



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 145 OF 2013

ABERI GEORGEAPPELLANT

VERSUS

NYANGOHO EVANS OBURE1ST RESPONDENT

HESBON CHWEYA2ND RESPONDENT

(Appeal from the Judgment and Decree in Ogembo PM Civil Case No. 158 of 2011 (Hon. Daniel O. Ogola - SPM.)

JUDGMENT

1. This appeal arises from the judgment and decree of the Senior Principal Magistrate delivered on 26th September 2013, in Ogembo PMCC No. 158 of 2011, in which the appellant, **Aberi George**, was sued together with the second respondent, **Hesbon Chweya**, by the first respondent, **Nyangoho Evans Obure**, for damages occasioned by a road traffic accident which occurred on 17th September 2010, along the Kisii-Kilgoris road near Igembe.

2. The accident involved motor vehicle Reg No. **KBA 579V**, belonging to the second respondent and driven at the time by his driver and/or servant/agent and **M/V RegNo. KBH 558**, belonging to the appellant and driven at the time by his driver and/or servant/agent.

It was pleaded that the two vehicles were so negligently, recklessly and/or carelessly driven such that they violently collided as a result of which the first respondent who was travelling as a lawful passenger in M/V RegNo. KBH 558 suffered bodily injuries.

3. The first respondent blamed both the appellant and the second respondent for the accident and instituted this suit against them praying for special and general damages together with costs of the suit and interest.

In a statement of defence dated 30th November 2011, the appellant denied the claim and prayed for the dismissal of the case against him. The record herein does not show that the second respondent entered appearance and filed his defence.

4. However, the second respondent was a party and did actively participate in a related case being Ogembo PMCC No. 338 of 2010, which the parties agreed to use as a test suit in all related matters on the question of liability. The appellant's liability in the test suit was placed at 100%. He was thus found to be fully liable for the negligent acts or omissions of his driver or agent.

5. In this matter, the basic issue for determination was one of quantum of damages on the basis of 100% liability against the appellant. In that regard, the trial court awarded general damages in the sum of Kshs. 120,000/= and special damages in the sum of Kshs. 6,700/=. The costs of the suit went to the first and second respondents.

6. The appellant was aggrieved by the award and preferred the present appeal on the basis of the grounds enumerated in the memorandum of appeal dated 24th October 2013.

With the consent of all parties, the appeal was canvassed by way of written submissions and in that regard, the appellant through the firm of **Omwenga & Company Advocates**, filed his submissions in support of the appeal while the first respondent's and the second respondent's submissions in opposition to the appeal were filed by the firms of **T.O Nyangosi & Co. Advocates** and **O.M Otieno & Co. Advocates**, respectively.

7. Upon due consideration of the grounds of appeal in the light of the rival submissions, the duty of this court was to reconsider the evidence in relation to the issue which arose for determination by the trial court i.e the quantum of damages.

Although issues relating to liability are addressed in the grounds of appeal, they do not fall for determination by this court.

For the avoidance of doubt, this appeal is essentially on quantum of damages.

8. The trial court considered the first respondent's evidence together with the relevant medical report (P.Ex 1) and made a finding that the first respondent suffered trauma to the head, swollen and tender forehead and generalized soft tissues bodily injuries without permanent disability. That, the injuries sustained were serious multiple body injuries.

Guided by the authorities availed by both sides, the trial court arrived at the figure of Kshs. 120,000/= and considered it to be sufficient compensation in general damages.

9. The Court of Appeal in **Kemfro Africa Ltd t/a Meru Express Services & Another Vs. A.M Lubia & Another (1982 – 1988)KAR 727** held that:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the damages, took into account an irrelevant factor or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages”.

10. In this case, the evidence by the first respondent (**PW 3**) and that of **Dr. Zoga Ogando (PW 1)**, showed that the injuries suffered by the first respondent were soft tissue injuries which had healed well. He prayed for general damages in the sum of Kshs. 450,000/= while the appellant opined that a sum of between Kshs. 20,000/= and Kshs. 30,000/= was adequate.

11. Consideration being given to the authorities cited at the trial court by both sides and regard being given to the economic standards existing at the time to date, this court does not consider an award of Kshs. 120,000/= general damages for pain, suffering and loss of amenities to be inordinately high. The amount was reasonable and sufficient compensation proportionate to the injuries suffered by the first respondent and does not call for any interference or disturbance at this juncture.

12. As for special damages in the sum of Kshs. 6,700/=: these were duly established by relevant documentary evidence (P.Ex 1, 2 & 4). This appeal in as much as it relates to quantum of damages is unmerited. And, even if it was truly related to liability, this court finds no good grounds to interfere with the lower court's finding for reasons that police investigations revealed that the appellant's driver was at

fault in causing the accident and that is why he was charged with the traffic offence of careless driving and convicted accordingly. This was established by the evidence of **P.C Gabriel Etyang (PW 2)**.

13. The specific finding by the trial court that the appellant was absolutely and solely to blame for the accident was based in cogent and credible evidence adduced by relevant witnesses.

In sum, this appeal is for dismissal and is hereby dismissed with costs to the first and second respondents both in this court and the trial court.

Ordered accordingly.

[Delivered and signed this 6th day of April 2017].

J.R. KARANJAH

JUDGE

In the presence of

Appellant present through Mr. Mogire for Mr. Omwenga

2nd respondent present through Mr. Oyugi for Mr. Otieno

1st Respondent - Absent

CC Mohe