



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 89 OF 2020**

**PETER MULANDA WANJE.....APPELLANT**

**VERSUS**

- 1. CAPTURE TRANSPORT LIMITED**
- 2. BEN GACHANJA CHEGE**
- 3. ANNA REHEMA.....RESPONDENTS**

***(An Appeal from the Judgment delivered on 12<sup>th</sup> May, 2020, by Hon. G. Kiage, Senior Resident***

***Magistrate, in Mombasa Chief Magistrate's Court Civil Case No. 1456 of 2018).***

**JUDGMENT**

1. The suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants (1<sup>st</sup> and 2<sup>nd</sup> respondents) in the lower Court was that on or about the 3<sup>rd</sup> December, 2017, the deceased was lawfully travelling along the Mombasa/Kilifi road as a passenger aboard motor vehicle registration No. KBM 251J Toyota Hilux, Double Cabin. That upon reaching Shariani area, the 1<sup>st</sup> respondent and/or its authorized driver, servant and/or agent negligently and/or carelessly parked motor vehicle KBN 337G ZD 3857 on the road causing an obstruction which resulted in an accident wherein the plaintiff (appellant) sustained serious injuries.
2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their statement of defence dated 26<sup>th</sup> September, 2018, where they admitted the occurrence of the accident. They however denied that the appellant was a passenger in motor vehicle registration No. KBM 251J. They also denied that the said accident was caused by the negligence on the part of the 2<sup>nd</sup> respondent. They alleged that the accident was caused and/or contributed by the negligence, carelessness or recklessness on the part of David Mulewa Katana (the third party driver) and that the doctrine of *res ipsa loquitor* did not apply to the circumstances of the case and put the appellant to strict proof thereof.
3. A Third Party Notice was duly served on the 3<sup>rd</sup> respondent but having failed to enter appearance within the stipulated period, an interlocutory Judgment was entered against her.
4. On the issue of liability, the Trial Court found that the 1<sup>st</sup> and 2<sup>nd</sup> respondents as well as the 3<sup>rd</sup> respondent bore the responsibility for having caused the accident and proceeded to apportion liability in the ratio of 70% against the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly and severally and 30% against the 3<sup>rd</sup> respondent. Judgment on quantum was entered for the sum of Kshs. 600,000/= in general damages and Kshs. 120,000/= for future medical expenses and Kshs. 2,550.00 for special damages making a total of Kshs. 722,550.00. The appellant was also awarded costs of the suit and interest at Court rates from the date of Judgment.
5. The appellant being dissatisfied with the decision of the Trial Court on liability and the quantum awarded on 12<sup>th</sup> May, 2020, filed a Memorandum of Appeal raising the following grounds of appeal-
  - (i) That the learned Magistrate erred in law and fact in failing to evaluate the evidence adduced in Court and consequently came to a conclusion on liability that was at variance with the evidence on record and in addition the liability apportionment was not clearly stipulated in the Judgment;
  - (ii) That the learned Magistrate erred in law and fact in totally failing to take into account the appellant's evidence and that of the Police Officer (PW2) that clearly confirmed that the 2<sup>nd</sup> respondent after investigations was blamed, charged and convicted in the Traffic Court;

(iii) That the learned Magistrate erred in law and fact by failing to evaluate the appellant's submissions together with the authorities cited and gave no justification of the award given;

(iv) The learned Magistrate erred in law and fact in finding that the nature of injuries suffered by the appellant merited general damages of Kshs. 600,000/= despite the fact that they were serious multiple injuries that resulted in some permanent incapacity; and

(v) That the learned Magistrate erred in law by failing to comply with the requirement of Order 21 Rule 4 of the Civil Procedure Act (Cap 21) (sic) in writing the Judgment.

6. The appellant's prayer is for this Court to allow the appeal with costs and set aside the Judgment delivered by the Trial Court. He also prays for the damages awarded to him to be varied and/or set aside.

7. The appeal herein was canvassed by way of written submissions. The law firm of Chepkemboi Milka & Co. Advocates filed written submissions on behalf of the appellant on 11<sup>th</sup> February, 2021. The submissions by the respondents' Counsel were filed on 19<sup>th</sup> March, 2021 by the law firm of Kishore Nanji Advocate. The 3<sup>rd</sup> respondent did not participate in the lower Court proceedings and in this appeal.

8. Ms. Chepkemboi, the appellant's learned Counsel submitted that PW1 (the appellant) testified that the 1<sup>st</sup> respondent's vehicle was parked in a way that left most of it occupying the road. On re-examination, PW1 stated that the section of the road where the accident occurred was after a steep incline but no warning sign had been placed on the road to alert other road users of the stalled trailer. She submitted that it was the appellant's evidence that the driver of motor vehicle registration No. KBM 251J tried to avoid the collision by swerving and in the process of so doing the accident occurred. Further, she submitted that the appellant's evidence was corroborated by the evidence of PW2 (PC David Awori Wafula) who testified that after investigations were done, the 1<sup>st</sup> respondent's driver was charged, found guilty and fined Kshs. 30,000/= in Traffic Case No. 6621 of 2018.

9. It was also submitted by the appellant's Counsel that the defence witness who testified as DW1 (Joseph Mutune) confirmed that the 1<sup>st</sup> respondent's driver had not put a warning sign on the road to warn other road users of his stalled trailer. In cross-examination, DW1 confirmed that the road was hilly and it was impossible for the driver of motor vehicle registration No. KBM 251J to have seen the stalled vehicle from a good distance and conclusively blamed the 1st respondent's driver. Ms Chepkemboi relied on the case of the **Peter Ochieng & 2 others vs Serfina Atieno Okwaro & another** [2015] eKLR, where the Court held that the main cause of the accident was the absence any warning signs having been placed on the road within a reasonable distance to warn approaching motorists that there was a stationary vehicle ahead so that they could take reasonable steps to avoid ramming into it.

10. On the issue of quantum of damages, Ms. Chepkemboi submitted that the appellant produced two (2) medical reports by Dr. Ajoni Adede and the report by Dr. Udayan Sheth together with all the medical documents as per the list of documents filed on 18<sup>th</sup> July, 2018, that were produced by consent. She indicated that a further list of documents was filed on 28<sup>th</sup> February, 2019 and the Trial Court noted that the two reports were in consonance with the injuries sustained except on the issue of permanent disability, where Dr. Adede gave 19% and Dr. Udayan assessed permanent disability at 10%. She stated that the Trial Court failed to analyze the authorities by the appellant on quantum in arriving at his decision.

11. On her part, Ms. Nasimiyu, learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that they proved their case against the 3<sup>rd</sup> respondent on a balance of probability going by the evidence on record. She stated that the fact that the 2<sup>nd</sup> respondent was charged and convicted by a competent Court did not mean that he was 100% liable in negligence and that he could also claim contributory negligence. She relied on the case of **Charles Ocharo Momanyi v United Millers Limited** [2017] eKLR, to support her assertion.

12. She stated that Courts have on many occasions held that the decision to charge one and not the other person with the offence of careless driving is usually at the discretion of the police and the mere fact that one of two drivers is charged does not necessarily mean that the other driver is not liable at all.

13. It was also submitted that the evidence on record showed that the 2<sup>nd</sup> respondent placed triangle lifesavers both at the rear and at the front of the stalled motor vehicle at a distance of 40 meters. Ms Nasimiyu contended that it was the third party's motor vehicle that rammed into the rear of the 1<sup>st</sup> respondent's stalled motor vehicle, thus the learned Trial Magistrate was justified in apportioning liability.

14. On the issue of quantum, the Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that save for the percentage of permanent disability, the injuries suffered by the appellant were not disputed and as such, the learned Magistrate properly evaluated the said injuries and arrived at an award that was commensurate to those injuries. She urged this Court not to disturb the said award, since the same was not a wholly erroneous estimate of the damage suffered by the appellant.

#### **ANALYSIS AND DETERMINATION.**

15. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. In **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates** [2013] eKLR, the Court stated as follows-

*“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.”*

16. The issues for determination are-

**(i) If the Trial Court complied with the provisions of Order 21 Rule 4 of the Civil Procedure Rules;**

**(ii) Whether the Trial Court erred in apportionment of liability; and**

**(iii) Whether the award of Kshs. 600,000/= in general damages was inordinately low in the circumstances.**

**If the Trial Court complied with the provisions of Order 21 Rule 4 of the Civil Procedure Rules.**

16. One of the grounds of appeal raised is that the Trial Magistrate erred by failing to comply with the requirements of Order 21 Rule 4 of the Civil Procedure Rules in writing the Judgment. The said provisions state that Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. In this Court's view, the only shortcoming in the Trial Magistrate's Judgment was the failure to set out the issues for determination before starting to address them. In the body of the Judgment, it is however clear that the said Magistrate addressed the issues of liability, quantum, future medical expenses, special damages in different sub-headings.

17. Under the sub-headings on liability and quantum, he duly analyzed the evidence adduced. In awarding general damages in the sum of Kshs. 600,000/= he stated that had considered the nature and extent of injuries suffered by the appellant and that he drew support from the case of **Nguku Joseph & another v Gerald Kihiu Maina** [2020] eKLR. Bearing in mind the foregoing, this Court holds that the Trial Magistrate substantially complied with the provisions of Order 21 Rule 4 of the Civil Procedure Rules and since he addressed issues in his Judgment which in any event, are still the same ones he would have listed as the issues for determination, that omission on its own would not vitiate the Judgment delivered on 12<sup>th</sup> May, 2020.

**Whether the Trial Court erred in apportionment of liability.**

18. This Court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' Advocates as well as the authorities relied on. A finding on apportionment of liability by a Trial Court calls for exercise of judicial discretion based on evaluation of the evidence adduced and an appellate Court can only interfere if the finding is not supported by the evidence on record. In **Isabella Wanjiru Karangu vs. Washington Malele** [1983] KLR 142 and **Mahendra M Malde vs. George M Angira** Civil Appeal No. 12 of 1981, it was held that apportionment of blame is an exercise of discretion with which the appellate Court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle or wrong principles.

19. In this case, the learned Trial Magistrate found and concluded that the accident was as a result of acts of negligence omissions and/or commissions of the two drivers concerned. He apportioned liability in the ratio of 70% against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and 30% against the 3<sup>rd</sup> respondent. In apportioning liability against the 3<sup>rd</sup> respondent, the Trial Magistrate observed as follows-

*"...the accident occurred at night it is reasonable to expect all vehicles on the road at that hour to have their headlights on and that the driver should, with the aid of the headlight, be able to see a reasonable distance ahead. It is also reasonable to infer that if the driver of Vehicle Reg. No. KBM 251J was driving at a reasonable speed he should have been able to spot the stalled trailer on time and to avoid the impact."*

20. The appellant (PW1) in his evidence stated as follows in regard to how the accident happened -

*"The accident occurred on 3<sup>rd</sup> December, 2017. I was traveling in motor vehicle Registration No. KBN 251J. The accident near Vipingo along Mombasa Malindi Road. I was traveling from (sic) towards Mombasa. I was with the driver. When we got to the lorry which is (sic) parked by the roadside while most of its body on the road (sic) and in the process we rammed into the lorry. The lorry was motor vehicle registration No. KBN 337G. The impact occurred mostly in (sic) the driver's side of the vehicle in which I was traveling....."*

21. PW2 was PC David Awori Wafula. He produced the police abstract which he stated emanated from Mtwapa Police Station. It was his evidence that it showed that the 2<sup>nd</sup> respondent was charged with a traffic offence, convicted and fined Kshs. 30,000/=. He indicated that he was not the Investigating Officer and never visited the scene of the accident.

22. DW1 was Joseph Motune, who was instructed by APA Insurance to investigate the accident in issue. He relied on the investigation report which indicated that the 1<sup>st</sup> respondent's trailer had been parked on the road when it stalled after developing a mechanical problem. DW1 in his report stated that the insured's driver placed triangle life savers on the rear and front sides of the insured vehicle at a reasonable distance of 40 meters from the stalled insured's vehicle and as the said motor vehicle was undergoing repairs at about 12:30 pm on 3<sup>rd</sup> December 2018, the 3<sup>rd</sup> respondent's motor vehicle rammed onto the rear side of the insured's motor vehicle. The said report stated that the point of impact was on the left lane. One must however note that DW1 in the said report indicated that the 1<sup>st</sup> respondent was largely to blame for the accident for failing to put adequate warning in place to warn other motorists of the presence of the broken down and stalled insured's vehicle on the road or organize to tow the vehicle to a safe place.

23. It is evident from the evidence of DW1 that there was contributory negligence on the part of the 3<sup>rd</sup> respondent's driver and there was need for the said respondent to lead evidence to controvert the said evidence and absolve the said driver from blame. The Trial Court was satisfied that the 3<sup>rd</sup> respondent had been duly served with a Third Party Notice and an interlocutory Judgment was entered against her on 24<sup>th</sup> May, 2019 due to her failure to challenge the allegations made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents against her driver. This Court holds that the 1<sup>st</sup> and 2<sup>nd</sup> respondents proved contributory negligence as against the 3<sup>rd</sup> respondent and that the appellant herein is mourning louder than the bereaved by attempting to defend a party that did not bother to defend herself before the Trial Court. Consequently, I hold that the finding by the Trial Magistrate on the issue of liability was sound and the same is hereby upheld.

**Whether the award of Kshs. 600,000/= in general damages was inordinately low in the circumstances.**

24. It has been reiterated innumerable times that an appellate Court can only interfere with the sum awarded where an appellant demonstrates that the award is too high or so low as to amount to an outright error in assessment of damages, or that in coming to that assessment the Court took into account an irrelevant matter or that it failed to take into account a relevant matter. The Court of Appeal in **Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates** [2013] eKLR held as follows-

*“We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled... This principle was adopted with approval by this Court in **Butt v Khan** [1981] KLR 349 where it was held per Law, JA:*

*“... 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 respect, and so arrived at a figure which was either inordinately high or low...”*

25. The award of the amount of Kshs. 600,000/= in general damages was challenged for being such a low estimate to compensate the appellant for the injuries he sustained and for pain and suffering. It was contended that the Trial Court did not take into account the authorities submitted by the appellant and opted to only rely on the authorities relied on by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. In addition, the Trial Court is said not to have taken inflation into account when making the award for damages.

26. In this case, it is agreed by the parties that the appellant sustained the following injuries:

- a) Fracture of the left radius forearm bone;
- b) Fractures of the chest center bone (sternum);
- c) Fracture of the right ribs (5<sup>th</sup> & 6<sup>th</sup>);
- d) Severe blunt injury to the abdomen with bleeding (haemoperitoneum);
- e) Bladder injury (tear);
- f) Severe blunt injury to the chest with traumatic air mass (pneumothorax);
- g) Cuts on the neck, chest, right index finger and right middle finger; and
- h) Blunt injury to the left knee.

27. In awarding damages in the sum of Kshs. 600,000/=, the Trial Court relied on the case of **Nguku Joseph & another v Gerald Kihiu Maina** [2020] eKLR. In the said case, the plaintiff sustained the following injuries:

- a) **Mild head injury;**
- b) **Lacerated wound on the left supra orbital region of the face;**
- c) **Blunt injury to the anterior abdominal wall leading to gall bladder laceration and liver laceration;**
- d) **Fracture right humerus; and**
- e) **Lacerated wound on the scalp about four (4) cm long.**

28. A comparison of the injuries sustained by the plaintiff in the above case and the injuries sustained by the appellant herein reveals that in the case herein, the Trial Court failed to take into account relevant issues, which in this case is the nature and degree of injuries sustained by the appellant in arriving at an award of Kshs. 600,000/= as general damages for pain and suffering.

29. In **Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd** [2013] eKLR, the claimant suffered multiple fractures involving the right femur, left femur and left scaphoid bones; dislocation of the left elbow joint associated with a fracture of the radial head; dislocation of left lunate bone and bruises parietal scalp. The Court of Appeal awarded Kshs. 1,500,000/= general damages.

30. In **Joseph Musee Mua v Julius Mbogo Mugi & 3 others** [2013] eKLR, the plaintiff who had suffered various injuries including injury to the left leg, on the head, and face; fractures to the left leg tibia and fibula; two broken upper jaw teeth; chest injury; right shoulder injury as well as bruises on the left elbow was awarded a sum of Kshs. 1,300,000/=.

31. In **Boniface Njiru v Tohel Agencies and another** [2011] eKLR, the plaintiff sustained a blunt head injury with loss of consciousness

for 24 hours, loss of four upper incisor teeth, fracture of the shaft of the right femur and a compound fracture of the right tibia with soft tissue injuries. He was awarded Kshs. 1,000,000/= in the year 2011.

32. In **James Gathirwa Ngungi vs. Multiple Hauliers (EA) Limited & another** [2015] eKLR, the plaintiff suffered a compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological/re-fracture of the right leg. The Court awarded him Kshs. 1,500,000/= in general damages for pain and suffering.

33. It is trite that when it comes to the issue of assessment of damages, comparable injuries should as far as possible be compensated by comparable awards. It however needs recalling that no two cases are usually similar in terms of the nature and extent of the injuries sustained. The Court of Appeal in **Stanley Maore vs Geoffrey Mwenda [2004] eKLR** stated as follows-

***“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”***

34. In this appeal, it is important to look at the medical report from Aga Khan Hospital Mombasa dated 1<sup>st</sup> February, 2019 that was produced as P. exhibit 1 before the Trial Court. The said report prepared by Dr. Mbinga showed that the appellant was admitted to the said Hospital on 3rd December, 2017 as a referral from Kilifi County Hospital following a motor vehicle collision accident. The Doctor noted that the appellant had sustained injuries on the chest, left arm, right hand, head and abdomen. That when examined, he was sick looking and was on oxygen therapy. That the appellant had surgical emphysema of the chest, neck and reduced air entry on the right side of the chest. His abdomen was distended with generalized tenderness. He had a bruises on the face and bandaged left hand with backslab. A CT Scan of the abdomen revealed hepatic contusion, grade 1 splenic subcapsular haematoma and bladder contusion. A CT scan of the chest revealed right tension pneumothorax, bilateral lung contusion, subcutaneous emphysema, manubrium sternum fracture, right anterior rib fractures involving 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> ribs and bilateral pulmonary bullae. An X-ray of the left forearm revealed left distal radius comminuted fracture with joint space involvement.

35. The said report further reveals that the appellant was initially managed in ICU for critical care management and other relevant treatment. A right sided chest tube was inserted and under water seal drainage was instituted. On 4<sup>th</sup> December, 2017, he was taken to theatre for open reduction and fixation of the left distal radius fracture with K-wires. The appellant stabilized on his treatment and was transferred to a ward bed on 7<sup>th</sup> December, 2017 where further treatment was continued. On 19<sup>th</sup> December, 2017 he was taken back to theatre for urethrocytoscopy and repair of bladder injury. The said report concludes on the note that he responded well to treatment and was discharged home on 24<sup>th</sup> December, 2017 and was to be followed up at the general surgery and urology outpatient clinics and also by his orthopaedic Surgeon Dr. Bebora.

36. Having considered the contents of the above medical report in regard to the extent and seriousness of the injuries which caused the appellant to be in the ICU for 4 days and admitted in hospital for a total of 21 days, and the fact that he was taken to the theatre twice for surgery, it is clear to this Court that the injuries sustained by the appellant were more severe compared to the ones sustained in the authority considered and relied on by the Trial Court. The appellant herein also underwent pain and suffering for a prolonged duration of time.

37. Guided by the authorities relied on and the ones I have considered herein, and also considering the element of inflation, it is my considered view that appellant ought to have been awarded Kshs 1,800,000/= as general damages for pain, suffering and loss of amenities. In the premises I allow the appeal to the extent that the award of Kshs. 600,000/= as general damages is hereby set aside and substituted with an award of Kshs 1,800,000/=.

38. Although the appellant testified that some of his medical expenses of Kshs. 750,000/= were paid by his employer and he paid the balance of Kshs. 937,000/= through a loan advanced by his employer, he never claimed the amount of money he spent personally on treatment. It was for the said reason that he was awarded Kshs. 2,550.00 in special damages. The appellant was also awarded Kshs. 120,000/= for future medical treatment for removal of the metal implant on his left upper limb. The said awards are hereby upheld.

39. This Court also upholds the award of costs of the suit and interest to the appellant. The appellant will also have the costs of this appeal. The awards made shall be borne by the 1st and 2<sup>nd</sup> respondents and the third party (3<sup>rd</sup> respondent) jointly and severally as per their shares of liability.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 31st day of March, 2022.** In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17<sup>th</sup> April, 2020 and subsequent directions, the Judgment herein has been delivered through Teams Online Platform.

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Ms Chepkemboi for the appellant

No appearance for the respondent

Mr. Oliver Musundi – Court Assistant.