REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CIVIL APPEAL NO. 620 OF 2017

FREDRICK OMONDI ONYANGO...APPELLANT

VERSUS

AMEYO PIUS ....1ST RESPONDENT

LUKE MACHARIA MWANGI...2ND RESPONDENT

(Being an appeal from the judgment of **Gichobi, SRM** in Milimani CMCC No. 3924 of 2015

delivered on 13th October, 2017)

JUDGMENT

1. This appeal emanates from the judgment of **Gichobi, SRM** in **Milimani CMCC No. 3924 of 2015** delivered on 13th October, 2017. The suit in the lower court had been filed by **Fredrick Omondi Onyango,** the Appellant herein, against **Ameyo Pius** and **Luke Macharia Mwangi** (the 1st and 2nd Respondents respectively) to recover damages for injuries sustained by the Appellant on 28th June, 2014, while allegedly traveling aboard the motor vehicle registration no. **KAT 046C** owned by the 1st Respondent, and driven at the material time by the 2nd Respondent. The Appellants had averred that the injuries were sustained after he was pushed out of the Respondents' vehicle by the conductor as the vehicle was on Mumias South Road. He pleaded negligence against the Respondents.

2. The Respondents had filed a defence statement denying inter alia the occurrence of the accident and liability and in the alternative, pleaded contributory negligence on the part of the Appellant. During the subsequent trial, only the Appellant adduced evidence. In her judgment, the trial Magistrate apportioned liability at 50:50 between the parties and awarded damages, subject to liability as follows:

General Damages - Kshs. 1,000,000/=

Special damages Kshs. 40,250/=

Total Kshs. 1,040,250/=

Less 50% contribution = Kshs. 520,125/=

3. Aggrieved by the outcome, the Appellant filed the instant appeal. The grounds of appeal are to the

effect that the learned trial Magistrate:

a) Took into account irrelevant issues and thus arrived at erroneous conclusions of law and fact;

b) Erred in fact and law by holding the Appellant 50% liable, which finding was against the weight of evidence adduced;

c) Failed to appreciate the evidence showing that the Respondents were wholly to blame for the accident;

d) Misdirected herself in law and fact thereby arriving at an erroneous award of damages, against the weight of evidence adduced; and

e) Failed to consider submissions and authorities cited by the Appellant and erred in law and fact therefore made an award that was too low.

4. The court (**Kamau J**) directed on 4/12/2019 that the appeal be canvased by way of written submissions. Subsequently when the parties appeared before me, they confirmed filing of submissions. However, while preparing this judgment, I could not trace the Respondents' submissions allegedly filed in May, 2020. In the interest of justice, the court will consider the Respondents' submissions before the lower court.

5. On this appeal, the Appellant's submissions consist of a two-pronged attack on the judgment of the Lower Court; on liability and quantum. On the first question, reiterating his evidence at the trial, the Appellant citing Section 107 of the Evidence Act as to burden of proof asserted that the Appellant had adduced evidence that he was pushed out of the moving vehicle.

6. The Appellant accuses the trial court of erroneously taking into account hearsay evidence by **PC Masinde** (**PW1**) which contained conflicting accounts of the accident as reported to police. Pointing out that the driver of the accident vehicle was not called as witness by the defence, the Appellant asserted that the trial court erred in apportioning liability between the parties without giving reasons and in the absence of evidence to controvert the Appellant's version of the accident. Several decisions were cited by the Appellant including **Boniface Waiti & Another v. Michael Kariuki Kamau [2007] eKLR and Kimatu Mbuvi v. Benson Nguli [2010] eKLR.** The Appellant submitted that the Respondents ought to have been held 100% liable.

7. On the issue of quantum, the Appellant restated the evidence adduced in connection with his injuries and sequela, as well as the lengthy period of admission in hospital to submit that an award of Kshs. 2,227,000/= in general damages would be reasonable compensation. He relied on several authorities including **Dorcus Wangithi Nderi V. Samuel Kiburu Mwaura & Another [2015] eKLR** where a plaintiff who suffered a fracture of left radius/ulna, compound fracture of the tibia/fibula and soft tissue injuries, was awarded general damages in the sum of Kshs. 2,000,000/=. The Appellant took issue with the fact that trial court distinguished his authorities on quantum yet they related to multiple fractures similar to the injuries he sustained.

8. On their part, the Respondents had submitted at the trial that the Appellant had not discharged the onus of proving negligence against the Respondents and citing the accounts of the accident given by **PW1** asserted that the Appellant was the author of his own misfortune, having jumped out of the moving vehicle. On quantum, they had urged an award of Kshs. 200,000/= as general damages citing the case of **Simon Mutisya Kavii V. Simon Kigutu Mwangi [2013] eKLR.**

9. The court has considered the record of the trial, the respective pleadings as well as the submissions relating to the appeal. The duty of this court as a first appellate court is re-evaluate the evidence adduced at the trial and to draw its own conclusion, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. **See Peters v Sunday Post Ltd (1958) EA 424; Sele and Anor. V Associated Motor Boat Co. Ltd and Others (1968) EA 123;** and **William Diamonds Ltd v Brown**

[1970] EA 11. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278** stated that:

> **"A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have alter on wrong principles in reaching the findings he did".**

10. On the issue of liability, the Appellant herein had pleaded at paragraph 5 of his plaint that:

> ***"On or about 28th day of June, 2014, the plaintiff was a passenger on board defendants' motor vehicle registration no. KAT 064C while along Mumias South Road, when the said motor vehicle was so negligently and/or carelessly driven, <u>that the same was allowed to ran over the Plaintiff after he was forcefully pushed out of the vehicle by the conductor and/or servant while the same was in motion and as a result</u> of which the Plaintiff sustained severe bodily injuries and has since suffered loss and damage"*** *(sic). (emphasis added)*

11. In his brief written statement adopted as his evidence-in-chief, at the trial, the Appellant stated in the second paragraph that

> ***"That it was on 28th June, 2014 while on board motor vehicle registration KAT 046C, that it was while we were along Mumias South Road <u>when I sustained injuries after I was forcefully thrown out of the moving vehicle by the conductor of the said matatu</u> and I sustained serious injuries"*** *(sic) (emphasis added).*

12. In his equally brief oral evidence at the trial, the Appellant claimed that he was pushed out by the conductor after he demanded his change. He specifically denied the allegations contained in the first Occurrence Book (OB) extract produced by **PW1** as **P. Exhibit 3a** to the effect that the driver of the accident vehicle reported that the Appellant (then described as unknown passenger) having snatched a purse from a fellow passenger in the vehicle had jumped out of the vehicle and sustained injuries before getting up and running away. The Appellant reiterated that he was pushed out by the conductor and stated that the driver was not driving carefully at the material time.

13. It is significant that both his written statement and oral evidence do not contain any assertion that the Appellant *was run over* (as pleaded in the plaint) by the matatu upon being pushed out, hence the injuries, similarly not specified in either statement. He stated under cross examination that after being pushed out he sustained a fracture on the left hip joint and left tibia/fibula as well as bruises on the back. Neither of his statements explain exactly how the injuries were sustained. Having apparently abandoned the assertion of being run over by the vehicle, the Appellant did not attempt to attribute his injuries to the other logical cause, a fall and seemingly left it to the Court to fill the gap through inference. The medical reports produced by the Appellant as **P. exhibit 10 & 14a** indicate that he sustained a compound fracture of the left tibia and fibula and fracture of the proximal shaft of the left femur and bruises on the left forearm and right leg. The Appellant has on this appeal attacked the trial court's finding that the Appellant may have jumped out of the moving vehicle and fallen down sustaining injuries or was pushed out by the conductor.

14. The court asserted that either of the *"two versions could be true"*. Nowhere does the court appear to accept the hearsay evidence of **PW1** as asserted by the Appellant. The court stated about the evidence on the two alleged versions based on two OB abstracts tendered by **PW1** that:

> **"However, of importance to note is that the information regarding how the accident occurred as contained in the occurrence book is as opined by the defendant's driver. There is no indication that police officer did their own independent investigation and arrived at an independent finding or how the accident occurred as the abstract tabled in evidence by PW1 showed case …is pending under investigation…"**

15. These statements clearly indicate firstly that the court was alive to the rule against hearsay evidence,

and secondly, that it did not accept the evidence of **PW1** on the occurrence of the accident so far as was derived from the OB abstract of the driver's report to police. That said, it is apparent from the record that the defence had, during cross examination correctly put to the Appellant the suggestion that he jumped out of the moving vehicle. Having pleaded contributory negligence against the Appellant, the Respondents were entitled to confront the Appellant with the alleged driver's version contained in the OB extract of his report, that he jumped out of the vehicle, whether or not they called their driver as a witness. The trial court having heard and seen the Appellant testify, was entitled to make the conclusions it did, notwithstanding the failure by the Respondents to call the driver. As observed earlier, the Appellant had not explained in his evidence-in-chief exactly how he sustained injuries after being allegedly thrown out of the moving vehicle.

16. What the trial court was essentially saying was that there were two equally valid possibilities and that it did not accept the Appellant's version in its entirety. Although the trial court did not explicitly refer to the Appellant's cross examination in determining the liability ratio, it is clear that the court was persuaded of the possibility that the Appellant may have jumped out of the moving vehicle and sustained injuries *after falling.*

17. The onus lay with the Appellant to prove the negligence of the Respondents on a balance of probabilities in **Karugi & Another V. Kabiya & 3 Others [1987] KLR** 347 the Court of Appeal stated:

> **"[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant… The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim…**
>
> <u>**Where the defendant has subjected the plaintiff or his witness to cross examination and the evidence adduced by the plaintiff is thereby thoroughly discredited the judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence b the defendant convinces the court that on a balance of probabilities, it proves the claim."**</u> (emphasis added)

18. From the trial court's finding on liability it is clear that the court did not accept wholesale the Appellant's version on the occurrence of the accident but considered that he may indeed have jumped out of the moving vehicle based on the evidence before her, and as suggested during cross-examination by the Respondents' advocate.

19. This Court is aware that the facts of this case differ from the facts in **W. K.** (**Minor suing through next friend and mother L. K.) Vs. Ghalib Khan & Another [2011] eKLR** in that in the said case both the parties offered rival evidence on how the accident occurred. Nonetheless, in the instant case, a proposition was put forward that the Appellant may, contrary to his evidence, have jumped out of the moving vehicle after snatching a purse from a lady passenger, which proposition the trial court did not consider a remote possibility. In the **Ghalib Khan** case, the Court of Appeal cited the decision on **Haji vs Marair Freight Agencies Ltd [1984] KLR** before stating:

> **"In this case, the court is faced with three practical alternatives either to find, as the trial judge did, that the Appellant had not proved negligence or to find that due to her age and the circumstances of the case no negligence was attributable to the Appellant and therefore Respondents were wholly to blame, or lastly, to find that both parties were negligent but that the respective degree of negligence would not be ascertained and hence apportion blame equally. Any other hypothesis would be in realm of speculation and arbitrary."**

20. Upon reviewing the circumstances of the accident in that case the Court of Appeal concluded that:

> **"However, in the absence of clear evidence of the contribution of each to the accident the justice of the case would have been met by apportioning blame equally. We are satisfied and we find that the trial judge misdirected herself in finding that the Appellant was solely to blame for the accident".**

Similarly, in this case, the trial court faced three possible hypotheses, namely that, the Appellant had not proved negligence, that the Respondents were wholly negligent or that the Appellant contributed to the accident but the degree of blame could not be ascertained. The court evidently dismissed the first two hypotheses and settled for the third. In the circumstances, this court is not persuaded that the trial court erred, misdirected itself or misapprehended the evidence. The grounds of appeal attacking the finding on liability therefore cannot stand.

21. The Appellant contends that the damages awarded in this case were too low. The appellate court will only disturb an award of damages where such award is so inordinately high or low as to represent an entirely erroneous estimate as stated by the Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan (1982-1988)KAR 5).**The court will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30.**It was held in that case that:

> **"The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that , short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."** see **also Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)e KLR.**

22. In the latter case, the Court of Appeal emphasized that the award of general damages is an exercise of the court's discretion and observed that *"an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance".*

23. The injuries proved by the Appellant herein have been listed elsewhere in this judgment. He was in hospital for 4 months. The Appellant produced a medical report (**P. exhibit 14a**) indicating permanent incapacity at 20% and 30% for the lower and upper leg respectively. The affected leg was the left leg and it is difficult to understand the varying degree of incapacity on two portions thereof as stated in the medical report by **Dr. Okere**. Be that as it may, the only complaint made by the Appellant at examination on 26/03/2015 was pain on the left leg and use of a crutch but the Respondents' medical report (**D. exhibit1**) produced by consent of the parties indicates that the Appellant had *"normal walking gait.* In court, the Appellant stated during cross- examination that he no longer attended clinic but he could no longer do heavy work as he did before the accident.

24. Evidently, his injuries healed well but with some residual disability. Of the three authorities cited by the Appellant before her, the trial court found the case of **Charles Waweru** also cited on this appeal, to be more comparable to the instant one, as the two others **Dorcas Wangithi Mwaura's** case**,** and **Kirinjit Sigh Magon V. Bonanza Rice Millers Ltd [2014] eklr** represented more severe injuries. I agree, reviewing the case of **kirinjit** that the said plaintiff's injuries were more severe, treatment complicated and morbidity extensive. Indeed, due to the nature of injuries on the left leg, that plaintiff practically lost the functionality of the injured leg. Similarly, the plaintiff in **Dorcas Wangithi** sustained three fractures, injury to the head and soft tissue injuries. It may well be that the plaintiff in **Charles Mathenge**'s case suffered one fracture to the femur and cut wound on the scalp, but he was left with a permanent incapacity of 25% as the affected leg was rendered shorter, permanently affecting his gait. He was awarded Kshs. 1,500,000/=.

25. The Appellant has on this appeal substituted **Kirinjit's** case with a different authority, viz, **James Gathirwa Ngungi V. Multiple Haulers (Ea)Limited & Another (2015) eKLR.** This authority was not placed before the trial court. This substitution of authorities at appeal stage is unacceptable. I am in full agreement with the sentiments of **Ochieng J** in his judgment in **Silas Tiren & Another V. Simon Ombati Omiambo [2014] eKLR** wherein the learned Judge took exception to the introduction of new authorities at the appeal stage, stating inter alia that:

> ***"None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court … it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court… The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal."***

26. While in my view the trial court was entitled to disregard the authorities cited by the Respondents which were undoubtedly old/or represented relatively minor injuries, it is my view that the proposal by the Appellant for an award of Kshs. 2,227,000/- in damages was exaggerated and not justifiable in this case.

27. Based on the reasoning of the trial court in arriving at the award of Kshs. 1,000,000/= and upon my own consideration of the matter, the trial court considered all the relevant factors, and the eventual award cannot be said to be so inordinately low as to constitute a wholly erroneous estimate of damages. In the circumstances this court does not find justification for disturbing the award on general damages. Equally, this court cannot entertain the claim for Kshs. 5,000/= urged in the Appellant's submission as payments made to **PW1** to attend the trial. This alleged expense was neither pleaded nor proved at the trial. Besides, **PW1** was a public servant, a police officer.

28. In the result, the appeal herein has failed and is hereby dismissed with costs.

Delivered and signed electronically at Nairobi on this 25TH Day of JUNE 2021.

C. MEOLI

JUDGE

In the Presence of:

Mr. Ngige for the Appellant

N/A for the Respondents

Carol-Court Assistant