Case Number:	Civil Appeal 92 of 2011
Date Delivered:	22 Dec 2015
Case Class:	Civil
Court:	High Court at Eldoret
Case Action:	Judgment
Judge:	Cecilia Wathaiya Githua
Citation:	David Karanja v Tofwa Vutagwa [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	Hon. I. Maisiba - Resident Magistrate
County:	Uasin Gishu
Docket Number:	-
History Docket Number:	CMCC No. 1028 of 2009
Case Outcome:	Appeal dismissed
History County:	Uasin Gishu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 92 OF 2011

DAVID KARANJA …… APELLANT

VERSUS

TOFWA VUTAGWA …… RESPONDENT

(An Appeal from the Judgment and Decree of the Principle Magistrate Honourable I. Maisiba (RM) in Eldoret CMCC No. 1028 of 2009 dated and delivered on 15.4.2011)

JUDGMENT

1. The respondent was the plaintiff in the lower court. She sued the appellant seeking general and special damages for injuries she sustained on 16th November, 2009 in a road traffic accident when motor vehicle registration No. KAN 591M veered off the Eldoret-Kitale road at Muchai area and violently knocked her down as she allegedly stood off the road.

2. The respondent in her plaint dated 18th December 2009 averred that the accident was caused by the appellant, his driver or agent's negligence in driving the motor vehicle at an excessive speed, driving on the wrong side of the road, failing to control or manage the vehicle with the result that it veered off the road and caused the accident.

3. In his statement of defence dated 16th March, 2010, the appellant denied all the allegations made against him by the respondent and put her to strict proof thereof.

In the alternative on a without prejudice basis, the appellant contended that if the accident occurred which was denied, it was wholly or substantially contributed to by the negligence of the respondent by abruptly stepping into the road without care and attention.

4. After a full trial, after analysing the evidence presented before the court, the learned trial magistrate found the appellant 100% liable for the injuries sustained by the respondent. He awarded the respondent general damages in the sum of Kshs. 180,000/- for pain and suffering and Kshs. 2,000/- as special damages. The respondent was also awarded costs of the suit and interest at court rates from the date of judgment until payment in full.

5. Being aggrieved by the trial court's judgment, the appellant proffered the instant appeal relying on five grounds of appeal which can be summarized into three main grounds namely:-

i. That the learned trial magistrate erred in law and in fact by entering judgment on liability against the appellant at a 100% against the weight of the evidence on record and without considering the defendant's submissions.

ii. That the learned trial magistrate erred in law and in fact in awarding the respondent damages which were excessive in the circumstances of the case.

iii. That the learned trial magistrate erred in law and in fact in failing to take into account the requisite principles of law in the assessment of general damages.

6. This being a first appeal to the High Court, I have an obligation to re-evaluate and consider afresh the evidence tendered before the trial court and to draw my own independent conclusions bearing in mind that unlike the trial court, i did not have the advantage of hearing or seeing the witnesses and give allowance for that disadvantage. This duty of the first appellate court has been restated time and again in many judicial pronouncements such as ***Sumaria & another V Allied Industrial Limited (2007) 2KLR 1;*** ***Williamson Diamonds Ltd V Brown (1970) EA 1*** and ***Peters V Sunday Post (1958) EA 424*** among others.

7. It is now settled law that an appellate court will not normally interfere with a finding of fact by the trial court unless it is demonstrated that the finding was based on no evidence or on a misapprehension of the evidence or on application of the wrong legal principles – See: ***Jabane V Okenja (1986) KLR 661;*** ***Ephantus Mwangi V Duncan Mwangi Wambugu (1982-88) I KAR 278*** and ***Peters V Sunday Post Ltd (Supra).***

8. I have considered the pleadings before the lower court, the evidence on record, the judgment of the learned trial magistrate, the grounds of appeal, the written submissions filed by the parties and the authorities cited.

Having done so, I find that only two key issues arise for my determination which are:

i. Whether the trial magistrate erred in law or in fact in finding the appellant wholly liable for the respondent's injuries.

ii. Whether the damages awarded to the respondent were manifestly excessive in the circumstances of the case and whether in the assessment of those damages, the learned trial magistrate applied the correct legal principles.

9. Turning to the first issue, I wish to start by setting out the undisputed facts. From the evidence on record and the submissions filed on behalf of the parties, I find that it is not disputed that an accident involving Motor vehicle Registration No. KAN 591M and the respondent occurred on 16th November, 2009 as a result of which the respondent sustained the injuries described in her plaint. It is also not disputed that at the material time, the vehicle was being driven by DW1 *Stephen Njoroge* on behalf of its owner *David Karanja*, the appellant in this appeal.

10. What is contested is whether the appellant's driver solely caused the accident by negligently driving or controlling the aforesaid motor vehicle or whether the respondent by her negligence caused or contributed to the occurrence of the accident. This is so because it is the appellant's contention that it is the respondent who was to blame for the accident.

11. The respondent's case is that on the material day, she wanted to cross the Eldoret-Kitale Road but as there was a traffic jam, she stood off the road on the left side as one faces Kitale direction waiting for

the road to clear. This is when vehicle Registration No. motor KAN 591 M Nissan Matatu approached at high speed from the Eldoret direction, veered off the road, found her standing off the road and knocked her down.

12. The accident was witnessed by PW3. PW3 corroborated the respondent's evidence that the vehicle was being driven at high speed when it veered off the road and hit the respondent as she stood completely off the road. She was emphatic in her evidence that the respondent had not started crossing the road when the accident occurred.

13. On his part, the appellant's driver who testified as DW1 blamed the respondent for the accident. He claimed that she abruptly and carelessly started crossing the road when his motor vehicle was close by; that he tried to avoid hitting the respondent by applying brakes to stop the vehicle but this was not possible as the vehicle skidded and hit her with its side mirror. DW1 admitted that though the speed limit for the area in which the accident occurred was 50 KMPH, he had been doing a speed of 60 KMPH.

14. The learned trial magistrate in his judgment after evaluating the evidence on record found that the respondent had proved her case on a balance of probabilities. He believed the evidence of the respondent that she had been hit by the appellant's vehicle while standing off the road because her account concerning how the accident occurred was consistent with the evidence of PW3 who had witnessed the accident.

The trial magistrate rejected the evidence of DW2 a police officer who produced as Dexhibit 1 a police abstract which indicated that the respondent was to blame for the accident.

15. Given the evidence on record, I am unable to fault the trial magistrate's finding that the appellant's driver was solely to blame for the accident. The finding was based on the evidence adduced by PW1 which was supported by the evidence of PW3 who witnessed the accident. PW3 appears to have been an independent witness who was going about her business when she saw the respondent being knocked down. The learned trial magistrate believed the evidence of PW1 and PW3 and I have no reason on my part to doubt their credibility more so because unlike the trial magistrate, I did not have the advantage of seeing them as they testified before the court.

16. Having accepted as a fact that the appellant's vehicle hit the respondent as she stood off the road, the trial magistrate was correct in holding the appellant 100% vicariously liable for the negligence of his driver because it is common knowledge that vehicles do not normally veer off the road. It is clear from the evidence that the appellant's driver was overspeeding and was either unable to take proper control of the motor vehicle or that he was attempting to beat the traffic jam on the road at the material time by overtaking on the wrong side of the road hence the accident. Whatever the case, the appellant's driver was clearly reckless or at the very least negligent in the manner in which he drove the vehicle at the material time.

17. It is also my view that the police abstract produced by DW2 was of no evidential value since no basis was laid for the claim in the report that the respondent was to blame for the accident. No evidence was led by the appellant during the trial to establish that the police had carried out independent investigations into how the accident occurred and more importantly, the police abstract was disowned by PW4, a police officer from the traffic base which had allegedly issued the abstract.

For all the foregoing reasons, I have come to the conclusion that the trial court's finding on liability was correct and the same is hereby upheld.

18. On quantum, the respondent pleaded that she suffered the following injuries as a result of the accident.

i. The forehead was swollen and tender with a deep cut wound.

ii. The right cheek was swollen and tender with bruises and lacerations.

iii. The neck was swollen and tender.

iv. Blunt trauma to the chest which was tender.

v. The back was swollen and tender with bruises.

vi. Blunt trauma to the spinal column which was tender

vii. The right shoulders and right arm were swollen and tender with bruises.

viii. Both legs were swollen and tender with bruises.

ix. A cut wound on the tongue

i. Pains in all the aforementioned parts of the body.

19. In her evidence, the respondent testified that on impact, she lost consciousness and only regained it while undergoing treatment at Moi Teaching & Referral Hospital. She did not however disclose how long she remained unconscious. At the time she testified, she claimed that she had not fully recovered as her right hand was weak and she was still undergoing treatment for chest aches. This was about four months after the accident. *Dr. S.I Aluda* in his report produced as PExhibit 5 (a) confirmed having examined the respondent on 21st November, 2009 and having noted the injuries she claims to have sustained in the accident.

Though he classified them as soft tissue injuries which were expected to heal with time, he was of the opinion that the same were severe. For these injuries, the learned trial magistrate awarded the respondent general damages for pain and suffering in the sum of Kshs. 180,000.

20. I must point out at this juncture that the award of damages is at the discretion of the trial court. And the law is that an appellate court should not interfere with the trial court's award of damages unless it is satisfied that in arriving at the award, the lower court misapprehended the facts; or applied the wrong legal principals or that the award was either too high or too low as to give rise to a reasonable inference that it was a totally erroneous estimate of the damages. See: ***Maraga V Musila (1984) KLR 251***; ***Karanja V Malele (1983) KLR 142***; ***Butt V Khan (1982-88) KAR 1;*** ***Arkay Industries Ltd V Amani (1990) KLR 309.***

21. The appellant contends that the award of damages in this case was inordinately high and was not comparable to other awards made for similar injuries in other cases. I agree that it is an established principle of law that damages for similar injuries must be within limits set by other decided cases. The appellants placed reliance on the case of ***South Nyanza Sugar Co. Vs Lilian Anyango (2012) eKLR*** wherein the persuasive authority of ***West (H) & Son ltd V Shepherd (1964) AC 326*** was cited with approval. In that case, ***Lord morris*** stated as follows;-

" But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to serve some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards: when all this is said, it still must be that amounts which are awarded are to a considerable extent conventional……"

22. In the instant case, the learned trial magistrate indicated in his judgment that he had considered the authorities cited before him by both parties before arriving at his decision. The respondent in her submissions had proposed a sum of Kshs. 250,000/- relying on the authority of ***Sister Margaret W. Chege & Another Vs Priscillah J. Kurgat Eldoret HCCA No. 46 of 2005*** and ***Kalenjin Auto Hardware Ltd & John Munene V Philip Wakaba Eldoret HCCA NO.75 of 2013*** in which awards of general damages of Kshs.220,000/- for soft tissue injuries were upheld on appeal. The appellant on his part proposed a sum of Kshs.40,000/- relying on several authorities namely ***Peter Kariuki Njuguna V Alex Kiguru Nganga Nairobi HCC No. 217 of 1991; Sofinaf Co. Ltd vs Joshua Ngungi Mwaura Nairobi HCCA No. 742 of 1991; Johnstone Amanga V Barvaaj Odhiambo & 2 others Bungoma HCCA No. 47 of 2003*** and ***Loice Nyabeki Oyugi Vs Omar Hassan Nairobi HCC No. 450 of 1991.***

23. I have perused three of the above authorities which were attached to the appellant's submissions in the lower court. I have noted that all the plaintiffs in those cases had suffered minor superficial injuries which are not comparable to the multiple injuries sustained by the respondent in this case which were apparently more serious in nature.

24. In view of the foregoing, I am unable to agree with the appellant that the quantum of damages awarded to the respondent was inordinately high as to be an erroneous estimate of the damages. My view is that the amount was reasonable compensation for the pain and suffering the respondent must have endured while nursing her multiple injuries which according to *Dr. Aluda's* report were expected to heal after an undisclosed period of time. There is no indication from the lower court's judgment that the award was based on any wrong legal principle. The award was based on the evidence on record. Special damages awarded were pleaded and specifically proved. I thus find no reason to interfere with the award on both general and special damages. The same is hereby upheld.

25. In the result, I find no merit in this appeal. It is consequently dismissed with costs to the respondent.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 22nd day of December 2015

In the presence of:

Mr. Lobolia Court Clerk

No appearance by the Appellant.

No appearance by the Respondent.