider) were to blame or contributed to the occurrence of the accident.

23. I am satisfied that the Respondent established the necessary casual link between the Appellant's negligence and his injury - **Amalgamated case** (Supra).

I agree with the holding in **Kiema Muthungu** (Supra) that a plaintiff must prove some negligence on the part of the Defendant. To that end,

I took the liberty to reproduce the Respondent's evidence in part verbatim – (Paragraph 7 above of this judgment)

I am satisfied that the said evidence represents the events preceeding the collision and how the accident occurred.

The totality of the evidence persuades me to come to the same findings reached by the trial magistrate, that the appellants driver caused the accident.

It has not been demonstrated that the trial magistrate took into account any extrinsic matters.

The appeal therefore fails on the matter of liability. The appellants remain wholly to blame for the accident.

24. **Quantum of damages**

Doctor W. Kiamba's Medical report (PExt 3) dated 31st August 2012 produced to the court states serious injuries to the Respondent

These are:

- Crush foot injury with fractures of right tibia and fibula
- resulting to below knee amputation.
- Head injury with intercerebral bleeding and focal intraparen chymal left sided funtal - temporal haemorrhages
- Soft tissue injuries of chest and bruises on the arms. Complaints at date of examination were pain in the chest, at the amputation stamp, and inability to walk.
- The doctors opinion was that the respondent required an artificial limb at a cost of at least 100,000/=.
- Degree of permanent incapacitation was assessed at 40%.

25. The trial court assessed general damages for pain and suffering at Kshs.2,500,000/=, Kshs.360,000/= future medical expenses and Kshs.572,611/= special damages.

26. The appellant has urged that the above sums are excessive. In its submissions a proposal of Kshs.500,000/=was suggested as sufficient in general damages and a sum of Kshs.382,611/= towards future medical expenses as being not supported by evidence. On special damages, it is submitted that no strict proof was adduced with proper receipts. The respondent on his part has urged that the awards be upheld as being reasonable.

27. It is trite that an appellate court will be slow in disturbing a trial court's discretion in the assessment of damages unless it is satisfied that the court took into account irrelevant factors or left out of account relevant ones or that the awards are inordinately low or high as to be a wholly erroneous estimate of the damage – **Kemfro Africa Ltd t/a Meru Express Services Ltd -vs- A Lubia (1982-88) I KAR 727**. See also **Butt -vs- Khan (1978) e KLR**.

I have considered parties submissions and the cited authorities including those cited before the trial court.

28. **Special damages**

The sum pleaded in the plaint as special damages is Kshs.392,611/=

It is trite that special damages must be pleaded and proved. The respondent produced as exhibits-hospital receipts PExt 11 and medical items in a bundle of Kshs.651,911/=. He bought an artificial leg at a cost of Kshs.180,000/- renewable every five years from AIC Kijabe hospital where he was admitted for treatment and amputation of the leg without objection from the Appellant.

The above sums were not pleaded. At time of filing the plaintiff as is expected in the circumstances, a sum of Kshs.392,611/= may have been spent. The balance must have been spent after filing of the suit on medication and treatment. However the respondent did not find it fit and proper to amend the plaint to include the extra medical expenses. **Civil Appeal No.189/2014**.

29. In **Capital Fish Kenya Ltd -vs- KLPC (2016) KLR** held that

“--- it is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly none can be awarded for failure to plead---”

30. I have seen the Respondent's bundle evidence that the bundle of exhibits (PEx 11) being treatment receipts were produced and not objected to. However, the law is plain and clear that only that which is pleaded ought to be allowed, but subject to strict proof.

Accordingly I set aside the award of Kshs.572,611/= as special damages and substitute with Kshs.392,611/= as the pleaded and proved special damages.

31. The respondent did not plead damages for future medical expenses. He did not need to as it is a claim under general damages and needed no specific pleading - **Thomas K. Ngaruiya & 2 Others -vs- David Chepsoror (2012) e KLR**.

I have also seen that the respondent pleaded damages for loss of earnings and earning capacity. The trial court did not award any damages on this item singly and the appellant has no quarrel with such.

32. I however note that the **cost of the artificial leg** was prayed for in the plaint. Dr. Kiamba placed the cost to about Kshs.100,000/=. It was purchased from AIC Kijabe hospital at Kshs.180,000/= and a receipt in support produced as exhibit.

What Doctor Kiamba gave was an estimate. It was a necessary expense in the circumstances. The appellant has a quarrel with the medial report that it did not indicate how many times it would be changed.

33. As a necessary item to aid the respondent in movement, I find that the cost of Kshs.180,000/= was properly incurred and awarded. An artificial leg ought to be changed as it is liable to damage wear and tear over time. The doctor ought to have stated the period. However, five years period is not out of place. It is conventionally awarded and capped on how many times. That depends on the age of the claimant and condition taking all circumstances into account.

34. I have stated that a claim for future medical expenses is part of general damages. The trial magistrate did not particularise the awards to that claim, but included the same in the awards on general damages. To that end I find that the trial magistrate erred by awarding a distinct award on this item when it was not strictly pleaded despite the respondent's attempts to prove the same.

Accordingly I set aside the award of Kshs.360,000/= as not having been pleaded, and therefore ought not to have awarded as a special damage.

35. **General damages** for pain and suffering was awarded at Kshs.2,500,000/=.

I have considered the following authorities:

Simon Ano Mua -vs- Kioga Mukwano t/a Kioga Mukwano Transporters & 2 Others (2013) e KLR and **Cosmos Mutiso Muema -vs- Kenya roads Transporters (2014) e KLR**. In the **Cosmas Mutiso case**, the injuries were more severe. A sum of Kshs.2,500,000/= damages for pain and suffering were awarded.

In the **Simon Ano Mua** case, a sum of Kshs.2 Million was awarded for similar injuries mainly amputation of the left leg below the knee. That was on the 30th August 2013 (Waweru J).

36. In **Geoffrey Mwaniki Mwinzi -vs- Ibero (K) Ltd & Another (2014)** an award of Kshs.2 million was awarded for pain and suffering for more severe injuries including amputation of the leg and fracture of collar bone. That was on the 30th July 2014.

37. Having taken the Respondent's injuries in this appeal and the respondents permanent incapacitation assessed at 40% and the future treatment needs and all attendant pains and costs, I do not find the trial magistrate's award of Kshs.2,500,000/= to be inordinately high as to warrant this courts interference.

I uphold the said award.

38. Consequently **the award of Kshs.360,000/= being cost of future medical treatment is set aside as well as Kshs.572,611/= special damages and substituted with an award of Kshs.392,611/= as pleaded and proved.**

Thus the appeal succeeds partially on the matter of damages.

39. The upshot is that the trial court's awards are adjusted as hereunder:

- **Liability at 100% against the appellants**
- **General damages for pain and suffering - Kshs.2.5 Million**
- **Special damages - Kshs.392,611/=**

40. The special damages shall accrue interest at the court rates from date of filing of the primary suit while general damages shall attract interest from the date of the primary suit judgment.

The appeal having succeeded partially, each party shall bear its own costs.

Dated, signed and delivered this 13th day of December 2018.

J.N. MULWA

JUDGE