REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 157 OF 2009

JOHN NDUNGU…..……..……..... APPELLANT

VERSUS

MICHAEL W. OCHIENG…...…..…….……..……RESPONDENT

(Being an appeal from the original judgment of I. Maisiba, Resident Magistrate

in Eldoret CMCC No. 980 of 2005 delivered on 11th February 2009)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Resident Magistrates Court dated 11th February 2009. The respondent had brought a suit against the appellant for the tort of negligence. The respondent claimed that on 3rd July 2005 he was cycling when the appellant or his agent drove his vehicle negligently or carelessly; knocked him down; and, caused him severe injuries.
2. The learned trial magistrate found that the appellant was 100% liable for the accident. The trial court awarded the respondent Kshs 150,000 as general damages and Kshs 1,500 as special damages. The net award was thus Kshs 151,500 or thereabouts. The learned trial Magistrate also awarded the respondent costs and interest.
3. The appellant has challenged those findings by memorandum of appeal dated 24th September 2009. The appellant contends that the plaintiff did not prove his case on a balance of probabilities; that the learned trial magistrate disregarded the submissions by the appellant; that he applied wrong principles in assessing damages; and, that the trial court failed to give reasons for its findings. In a nutshell, the appeal is against both liability and quantum of damages.
4. The appeal is contested by the respondent. There is no cross-appeal. The respondent's case is that his evidence was not controverted; that the appellant did not call evidence; and, that considering the nature of injuries, the award of Kshs 150,000 as general damages was reasonable. I was implored to dismiss the appeal.
5. The appellant has filed submissions dated 13th October 2014 with authorities annexed. The respondent's submissions were filed on 3rd July 2015. On 14th July 2015, I heard learned counsels for both parties. I have considered the memorandum of appeal, record of appeal, the pleadings in the lower court, the evidence in the trial court and the rival submissions.
6. This 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 *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1.
7. On the material date the respondent was participating in bicycle race in Eldoret. Notice of the race had been given by the police. As the respondent approached the Brookside Depot, the appellant's

vehicle was ahead of him. It made a sudden U-turn and hit the respondent. The respondent fell down and was injured. The appellant came out of his vehicle and took the respondent to Moi Teaching and Referral Hospital. On cross-examination, the respondent was emphatic that he was not overtaking the vehicle and that the driver did not indicate he was turning. The respondent was examined by Dr. S. Aluda. The report of the doctor was produced as exhibit 4.

8. The appellant testified that his vehicle was stationary when the cyclist hit it. He claimed he had indicated to turn into a petrol station. He claimed he had been a driver since 1975. He did not exhibit his driving licence.
9. A number of issues arise from that evidence. It is *not* true as submitted by the respondent that the appellant did *not* testify. He did. The appellant conceded that as he was turning to enter the petrol station, the cyclist hit his vehicle on the right front tyre. That confirms he was turning. As it was in the middle of the road, I doubt very much that his car was stationary. If it was, the cyclist would have seen it and perhaps the injuries would not have been as severe. I find the respondent's evidence consistent. He was clear that the appellant was driving ahead of him when he made a made a sudden U-turn and hit the respondent. It is the appellant who took the respondent to hospital. He did not deny he owned the suit vehicle. I thus find that the accident was caused *wholly* by the *negligence* of the appellant.
10. The impugned judgment contains *reasons*. The learned trial magistrate correctly found that the respondent's evidence relating to negligence was not sufficiently countered. He found the appellant 100% liable. Relying on the medical report of Dr. Aluda, he found that an award of Kshs 150,000 was suitable. It is a very brief judgment: but I am unable to say that it did not conform to the requirements of the Civil Procedure Act and Rules. Although it is a good practice, it is not mandatory that the judicial officer refers to the *submissions* by the counsel in the judgment. Submissions are not pleadings or evidence. I find no merit in those grounds of appeal.
11. I will now turn to the quantum of damages. The appellant contends that the award of Kshs 150,000 as general damages was too high. His learned counsel proposed a sum of Kshs 80,000 as being more appropriate for the injuries. 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, *Kemfro Africa Limited & another v Lubia & another* [1987] KLR 30, *Akamba Public Road Services Ltd v Omambia* Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.
12. From the medical report of Dr. S. I. Aluda dated 6th July 2005 (exhibit 4), the respondent suffered blunt trauma to the scalp, neck, chest, spinal column, left arm and lower limb. He was tender in all those regions. The treatment involved cleaning and dressing the bruises. An injection for tetanus was given as well as antibiotics and analgesics. The doctor opined that the injuries were severe but continued to heal. The pain would eventually subside and the scabs would fall off. The injuries were thus of a *soft tissue* nature.
13. Granted the evidence, I would say that the award of general damages of Kshs 150,000 was *manifestly* high. In *Peter Kahugu & another v Ongaro*, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR, the plaintiff suffered soft tissue injuries. An award of Kshs 80,000 was made. In *Sokoro Saw Mills Limited v Grace Nduta Ndungu* High Court, Nakuru, Civil Appeal 99 of 2000 [2004] eKLR the court reduced the general damages for soft tissue injuries to Kshs 30,000. The appellant in the present appeal submitted that an award of Kshs 80,000 would be reasonable. Considering the *multiple* soft tissue injuries suffered by the respondent (but which have completely healed); the rate of inflation and the precedents, an award of Kshs 100,000 is sufficient. I will not disturb the award on special damages. They were specifically pleaded and strictly proved. See *Kampala City Council v Nakaye* [1972] E.A 446.
14. In the result, this appeal succeeds in part. The judgment and decree dated 11th February 2009 is hereby set aside. Judgment on liability is entered at a 100% in favour of the respondent against the appellant. General damages are assessed at Kshs 100,000. I award special damages of Kshs 1,500. I also grant the respondent costs in the lower court together with interest. As both parties have succeeded in part in this appeal, I order that each party shall bear its own costs at the High Court.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 1st day of October 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Mugambi for Mr. Kiarie for the appellants instructed by Kiarie & Company Advocates.

Mr. Andambi for the respondent instructed by Andambi & Company Advocates.

Mr. J. Kemboi, Court clerk.