



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Cockar & Muli JJ A)

CIVIL APPEAL NO 51 OF 1989

MUNICIPAL COUNCIL OF NAKURU & ANOTHER APPELLANTS

VERSUS

GATHIAYA..... RESPONDENT

JUDGMENT

This is yet another instance in which a young man's life has been battered and shattered as a result of a motor accident which occurred on the 11th September, 1975 near Nakuru Town. The respondent was walking on the left side pavement of Nakuru - Nairobi Road when he was violently hit from behind by a vehicle registration number KNR 1 owned by the 1st appellant and, at the material time, being driven by the 2nd appellant in the course and scope of his employment with the 1st appellant. It was about 11.30 pm, when the respondent and other school children left State House after entertaining the late President. The group of the children including the respondent had just crossed the main Nairobi – Nakuru Road and was walking on their left side of the road. The respondent was slightly behind the other children when he was suddenly hit from behind by the 1st appellant's vehicle while it was being driven by the 2nd appellant. The learned trial judge (Msagha, J) held that the 2nd appellant was solely to blame for the accident and the 1st appellant was therefore vicariously liable in negligence.

There are seven grounds of appeal. Mr Reg Sampson, for the appellants abandoned grounds 7,8 and 9 saying that the awards therein were conservative and that he did not wish to pursue them. He then grouped grounds 1,2 & 5 on liability and argued them together. Ground 6 was on quantum of damages and he argued it separately.

On the grounds of liability, Mr Sampson submitted that on the evidence before the judge, it is quite obvious that the two witnesses did not know how the accident occurred in view of the inconsistencies in their evidence and that the learned trial judge failed to give sufficient consideration of these inconsistencies when he should have held that liability should have been apportioned on fifty-fifty percent basis instead of 100% on the appellants. The truth of what actually happened was seriously affected by the manner in which the police investigated the accident. There was no sketch plan to at least pin-point the spot where the accident occurred in relation to the Nairobi – Nakuru Road and the pavements. According to the respondent, he was walking on the left pavement on the Nairobi – Nakuru Road when he was suddenly hit from behind by a vehicle he had not seen. He knew nothing more as he was rendered unconscious. The 2nd appellant gave varied versions as to how the accident occurred. The learned judge preferred the version given by the respondent and attributed liability entirely on the 2nd appellant.

From the evidence on the record, there was very little that the trial judge could do except to rely on the credibility of the two witnesses. According to the evidence, it was a rainy night with vehicles and people

including school children who had come from the State House using the Nairobi – Nakuru Road. Being at night with bad weather conditions, the 2nd respondent should have exercised due care and look-out to ensure that his vehicle did not endanger any pedestrian or other road users on the busy road. It all turned on the credibility of the respondent and the second appellant. The trial judge found the respondents' version as to the cause of the accident credible and rejected the 2nd appellant's versions.

Mr Sampson cited the decision in *Berkley – Steward Ltd and David Cottle & another v Lewis Kimani Waiyaki* [1982-88] 1 KAR 1118 where the accident was a near head-on collision with no credible direct evidence of how it had occurred. It was held that since there was no concrete evidence to distinguish between the blameworthiness or otherwise of the two drivers, both should be held equally to blame on a fifty- fifty basis.

This case is clearly distinguishable on facts. In that case, there was no direct concrete evidence as to how the accident occurred. In the instance case there was the evidence of the respondent to the effect that he was walking behind other children on the left pavement along Nairobi – Nakuru Road. That he was hit from behind and knocked down unconscious. The 2nd appellant gave varied and contradictory versions of how the accident occurred. One fact is clear that he did not see the respondent before he hit him from behind. He should have exercised due care and attention while driving during a rainy night, with pedestrians whom he knew had come out from the State House. The respondent did not expect any motor vehicle to be driven on the pavement he was walking along. He could not have been expected to see what was behind him. The doctrine of *Res Ipsa Loquitur* was properly pleaded. The onus shifted to the appellants to explain how the accident occurred. The 2nd appellant's versions on how the accident occurred were as follows:-

“When I reached a bus stage near the town, I saw a motor vehicle ahead and blinded me by its beam. At that time I heard a bang on my right hand side.. I did not know whether the pedestrian was on the road or off the road. He was walking. He was crossing the road. I was driving at about 50 KPH because it was drizzling and the other car had blinded me. The road has a slight bend at the scene of the accident.”

He then changed his version and testified that the pedestrian was knocked by the “left hand side of the car.”

In cross-examination, he changed his version again and testified that:-

“I did not see the plaintiff before I knocked him because of the rain and the beam of the other car.”

With these contradictory versions, the learned trial judge disbelieved the 2nd appellant and believed the version given by the respondent. On our own evaluation of the evidence, the respondent's version was credible and that of the 2nd respondent not worthy of belief. Mr Nyakundi, for the respondent submitted that the finding of liability on 100% basis was based on credibility and therefore supportable on the available evidence. We agree with him. Grounds 1, 2, and 5 fail.

Turning now to ground 6 of the appeal, Mr Sampson submitted that the award of Ksh 1,200,000 for pain and suffering and loss of amenities was inordinately high to amount to wholly erroneous estimate of the damage suffered by the respondent and that the award was disproportionate to the damage sustained by the respondent as compared with current awards in similar cases.

The respondent then aged 19 years and a standard four pupil suffered serious injuries as a result of this accident. He became unconscious and was taken to Nakuru General Hospital where he remained unconscious for a week. He is still in that Hospital up to now. According to the medical report of Mr Masiira, Consultant Surgeon who examined him about 10 years after the accident, the respondent suffered:-

“1. Spinal cord injury (cervical and thoracic) with :-

(a) Paralysis of both legs.

(b) Incontinence of urine and faeces.

(c) Recurrent urinary tract infections with damage to both kidneys and a bladder stone.

2. Multiple pressure sores on both buttocks, trochanteric regions and upper parts of both thighs (most of them healed now) together with deformities of the hip joints.”

The respondent suffered serious injuries which rendered him to be bed-ridden in hospital since the accident. He is now a helpless and bed-ridden for the rest of his life. He has 100% permanent disability with no chance of recovery. Although the respondent did not suffer head injuries, he is paralysed from the neck downwards. He cannot help himself in any manner and must depend on the nurses to attend him and to feed him.

Mr Sampson also referred us to the decisions in *Butt v Khan* [1982-88] 1 KAR: 1 in which the infant aged seven and a half suffered a fractured skull, was unconscious for ten hours, spent four days in hospital and was left with diminished cerebral ability, headaches, failure of memory and lack of concentration. He was found to have fifty per cent permanent disability. He was awarded Kshs 400,000/= for pain, suffering and loss of amenities. That award was reduced by this Court to Kshs 300,000/= because the judge had been duly influenced by the likelihood of epilepsy occurring. The injuries suffered by the respondent in this case were severe than those in *Butt v Khan*'s case. (*supra*).

In the instant case, the respondent suffered injuries of maximum severity which have left him bed-ridden for life with 100% permanent disability.

In another case *Mariga vs Masila* [1982 – 88] KAR 507 the appellant was involved in a motor accident and suffered serious injuries with initial total paralysis, but recovered a degree of mobility. His residual injuries were that his left side was severely affected with a dropped left foot, weakness of the left hand, some deformity of his right side, impotency, urinary difficulties and considerable continuing pain. He was awarded Ksh 600,000/= for pain, suffering and loss of amenities. The award was not disturbed by this Court. The injuries in the present case were severe and involved total paralysis from the neck downwards. The respondent is still bed-ridden in the hospital.

The decision in *Kusira v Futi* CA No 138 of 1986 (unreported) was also cited. A young girl aged 19 years sustained grave injuries in a road accident. She suffered neurological damage resulting in constant headaches, impaired vision and hearing. She was rendered a wheelchair invalid for the rest of her life. She was awarded Ksh 700,000/- for pain, suffering and loss of amenities. Here again, the injuries in the present case were much more severe than those in *Kisira v Futi*'s case.

Shaban v City Council of Nairobi [1982-88] KAR 681 was also cited as authority on various points of law although the award was increased from Kshs 150,000/- to Kshs 350,000/=.

Finally, in *Kibucha v Kwamboka Mosongo*, Civil Appeal No 93 of 1987 (unreported) the 1st respondent, Isabella Mosongo, received serious injuries. She was paralysed from waist downwards. She could no longer have sex or perform the normal domestic chores. She was awarded Kshs 850,000/- for pain, suffering and loss of amenities. Mr Sampson suggested that the award in this case should have been between Ksh 700,000/= and Ksh 850,000/= and therefore we are justified in disturbing the award of Ksh 1,200,000/= which he submitted was inordinately high and disproportionate to the injuries suffered by respondent.

Mr Nyakundi, for the respondent supported the award saying that the award was not inordinately high to warrant disturbance. He submitted that the injuries in the present case were grave and of maximum severity compared with those in *Kisira v Futi*, *Kibucha v Kwamboka Mosongo* and *Butt v Khan* cases (*supra*).

There can never be any doubt, that the respondent suffered injuries of maximum severity and was rendered bed-ridden for the rest of his life. The fact that the respondent is still in hospital confirms the gravity of the injuries and the permanency of the disability.

We would like, with greatest respect, to echo the sentiments expressed by Chesoni, Ag JA as he then was, in the case of *Mariga v Musila* (*supra*) at page 519:

“No two cases of motor accident are exactly the same for one to form a suitable precedent of the other. The facts, the injuries or even degree of similar injuries and the effect of such injuries are usually so different that it is necessary to consider each case on its own merit and peculiar facts even where the country, venue and circumstances are the same. For this reason, past decisions in this type of cases are of little assistance in determining the quantum of damages, especially the non-pecuniary damages on pain, suffering and loss of amenities.”

Mr Sampson urged us to hold that the award of Ksh 1,200,000/= was inordinately high and disproportionate to the injuries sustained by the respondent. It has been settled that -

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respects, and so arrived at a figure, which was inordinately high or low.” (see *Butt v Khan*, *Shaban v City of Nairobi*, *Mariga v Musila*)

The question is this – was the award of Ksh 1,200,000/= inordinately high or disproportionate to the injuries suffered by the respondent to warrant disturbance by this Court? We think not. Mr Sampson did not single out any wrong principle which the learned trial judge applied. We ourselves find none at all. The comparable current awards show an upward trend. The award in this case is within the range of the up-ward trend. This upward trend is explained by the inflationary trend and the decline of the value of the Kenya Shilling. Taking all into account and bearing in mind that no pecuniary award will adequately compensate this young respondent who has lost all his amenities and must have suffered pain since the accident, the award of Ksh 1,200,000/= was not inordinately high to warrant our disturbing it. The respondent has lost everything including a future happy life. Ground 6 of the appeal also fails.

Mr Sampson having abandoned the other grounds of appeal, the result is that the appeal fails and we dismiss it with costs.

Dated and delivered at Nairobi this 13th day of October, 1993

J.E. GICHERU

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

M.G. MULI

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JUDGE OF APPEAL