THE REPUBLIC OF KENYA

IN THE COURT OF KENYA AT BUNGOMA

HCCA NO. 17 OF 2019

POA LINK SERVICES CO. LTD .....1ST APPEALANT

PATRICK ATARO OTWANI .....2ND APPELLANT

VERSUS

SINDANI BOAZ BONZEMO.....RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. C. Menya SRM in Kimilili PMCC No. 71/2018

delivered on 28/12/2018)

JUDGMENT

The respondent (plaintiff in the trial court) sued the appellants for negligence alleging that on 25th August, 2017 the appellant caused his Motor Vehicle Reg No. KCL 484W to collide with the respondent's Motor Vehicle Registration Number KCE 982B Toyota Fielder resulting in various bodily injuries to the respondent. He blamed the appellant for the accident.

The appellant filed a statement of defence dated 20th June 2018 denying the occurrence of the accident and accused the respondent of negligence.

The matter proceeded to hearing where the respondent called five witnesses in support of his case whereas the 2nd appelant testified on his behalf. After considering the oral evidence and submissions on record the trial magistrate made her judgement in favour of the respondent as follows: -

Liability **100% against the appellants**

General damages **kshs.350,000/=**

Special damage **kshs.11,600/=**

Costs and interest

Aggrieved by this decision; the appellant preferred this appeal raising the following grounds: -

1. THAT the learned Trial Magistrate erred both in law and fact in pronouncing judgment against the appellants on liability when there was no legal basis or otherwise basis of doing so in light of there being insufficient evidence adduced before her.

2. THAT the learned Trial Magistrate erred both in fact and law by pronouncing judgment against the appellants whereas the respondent had not proved appellants liability on a balance of probability.

3. THAT the learned Trial Magistrate erred in law and in fact by failing to take into account all material and relevant facts as to the causation of the accident and as a result thereof reached a wrong decision by holding the appellant 100%liable for the accident.

4. THAT the learned Trial Magistrate erred in law and in fact by holding that the respondent had proved negligence as against the appellants on balance of probability.

5. THAT the learned Trial Magistrate erred in law and in fact by awarding special damages not supported by any prove.

6. THAT the learned Magistrate misdirected himself failing to apply or applying wrong principles on the assessment of quantum on damages awardable to the respondent thus awarding damages which were manifestly excessive in the circumstances and not commensurate with the injuries sustained by the respondent.

7. THAT the learned Trial Magistrate erred both in law and fact by finding the appellants 100%liable for the accident in light of the evidence adduced.

8. THAT the learned trial magistrate erred in law and in fact by failing to consider the submissions of the Appellants.

9. THAT the learned trial magistrate erred in law and in fact by taking into account irrelevant factors and failing to take into account relevant factors thereby arriving at an erroneous judgment.

Directions were given on 10th February ,2020 to have the appeal disposed of by way of written submissions. Both parties filed their respective submissions.

On liability the appellants submitted that the respondent failed to prove negligence on their part. According to them the respondent did not call any independent eye witness to corroborate his assertions. They submitted that the respondent failed to discharge the burden of proof hence failed to prove his case on a balance of probability therefore the suit ought to have been dismissed or at best, liability be apportioned equally. They further submitted that a conviction on in a traffic case does not bar the defendant from raising a defence of contributory negligence appellant relied in the cases of **Lavington Security Services Ltd Vs Okeyo (2004) eKLR** and **Lilian Birir& Another Vs Ambrose leaman [2016] eKLR.**

On quantum the appellant submitted that the Respondent only suffered soft tissue injuries which did not cause him permanent disability. He urged this court to revise the award downwards from Kshs 350,000/= to Kshs.100,000/=. They cited cases of **Ndungu Dennis Vs Ann Wangari Ndirangu &Another(2018)eKLR, Dickson Ndungu Kirembe vs Theresia Atieno & 4Others [2014] eKLR and Juma Hajee Properties Vs Hamidu Malio & 2others Eldoret Civil Appeal 42 of 2018** in support.

The respondent submits that since the proceedings in Kimilili Traffic case Number 102/2018 were produced in court, where the 2nd appellant pleaded guilty and fined Kshs 8,000/= is sufficient reason not to apportion liability. Further that the appellant did not adduce any evidence as to how he contributed to the occurrence of the accident. Counsel in this regard cited the case of ***Emmanuel Kirwa Too*** (***suing through father and next friend) John Kiptoo Koskei Vs Poa Link Services Company Ltd & 2 Ors.HCC 26/2018-Eldoret***

The respondent argues that the appellants did not subject the respondent to a second medical examination to challenge the injuries allegedly sustained. The respondent proposes an award of Kshs 700,000/=.

On special damages, counsel argues that the same were specifically pleaded and proved.He has relied on the authority in ***Easy Coach Ltd Vs Emily Nyangasi*** **(2017) eKLR.**

From the appeal and the and the rival submissions filed by the parties herein, I find that the issues to be determined are; **-**

a) Whether the trial court erred in holding Appellant 100% liable for the accident

b) whether the trial magistrate's award of quantum was inordinately high.

Determination

On liability; the appelants submit that PW3 testified that she did not know who to blame for the accident and that it had drizzled before the accident occurred and that the police officer who testified was not the Investigating Officer.

PW4 on his part stated on the date of the alleged accident, he was driving towards Kitale from kamukuiywa and when he started climbing the lane, he saw a car coming from behind whereupon he moved to the climbing lane to give a chance to overtake. That about 200 Metres from the bridge, he met a Toyota Land Cruiser, Prado KCL 484W overtaking a lorry downhill. That it encroached the yellow line to accelerating lane used by overtaking vehicles, the Prado hit two vehicles KCE 982B belonging to the plaintiff and a Toyota Passo, KCL 863F and finally that the 2nd appelant was charged , pleaded guilty and fined Kshs8,000/=

On his part, the 2nd appelant stated that he was heading to Busia from Kitale on the date and it was drizzling. That he was sloping and two motor vehicles KCL 863L and KCE 982B were climbing. That KCL 863L was on the path of the 2nd appelant and when he attempted to evade hitting it, he hit KCE 982B. He admitted having been charged.

Black's law Dictionary, 8th edition defines liability to mean; ***the quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.***

It is common ground that the 2nd appelant was charged in Kimilili Senior Principal Magistrates Court vide Traffic Case Number 102/2018. He pleaded guilty to the offence of Driving a motor vehicle on a public road without due care and attention contrary to Section 49 of the Traffic Act.

The appelant submits that even though the appelant was charged, nothing bars him from raising a defence on contributory negligence. On this proposition counsel cited ***Lavington Security Services Ltd V Okeyo*****(2004)eKLR.**

This court agrees with the appelant's counsel's submission on this point however I must point out that it is the defendant's duty to adduce evidence to that effect failing of which the court shall not infer any negligence.

The appelants' statement of defence under paragraph 8, enumerates instances of negligence on the part of the plaintiff and on the part of the driver of Motor vehicle registration Number KCE 982B. This is not enough. In fact in his testimony, the 2nd appelant admits that he pleaded guilty to the Traffic charges.

The court finds no reason to interfere with the trial court's finding on the issue of liability and hereby proceed to affirm the same.

The second issue is whether the award of damages was inordinately high. From the record, the respondent suffered; Blunt injury to the chest, Bruises of the lower abdomen, Bruises of the right hip joint, Bruises of the thigh and Bruises on the knee. The trial magistrate awarded Kshs.350, 000/= as compensation for general damages for these injuries.

On quantum of damages, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete (2004) 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**
>
> **The appelate court can only interfere with the award of damages where it finds that the trial court applied wrong principles of law by taking into account some irrelevant factor, leaving out of account some relevant ones and therefore arriving at an erroneous estimate of damages to be awarded.**

The appellants submitted that the awards of Kshs.350,000/= was excessive They submitted that Dr.Sokobe who testified in this case confirmed that the respondent suffered from multiple soft tissue injuries from which he had fully recovered with no incapacitation or complications. They proposed that an award of kshs.100,000/= would be sufficient compensation for respondent in terms of general damages.

The appellant relied in the cases of ;***Ndungu Dennis Vs Ann Wangari Ndirangu &Another*** **(2018)eKLR** where the court awarded Kshs.100,000/=for soft tissue injures to the lower leg and back, ***Robert Ngare Gateri Vs Maingo Transporters*** **(2015)eKLR** where Kshs.60,000/= was awarded for soft tissue injuries to the lower chest, left elbow and right buttock and ***Juma Hajee Properties Vs Hamidu Malio & 2 Others Eldoret Civil Appeal*** **42 of 2018.**

The respondent submits that an award of Kshs 700,000/- would be sufficient compensation as general damages. He relied in the decision in ***Easy Coach Limited Vs Emily Nyangasi*** **(2017) eKLR**. Since the respondent did not file a cross appeal on the award of damages, they cannot seek enhancement of the same at this point.

From the foregoing I note that the authorities cited by the appellants quote an inordinately low figure and the respondent inordinately high.

In *Francis Ochieng & Another v Alice Kajimba* (2015) eKLR, the High Court reduced an award of Kshs 500,000/= to Kshs 350,000/= for multiple soft tissue injuries. **In *H. Young Construction Company Ltd v Richard Kyule Ndolo* (2014) eKLR** an award of Kshs 250,000/= general damages were made for soft tissue injuries.

Guided by the above cited decisions, it is the court's finding that the trial magistrates' award of Kshs 350,000/= for general damages is a fair amount bearing in mind the inflation tendencies that have affected the economy and strikes a balance between the parties' proposed amounts.

On special damages I must say that the nature of special damages demands that the party claiming must specifically plead and prove by way of receipts any expenditure that he or she incurred. Nothing less. There was no proof of expenditure on the other items falling under special damages except for the receipt of Kshs.6000/= for the medical report.

Consequently, the trial court's finding on liability is affirmed, special damages is reduced from the awarded sum of Kshs 11,600/= to Kshs 6,000/= being the cost of procuring the medical report and affirm the trial court's finding on the award of general damages.

I make no orders as to costs on the appeal.

DATED AT BUNGOMA THIS 10TH DAY OF MARCH 2021

S.N RIECHI

JUDGE