



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. E095 OF OF 2021**

**BETWEEN**

**GODFREY MUGNICHOLAS MWITI MWIREBUA.....APPELLANT**

**AND**

**MARCELLA MPAKA KIAMBI..... RESPONDENT**

**(Being an appeal from the Judgment in Githongo PMCC NO. 55 OF 2016 by Hon. E.W.Ndegwa (RM) on 30<sup>th</sup> June, 2021)**

**JUDGMENT**

**Background**

1. By a plaint further amended on 03<sup>rd</sup> November, 2020, Appellant pleaded that on 05<sup>th</sup> February, 2016, he was riding a motor cycle KMDT 451E when it was involved in an accident with Respondent's motor vehicles KBT 330G as a result of which he suffered injured bodily injuries.
2. Respondent by a further amended defence dated 24<sup>th</sup> November, 2020 denied the Appellant's claim in toto.
3. At the conclusion of the trial, the learned trial magistrate found the both the Appellant and Respondent equally to blame, apportioned liability at 50:50 % and awarded general damages at Kshs. 900,000/-, special damages at Kshs. 206,000/-, costs and interest.

**The Appeal**

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and by a Memorandum of Appeal dated 26<sup>th</sup> July 2021 raised 8 grounds mainly that;
  - a. **The Learned trial Magistrate erred in law and fact in apportioning liability at 50:50 %**
  - b. **The award was inordinately low**

**Analysis and Determination**

5. I have considered this appeal, submissions by the Appellant and the authorities relied on. I have also considered the record and the impugned judgment. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination.
6. In **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, the same court stated with regard to the duty of the first appellate court;

**“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

**Liability**

7. It is trite law that "whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** states as follows:

**1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.**

**2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person**

8. Further **Section 109** in narrowing down to proof of particular facts stipulates:

**The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

9. The foregoing provisions of the law were restated by the Court of Appeal in the case of **Kirugi & Another – Vs – Kabiya & 3 Others [1987] KLR 347** where it held thus:

**“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”**

10. In this case, the trial court was confronted with evidence by the Appellant blaming the Respondent for the accident and the Respondent's witness who said she was in the accident motor vehicle blaming the Appellant. Whereas there was evidence that Respondent had been charged with careless driving, the case was still pending and it could not be used to prove her culpability. The police officer who testified did not produce a sketch plan of the accident scene nor was any witness called to corroborate Appellant's evidence that the point of impact was on his lawful lane.

11. The Court of Appeal faced with a situation similar to the one subsisting in this case in the case of **Hussein Omar Farah v Lento Agencies [2006] eKLR**, and it held as follows:

**“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”**

12. Applying the same principle to this case, I have come to the conclusion that on the analysis of the evidence on record, the learned trial magistrate correctly apportioned liability at 50:50 % as between the Appellant and Respondent.

### **Quantum**

13. It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise. Such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. Where the trial court has violated legal principles, the appellate court will interfere with the exercise of discretion by the trial court. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were set out by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by the Court of Appeal in several cases among them; **Kanga v Manyoka [1961] EA 705, Lukenya Ranching and Farming Co-op. Society Ltd v Kavoloto [1979] E. A. 414, Butt v Khan [1981] KLR 349, Kemfro Africa t/a Meru Express & Another v. A. M. Lubia & Another [1982 – 88] 1 KAR 72 and Mariga v Musila [1984] KLR 257.**

14. In **Harun Muyoma Boge v Daniel Otieno Agulo MGR HCCA No. 7 of 2015 [2015] eKLR**, D.S Majanja J. expressed himself thus: -

**“The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”**

15. The Appellant suffered multiple comminuted fracture of right femur, right tibio-fibular fracture and blunt abdominal trauma injuries which were confirmed by a discharge summary. The Physiotherapy report reveals that as a result of the injuries, Appellant suffered: -

**i. muscle loss on right leg**

**ii. joint range was reduced to 75%**

**iii. weak ligaments**

**iv. walks with a limp and may require collective surgery.**

16. Appellant asked for Kshs. 2,500,000/- and cited two authorities. In **Frankline Chilibasi Spii v Kirangi Liston [2017] eKLR**, the plaintiff was awarded Kshs. 1.8 million for the following injuries:

- i. Compound and comminuted fracture of the right distal tibia
- ii. Fracture of the distal right radius extending to the wrist joint.
- iii. Severe head injuries involving fracture of the left zygomatic arch extending to the lateral wall of the left orbit, haematoma on the right temporal scalp
- iv. Soft tissue contusion on the left peri-orbital and front scalp

**Residual scars:**

- i. 8x3cm large friction burns on the left forearm.
- ii. 6cm long friction burns on the left forearm.
- iii. Large wound on the right leg and foot.

17. In **Ziporrah Nangila v Edoret Express Limited & 2 others [2016] eKLR**, the plaintiff was awarded Kshs. 2.4 million for the following injuries:

- i. Bilateral leg injuries
- ii. right wrist injury
- iii. Fracture dislocation of the right ankle
- iv. comminuted compound fracture of the distal and fibular
- v. Fracture of the left distal and tibia and fibular
- vi. Total functional loss with a lifeless right foot and ankle at 70%.

18. Respondent offered Kshs. 500,000/- and had cited five authorities. In **Treadsetters Tyres Ltd V John Wekesa Wepukhulu [2010] eKLR**, which was dismissed on appeal. **Jamal Ramadhan Yusuf & Another -v- Ruth Achieng Onditi & Another (2010) eKLR** was a claim for fatal injuries. In **Mount Elgon Hardware v United Millers Ltd [1996] eKLR** the award for damages was set aside on appeal and **Bawani Stores Limited & another v Margaret Magiiri Gitau [2015] eKLR**, plaintiff was awarded Kshs. 450,000/- for compound fracture of the left fibula in the distal  $\frac{1}{3}$  and fracture of the left medial malleolus. The left leg healed with a scar 15 cm x 3 cm and all movements of left ankle joint were restricted, and function of the limb reduced. Permanent disability was assessed at 20%.

19. The authorities cited by the Appellant relate to more serious injuries and those by the Respondent to less serious injuries. It is the duty of parties to avail to the court comparable decisions to assist the court to make an informed decision. From the material placed before the trial court, I find no reason to interfere with the discretion of the trial magistrate.

20. In conclusion, I find that this appeal has no merit and it is disallowed with costs.

**DELIVERED IN MERU THIS 24TH DAY OF FEBRUARY 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For the Appellants -N/A for Kiautha Arithi & Co Advocates**

**For the Respondent - N/A for J.K.Kibicho & Co. Advocates**