**Kalama v Kagai (Civil Appeal 16 of 2021) [2022] KEHC 17200 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 17200 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL APPEAL 16 OF 2021**

**SM GITHINJI, J**

**JUNE 22, 2022**

**BETWEEN**

**SIDI KITSAO KALAMA ..... APPELLANT**

**AND**

**MARTIN KAGAI ..... RESPONDENT**

***(Being an appeal against the judgement of Honourable Olga Onalo, Resident magistrate delivered on 19/2/2021 in MalindiCMCC No. 23 of 2019)***

**JUDGMENT**

**CORAM:**

Hon. Justice S. M. Githinji

Wambua Kilonzo advocate for the appellant

Kiprop Cheruiyot advocate for the respondents

1. The trial magistrate erred in law and fact in holding that there was no proof of injuries yet the plaintiff produced treatment notes, P3 form and medical report which were not controverted.

2. That the trial magistrate erred in failing to find the evidence and medical reports tendered herein established/proved to the required standard injuries sustained by the appellant.

3. The trial magistrate erred in law and fact by subjecting the appellant case to a standard of proof of beyond reasonable doubt and dismissed the appellant's suit with costs on basis that she had not proved liability against the respondents on a balance of probabilities.

4. The learned trial magistrate erred in law and in fact in failing to appreciate the evidence that was placed before her and taking into account extraneous issues hence arrived at a decision that was erroneous and against the evidence that was placed before her.

5. The learned trial magistrate erred in law and in fact in failing to take into account the principle in the doctrine of res ipsa loquitur as pleaded by the appellant.

6. The learned trial magistrate erred in law and in fact by disregarding the plaintiff's testimony when the same was not rebutted by failure on the part of the respondent to call a defence witness.

7. The learned trial magistrate misdirected herself in the appraisal of the evidence by failing to consider that the authenticity of the police abstract had not been rebutted.

8. The learned trial magistrate erred in fact and in law in failing to assess the quantum damage payable to the appellant even after she dismissed the suit.

9. The learned trial magistrate erred in law and fact by being biased against the appellant.

10. The learned trial magistrate erred in law and fact by exercising her discretion capriciously and not judiciously.

11. That the trial magistrate erred in fact and law by writing a judgment that is not only incomplete but also not based on proper evaluation and consideration of pleadings, evidence on record, submissions and applicable law and principles for award of damages.

12. That the trial magistrate erred in fact and law by failing to award the appellant general and special damages despite the appellant having proved her case to the required standard.

13. That the trial magistrate erred in fact and law by failing to appreciate that it was not in dispute that the appellant was injured in a road accident, that the occurrence of the accident is not disputed hence the liability of the blamed motor vehicle could be inferred.

14. The learned trial magistrate erred in basing her finding on the inconsistency of the direction of the motor vehicles involved in the accident whereas the occurrence of the accident and involvement of the said motor vehicle was not challenged or disputed.

15. The learned trial magistrate erred in law in discarding the evidence of the plaintiff who witnessed the accident ending up dismissing the case.

16. That learned trial magistrate's decision was arrived at in a cursory and perfunctory manner in consideration of the irrelevant factors while leaving our relevant ones ending up dismissing the plaintiff's case.

17 The Appellant herein Sidi Kitsao Kalama had sued the Respondents Janet Wanja Njeru and Martin Kagai for damages arising out of a road traffic accident that occurred on September 8, 2018 along Malindi-Mombasa road.

**Evidence at Trial**

18 PW1 Sidi Kitsao Kalama adopted her witness statement dated 12/2/2019 and stated that as regards the issue of liability she is bound by the evidence of Christine Kalama in file no 20 of 2019. She testified that following the accident, she sustained injuries on her right leg and back and was treated at Tawfiq hospital.

19 On cross examination, she stated that they reported the accident at Watamu police station but the police were from Malindi. In respect of her injuries, she stated that the doctor would be lying if they say that she got injured on her left leg.

20 PW2 No 231406 Chief Inspector George Naibei's evidence in file No 20 of 2019 was adopted as evidence

**Submissions, Analysis and Determination**

21 I have perused and weighed the contents of the pleadings, judgment, grounds of appeal, submissions and decisions referred to. I also note that the Respondent did note file their submissions and seem to have lost interest in the appeal.

22 This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and should therefore make due allowance for that. This duty was well stated in *Selle & Another v Associated Motor Boat Co Ltd & Others* (1968) EA 123 in the following terms:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).

23 The Court of Appeal for East Africa took the same position in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

24 The issues arising out of the appeal herein are;

1. Whether the appellant discharged his burden of proof on a balance of probabilities at the trial court?

2. Whether the learned magistrate erred in dismissing the claim for negligence as was pleaded in the trial court?

25 The legal basis for the legal burden of proof is provided in Section 107 of the *Evidence Act*, Cap 80 of the Laws of Kenya. The said section states as follows: -

a. 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.

b. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

26 On the standard of proof, the *Black's Law Dictionary*, (9th Edition, 2009) at page 1535 defines 'the standard of proof'as 'the degree or level of proof demanded in a specific case in order for a party to succeed.'

27 The standard of proof in civil cases is proof on the balance of probability.

28 In respect of the above sections, in my view, the trial court had a duty to test the evidence by the appellant on whether on the balance of probabilities, it ascertained liability and damages in respect of the accident.

29 The trial was premised on the law of negligence and liability on the part of the Respondents. The correct statement of the test on the ingredients of this tort is as defined by *Clerk & Lindsell* on Torts 18th Edition in the following passage; -

30 There are four requirements for the tort of negligence namely; -

1. the existence of law of a duty of care situation i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.

2. breach of the duty of care by the defendant, i.e. that it failed to measure up to the standard set by law;

3. a causal connection between the defendant's careless conduct and the damage;

4. that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote. When these four requirements are satisfied the defendant is liable in negligence.

31 "A defendant will be regarded as in breach of a duty of care if his conduct falls below the standard required by law. The standard normally set is that of a reasonable and prudent man. In the off cited words of Baron Alderson; "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do; or doing something which a prudent and reasonable man would not do". The key notion of "reasonableness" provides the law with a flexible test, capable of being adapted to the circumstances of each case."

32 In the instant case, the appellant was a fare paying passenger in Motor vehicle registration number KCH 402J on a journey along Malindi-Matsangoni Road when Motor Vehicle registration number KCK 840F collided with Motor vehicle registration number KCH 402J thus the appellant sustained injuries. From the evidence of PW1, PW2 and the Police Abstract on record, the 2nd Respondent was to blame for the accident and the 1st defendant was vicariously liable.

33 It is not in dispute that the accident occurred and that the appellant herein is listed in the Police Abstract. From the impugned judgment of the trial magistrate, in dismissing the suit, the court casted doubts as to the truth of the plaintiff's case given the inconsistencies of the evidence of the appellant. I however find that the appellant established that there was an accident arising out of the collision of the two motor vehicles of which evidence was not controverted.

34 The court held in a similar case arising from the said accident, Civil Appeal No 18 of 2020 *Christine Kalama Vs Jane Wanja Njeru & Martin Kagai* by Justice Nyakundi, that;

> "It is a basic element of a cause of action in negligence that the claimant can allege that he or she has suffered loss and damage falling within the scope of a duty of care owed to her or him by the defendant. For that matter it was the duty of the appellant to show that she was owed a duty of care on the material day of the accident. It is a nexus between the harm and negligence on the part of the respondents. How is the scope of negligence and duty of care determined?
>
> (1). First that the respondents owed a duty of care to the appellant.
>
> (2). Second, that the respondents breached that duty of care in the manner of their driving.
>
> (3). That the breach caused the appellant to suffer personal injuries attracting recoverable damages at Law.
>
> (4). That the injury suffered by the appellant was as a result of the breach and negligence which was reasonably foreseeable."

35 The *Traffic Act* Cap 403 Laws of Kenya imposes a duty of care on drivers, to take necessary precautions to avoid accidents. In the event they breach the *Traffic Act* and Highway Code they are liable for penal sanctions in cases of careless or reckless driving or causing death by dangerous driving. Whereas the collision between the two offending motor vehicles is a fact, the burden of proof rested upon the appellant not only to proof negligence but also establish the plea on *res Ipsa Loquitur*, of which he claims the trial court did not take into consideration.

36 In the instant case, the appellant adduced evidence that she was a fare-paying passenger in motor vehicle registration No KCH 402J along Malindi-Matsangoni Road when it was hit by motor vehicle KCK 840F. The appellant maintained that the collision occasioned personal injuries to the right leg and back. As a consequence, he reported the accident to Malindi Police Station and was issued with a police abstract on November 16, 2018. Thereafter, the appellant gave evidence that he was seen by Dr Ajoni Adede on November 10, 2018 who on examination prepared a medical-legal report. That medical report admitted in evidence shows the nature of injuries sustained on the particular day of the accident. Under cross-examination, there is no evidence that her recount of the chronology of events was different from the original witness statement. She recounted on how the collision occurred as she was a passenger in one of the subject motor vehicles. There was no evidence of an obstruction to impair recognition of the chain of events and proximate cause of the accident. She told the Court of having seen one vehicle turn into the path of the other causing the collision.

37 As regards to (PW2) evidence, he particularized the circumstances of the accident as confirmed by the report. (PW2) acknowledged that the oncoming vehicle KCK 840F collided with the appellant's motor vehicle registration number KCH 402J. It was on reaching in the vicinity of motor vehicle KCH 402J of which was travelling in the opposite direction, that (PW1) confirmed is when the collision took place.

38 Although the appellant had presented a *prima facie* case on causation, there was no evidence called on behalf of the respondents. The evidence tendered on behalf of the appellant stood uncontroverted before the trial Court. The case for the appellant therefore flowed consistently from the pleadings and evidence of (PW1) and (PW2). (See the authorities of Surgipharm Ltd v Medilife (*supra*). Interchemie EA Ltd v Nakuru Veterinary Center Ltd HCCC No 1165B of 2000).

39 The discrepancy noted by the trial Magistrate between the documents presented and the oral evidence in Court as to the injuries is not fatal to the issue of the breach of duty of care and negligence.

40 In reviewing the evidence at the close of the appellant's case, three elements stood out significantly as alleged in the Plaint and testimonies of (PW1) and (PW2); That the appellant was owed a duty of care by the respondents; There was a breach of that duty on September 8, 2018 along Malindi Mombasa highway; As a consequence, the appellant suffered loss and damage by sustaining physical harm.

41 The trial Court duty was to determine what caused the accident and who between the two drivers of the vehicles involved breached the duty of care. In evaluating the evidence, I find no discrepancy on facts deduced in the witness statements and oral evidence in Court as tendered by (PW1) and (PW2).

42 Flowing from the foregoing, I find that the respondents were to wholly blame for the accident and therefore apportion liability at 100%

43 The trial Magistrate was bound to assess damages even where she was not finding the matter in favour of the Plaintiff.

44 I therefore begin from the basics with regard to the issue of damages. Firstly, in *Mohamed Mahmoud Jabane v High Shine Butty Tongoi* CA No 2 of [1986] KLR Vol 1 The Court of Appeal stated as follows:

> " The correct approach in award of damages are:
>
> (1). Each case depends on its own facts.
>
> (2). Awards should not be excessive for the sake of those who have to pay premiums, medical fees or taxes (the body politic).
>
> (3). Compensable injuries should attract comparable awards.
>
> (4). Inflation should be taken into account.
>
> (5). Loss of future earnings has to be pleaded.
>
> (6). Loss of earnings power is part of the general damages.

45 The Court of Appeal in *Ugenya Bus Service v Gachuki* CA No 66 of [1981 – 1986] KLR 567 took this approach:

> " General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task and one cannot aim for precision."

46 The court in the case of Ossuman Mohamed & Another vs Saluro Bundit Mohumed, Civil Appeal No 30 of 1997 (unreported) wherein the following passage, in the case of *Kigaragari vs Aya* [1982 – 1988] IKAR 768 is employed;

> " Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees."

47 In assessing damages, I place my reliance on the principles laid down in the case of *West (H) & Son Ltd v Stephard* [1964] AC 345 stated as;

> "But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure 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."

48 In his submissions at the lower court, the Appellant opined that a quantum of Kshs 250,000 should suffice in general damages. They relied on the authority of *Josephat Kaliche Ambani vs Farm Industries Ltd* where the appellant was awarded Kshs 200,000 as general damages for soft tissue injuries suffered on the left knee.

49 The injuries suffered by the Appellant have been described as soft tissue in nature and there has been no proof that there is residual partial or permanent disability.

50 There is no simple formulae for converting the pain and suffering into monetary terms (See *Andrew v Grand & Toy Alberta Ltd* [1977] 83 DLR 452, *Heil v Rankeh* EWCA CIV 84). In *George Mugo & Another v AKM* {2018} eKLR the Court awarded Kshs 90, 000/= for soft tissue injuries. Likewise, in *Ndungu Dennis v Ann Wangari Ndirangu* [2018] the Court awarded Kshs 100, 000/= for soft tissue injuries subsequent to these awards is the long held principle that general damages must be compensatory.

51 Taking into account the economic climate vis a vis the injuries suffered I asses general damages at Kshs 90,000 and special damages of Kshs 4, 600 as pleaded and proved.

52 Judgement is therefore entered for the appellant against the respondents in the following terms;

1. Liability at 100% against the respondents.
2. General damages awarded at 90,000.
3. Special damages of Kshs 4,600 as pleaded and proved.
4. Costs and interests at courts rates from the date of judgement in the lower court to the appellant.
5. Costs of the appeal to the appellant.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF JUNE, 2022.**

**.....**

**S.M GITHINJI**

**JUDGE**

**In the Presence of; -**

1. Wambua Kilonzo Advocate for the Appellant

2. Kiprop Cheruiyot Advocate for the Respondents