



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 121 OF 2013

SAMMMY MUGO KINYANJUI.....1ST APPELLANT

ANTHONY MWAURA KARANJA.....2ND APPELLANT

VERSUS

KAIRO THUORESPONDENT

[Being an appeal from the original judgment and decree of F. Kyambia, Principal

Magistrate in Eldoret CMCC No. 201 of 2012 delivered on 4th September 2013]

JUDGMENT

1. The appellants are aggrieved by the judgment of the lower court dated 4th September 2013. The claim was in tort for *negligence*. By a plaint dated 9th March 2012, the respondent pleaded as follows: That on 16th August 2011, he was walking by the roadside in Eldoret Town. He was knocked down by a motor vehicle registration number KBD 067D driven by the 1st appellant. The vehicle belonged to the 2nd appellant.

2. The learned trial magistrate found the appellants liable at 80% for the accident; and, the pedestrian guilty of negligence at 20%. The court assessed general damages at Kshs 1,000,000; and, special damages at Kshs 2,200 less the *contributory negligence*. The respondent was also granted interest and costs.

3. The appellants filed a memorandum of appeal on 24th October 2013. It raises *ten* grounds. They can be condensed into *five*. First, that the learned trial magistrate misapprehended the evidence by apportioning liability at 80% to 20%; secondly, that the amount of general damages was exorbitant; thirdly, that the special damages were not specially proved; fourthly, that the learned trial magistrate disregarded the submissions made by the appellants' counsel; and, fifthly, that the learned trial magistrate employed wrong principles in assessment of damages.

4. At the hearing of this appeal, the appellant relied largely on the written submissions filed on 8th November 2016. Learned counsel submitted that the accident occurred at 3:00 a.m.; and, that there were two contradicting explanations for the accident. In his view, liability should have been *equally* apportioned. He attacked the award of damages as too high as to disclose an *error of principle*. He submitted that the respondent did not suffer any *disability*. Lastly, he submitted that although the special damages were pleaded, they were *not* proved by documentary evidence.

5. The appeal is contested by the respondent. The submissions are on a three-strand. First, that the

findings on liability were consistent with the evidence; secondly, from the medical report of Dr. Aluda (PW4) the respondent suffered *multiple fractures* and extensive soft tissue injuries. The award of general damages was thus reasonable; and, thirdly, that the special damages were proved at the trial. I was implored to dismiss the appeal.

6. This is a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.

7. I will deal first with the element of negligence. The respondent (PW1) said the accident occurred at 3:00 a.m. It was between *Paradise Hotel* and *Nakumatt Supermarket* off Eldoret- Uganda Road. He testified that he was off the road. The suit vehicle knocked him from behind. He said it “*was driving [sic] very fast*”. He said the vehicle veered off the road; and, there was no warning. He lost consciousness and only recovered senses at Moi Teaching and Referral Hospital. He sustained fractures, injuries on the head, chest, abdomen, and lower limbs. He was hospitalized for over a month.

8. Regarding special damages, PW1 testified that-

“I paid some money at the hospital. I have invoice for Kshs 47,517 dated 20. 9. 2011....I have x-ray report form. I paid Kshs 500 for x-ray. I wish to produce the aforesaid documents as exhibits.....I was issued with P3 form. It is dated 31.1.2012.”

9. PW2 saw the suit vehicle being driven at high speed. He said that a taxi operator raised an alarm. The vehicle knocked down the respondent. He said the respondent was walking on the side of the road. He helped to take the respondent to hospital.

10. PW3 was Dr. Rono from Moi Teaching and Referral Hospital. He produced a receipt for Kshs 500 for x-ray services, an invoice for Kshs 27,517 and the patient’s discharge summary. In essence, he confirmed that the respondent was treated at the hospital.

11. PW4 was Dr. Samuel Aluda. He produced a medical report dated 7th February 2012. His findings were as follows: slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; fracture of the right tibia; fracture of the left tibia and fibula. His conclusion was that the injuries were very severe but had healed. The pain would subside with help of analgesics. He produced a receipt for Kshs 1,500 for the medical report.

12. PW5 was a clinical officer at Uasin Gishu Hospital. He filled in the P3 form. He conceded that he did not treat the patient and relied on the medical history given by the patient. He did not indicate any injury to the neck or shoulder.

13. The next witness for the respondent was Beatrice tarang. She was attached to the Traffic Registry at Eldoret Law Courts. She confirmed that the 1st appellant was charged for carelessly driving the suit vehicle. The proceedings were in *Traffic Case 1578 of 2011* (exhibit 7). He pleaded guilty and was fined Kshs 5,000. That narrative was confirmed by PW7, Police Constable Obel Ogutu. The latter also produced the relevant police abstract (exhibit 4). That marked the close of the respondent’s case at the lower court.

14. The appellants called one witness. He was Sammy Kinyanjui, the 1st appellant. He testified as follows-

“The pedestrian suddenly emerged attempting to cross the road. He was knocked. I took him to hospital. When he was taken to the hospital, it was found that he was drunk. I blame the plaintiff for suddenly joining the road.”

15. From my re-appraisal of the evidence, I find that it is beyond question that the respondent was ran down by the appellants' vehicle. The respondent claims the vehicle veered off the road without warning. The 1st appellant claims the pedestrian was drunk and was attempting to cross the road. The respondent's version of events is *correct* for two reasons. First, it was corroborated by PW2. Secondly, and, more importantly, the 1st appellant was charged for carelessly driving the suit vehicle. The proceedings were in *Traffic Case 1578 of 2011* (exhibit 7). He pleaded *guilty* and was *fined* Kshs 5,000. The allegations that the respondent was drunk; or, attempting to cross the road are dead fish in the water.

16. It must follow as a corollary that the 1st appellant was *wholly* negligent. But seeing that there is no *cross-appeal* on liability, I decline to disturb the findings of the learned trial magistrate on liability. The appeal on liability is accordingly devoid of merit. It is *dismissed*.

17. I will now turn to *quantum* of damages. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Akamba Public Road Services Ltd v Omambia* Court of Appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

18. From the evidence of PW4 (Dr. Samuel Aluda), the respondent had slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; *fracture* of the right tibia; *fracture* of the left tibia and fibula. His conclusion was that the injuries were *very severe* but had healed. The pain would subside with help of analgesics. The *severity* of the injuries is amplified by the conclusions in the discharge summary at page 12 of the record of appeal. Although there was *no* permanent *disability*, a wheel chair was nevertheless recommended.

19. The lower court awarded general damages of Kshs 1,000,000. I think it was on the higher side. To that extent, the judgment on quantum was founded on *wrong principles*. For example, the two precedents relied on by the learned trial magistrate related to *permanent disability*. The first was *Joseph Mwanza v Eldoret Express*, Kisumu High Court, Civil Case 160 of 2004 (unreported). In that case, the court awarded Kshs 1,200,000 in damages. It is noteworthy that the plaintiff in that case suffered *40% disability*. In the second authority cited to the learned trial magistrate, *James Machuka v Julius Ogeto*, Nairobi High Court, Civil Case 2048 of 1999 (unreported), the plaintiff had suffered *30% disability*. That is *not* the case in the present matter. I am thus *inclined* to disturb the award on general damages.

20. I have considered a number of relevant authorities on the subject. In *Kennedy Kosgey v Kormoto General Agencies*, High Court, Eldoret, Civil Appeal 36 of 2011 [2014] eKLR, the appellant had suffered blunt trauma to the chest, fracture of the anterior ribs and dislocation of his shoulder. Permanent disability was assessed at 5%. An award of Kshs 400,000 was upheld on appeal. In *Haron Cheron v Eastern Produce (K) Limited*, High Court, Eldoret, Civil Appeal 92 of 2013 [2014] eKLR, the plaintiff suffered a fracture on the right radius distal third; double fractures of the right ulna; and, a fracture of the right olecranon of the right ulna at the elbow joint. An award of Kshs 350,000 was upheld on appeal. In *George Kinyanjui T/A Climax Coaches v Agoi*, Eldoret, High Court Civil Appeal 29 of 2012 [2015] eKLR, the appellant suffered a fracture of the left clavicle; fractures of the 4th and 5th left ribs mid shaft; dislocation of the left shoulder joint and multiple soft tissue injuries. An award of Kshs 450,000 was made.

21. The appellants have proposed an award of Kshs 250,000. That is low to the extreme considering the *severity* of the injuries suffered by the respondent. Considering the gravity of the injuries to the respondent; the *age* of the authorities I have cited above; and, *inflation*, an award of *Kshs 600,000* would be sufficient in this case.

22. Lastly, I will turn to special damages. It is trite that special damages *must* be *specifically* pleaded; and, *strictly* proved. See *Kampala City Council v Nakaye* [1972] E.A 446, *Coast Bus Service limited v Sisco E. Murunga and others*, Nairobi, Court of Appeal, Civil Appeal 192 of 1992 (unreported). The degree of *certainty* and *particularity* of proof depends on the circumstances and nature of the acts themselves. See *Hahn v Singh* [1985] KLR 716.

23. Although the plaintiff specifically pleaded for Kshs 109, 217 in special damages, he generally failed to produce evidence of actual *payment*. The learned trial magistrate found he proved only the sum of Kshs 1,500 for the medical report; Kshs 500 for x-ray; and, Kshs 200 for the police abstract. I partly agree with the learned trial magistrate. I have seen the receipt marked exhibit 5 (b) for Kshs 1,500 from Dr. Aluda (PW4). There is also exhibit 2 (d), receipt number 911520 for Kshs 500 for x-ray services. But there is *no* receipt for the police abstract form. Regrettably I am unable take *judicial notice* of the actual costs of the police abstract. The upshot is that special damages were proved *only* in the sum of *Kshs 2,000*. The award of Kshs 2,200 is accordingly *set aside* and substituted with a sum of *Kshs 2000* only.

24. In the result, the appeal succeeds only in *part*. The appeal on *liability* is *dismissed*. The judgment on quantum of *general damages* is *set aside*. There shall now be judgment in favour of the respondent against the appellants, jointly and severally, for *general damages* in the sum of Kshs 600,000 less 20% liability. The appellants shall also pay special damages of *Kshs 2,000*. That is to say a *net* sum of general damages of *Kshs 481,600*. I award the *respondent* interest and costs in the *lower court*. I order that each party shall bear its own costs in this *appeal*.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 14th day of March 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Oribo for the appellant instructed by Omwenga & Company Advocates.

No appearance by counsel for the respondent.

Mr. J. Kemboi, Court Clerk.