IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL 68 OF 2004

DAVID KIPRUGUT …….……..... 1ST APPELLANT

KENYA PIPELINE CO. LTD. …… 2ND APPELLANT

AND

PETER OKEBE PANGO ……...…..…..…… RESPONDENT

***(Appeal from the judgment and decree of the High Court of Kenya Eldoret (Omonyi Tunya, J.) dated 1st November, 2002* in H.C.C.C. NO. 191 OF 2000)**

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JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court *(Omondi Tunya, J.)* delivered at Eldoret on *1st November, 2002* in which the learned Judge awarded the respondent herein, *Peter Okebe Pango (as the plaintiff in the superior court)* a sum of *Shs.1,552,000/=* as general and special damages arising out of a traffic road accident in which the respondent sustained injuries.

The respondent herein, *Peter Okebe Pango,* filed a suit against the appellants in the superior court. The pertinent paragraphs of the amended plaint were as follows:-

> ***"1. The plaintiff is a male adult of sound mind and his address of service for the purposes of this suit is care of KITIWA & COMPANY ADVOCATES, 1ST FLOOR, SIMPHI HOUSE, OLOO STREET, P.O. BOX 6680, ELDORET.***
>
> ***2. The 1st defendant is a male adult of sound mind and was at all material times to this suit the driver of motor vehicle registration number KAE 567F. His address of service is care of P.O. Box 4338, Eldoret (Service of summons to be effected through the plaintiff's advocate's office.)***
>
> ***3. The 2nd defendant is a company and was at all material times to this suit the registered owner of motor vehicle registration number KAE 567F. His (sic) address of service is care of P.O. Box 4338, Eldoret. (Service of summons to be effected through the plaintiff's advocate's office.)***

> ***4. On or about 5th June, 2000 the plaintiff was lawfully walking along Eldoret-Kitale road when at or about Pemugi, the 1st defendant so carelessly and negligently drove motor vehicle registration number KAE 567F that he caused it to loose control and overturn and knock the plaintiff injuring him seriously."***

After the foregoing paragraphs of the amended plaint, the respondent then set out what he considered to be particulars of negligence of the 1st appellant. The respondent then concluded his amended plaint as follows:-

> ***"REASONS WHEREFORE the plaintiff prays for judgment against the defendant (sic) for:-***
>
> ***(a) General damages for pain suffering and loss of amenities, loss of future earnings and future medical care.***
>
> ***(b) Special damages.***
>
> ***(c) Cost of this suit.***
>
> ***(d) Interest on (a), (b), and (c) above.***
>
> ***(e) Any other or further relief this Honourable court deems fit and just to grant."***

The appellants' counsel filed a statement of joint defence in which it was stated:-

> "***1. The defendants admit paragraphs 1, 2 and 3 of the plaint in so far as these describe the parties except that their address of service for the purposes of this suit is care of Messrs. Onyancha Bw'Omote & Company Advocates, Corner House, 9th Floor, Mama Ngina Street, and Post Office Box Number 55641-00200 Nairobi.***
>
> ***2. Save that an accident occurred on 5th June, 2000, along the said road, paragraph 4 of the plaint is denied. In particular it is denied that the accident occurred in the manner alleged or that the first defendant was negligent as alleged or at all and all the particulars of negligence set forth in paragraph 4 (a) – (k), inclusive, are denied and the plaintiff put to strict proof thereof.***
>
> ***3. The alleged injuries loss and damages are denied.***
>
> ***4. If, which is denied, a collision occurred then it was caused by the sole or substantial contributory negligence of the plaintiff."***

Then followed particulars of the respondent's negligence according to the appellants. In their defence, the appellants asked the superior court to dismiss the respondent's claim with costs.

The hearing of the suit in the superior court commenced on *11th April, 2002* when the respondent testified as to how the accident occurred. It was his evidence that on the material day *(5th June, 2000)* at about **8:00 p.m.** he was at a bus stage waiting for transport along Eldoret-Kitale road. While at the bus stage a vehicle (a matatu) stopped to pick passengers but the respondent declined to board the vehicle. The respondent moved a few steps infront of the vehicle and a vehicle registration number ***KAE 567F*** being driven by ***1st appellant*** and owned by ***2nd appellant*** lost control, swerved off the road and knocked the respondent infront of the matatu. It was the respondent's evidence that the 1st appellant was careless, drove at excessive speed and had no regard to other road users.

Richard Owuor Ooko (PW5) testified that on the material day at the material time he was a passenger in the matatu that stopped just before the accident. He claimed to have seen how the accident occurred.

In his evidence he said that the appellants' vehicle in an attempt to avoid ramming into the matatu, swerved and lost control and in the process knocked down the respondent.

Dr. Lectary Kibor Lelei (PW2) examined the respondent and treated him as a result of the accident. ***Dr. Samuel Aluda (PW3)*** also examined the respondent and prepared a medical report. ***Ann Chemworsio (PW4)*** gave evidence to the effect that the respondent was one of the employees of KVDA and that his salary at the material time was Shs.10,000/= per month.

The 1st appellant, ***David Kiprugut***, in his evidence admitted that he was driving the accident vehicle when it knocked down the respondent at the scene. According to him it was past **10:00 p.m.** This is what the 1st appellant told the superior court:-

> "***I slowed down to let the oncoming vehicle pass before I could overtake the matatu in its stationary position. As soon as the on-coming vehicle passed I overtook the matatu and while side by side with the matatu I noticed that there was someone on my bonnet. I immediately stopped in the middle of the road. When I came out I noticed the impact on my vehicle was on the front right hand side had been damaged, the right hand side bonnet was dented and the windscreen shattered. The man fell off the bonnet to the left side of the road, off the tarmac. The matatu was still parked but was behind me. The impact did not occur when I was side to side with the matatu. As a result of the impact I veered to the left and the matatu was immediately behind me. I had not seen anyone crossing but the damage to my vehicle was to the right side. The final resting place of the victim was off the tarmac. On the left side, only the wiper and car aerial got ripped off. After the accident I took the victim to hospital and went to report at Eldoret Police Station in my accident vehicle."***

The 1st respondent did not call any witness.

The learned Judge of the superior court considered the evidence placed before him and in the end reached the conclusion that the 1st appellant was 100% liable. In the course of his judgment, the learned Judge said:-

> "***In my view, I am more inclined to the evidence that the accident in fact occurred off the road to the left and in front of the stationary matatu. Both the plaintiff and the defence agreed that the plaintiff rested off the road after the impact. The fact that the right side of the vehicle and not the left got damaged is immaterial because if the vehicle lost control, it didn't have to knock the plaintiff only with its left side. It would all depend on how it approached the plaintiff. The theory that the 1st defendant knocked the plaintiff in the middle of the road and then threw him several metres off the road from the middle is untenable. Unless, of course, the impact was at an extremely high speed, which is itself an act of recklessness in the circumstances of this case. The plaintiff may or may not have been drunk. Since the medical records show he was, I will take it that the records are accurate. That in itself, without any other evidence to show it did contribute to the accident cannot be a justification for finding him guilty of contributory negligence. The clinical notes are silent on to what extent he was drunk and if he was so drunk as to be impaired in his judgment. Again, that would be relevant in the event he was knocked while crossing the road, a theory which this court rejects. On liability, I find the 1st defendant 100% liable and the 2nd defendant likewise, vicariously as his employer."***

Having so expressed himself, the learned Judge then proceeded to assess both general and special damages concluding his judgment thus:-

> ***"Accordingly, judgment is entered for the plaintiff against the defendants jointly and severally as follows:-***

(a) General damages for pain, suffering

and loss of amenities …….Shs.1,200,000.00

(b) General damages for future

medical expenses…….Shs. 350,000.00

(c) Special damages …… Shs. 2,000.00

TOTAL Shs.1,552,000.00

The plaintiff is also awarded costs of this suit and interest at court rates. It is so ordered."

Being dissatisfied with that judgment, the appellants through their counsel filed this appeal citing ten grounds of appeal in the memorandum of appeal.

When the appeal came up for hearing before us on *21st February, 2007*, Mr. Onyancha Bw'Omote appeared for the appellants while Mr. Kitiwa appeared for the respondent.

Mr. Bw'Omote challenged the findings of the learned Judge in that he disbelieved the evidence of the 1st appellant and yet he *(1st appellant)* was very consistent in his evidence unlike the respondent. It was Mr. Bw'Omote's contention that the version of the 1st appellant as to how the accident occurred should have been accepted.

As regards the award of general and special damages, Mr. Bw'Omote submitted that these were very high and that a figure of ***Shs.800,000/=*** would have been reasonable.

Mr. Kitiwa supported the findings of the learned Judge as to how the accident occurred. In Mr. Kitiwa's view, the awards were not inordinately low or inordinately high to warrant interference by this Court. He therefore asked us to dismiss this appeal with costs.

This being a first appeal, it is our duty to re-evaluate the evidence, assess it and make our own conclusions remembering that we have neither seen nor heard the witnesses and hence due allowance must be made for this – See ***SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD [1968] E.A. 123 at p. 126*** and ***WILLIAMSON DIAMONDS LTD. V. BROWN [1970] E.A. 1.***

We have considered the evidence placed before the learned judge and taking into account what the respondent and the 1st appellant stated in their respective evidence, we wish to observe that the 1st appellant's vehicle was damaged on the right hand side which in a way confirms the testimony of the 1st appellant. It is further to be noted that medical report showed that the respondent may have been drunk. On the other hand the 1st appellant conceded he did not see the respondent before impact. He did not therefore exercise due care and attention. Taking all these into consideration, we are of the view that the respondent contributed to the occurrence of the accident. We apportion liability at ***50%.*** Hence we find the respondent to have been ***50%*** to blame for the accident.

We must now move onto the quantum of damages. Medical evidence as to the injuries sustained by the respondent was produced and the learned judge relied on the same in the assessment of general and special damages. In this appeal, Mr. Bw'Omote urged us to interfere with the awards made by the superior court. In ***KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE GATHOGO KANINI V. A.M. LUBIA AND OLIVE LUBIA (1982-88)*** **1 KAR 727 at p. 730** Kneller J.A. said:-

> "***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 that 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 damage. See Ilango v. Manyoka [1961] E.A. 705, 709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd v. Kavoloto [1970] E.A. 414, 418, 419. This Court follows the same principles."***

The above stated principles continue to be applied by this Court. We have endeavoured to set out the brief background to this appeal. The appeal as already stated, arises out of a traffic road accident in which the respondent was hit by a vehicle at a matatu stage. The learned Judge of the superior court considered the injuries sustained by the respondent as per the medical report produced. As we have already stated, in the assessment of damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards on similar cases. It would appear that the learned Judge had the correct approach as he embarked on the exercise of the assessment of general damages – See ***RAHIMA TAYAB AND ANOTHER V. ANNA MARY KINARU (1987-88) 1 KAR 90***.

In view of the foregoing, we are not prepared to interfere with the awards, but since we have found that the respondent was ***50% liable*** it must follow that the award has to be reduced by half. For that reason this appeal is allowed to the extent that the award of ***Shs.1,552,000/=*** is set aside and in its place we award the respondent ***Shs.776,000/=*** plus costs in the superior court.

As the appellants have partially succeeded, we order that they be awarded half the costs of this appeal. It is so ordered.

Dated and delivered at Eldoret this 30th day of March, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR