



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 45 OF 2018

SAMUEL NJAU.....1ST APPELLANT

KARANJA MWANGI JACKSON.....2ND APPELLANT

VERSUS

NANCY WANJIRA NYAGA.....RESPONDENT

JUDGMENT

1. This appeal emanates from a judgment delivered in Embu CMCC No. 82 of 2017 in favour of the respondent against the appellants. In the suit, the respondent sued the appellants seeking general and special damages for personal injuries sustained in a road traffic accident involving her as a pedestrian and motor vehicle registration number KBZ 258Z (the subject vehicle).
2. According to the respondent, the accident occurred on 17th December 2016 when the 1st appellant who was the 2nd appellant's authorized driver and or agent so negligently drove the subject vehicle that it went off the road and hit her while she was walking off the Kithimu murrum road occasioning her personal injuries.
3. In their joint statement of defence dated 10th August 2017, the appellants denied liability as alleged and put the respondent to strict proof thereof. Without prejudice, they averred that if the accident occurred which was denied, it was caused or substantially contributed to by the respondent's negligence.
4. After a brief hearing in which only the respondent testified, the learned trial magistrate rendered her decision on 22nd May 2018 in which she apportioned liability in favour of the respondent against the appellants jointly and severally at 100% and awarded KShs.1,500,000 as general damages and KShs.25,520 as special damages together with costs of the suit and interest.
5. Aggrieved by the trial court's judgment, the appellants filed the instant appeal relying on six grounds of appeal in which they principally complained that the learned trial magistrate erred in law and fact by finding them liable at 100% while the evidence on record did not establish negligence against them; considering irrelevant matters in arriving at her decision and disregarding their written submissions and by awarding general damages which were manifestly excessive as to be erroneous given the circumstances of the case.
6. By consent of the parties, the appeal was prosecuted by way of written submissions.
7. As the first appellate court, I am well aware of my duty which is to consider afresh and to re-evaluate all the evidence and material presented before the trial court to arrive at my own independent conclusions bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses. See: **Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123** and **Peters V Sunday Post Limited, [1958] EA 424**.
8. I have carefully considered the grounds of appeal, the evidence on record as well as the parties' rival written submissions and authorities cited. This being an appeal against both liability and quantum, I will start by determining whether the learned trial magistrate erred in her finding on liability.
9. As stated earlier, only the respondent testified during the trial. In her evidence, she recalled that she had just crossed the road proceeding to her neighbour's home when the subject vehicle lost control, veered off the road and proceeded to hit her when she was in a farm. Her evidence was neither shaken in cross-examination nor was it controverted by any evidence to the contrary since the appellants chose not to call any evidence. A copy of the motor vehicle records produced as *pexhibit 4* showed clearly that the 2nd appellant was the registered owner of the subject vehicle. The respondent also produced a police abstract dated 12th April 2017 which confirmed occurrence of the accident.
10. Given the above evidence and considering that the appellants did not adduce any evidence either to controvert the respondent's evidence

or to support their claim that the respondent contributed to the accident, I have no hesitation in finding that the respondent proved to the required standard that the 1st appellant who was the 2nd appellant's authorized driver caused the accident by negligently driving the subject vehicle. If he had been driving with due care and attention, he would not have lost control of the vehicle to an extent that it completely went off the road and found the respondent in a farm. In the premises, I have no reason whatsoever to fault the trial court's finding on liability. The same is hereby confirmed.

11. On quantum, the appellants have claimed that the award of general damages was erroneous since in their view, it was inordinately high and excessive.

12. I must point out at this stage that as a general rule, an appellate court ought to be slow in interfering with awards of damages made by the trial court. This is because damages for personal injuries are at large and are dependent on the trial court's discretion. However, an appellate court is by law mandated to interfere with such an award if it was satisfied that in arriving at its decision, the trial court considered irrelevant factors or failed to consider relevant ones; or, that the court misapprehended the evidence or applied the wrong legal principles or that the award was either too low or too high as to lead to an inference that it was based on an erroneous estimate of the damage suffered. See: **Kemfro Africa Limited T/A Meru Express Services & Another V Lubia & Another, [1987] KLR 30; Bashir Ahmed Butt V Uwais Ahmed Khan, [1982-88] 1 KAR 1.**

13. In the assessment of damages, the general method of approach is that comparable injuries should as far as is practically possible attract comparable awards bearing in mind that no two cases can be exactly similar.

14. In this case, the injuries the respondent sustained in the accident as pleaded in her plaint were confirmed by the medical evidence contained in *Dr. Mulwa's* medical report produced as *pexhibit 1*. She sustained multiple soft tissue injuries and fractures of the distal fibular and bi-malleolar and dislocation of the left ankle joint.

15. In her written submissions, the respondent proposed a sum of KShs.2,000,000 relying on several authorities in which the plaintiffs had sustained mainly soft tissue injuries and were awarded amounts ranging from KShs.150,000-KShs.400,000 between 2004-2006.

16. On their part, in the lower court and in this appeal, the appellants proposed a sum of KShs.200,000 relying on the authorities of **Johnson Mose Nyaundi (minor suing through a next friend and father Wilfred Wadimba Nyaundi V Petroleum & Industrial Services Ltd, [2014] eKLR** where the plaintiff was awarded KShs.180,000 in the trial court and on appeal and **Isaac Mwenda Micheni V Mutegi Murango, [2004] eKLR** where the plaintiff was awarded KShs.100,000 for injuries which the appellants did not specify in their submissions.

On perusal of the authorities, however, I note that the plaintiffs sustained injuries which were less severe and different from the injuries sustained by the respondent in this case except for the fractures on the leg. In the two cases cited by the appellants, the injuries healed completely with no residual disability but in this case, according to *Dr. Mulwa's* medical report, the injuries left the respondent with a deformed ankle joint.

17. The respondent has implored me to uphold the trial court's award arguing that it was fair and reasonable. She relied on four authorities namely **Frankline Chilibasi Spii V Kirangi Liston, [2017] eKLR; Baj V Roadster Ltd & 2 Others, [2018] eKLR; Zipporah Nangila V Eldoret Express Ltd & 2 Others, [2016] eKLR** and **Hellen Kwamboka Onchong'a V John Ouko Oyoo, [2010] eKLR** where the plaintiffs were awarded damages ranging from KShs.800,000 to KShs.1,800,000 but for injuries which were more serious and are not comparable to those sustained by the respondent.

18. In her decision on quantum, the learned trial magistrate did not state the basis for her finding that KShs.1,500,000 would be adequate compensation for the respondent's injuries. In my view, given *Dr. Mulwa's* prognosis that the deformed ankle could heal with continued physiotherapy and all the other injuries had completely healed by the time of her examination which was about four months after the accident, I agree with the appellants that the trial court's award on general damages was inordinately high as to be erroneous. In my opinion, an award of KShs.1,000,000 would have been fair and reasonable compensation for the respondent's pain and suffering at the time of the trial court's decision. The trial court's award is thus set aside and is substituted with an award of KShs.1,000,000.

19. As the award of special damages was not contested on appeal, the same will remain undisturbed.

20. For the foregoing reasons, the appeal has partially succeeded to the extent specified above on quantum. The judgment of the trial court with regard to the award of general damages is hereby set aside and is substituted with an award of KShs.1,000,000. The award of general damages will attract interest at court rates from date of judgment of the trial court until payment in full. The award of special damages will earn interest from date of filing suit until payment in full.

21. Costs follow the event and are at the discretion of the trial court. I award the respondent costs of the suit in the lower court but as the appeal has partially succeeded, each party will bear his/her own costs of the appeal.

It is so ordered.

DATED and SIGNED at NAIROBI this 9th day of March 2021.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at EMBU this 18th day of March 2021.

L. NJUGUNA

JUDGE

In the presence of:

No appearance for the appellants

Mr. Njagi for the respondent

Esterina: Court Assistant