REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL NO. E018 OF 2020

CHRISTINE KALAMA.....APPELLANT

VERSUS

JANE WANJA NJERU.....1ST RESPONDENT

MARTIN KAGAI.....2ND RESPONDENT

(Being an appeal against the Judgment of Hon. Olga Onalo (Resident Magistrate)

delivered on the 20th November, 2020 CMCC No. 20 of 2019)

BETWEEN

CHRISTINE KALAMA.....PLAINTIFF

VERSUS

JANE WANJA NJERU.....1ST DEFENDANT

MARTIN KAGAI.....2ND DEFENDANT

Coram: Hon. Justice R. Nyakundi

Wambua Kilonzo advocate for the appellant

Kiprop Cheruiyot advocate for the respondents

J U D G M E N T

This appeal arises from a decision of **Hon. Onalo (RM)** on a trial in which the appellant **Christine Kalama** had sued the respondents – **Janet Wanja Njeru** and **Martin Kagai** for damages arising out acts of negligence in a road traffic accident of 8.9.2018 along – Malindi – Mombasa Road. After a full trial and consideration of the evidence and authorities cited to her, **Hon. Onalo** on 31.11.2020 dismissed the claim for failure to meet the burden and standard of proof on a balance of probabilities. That drastic remedy triggered the present appeal as epitomized in the memorandum of appeal crafted as follows:

1. The Learned 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 that the evidence and material 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 dismissing the appellant's suit with costs on the basis that she had not proved liability against the respondent 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 in 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 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 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 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 in fact by being biased against the appellant.

10. The Learned trial Magistrate erred in law and in 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. The Learned trial Magistrate erred in law and in fact in 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 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 the involvement of the said motor vehicle was not challenged and 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 out relevant ones ending up dismissing the plaintiff's case.

I now turn to the submissions advanced by **Mr. Wambua** in this appeal. The submissions as a model of canvassing the appeal focused on appraisal of the appellant and her witnesses on what caused the accident and injuries suffered as a consequent of the respondents negligence. Reliance by **Mr. Wambua** was placed on the direct testimony of the appellant, who boarded motor vehicle KCH – 402J as a fare paying passenger along Malindi – Matsangoni road. Further **Mr. Wambua** submitted that it was in the course of the journey, motor vehicle KCK 840F collided with motor vehicle KCH – 402J resulting in the appellant sustaining physical injuries. That the appellant and her witness **(PW2)** indicated on oath the blameworthy motor vehicle being KCK 840F being driven from the opposite direction.

Mr. Wambua referred to the Court both the evidence of the appellant and circumstantial evidence by the two to advance a case that had no difficulty in making a finding of liability by the Learned trial Magistrate. He referred to the dictum in **PNM & Another (The legal personal representative of the estate of LMM v Telkom Kenya Ltd & 2 others {2015} eKLR; Nandwa v Kenya Kazi Ltd {1988} KLR 468 and Learned Author in Black Law Dictionary 8th Edition**. It was urged on behalf of the appellant that the doctrine of *res ipsa Loquiter* was also relevant to this matter, notwithstanding that the Learned trial Magistrate ignored it altogether.

In applying the Law on proof of damages, **Mr. Wambua** cited the following authorities to discredit exercise of discretion by the Learned trial Magistrate in dismissing the claim for award of damages. Both **Njeri Koigi v Martin Muraya Rwamba & Another {2019} eKLR, James Mburu Njoki v Richard Kipkorir Langat {2020} eKLR.** The case as determined by the Learned trial Magistrate was in circumstances that the respondents did not participate inspite of the fact both being served and filing the respective defence on 2.4.2019. Nevertheless, she went to hold that the appellant failed to discharge the burden of proof on a balance of probabilities. The question, however which I have to determine is whether the Learned trial Magistrate was right in dismissing the claim in negligence as pleaded and tried by that Court.

Determination

This being a first appeal the observations and guiding principles in **Selle v Associated Motor Boat Co. {1968} EA 123** will offer the much needed guidance on the jurisdiction of the Court. It is not in dispute that the first hurdle which ought to be passed by the appellant remained to be on proof of liability on a balance of probabilities.

The Law

The import of Section 107 (1) of the Evidence Act is to the effect that:

> ***(1). Whoever desires any Court to give Judgment as to any legal right dependent on the existence facts which he asserts must prove that those facts exist.***
>
> ***(2). When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

In the cases of **Re H (minors) sexual abuse; standard of proof {1996} AC 563** and **505 for the Home Department v Rehman {2003} 1 AC 153.** The **House of Lords** laid down a series of guiding principles on standard of proof as follows:

> ***(1). Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability.***
>
> ***(2). The balance of probability standard means that the Court must be satisfied that the event in question is more likely than not to have occurred.***
>
> ***(3). The balance of probability standard is a flexible standard. This means that when assessing this probability, the Court will assume that some things are inherently more likely than orthers."***

From these the legislative interest is for the Courts to construe and interpret the notion of burden of proof in a trial discourse. In that particular context to do justice to the parties. In the sense of the case before the trial Magistrate, it was the appellant who bore the evidential burden to lead evidence against the respondents to show that acts of negligence and breach of the duty of care owed to her on the material day. On the other hand, once the appellant discharges the burden of a *primafacie* case, the respondent were to be under a duty of offer tactical evidence to rebut or controvert the elements of the appellant's case.

From the record, it is understandable that the home stretch and the duty for the respondents to successfully discharge that burden was never to be given the manner in which the trial proceeded in their evidence. The question for the decision on liability was essentially an obligation of the appellant herself as the respondents elected not to escalate their participation to the trial stage.

In the case at bar, the parties against whom such presumptions operated did not adduce any countering or rebuttal evidence to the state of affairs on the accident presented by the appellant. The opinion by **Rajah J A in Britestone Pte Ltd v Smith & Associates Far East Ltd {2007} 4 SLR 855** expressed the notion as follows:

> ***"The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms proved, disapproved and not proved are statutory definitions contained in the Evidence Act. The term proof whenever it appears in the Evidence Act and unless the context otherwise suggests, means, the burden to satisfy the Court of the existence or non-existence of some fact."***

That is the legal burden of proof as heavily postulated in Section 107, 108 and 109 of our Evidence Act. (**See the principles in Surgi Pharm Limited v Medilife Pharmaceuticals Ltd HCC Number 624 of 1990).** By virtue of the above Sections, the trial Court was expected to test the evidence by the appellant and whether it exploded the burden of proof on a balance of probabilities. The evidence legitimately expected was on the two sets of facts on liability and damages relevant to the occurrence of an accident.

This appeal is concerned with the application of the concept of negligence and scope of duty of care owed by each drivers on Kenyan roads and highways. In the present appeal, I have the advantage and the benefit of reading the impugned Judgment of Learned trial Magistrate **Onalo**. However, I have some reservations about her explanations as to the extent of non-proof on liability. 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.***

In **Caparo Industries PLC v Dickman {1990} 1 ALL ER 568** and **Chun Pui v Lee Chuen Tal {1988} RTR 298** highlighted the determinants of negligence as follows:

> ***"The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."***

In **Caparo** case the Court stated:

> ***"What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."***

Berkley Steward v Waiyaki Vol 1 KAR 1118 {1986 – 1989} it was held:

> ***"Under Section 119 of the Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case."***

In **Baker v Market Harborough** in his trial **Co-operative Society Ltd {1953} 1 WLR 1472** it was observed:

> ***"That everyday proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence the Court would unhesitantly hold that both are to blame. They would not escape simply because the Court had nothing by which to draw any distraction between them."*** **(see Lakhamshi v Attorney General {1971} EA 118; Welch v Standard Bank Ltd {1970} EA 115.)**

Similarly, the Traffic Act Cap 403 the 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. The Law on these issues is very clear, and the breach by a driver of any motor vehicle on the Kenyan roads. Whereas in the said claim, collision between the two offending motor vehicles is a fact, the burden of proof rested upon the appellant not only to proof negligence but the plea on *res Ipsa Loquitur*. That also seemed to have escaped the mind of the trial Magistrate.

It cannot be doubted that this maxim has to be proved by way of evidence in support of the pleading by the plaint filed in Court. The phrase *res Ipsa Loquitur* found its ground under paragraph 4. In consonant with this maxim, Learned authors of **Halsbury's Laws of England Vol. 78 5th Edition** discussed the doctrine and its application in the following words:

> ***"Where the claimant successfully alleges res Ipsa Loquitur its effect is to furnish evidence of negligence on which a Court is free to find for the claimant. If the defendant shows how the accident happened, and that is consistent with absence of negligence on his part, he will displace the effect of the maxim and not be liable. Proof that there was no negligence by him or those for whom he is responsible will also absolve him from liability. However, it seems that the maxim does not reverse the burden of proof, so that where defendant provides a plausible explanation without proving either of those matters, the Court must still decide, in the light of the strength of the inference of negligence raised by the maxim in the particular case, whether the defendant has sufficiently rebutted that inference."***

In the instant case, the appellant adduced evidence that she was a fare-paying passenger in motor vehicle registration KCH 402J along Malindi-Matsangoni Road when it was hit by motor vehicle KCK 840F. The appellant maintained that the involved collision occasioned personal injuries to the neck and right shoulder. As a consequence, she reported the accident to Watamu Police Station who issued her with a P3 Form. Thereafter, the appellant gave evidence that she was to be seen by **Dr. Ajoni Adede.** On 12.11.2018 who on examination prepared a medical-legal report. That medical report admitted in evidence tabulated the nature of injuries sustained on the particular day of the accident. Under cross-examination, there is no evidence that her clarity of thoughts was interfered with to give a different version from the original witness statement. She recalled 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 having seen one vehicle turn into the path of the other vehicle before it collided with hers.

As regards to **(PW2)** evidence, he particularized the circumstances of the accident as confronted by the investigations 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 travelling from the opposite directions **(PW1)** confirmed that the collision took place.

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

In my view the discrepancy mentioned by the Learned trial Magistrate between the doctrines presented and the oral evidence in Court as to the injuries was not fatal to the breach of duty of care and negligence whereas it is true that the trial Court has the advantage of demeanor, the particulars of such ought to be contained in the record of session Magistrate. The existence of such facts are not deducible from the record but at the tail end of the Judgment.

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 8.9.2018 along Malindi – Mombasa highway. As a consequence, the appellant suffered loss and damage by sustaining physical harm.

The trial Court was asked to determine what caused the accident and in so doing consider who between the two vehicles breached the duty of care. In assessing the evidence, I find no iota of differentia on issues between the witness statements and oral evidence in Court as tendered

by **(PW1)** and **(PW2).** There is no fatal evidence of evasiveness or not being forthright in their answers as opined by the Learned trial Magistrate.

In **Blyth v Birmingham Water Works Co {1856}:**

> ***"Negligence is the omission to do something which a reasonable man, grieved upon those considerations which ordinarily regulate the conduct of human affairs, would do or something which a prudent and reasonable man could not do."***

In this case, the conduct of the respondents' motor vehicle colliding was treated as irrelevant and on reflection the trial Court placed a higher burden of standard of proof upon the appellant than the one known in Law. In **re H C minors {1996} AC 563 at 586 – Lord Nicholls** explained himself as follows:

> ***"The balance of probability standard means that a Court is satisfied an event occurred, if the Court considers, that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegations, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation ……."***

In the instant case, the Learned Magistrate expressing herself on the testimony of the appellant found fault with the differentia on the place of the accident and on the nature of the injuries to dismiss the claim in its entirety. Whereas all these conclusions were drawn, there was cogent evidence to satisfy the Court on the trial question of occurrence and causation of the accident. The appellant established that the accident was real arising out of collision of the two motor vehicles.

The appellant further summoned the evidence on a balance probability from the material evidence given by **(PW2).** Take the example of this typical case reported to the police who in turn investigated the accident.

On account of investigations, the documentation largely blamed the offending motor vehicle registration KCK 840F which veered off the road to the lane of motor vehicle KCH 402J. The case comes for trial and the Learned trial Magistrate dismisses the claim in her very mind without giving sufficient reasons of rejecting the totality of the evidence by **(PW1)** and **(PW2).**

In this country we do not require oral evidence to proof documentary evidence as of necessity. That is the task the Learned trial Magistrate failed to appreciate under the canons of the best evidence from documentary exhibits so as to assist in making up her mind where the truth lies, without the need to rely upon oral evidence to that effect.

This case involved Civil proceedings commenced by the appellant and at the trial on the issues all relevant documentary evidence had been exhibited. In absence of good reason or convert evidence called by the respondent, there remained credible material to proof sufficiently existence of facts in issue on the accident. There were not too competing causes for the occurrence of the accident in which the appellant suffered personal injuries.

If the Learned trial Magistrate dismissed the cause of the accident, on the balance of probabilities, whereas the appellant probable cause of the event remained the only plausible cause and nothing else. Overall, in this case the only reason for departing with the Learned trial Magistrate is because of the wrong exercise of discretion to dismiss the claim on liability without a just cause. This was a case derivable largely from **(PW1)** and **(PW2)** uncontroverted evidence to discharge the burden of proof on a balance of probabilities against the respondents. For this and only this reason, I am constrained by the facts of the case to interfere with the Judgment of the Court dismissing the claim on liability as a non-proven issue. I am satisfied that the justice of the case requires therefore for me to rule and conclude that the decision in the Court below was arrived at based on a number of errors in fact and Law. The same ought to be set aside. **(See Sella v Associated Motor Boat Co. Ltd (supra).**

It is abundantly clear that the appellant was entitled to damages for pain and suffering and loss of amenities. The claimant to a road traffic accident is entitled to be compensated for the actual pain of which he or she suffered and also for amenities in relation to the injury. The appellant in this case went home empty handed in view of the dismissal order. It is helpful to remind the Learned trial Magistrate that procedural Law binds her to assess damages even if she is in doubt of proof of liability. As an appeal's Court the principles in **Mwana Sokoni v Kenya Bus Services & Others {1982 – 1988} 1 KAR 870** are not applicable on account of the facts of this case where no assessment of damages was never undertaken by the Learned trial Magistrate.

I therefore begin from the basics with regard to the issue on 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.

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."***

The other relevant principles were those articulated by the Court in **Southern Engineering Co. Ltd v Musinga Muhia {1985} KLR 730:**

> ***"It is trite Law that the measurement of the quantum of damages, is a matter for the discretion of the individual judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country (In Butt v Khan {1982 – 1988} 1 KAR "It is inevitable in any system of Law that there will be disparity in awards made by different Courts for similar injuries, since no two cases are precisely the same either in the nature of the injury or in age, circumstances of or other conditions."***

In the instant appeal, counsel invited the Court below to adopt the awards in **Josephat Kaliche Ambani v Farm Industries Ltd ELRC No. 11 of 2015 at Kisumu** to award the appellant Kshs.250,000/=. It is important not to lose sight of the fundamentals on assessment of damages that the plaintiff or claimant is entitled full compensation from the wrongdoer in negligence. Its therefore the Court's duty to do its best, applying all the tools available to evaluate the relevant factors for a just and fair assessment. That is precisely what I will endeavor to achieve. This is a terrain difficulty to navigate, given the unique facts and circumstances of each case. What is most appropriate in one case may not be a justification of the same quantum on another. Such damages rest in the sound Judgment of the session Judge as a trier of facts. Each case primarily sets its own standards.

In my view, inspite of jurisprudential development in this area, from a Law and economics perspective, the threshold question of the justness or appropriateness or desirability of pain and suffering damages remain unsettled. Case Laws does throw much light on how to quantify damages for pain and suffering as opposed to conjecture i.e. 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. They must be also be fair in the sense of being fair to the claimant and for the defendant who is required to pay.

However, as stated earlier, 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).**

Given the essentials of this case, my assessment of damages remains in the scope of Kshs.70,000/= for pain and suffering in favor of the appellant. Consistent with the above is an award of Kshs.3,950/= under the limb of special damages. It is also important to award costs and interest of the appeal decretal sum payable by the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 17TH DAY OF DECEMBER 2021

.....

R. NYAKUNDI

JUDGE

<u>In the presence of:</u>

1. .....

2. .....