



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 675 'A' OF 2012

ALEX GITONGA MWONGERA.....APPELLANT

VERSUS

JOSEPH KAMAKIA RESPONDENT

(Appeal from the judgement and decree of Ms C.C Kipkorir resident Magistrate delivered on 13th November 2012, in Nairobi CMCC 761 of 2010)

JUDGEMENT

1. Alex Gitonga Mwongera, the Appellant herein, filed a compensatory suit before Chief Magistrate's court, Milimani, Nairobi, against Joseph Kamaika, the Respondent herein, for the injuries the Appellant is alleged to have sustained as a result of a road traffic accident which occurred on 23rd May 2009 involving motor vehicle registration no. KAV 230H. The Respondent filed a defence to deny the Appellant's claim. Hon. M/s Kipkorir, learned Resident Magistrate heard and determined the suit. She found that the Appellant and the Respondent were each 50% liable for the accident. The Appellant was awarded ksh,400,000/= as general damages and kshs,109,075 as special damages. The learned Resident Magistrate dismissed the claim for future medical expenses on the basis that the same was not pleaded. Being aggrieved by the aforesaid decision, the Appellant filed this appeal to have the same impugned.
2. On appeal, the Appellant put forward the following ground in his memorandum of appeal:
 1. ***That the learned trial magistrate erred in law and in fact in failing to examine and weigh the evidence by both the plaintiff and defendant as to arrive at liability to be shared on a 50-50 basis.***
 2. ***That the learned trial magistrate erred in law and in fact in awarding a paltry 400,000/= in general damages against evidence of the injuries suffered by the plaintiff having been so severe.***
 3. ***That the learned trial magistrate erred in law and in fact by failing to consider the plaintiff's counsel's submissions and the legal authorities cited as to reach a meagre ksh.400,000/= as general damages.***
 4. ***That the learned trial magistrate erred in law and in fact in going against the weight of the plaintiff's evidence/testimony to find liability and general damages in the manner in which she judged.***
 5. ***That the learned trial magistrate erred in law and in fact in rejecting to award future medical expenses when the same were neither contested and the same having been quantified by the two doctors and the medical reports having been allowed as evidence by consent.***
3. When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case

that was before the trial court. I have also considered the rival written submissions. The Appellant argued that the learned Resident Magistrate erred when she apportioned liability at 50%. It is the Appellant's argument that motorists have a high burden of blame as a motor vehicle usually does more damage to a person than a person does to a car hence a pedestrian should not be found more liable than or equally responsible to a driver. The Appellant further pointed out that the accident occurred in a well lit area and being at night the Respondent ought to have switched on his headlights hence he should have seen what or who was ahead of the motor vehicle in sufficient time to enable brake and avoid the accident. It was further argued that the Respondent spotted the Appellant suddenly, this means that the motorist was driving without a proper look out of other road users and particularly pedestrians. The Respondent on the other hand is of the view that the learned Resident Magistrate came to the correct decision on apportionment of liability. I have examined the evidence tendered before the trial court in respect of liability. Adrine Bernice Wanja Ireri (DW2) told the trial court that she was a passenger aboard motor vehicle registration no. KAV 230H and that she saw the Appellant on the road and that she saw the driver swerve to avoid the accident but he eventually hit him with the left side of the car. She stated that the pedestrian was facing the same direction as the car. DW1 stated that the pedestrian appeared to be drunk. DW2 further averred that the Appellant gave them the direction to his house where a lady opened the door for them. The Respondent (DW1) stated that he was driving near Kobil Petrol station when he suddenly saw a man on the road. He said he tried to swerve was unable to avoid knocking the appellant. DW1 Claimed that he called the Respondent's wife who gave him the direction leading to the Appellant's house since the Appellant was too drunk. DW1 confirmed that he drove his motor vehicle on dim lights at the time of the accident. The Appellant (PW1) averred that he was a pedestrian walking towards Kiserian on the left side of the road. He stated that he was hit on his left side and was consequently injured on the left leg, shoulder and the left side of the head. PW1 accused the driver of motor vehicle registration No. KAV 230H to have been drunk. He stated that he was walking on the pedestrian lane while the motor vehicle was driving on the opposite direction. The learned Resident Magistrate appreciated that the Appellant and the Respondent accused each other of being drunk. She also noted that there was a reactionary opportunity by each party to avoid the occurrence of the accident. For the above reasons she made an order apportioning liability in equal measure. However, after a careful re-evaluation of the evidence, I am convinced the learned Resident Magistrate fell into error. There is clear evidence that the scene of the accident was well lit. There is also no dispute that the Respondent drove his motor vehicle while the headlights were dimmed. The evidence indicate that had the Respondent been on a proper look out he would have been able to notice in advance the presence of the Appellant along the road. It would appear the Respondent was not careful nor keen. There is also the undisputed evidence that the Respondent drove his motor vehicle while on dim lights. This, in my view, may have impaired his vision thus failing to see the Appellant from a safe distance. In the circumstances, I find that the order apportioning liability at 50% to be erroneous hence the same should be set aside. However, the Appellant cannot be said to be blameless. The evidence tendered shows that he must shoulder some percentage of liability but not certainly 50%.

4. I am convinced the Respondent should shoulder 90% and the Appellant should shoulder 10% liability.
5. The Appellant has also challenged the decision on quantum and the decision to dismiss the claim on future medical expenses.
6. I have already stated that the learned Resident Magistrate dismissed the claim on future medical expenses on the basis that the same was not pleaded though proved. The Appellant argued that the trial court erred by dismissing the claim while the same was never contested. The Respondent is of the view that the trial court cannot be faulted because there was no plea for future medical expenses as a special damage. I have carefully looked at the Appellant's plaint dated 15th February 2010 and I have found no prayer for the provision of future medical expenses. The learned Resident Magistrate cannot therefore be faulted in her decision to dismiss the same. Courts can never be gratuitous in making awards but can only award what has been prayed for and

established by credible evidence.

7. The Appellant is of the view that the award of kshs.400,000/= as general damages was too low and not commensurate to the injuries he suffered. The Respondent has urged this court not to interfere with the decision of the trial court on quantum because the learned Resident Magistrate considered the relevant material and the authorities supplied to her before arriving at her decision. I have carefully examined the record of trial court and it is clear to me that the learned Resident Magistrate considered all the relevant factors and decisions in respect of similar cases. With respect, the decision on quantum of the learned Resident Magistrate cannot be faulted.
8. In the end, the appeal as against liability succeeds while that against quantum is dismissed. For the avoidance of doubt, the order apportioning liability at 50% is set aside and is substituted with an order directing the Appellant(plaintiff) to shoulder 10% liability while the Respondent (defendant) shoulders 90% liability.
9. Consequently the Appellant shall be paid the amount awarded by the trial court less 10%.i.e.

General damages	-ksh.400,000/=	
Less 10% contribution	-ksh. 40,000/=	
		360,000/=
Special damages	-ksh.109,075/=	
Less 10% contribution	-ksh. 10,907/50	
		98,167/50
Net total		458,167/50

- 10.The Appellant to have costs of the suit and that of the appeal.

Dated, Signed and Delivered in open court this 1st day of April, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent