REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 10 OF 2020

NANJI PREMJI KHETANI.....APPELLANT

VERSUS

RAPHAEL CHARO JEFWA .....RESPONDENT

(Being an appeal against the Judgment of Hon. Dr.J.Oseko – Chief Magistrate, delivered on the 19th of November 2019 in Malindi CMCC No. 171 of 2017)

CORAM: Hon. Justice R. Nyakundi

Wambua Kilonzo for the Appellant

M/S Kariuki Gathuthi & Co. Advocates for the Respondent

J U D G E M E N T

The Appellant **Nanji Premji Khetani** formerly the defendant in **Cmcc No. 171 of 2017** has appealed against the judgement of the trial court delivered on **19th November, 2019** by **Hon Dr. J.Oseko – (CM)** on both liability and assessment of damages. Being aggrieved with the judgement and decree of the said trial court the appellant filed his Memorandum of appeal dated 10th February, 2020 formed up as follows; -

1) The Learned Trial Magistrate erred in Law and in by applying the wrong principles in finding the appellant 100% liable.

2) The Learned Trial Magistrate erred in fact and in law by awarding the Respondent Kshs.250,000/= as general damages which was excessive and exaggerated under the circumstances.

3) The Learned Trial Magistrate erred in Law and facts in failing to appreciate the evidence of the Appellant thereby leading to a miscarriage of justice.

4) The Learned Trial Magistrate greatly misdirected himself in ignoring and treating the submissions of the Appellant on both liability and quantum very superficially thereby arriving at a wrong conclusion.

5) The Learned Trial Magistrate proceeded on wrong principles when assessing both liability and damages against the Appellant.

Litigation History

On 4.9.2017, a Plaint was drafted and lodged before the Trial Court at Malindi by one **Raphael Charo Jefwa** as the claimant for damages arising vide a traffic road accident which took place on 1.7.2017. It was pleaded in the Plaint that the Respondent was at the time travelling as a lawful fare paying passenger in motor vehicle registration number **KCJ 391J** along Mombasa – Malindi Road at Kwa Abudu area. When the said motor vehicle was carelessly managed by the appellant driver. That an accident ensued; involving another motor vehicle **KBM 330B**. In the same plaint it is averred that the respondent did sustain injuries to the anterior aspect of the right shoulder, right upper arm and right elbow. All these was blamed upon the driver, or agent, servant or employee of the appellant. The particulars of negligence are as outlined in paragraph 6 of the Plaint which outlines excessive speed, failure to keep a proper look out, veering off the road, overturning dangerously, failing to keep into his lane.

The 2nd Defendant, appellant herein filed a statement of defence denying any breach of duty of care and or particulars of negligence as pleaded by the respondent. At the trial the respondent (**Raphael Charo Jefwa)** gave evidence on oath as to the circumstances of the accident

and the person to whom liability should lie. In so far as negligent acts are concerned the respondent blamed the driver of motor vehicle registration No. **KBMN 830B**. According, to the respondent observations the driver of the aforesaid motor vehicle was being driven at high speed and as a result collided with motor vehicle **KCJ 391J.** Upon cross examination the respondent told the trial court that motor vehicle registration no. **KBMN 830B** veered off its lane into the opposite lane being used by motor vehicle registration no **KCJ 391J.**

The other key witness happened to be one **Pc Samuel Barno (Pw1)** of Malindi Traffic Base. According to witness, on visiting the scene the evidence gathered showed the offending vehicle being registration no. **KBMN 830B.** He attributed the proximate cause of the accident of the negligent manner of driving of the appellants driver, agent and or employee on the part of the defence, one Jackson, Wainana. The driver of motor vehicle registration no. **KCJ 391 J** denied any wrong during at the time the alleged accident occurred along – Mombasa – Malindi road. In his evidence he blamed the driver of the truck registration No. **KBM 830B.**

Having looked at the evidence and submissions by both counsels, it is clear from the judgement that the appellant was wholly blamed for the accident. Further, on damages, an award of Kshs.250,000/- as general damages was arrived at by the same Court. The grievances by the appellant revolves on the two critical findings defined as liability and assessment of damages for pain, suffering and loss of amenities.

Submissions on Appeal Concerning these issues

Mr Wambua Kilonzo for the appellant submitted that on account of the evidence before the trial court, negligence and breach of duty of care as known in law was never proved to wholly blame the appellant learned counsel argued and submitted that form the evidence of (Pw 1) Pc Baruo and Raphael Charo (Pw2) there appears to be no cogent evidence to lay blame upon the appellant as founded by the Learned Trial Magistrate. On that basis Learned Counsel took the view that findings on 100%. Liability against the appellant was erroneous capable of being interfered by this appeals court. Learned Counsel buttressed his arguments in placing reliance on the jurisprudential principles in ***Sammy Ngugi Mugo V Mombasa Salt Lakes Ltd [2014] eKLR, Treadsetter Tyres V John Wekesa Wepukhulu[2010]eKLR,Mbatha Muithya & another V Kenya Power Lighting Co. Ltd, Violet Kamwenya Odiare & ano(Suing as the Administrators of the Estate of late Timothy Odiara Ndege V Kiprono Chemwono[2019]eKLR.***

Learned Counsel continued that liability as known in law was never established at a ratio of 100% against the appellant. Concerning damages learned counsel submitted that the award was at all times high and against all the settled principles in similar past discussions made by the Superior Courts Learned Counsel placed reliance on the similar past case principles. In the case of ***Cecilia W.Mwangi & another V Ruth Mwangi[1977]eKLR, Samuel Muthama V Kenneth Maundu Muindi CA No. 102 of 2008, Mokaya Mochama V Julius Momanyi Nyokwoyo HCCA No. 101 of 2010*** to show the misdirection and errors made by the learned trial magistrate in assessing general damages at Kshs.250,000/=. Learned Counsel in his submissions urged this Court to reduce the sum awarded to Kshs.140,000/= with that Learned Counsel rested his case beseeching the Court to allow the appeal.

Submissions by the Respondent

Mr Kariuki for the respondent fully relied on his written submissions filed in Court on 12th May, 2020. The gist of Learned Counsel's submissions on liability was that in the circumstances of this case. There was sufficient evidence to find the appellant wholly negligent. Learned Counsel placed reliance on the witness statements on oath as to what they observed as to what the matatu driver **KCJ 391 J** and the truck driver of motor vehicle **KBM 830B** was to blame for the accident. In view of the evidence and the submissions before the trial Court there was nothing else in which the Learned Trial Magistrate could have decided in the alternative. According to the Learned Counsel the burden discharged by the respondent on a prima facie case was never contributed by the appellant.

On damages, Learned Counsel submitted that the substance of the matter is that the respondent suffered injuries and there should be no quarrel on the discretionary nature of the assessed damages. According to Learned Counsel, the appellant has failed to show that the Learned Trial Magistrate overlooked or took into account irrelevant materials to assess the claim for suffering and loss of amenities. The Learned Counsel submitted can be detected from the record and evidence which guided the Court on assessment. Learned Counsel submitted and made the observation by citing and placing reliance on the cases of ***General Motors East Africa Ltd V Eunice Alila Ndeswa & another [2015] eKLR, West(H) & Sons Ltd V Shepherd [1964] A.G.*** Learned Counsel argued and submitted that there was ample evidence to award the general damages at Kshs.250,000/=. As such there is no room in which the Court can navigate to interfere with the decision of the trial Court submitted Counsel for the Respondent.

What is important for our present principles is to establish whether on the two predominant issues being Liability and Quantum, the appeal so far filed and heard has merit.

Determination

The law on the duty of the first appellate Court is well settled. In the case of ***Abok James Odera T/a A. J Odera & Associates v John Patrick Machira T/a & Co. Advocates [2013] eKLR*** the Court stated that:

> ***"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. See the case of KENYA PORTS AUTHORITY VERSUS KUSTON (KENYA) LIMITED (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-***
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> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."*** *(Emphasize ours, bold, underlined)*

Whilst an appellate Court has jurisdiction to review the evidence of an inferior tribunal to determine whether the conclusions of that tribunal should stand, this jurisdiction and power is normally exercised with caution. If there is no evidence to support a particular conclusion or view, the appeal's Court would be at liberty to vary or set aside the order. But if, the tribunal appreciated the weight of the evidence bearing in mind on proof of the existence or non-existence of a particular fact it is plainly clear an appeal's Court has no discretion to vitiate the decision. This jurisdiction is beyond controversy. I stand with that position in law as affirmed by the ***Court of Appeal Eastern Africa in Peter V Sunday Post***.

The issues which emerges from the appeal are whether the appellant's driver caused injury and damage to the respondent by reason of negligence. Secondly, whether the respondent was contributorily negligent.

Additionally, the court has to address the issue of the nature and extent of the personal injury and the quantum of damages, as awarded by the trial court. First is the question of duty of care and liability.

The Law

The courts have construed and interpreted negligence as deduced in the following cases: In ***Rosemary Wanjiru Kiungu v Elijah Macharia & Another [2014] eKLR:***

> ***"Negligence is the breach of a legal duty to take care resulting in damage to the plaintiff which was not desired by the plaintiff."***

Whereas in the case of ***Jimmy Paul Semenya v Aga Khan Health Services T/a Aga Khan Hospital & 2 others:***

> ***"Negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes, the complex concept of duty of care of that duty and damage, thereby suffered by the person to whom the duty was owing. Negligence is therefore an act or an omission that results to harm to a person."***

On this issue, the appellant case was that both drivers were to blame for the accident and therefore a finding of 100% liability by the trial Magistrate was erroneous. It was the appellant contention that the court should draw inferences from the evidence of the witnesses which in his view was mistakenly construed by the Learned trial Magistrate.

As the principle in ***Hay v Young [1942] 2 ALL ER 396***:

> ***"The duty is not owed to the world at large. It must be tested by asking with reference to several complainant was a duty owed to him or her? If no one of them was in such a position that direct physical injury could reasonably be anticipated to them or other relations or friends, normally I think, no duty would be owed."***

The duty in terms of proper care connotes avoidance of excessive speed, keeping a good look-out, observation of traffic rules and signals and so on. Then to whom is the duty owed? Again I quote and accept the words of Lord Javeieson:

> ***"To persons so placed that there may reasonably be expected to be injured by the omission to take such care. The duty to take care is the duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as it's reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably anticipated if the duty is not observed."***

On this ground the two trajectories on causation are clearly manifested in the witness statements who testified on oath before the trial court. This court on reviewing the record of the evidence in order to determine liability and whether the conclusion reached in the impugned judgement was erroneous takes the following view. So far as the case stood at the trial court it is not disputed that both vehicles were being driven alongside their independent lanes. The offending lorry was from the opposite direction visa viz the motor vehicle in which the respondent was a fare-paying passenger.

According to (Pw1) evidence the lorry was being driven along Mombasa. Further its crystal clear from the investigations carried out by (Pw2) – the driver of the lorry lost control and veered off to the right side of the road occasioning a collision with a Nissan Matatu heading to Mombasa. (Pw2), in this aspect of negligence told the court that he was a mere passenger in the Nissan Matatu. In his observations he thought the Nissan Matatu was being driven at high speed, but acknowledged that the lorry driver was the one who collided with their motor vehicle causing the accident. That is how he suffered personal injuries.

In assessing the adequacy of the findings made by the Learned trial Magistrate, she told the parties on this fundamental question why liability ought to be shouldered by the driver of the lorry. It is significance to describe the context of this accident from the position of an appellate court. In simple terms this was a straight forward fact finding exercise by the Learned trial Magistrate. There is support on the basis of the judgement given by the Learned trial Magistrate to blame the appellant whereby for the accident. The emphasis here is on the direction which the two motor vehicles were being driven at the time of the collision. A valuable piece of evidence is that of the offending motor vehicle on approaching the bump, lost control and veered off into the lane of the respondent's motor vehicle. The complaint made by the appellant is to the effect of the respondent's motor vehicle not taking evasive steps to avoid the accident. It must be remembered as reflective of the evidence that the appellant's driver invaded the respondent's territory negligently and as a consequence an accident occurred.

It is a well known principle of law that a party must be considered to intend that which is the necessary or natural consequence of that which he does. Here, the duty of care was owed to the respondent who was lawfully driving alongside the correct lane. In order to establish

whether both drivers can be blamed for the accident as suggested by the appellant, the following pertinent questions are critical. First, whether, as between the alleged wrongdoer and the person who has suffered damage, there is sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, careless on his part may have caused damage to the latter to create a prima facie case of negligence. Secondly, if that question is answered in the affirmative, it gives rise to the question whether the scope of duty created an aspect of contributory negligence.

In my analysis of the evidence, I do not think that this accident ought to take a direction of apportionment of contributory negligence. In the instant case, the selection on proximate cause is attributable to the driver of the lorry on account of not slowing down as he approached the bump on the said road.

The incremental approach entailed a category of a breach of duty of care owed to the respondent's motor vehicle. It is trite that negligence is the omission to do something which a reasonable man guided upon certain considerations which regulate human conduct imports the likelihood of harm.

There is no evidence in the present case that there was any act constituting negligence on the part of the respondent's motor vehicle. It is not enough for the appellant to say that the respondent could have foreseen the impending risk to take evasive measures to avoid the accident. In light of these observations and being guided by the principles in the case of ***Peter v Sunday Post*** there are substantial grounds to support the decision reached on liability by the Learned trial Magistrate. In the circumstances, the appellant submissions on this ground fails.

Assessment of damages

On damages, it is further argued that the Learned trial Magistrate failed to apply the settled principles of similar awards to arrive at a just and fair quantum. After reviewing various cases for pricing pain and suffering, the appellant Counsel argued that the case at bar was at an extreme end of the fulcrum to call upon this court to interfere with the decision. In order to appreciate the duty of the appeals court, I rely on the principles in the cases of ***Tahir Sheikh Said Transporters (K) Ltd. v Charles Mugabo, Civil application Nairobi Number 283 of 1998:***

> ***"In an application for stay of execution pending appeal where the complaint is that the Learned trial Judge erred in failing to make a global award and in making separate award of damages on each item of multiple injuries sustained by the plaintiff and that an award of loss of future earnings was made without the same being pleaded or claimed in the plaint, the same constitute triable issues."***
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> ***Boniface Musyoka Ndolo v Pauline Katonge Musau, Civil Appeal Number 34 of 1996 (Gicheru, Lakha and Bosire, JJA on 7 March 1997)***
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> ***"The appellate court is not entitled to review the finding of the lower court merely because it is probable that had it been sitting in first instance it would have awarded a smaller sum but would interfere only if satisfied that the Judge acted upon wrong principle of law or that the amount awarded as damages is so high or so small as to make it an erroneous estimate of the damages to which the respondent is entitled. Where the award differs widely from the awards given in comparable cases it may be right for an appellate court to alter it."***

In assessing damages again and again courts have repeated that it's a discretionary function under the control of the trial court. The main sources of discomfort about pain and suffering damages seem to be, first that they are unpredictable, and second, that because an amount of court's time is dedicated to proving the pain and suffering loss. They cause high administrative costs to the system. Thirdly, there are several problems with simply capping pain and suffering damages in the sense of past similar awards principles. Fifth, there is apparent risk to address assessment on the previous predetermined cases with differentia on the range of pain and suffering of course, I agree that pain and suffering damages seek to compensate the victim for the severity of the injuries, which is not already compensated in the monetary loss component. The problems which comes with it are enormous, essentially how best is it to estimate the severity if one tort's victim injuries with another even in similar circumstances.

In matters of this kind, I doubt whether there is any precise mathematical formulae to answer the question ***"what pain and suffering is worthy of?"*** If science can unequivocally answer yes, to this question, some damages in personal injury claims can be predicted. However, that is not the situation courts are faced with on assessment of damages.

Notwithstanding, all that conceptualization of the principles it is well settled that in assessing the amount for compensation for pain and suffering and loss of amenities, the court must bear in mind the fact of restoring the plaintiffs to the original position before the occurrence of the accident.

That is the test for assessing damages. What is puzzling is how to restore a fractured bone and in some severe cases of injury in practical terms of paraplegic or quadplegic permanent disability to the original condition. The permanent impairment of a claimant can rarely be restored to the position she or he was before the accident.

Turning to the case before me, the evidence presented on damages came from (Pw2), to her recollection, of the accident resulted in a painful experience to the upper and lower limbs. This is documented in the P3 extract dated 21.8.2017 and treatment notes from Tawfiq Hospital of the same date. Thereafter, on examination by **Dr. Ndegwa** quantified the injuries in his medical report dated 23.8.2017 to comprise of several large lacerations, on the anterior aspect of the right shoulder, right upper arm and right elbow. **Dr. Ndegwa** opined the claimant's injuries to be functionally reflective of soft tissue injuries, with no skeletal malfunctioning.

As the Learned trial Magistrate understood the evidence in relation to the soft tissue injuries she awarded Kshs.250,000/= to the claimant for pain and suffering and loss of amenities. That is the quarrel the appellant has before this court.

I am of the view that part of the problem which brings about discrepancies complained of by the appellant is the factual uncertainty, especially with respect to the specific types of injuries and recoveries. From the compensation perspective, the distinguishing features of reconciling one affliction to another is a cumbersome task for the court. The weight of measure to be given to those past injuries as a determinant score to account for the recent awards from the outset sets in motion of all the appeals within our court system.

Why do I say so, the full impact of an accident, pain, suffering, loss of amenities is never identical nor similar as normally canvassed by the respective litigants. However, as the law stands the capping of damages in personal injuries is guided by past precedents with similar characteristics. The damages trilogy cases do acknowledge that it is not always possible to reflect accurately what a reasonable amount of general damages should be, especially in personal injuries or catastrophic cases. This is because of in commensurability of different kinds of injuries.

As stated in ***A. Arnold v Teno case [1978] 2 SCR 287 at Page 333***:

> ***"There is simply no equation between paralyzed limbs and or injured brain and dollars," to provide fair compensation to the injured person."***

In the instant appeal, I have reviewed the cases referred to by the Learned trial Magistrate on assessment of damages for the respondent. In order to ascertain the parameters used for the pain and suffering the trial court considered the physical injury itself, the initial treatment after the accident together with the medico-legal report of **Dr. Ndegwa**.

Having considered past and similar awards she took the view to compensate the respondent with a quantum of Kshs.250,000. The focus of this court has been on the evidence and the cases cited by the Learned trial Magistrate. Notwithstanding the grounds of appeal. There is no err or misdirection for the court to give a divergent of assessment of damages.

Generally, while it is true an appellate court has the jurisdiction to appreciate the evidence so as to draw its own conclusion, but there is an opportunity on demeanor, observations of the witnesses, the estimate value of that evidence to the facts in issue which is never accorded, the court in a manner which sometimes is disadvantageous. This court has a duty to bear that in mind at all times.

Looking at the impugned judgement I am satisfied that the decision of the Learned trial Magistrate enjoyed that advantage and she gave reasons relied upon towards the final assessment in favour of the respondent.

Although, the appellant in the appeal has challenged the decision, the Learned trial Magistrate made the critical findings of fact as to the award of damages based on similar past awards instructive of the evidence by the respondent. The duty to give reasons as a function of due process and therefore of justice was a criterion satisfied by the trial court.

In saying so I buttress my conclusion with the guiding principles in the case of ***Kenya Power & Lightning Co. Ltd v Timothy Oiudi Ogutu CA No. 112 of 2002***.

The adequacy of the fact finding of the trial court cannot be faulted. The Learned trial Magistrate addressed the fundamental question considering the range of the cases that carefully went to the final award. Therefore, the important questions raised in the memorandum of appeal finds no answers to the material conclusions to precipitate the success of the appeal unfortunately, as the authorities cited indicate the appeal lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED *via Email* AT MALINDI THIS 5TH DAY OF AUGUST, 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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