



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 68 OF 2018**

**WILSON WAMBUGU GACHANJA.....APPELLANT**

**VERSUS**

**VIRGINIA NGUNYI MUTOKAA.....RESPONDENT**

**JUDGMENT**

1. This appeal challenges the judgment of *Hon. M.N. Gicheru (CM)* dated 19<sup>th</sup> November 2018 delivered in Embu CMCC No. 213 of 2016.

By way of background, the respondent sued the appellant in the lower court seeking general damages for pain, suffering, loss of amenities and loss of future earning capacity as well as special damages in the sum of KShs.37,585 following personal injuries sustained in a road traffic accident on 17<sup>th</sup> February 2014.

2. In her pleadings, the respondent alleged that she was walking along the Embu-Nairobi Road when motor vehicle registration number KBE 210V owned by the appellant was so negligently driven by his authorized driver or agent that it lost control, veered off the road and hit her occasioning her personal injuries.

3. The appellant denied the respondent's claim in a statement of defence filed on 26<sup>th</sup> May 2017. In the alternative, he pleaded that if the accident occurred which was denied, it was solely caused or substantially contributed to by the respondent's negligence.

4. After a full hearing, the learned trial magistrate in the impugned judgment made a finding on liability in favour of the respondent against the appellant at 100% and proceeded to award general damages in the sum of KShs.700,000 and special damages in the sum of KShs.29,895. The respondent was also awarded costs of the suit and interest.

5. Being dissatisfied with the trial court's decision, the appellant filed the instant appeal raising eight grounds of appeal which can be condensed into three main grounds as follows:

- i. That the learned trial magistrate erred in finding the appellant 100% liable which finding was against the weight of the evidence on record.
- ii. That the learned trial magistrate erred by failing to consider the appellant's written submissions and authorities on quantum.
- iii. That the learned trial magistrate erred in awarding the respondent general damages of KShs.700,000 which was excessive and inordinately high.

6. At the hearing, parties consented to disposing of the appeal by way of written submissions which they duly filed.

7. As the first appellate court, it is my duty to subject the totality of the evidence presented before the trial court to an exhaustive analysis and re-evaluation to draw my own independent conclusions bearing in mind that unlike the trial court, I did not have the advantage of seeing the witnesses as they testified. See: *Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123*.

8. I have carefully considered the pleadings, the grounds of appeal, the evidence on record and the parties' rival written submissions alongside the authorities cited. I have also read the judgment of the learned trial magistrate.

9. In his submissions, the appellant faulted the learned trial magistrate for basing his finding on liability on grounds, *inter alia*, that the appellant failed to describe in his statement of defence how the accident occurred which amounted to shifting the burden of proof from the

respondent to him; that the finding was based on pleadings and not on judicial examination of the evidence and the law; that the finding was erroneous as in his view, the respondent failed to prove her case that she was off the road when the accident happened.

10. On quantum, the appellant submitted that the award of KShs.700,000 was erroneous as it was not only excessive but was based on new evidence which was neither pleaded nor availed by the respondent; that in making the award, the trial court relied on previous awards made for injuries which were not comparable to the injuries sustained by the respondent.

11. On her part, the respondent supported the learned trial magistrate's finding on both liability and quantum. On liability, she invited the court to find that she had established her case to the required standard by availing evidence to prove that she was hit by the appellant's vehicle when off the Embu-Nairobi Road.

12. On quantum, she maintained that the award of KShs.700,000 was fair and reasonable and ought to be upheld. She also submitted that the trial court was right in taking into account her head injury while assessing damages even if the injury was not pleaded in the plaint.

13. The trial court's record shows that in her evidence, the respondent adopted her written statement as her evidence in chief in which she claimed that she had been walking off the Embu-Nairobi Road when motor vehicle registration number KBE 200V lost control, went off the road and knocked her down. In cross examination, she stated that she was hit when waiting to board a certain vehicle which was on the right side of the road facing Mwea (Nairobi) direction. She produced two medical reports, treatment notes and other documents as part of her evidence.

14. In an interesting turn of events, the parties consented to a most unorthodox manner of presenting the appellant's evidence in support of his defence. They agreed to have a witness statement dated 3<sup>rd</sup> October 2017 adopted as his evidence without its maker testifying before the court. They also consented to having the medical report by *Dr. Maina Ruga* admitted as D exhibit 1 without calling its maker.

15. In my view, the learned trial magistrate erred in adopting the consent of the parties on the adoption of a mere witness statement as evidence in support of the defence case. The witness statement made by *Dennis Wambugu Gachanja* cannot in law amount to evidence since it was not made on oath and presented in court as evidence in the manner contemplated under the *Evidence Act*.

16. After my own analysis of the evidence on record, though I agree with the appellant's submissions that the learned trial magistrate erred in his reasoning that the appellant should have pleaded in his defence how the accident occurred, I nevertheless agree with his conclusion that the respondent had proved to the required standard that she was hit while off the right side of the road as one faces Nairobi direction whereas the appellant's driver was proceeding towards the same direction and ought to have been driving on the left side of the road. This evidence was sufficient proof that the driver lost control of the vehicle which veered off its correct lane, crossed to the right side and went off the road where it found the respondent and hit her.

17. In my opinion, it is immaterial whether the respondent was walking or standing off the road. The important point to note is that she was hit when she was off the right side of the road. I do not therefore have any doubt in my mind that the respondent established to the required legal standard that the accident in which she was injured was caused by the negligence of the appellant's driver and or his authorized agent. I am thus satisfied that the learned trial magistrate was right in his finding on liability save for his omission to specify that the appellant was vicariously as opposed to directly liable for the accident at 100%. The trial court's finding on liability is consequently confirmed.

18. On quantum, it is clear from the trial court's judgment that the learned trial magistrate awarded the respondent KShs.700,000 general damages for pain, suffering and loss of amenities because of new evidence he discovered in one of the medical reports that the respondent had also sustained a head injury. I fully concur with the appellant that this injury was not only not pleaded but it did not form part of the respondent's evidence. The only injury pleaded and proved by the respondent was a weber (c) fracture on right lower limb.

19. The treatment notes, P3 form, the CT scan of the brain and the medical report by *Dr. Njiru G.N.* dated 27<sup>th</sup> February 2016 which I perused from the original record of the trial court since for some undisclosed reasons they were not included in the record of appeal all confirm that a head injury was not one of the injuries noted on the respondent after the accident.

20. *Dr. Maina Ruga* did not testify before the trial court and it is not clear how he included a head injury as part of the injuries the respondent had allegedly sustained in the accident when the source documents from which he based his findings did not disclose such an injury.

21. A reading of the learned trial magistrate's judgment also shows that in arriving at his decision on quantum, he did not consider the medical evidence availed by the respondent nor did he consider the appellant's written submissions and authorities. He only considered the medical report adduced by the appellant and one authority cited by the respondent. This was a serious error and an abuse of the trial court's judicial discretion because as an impartial arbiter, the dictates of fairness required him to thoroughly interrogate all the evidence adduced by both parties in its entirety as well as their written submissions and authorities before arriving at his decision on quantum.

22. In view of the foregoing, it is clear to me that the learned trial magistrate fell into error when making his decision on quantum. He was obviously influenced by his finding that the respondent had suffered a head injury in addition to the weber (c) fracture which was not pleaded or borne out by the medical evidence considered in its totality. He also relied on the persuasive authority of *Stephen Wanderi Kamau & Another V Gladys Wanjiku Kungu, CA No. 81 of 2005* in which the plaintiff was awarded KShs.600,000 for multiple fractures of the left fibula and tibia which united but left her with residual disability. The plaintiff had also suffered extensive skin loss from the knee downwards which required grafting. It is thus clear that the plaintiff in that case suffered different and much more serious injuries than those sustained by the respondent in this case.

23. One of the settled principles in the assessment of damages for personal injuries is that comparable awards should be made for comparable injuries. In this case, the learned trial magistrate misapplied the law by basing his award on previous awards for injuries which

were not comparable to the weber (c) fracture sustained by the respondent in this case.

24. For all the above reasons, I am satisfied that there is good reason to justify my interference with the award made by the trial court. Given the nature of the injury sustained by the respondent, I find that the award of KShs.700,000 was inordinately high as to be erroneous. I am satisfied that an award of KShs.400,000 would have adequately compensated the respondent for her pain and suffering. The award of KShs.700,000 is consequently set aside and is substituted with an award of KShs.400,000.

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

26. The upshot of this judgment is that the appeal has partially succeeded on the issue of quantum only. The respondent is awarded general damages in the sum of KShs.400,000 in addition to KShs.29,895 special damages awarded by the trial court.

27. 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 at court rates from date of filing suit until payment in full.

28. Costs follow the event and are at the court's discretion. The respondent is awarded costs of the suit at the lower court but since the appeal has partially succeeded, each party shall bear his/her own costs of the appeal.

It is so ordered.

**DATED and SIGNED** at **NAIROBI** this 9<sup>th</sup> day of March 2021.

**C. W. GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED** at **EMBU** this 18<sup>th</sup> day of March 2021.

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

No appearance for the appellant

Mr. Ogweno for the respondent

Esterina: Court Assistant