



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. E027 OF 2021**

**EVERSON GATHENJI MWANGI.....1<sup>ST</sup> APPELLANT**

**FREDRICK NG'ANG'A MUCHIRI.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**TERESIAH NJOKI NYORO.....RESPONDENT**

*(Being an appeal against the Judgment of Senior Principal Magistrate's Court*

*at Githunguri (Hon. B. Ojoo, S.P.M.) in Githunguri SPMCC No. 98 of 2018*

*delivered on 8<sup>th</sup> February, 2021)*

**JUDGMENT**

1. **TERESIA NJOKI NYORO** (the respondent) filed a case at the Senior Principal Magistrate's Court Githunguri, Civil Case No. 98 of 2018 seeking for damages that occurred as a result of an accident that in which she was a passenger in Motor Vehicle Registration No. KBJ 107D. In her pleading she stated that the subject vehicle was registered in the name of **EVERSON GATHENJI MWANGI** (1<sup>st</sup> appellant) and was on the material date driven by **FREDRICK NG'ANG'A MUCHIRI** (2<sup>nd</sup> appellant). She pleaded that the 2<sup>nd</sup> appellant negligently drove the subject vehicle causing the accident which resulted in her injuries.

2. At the trial, the appellants did not offer any evidence. It therefore means that the evidence of the respondent remained unconverted: See the discussion in the case ***BILIAH MATIANGI VS. KISII BOTTLERS LIMITED & ANOTHER (u7uear that he who asserts or pleads must support the same by way of evidence***".

3. The trial court by its judgment of 8<sup>th</sup> February, 2021 found the 2<sup>nd</sup> appellant entirely to blame for the accident and the 1<sup>st</sup> appellant was found vicariously liable. The respondent was awarded in general damages Kshs.500,000 and in special damages Kshs.70,926.40.

4. That judgment aggrieved the appellants and hence this appeal.

5. This is a first appellate court. This Court therefore is required to retry the case. That means this Court must reconsider the evidence, evaluate that evidence for itself and draw its own conclusion and in doing so this Court should bear in mind that it neither saw nor heard the witnesses to testify: See the case ***SELLE VS. ASSOCIATED MOTOR BOAT CO. (1968) EA 123***.

**ANALYSIS**

6. Although the grounds in the appellant's Memorandum of Appeal are long winded, they essentially show that the appellants were aggrieved by the award by the trial court, of general and special damages.

7. The appellants in their written submission tried to widen their grounds of appeal by submitting and advancing their defence. But as stated above in this judgment, they failed to adduce evidence in support of that defence and consequently, the defence filed before the trial court remained mere allegations.

8. More importantly, on liability the 2<sup>nd</sup> appellant having been convicted on his own plea of guilty of the offence driving without due care and attention contrary to **Section 49(1)(a)** of the Traffic Act he could not escape the claim on liability. He was sentenced to pay a fine of

Ksdhs.5,000/=. Having been convicted and by virtue Section 47A of the Evidence Act that conviction is conclusive evidence that he was guilty of that offence and by extension was liable in damages for the accident. Section 47A of the Evidence Act provides:-

***“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”***

9. The respondent, in her evidence, stated that the subject vehicle was overtaking another car and in avoiding a head-on collision with oncoming car rolled several times before resting in a ditch. The respondent said that she was the last to be pulled out of the subject vehicle and she was taken to Kiambu District Hospital where she was treated then discharged. She continued out-patient treatment at Githunguri Health Centre for the dressing of her wound but the wound became worse. She sought treatment at Kijabe Mission Hospital. *Doctor Cyprianus Okoth Okere*, by his report presented to the trial court stated that respondent suffered deep cuts on the left lower leg and a blunt injury to the right leg. He stated that at Kijabe Hospital she had her wound cleaned, stitching, dressing, injections and medications and skin grafting. He found, when he examined her, she had recurrent pains and numbness on both legs, she had difficulty in walking, recurrent headaches and recurrent dizziness. On carrying out physical examination he stated:-

***“Left upper leg and lower leg – There are lacerated scars and skin grafted scar on the lower leg.***

***Right upper leg and lower leg – there are depressed skin areas on the lower leg.***

***She walks with a limp.”***

10. The doctor classified the injuries as severe harm.

11. The respondent also relied on the report of Kijabe Hospital dated 17<sup>th</sup> August, 2016. The report stated:-

***“This is to confirm that the above mentioned person was admitted at AIC Kijabe Hospital 27/7/16 following a R.T.A. (27/6/16).***

***She underwent an operation: split thickness skin graft for the chronic left leg ankle.***

***Good take of autograft noted.”***

12. The respondent was 70 years when the accident occurred. The trial court made a finding that the injuries she suffered affected her quality of life. While the respondent testified during the trial, the trial court noted:-

***“Evidence of disability seen by the court upto(sic) a large healed scar to the leg.”***

13. I will bear in mind of the jurisprudence seen in two cases below.

14. The first is the case ***JOHNSON EVAN GICHERU VS. ANDREW MORTON & ANOTHER (2005) eKLR*** thus:-

***“In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.***

15. The second case is ***DERRIC MWENDA NGAINE & ANOTHER VS. DENNIS MWENDA (2021) eKLR***:-

***“10. 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.”***

16. The appellants cited in their written submissions several cases not all copies were provided for to the court in those submission. What is a concern however is in some of the cited cases, copies of which were attached I find the appellant misrepresented the injuries not evident in the actual case. For example, in the case ***KENYA POWER & LIGHTING COMPANY LIMITED VS. BENSON ASEKA ANYANZWA (2017) eKLR*** the appellant stated in the written submission injuries not mentioned in the actual judgment that is:-

***“Head injuries with loss of consciousness, chest injuries, ... injuries on the back, left and right shoulder, left and right knee, injuries on the left and right leg with bruises to the groin.”***

17. I do hope that such exaggeration of injuries by the appellants was not intended to mislead this Court.

18. I have considered the extensive decisions cited by the appellant and by respondent at large. I am persuaded that the trial court did not fall in error in making an award in general damages. In this regard, I cite one of the appellant's cases, that is, **GLADYS LYAKA MWOMBE VS. FRANCIS NAMATSI & 2 OTHERS (2019)** where the plaintiff suffered injuries, cut wound, on the anterior part of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula and a cut wound on the face. The learned *Justice W. Musyoka* in considering the trial court's award stated:

***“The trend is to award general damages in the range of Kshs.300,000/= to Kshs.500,000/=”***

19. The above statement indeed rings true to my consideration of the authorities I have sighted. The respondent suffered what the doctor described as severe harm. Her initial treatment did not lead to healing, and she had to seek further treatment a month after the accident.

20. On seeking that further treatment, she was admitted and underwent an operation of skin grafting to enable healing to her leg.

21. In the case **EASY COACH LIMITED VS. EMILY NYANGASI (2017) eKLR** the High Court, *Justice T.W.W Cherere* upheld the trial court's award for general damages of Kshs.700,000. The injuries considered in that case were injury to the right leg, right hand and left leg and the claimant was admitted in hospital for her skin from the right thigh to be grafted to the left lower leg. Those injuries are comparable to those suffered by the respondent in this appeal.

22. It is because of the above discussion that I am not persuaded that I should interfere with the trial court's award. The trial court did not also err in the award of special damages.

### **DISPOSITION**

23. Consequent to the above discussion, I order this appeal be and is hereby dismissed with costs.

**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 31<sup>ST</sup> DAY OF MARCH, 2022.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant : Mourice

For 1<sup>st</sup> appellant : - Mr. Nganga

For 2<sup>nd</sup> appellant : - Mr. Nganga

For Respondent : - Mr. Nzioka

***JUDGMENT delivered virtually.***

**MARY KASANGO**

**JUDGE**