



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 137 OF 2016**

**ALI ABDULWAHAB.....1<sup>ST</sup> APPELLANT**

**LINDERBERG HOLIDAYS & SAFARIS.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**MONICAH NYAMBURA KAMAU (suing as the legal guardian and/or**

**manager of the estate of the patient herein JOHN KAMAU MAINA A.K.A.**

**UNCLE (JOHN) KAMAU MWANGI)..... RESPONDENT**

*(Being an Appeal against the judgement in Nakuru Chief Magistrate's Court Civil Case No. 8 of 2014 by Hon. B Mararo P.M. Delivered on the 11<sup>th</sup> day of October 2016)*

**JUDGMENT**

**BACKGROUND**

1. This Appeal arises from a claim filed in the lower court by the respondent in her capacity as the legal guardian and manager of **JOHN KAMAU MAINA** who sustained injuries as a result of being knocked by the appellants'/defendants' vehicle registration number KBB 353T on 31<sup>st</sup> August 2011.
2. In the plaint dated 23<sup>rd</sup> December 2013 the Respondents sought the following prayers:-
  - i. General damages for pain and suffering.
  - ii. Damages for loss of income at Kshs 15,000 per month and or any other sum as the Court shall deem fit from the date of the accident up to the time of filing this suit and or such time that this Honourable Court shall deem fit to grant.
  - iii. General damages for loss of earning capacity and or loss of future earning capacity.
  - iv. General damages for loss of consortium and or servitude.
  - v. Aggravated damages.
  - vi. Special damages of Kshs 17,340.00.
  - vii. Costs of the suit.
  - viii. Interests on all the above at Court rate.
3. The Appellants entered appearance on the 4<sup>th</sup> of March 2014 and filed a statement of defence dated 10<sup>th</sup> of March 2014, denying each and every allegation in the Plaint and put the Plaintiff to strict proof of the same. The defendants/appellants alleged that the Plaintiff was negligent and listed the particulars of negligence.
4. The plaintiff availed 6 witnesses while the defendant availed one witness. The trial magistrate apportioned liability at 20:80 against the

defendants/appellants. He awarded damages of kshs 2,500,000 under pain and suffering, kshs 1,905,120 for loss of earning capacity and special damages of kshs 16,640; Total **Kshs 4,421,760.**

5. The Appellants/defendants being aggrieved by the decision of **Hon. B. Mararo, PM** has preferred this appeal. In their Memorandum of Appeal dated the 8<sup>th</sup> of November 2016, the Appellants listed eight grounds of Appeal as follows:

i. The Learned Magistrate erred in law and in fact in failing to enquire into the physical status of the Patient/Claimant John Kamau Maina on whose behalf the suit had been filed.

ii. The Learned Magistrate erred in law and in fact in disregarding that the burden of proof lay on the Plaintiff to prove negligence and particulars of negligence pleaded which the Plaintiff failed to do.

iii. The Learned Magistrate erred in law and in fact in ignoring that the Plaintiff failed to prove ownership of the Vehicle KBB 353 T Toyota Hiace which ownership had been denied by the Defendant in their Written Statement of Defence and also failed to make a finding whether the Driver of the vehicle was a servant, agent and /or employee of the Defendant(s) jointly and severally.

iv. The Learned Magistrate erred in law and in fact in disregarding the defence evidence and the submissions filed by the Defendants/Appellants.

v. The Learned Magistrate erred in law and in fact in awarding contributory negligence of only 20% and erred in disregarding the evidence that the Claimant was a pedal cyclist who was crossing the road and caused the accident.

vi. The Learned Magistrate erred in law and in fact in his finding in the nature and extent of injury suffered by the Plaintiff and in particular:

a) His finding on resultant injury is based on:

i. Dr. Wellington Kiamba's statements by way of opinions and presumptions.

ii. Dr. Njau J. W.'s findings made on basis of hearsay and

iii. Neither Dr. Wellington Kiamba's or Dr. Njau J. W.'s reports were supported by conclusive medical evidence.

b) The Learned Magistrate disregarded and failed to give due regard to and / or ignored the medical report of Dr. M. S. Malik and his findings.

c) The Learned Magistrate erred in his find of permanent disability awarded by Dr. Wellington K. Kiamba and ignored the findings of D. S. Malik.

vii. The damages awarded by the Learned Magistrate are speculative, excessive and unrealistic and unreasonable and not supported by evidence and in particular:

a) The Learned Magistrate ignores that there was no conclusive evidence that the Patient /claimant was a mason by profession.

b) There was no evidence on the issue if earnings by the Patient/ Claimant.

c) There was no evidence to support the award for loss of earning capacity.

viii. The Learned Magistrate failed to appreciate the totality of evidence before him.

6. The opposing pleadings were canvassed by way of oral testimonies and written submissions. The Respondent called six witnesses in support of its case, while the Appellant was the only witness to rebut the Respondent's claim.

7. At the conclusion of the trial, the trial Magistrate analysed and assessed the record, identified issues for determination and considering these in light of the opposing pleadings, evidence and submissions, he made findings thereon, *inter alia* that:

a) DW1 looked remorseful and regretted the accident. He apportioned the liability at 80:20 for the Plaintiff against the Defendant.

b) The authorities cited by the Plaintiff's counsel to be appropriate and taking into account the injuries sustained, the passage of time, the incident at inflation rate he opined that an award of Kshs 2,500,000 would suffice.

c) The damages for loss of future earning capacity was awarded Kshs 1,905,120.

d) Special damages as pleaded and proved Kshs 16,640. Costs and interests at Court rates.

## APPELLANT'S CASE

8. The Appellant submits that based on the totality evidence tendered before the trial Court, it would be difficult for this Court to conclusively determine the mental status of the Respondent herein and given the substantively differing medical opinions of the Doctors who examined him.

9. The appellants invited the Court to invoke its powers granted under **Section 78 of the Civil Procedure Act, Cap 21**, and direct additional evidence and/ or order new trial to conclusively put to rest the issue of the mental status of the Respondent. They also refer to **Order 42 Rule 27 (b)**.

10. The Appellants further submitted that it is the duty of the Respondent to prove all the particulars of negligence appearing at page 7 of the Record of Appeal; that there is no single evidence that PW 5 adduced to prove that the 1<sup>st</sup> Appellant was driving at a high speed in the circumstances. They submitted that DW 1 in his testimony stated that though he was released on cash bail he has never been charged in any court with any traffic offence.

11. The Appellants stated that the Police Abstract dated 13<sup>th</sup> of April 2012 show that the case was pending investigations. No results of the investigations were produced in Court. They further stated that had DW 1 been charged with dangerous driving that would be conclusive evidence of negligence as provided in **Section 47 A of the Evidence Act**.

12. Appellants submitted that the Learned Magistrate did not have an opportunity to observe the demeanour of PW 5 but observed that DW 1 was remorseful and regretted the accident and it is upon this that the Magistrate found the Appellant 80% liable and not based on any evidence.

13. The appellants cited **Civil Appeal No. 53 of 2017 Eunice Wayua Munyao Vs. Mutilu Beatrice & 3 others [2017]** where the Court cited **Treadsetters Tyres Ltd v John Wekesa Wepukhulu [2010] eKLR** where the court held that **the burden of proof in an action for negligence falls on the Plaintiff**. The evidence called on behalf of his behalf must answer 2 questions: whether from that evidence, negligence may be inferred and whether assuming it may be reasonably inferred, negligence is in fact inferred and in **East Produce (K) Limited v Christopher Astiado in Civil Appeal No. 43 of 2001** the court held that there is no liability without fault in the legal system in Kenya

14. On prove of ownership of motor vehicle, the appellants submitted that the Respondent did not adduce any evidence in form of Copy of Records from the Registrar of Motor Vehicles contrary to **Section 8 of the Traffic Act CAP 403 of the Laws of Kenya**.

15. Further that the the Learned Magistrate did not consider the evidence tendered by DW 1 who was the driver who stated that the Respondent suddenly emerged attempting to cross the road when he was hit; that the Respondent emerged trying to cross the road when he was hit; which shows that the Appellants were not substantially in control of the Accident.

16. Appellants cited Scholarly English test on contributory negligence by **Winfield and Johowicz on the 19<sup>th</sup> Edition Sweet and Maxwell 2014 at 703 paragraph 23-042** as cited in **Peter Benard Makau v Prime Steel Limited [2018] eKLR** where the court held that **the reasonable person will be careless and so the claimant who does not anticipate that the Defendant might be negligent may be guilty of contributory negligence**.

17. On medical examination, the Appellant submitted that Dr. Njau for the Respondent stated that the Respondent recalled selective information and he was unlikely to recover. Dr. Malik who examined the Respondent on behalf of the Appellant opined that the Respondent seemed mentally disturbed. That the Respondent's attention span was normal and that he responded quite normally to questions. Dr. Malik further stated it was quite rare to have psychiatric disturbance after a head injury

18. Appellants submitted that the Respondent did not suffer any impairment of Memory.

19. The appellants propose damages should be as follows:

General Damages for pain and suffering	Kshs 1,000,000
Special damages	Kshs 16,640

**Kshs 1,016,640**

20. Appellants relied on the case of **Civil Suit 555 of 2007 Bonface Mugendi Njiru V Ochieng T/A Tohel Agencies & another [2011] eKLR** where the Plaintiff sustained a blunt head injury with loss of consciousness for 24 hours, loss of four upper incisor teeth, fracture of the shaft of the right femur and a compound fracture of the right tibia with soft tissue injuries. The Court awarded him a sum of Kshs 1,000,000 general damages for pain, suffering and loss of amenities.

## RESPONDENTS' CASE

21. The Respondent filed submissions dated 17<sup>th</sup> of August 2019. On applicable principles of law the respondent cited the case of **Peter v Sunday Post Limited [1958] EA 424 which stated the** duty of Court on first appeal on both liability and quantum. The court stated that an appellate Court jurisdiction is to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand.

22. Further in **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros Vs Augustine Munyao Kioko [2006] eKLR** the court held that assessment of personal injury cases is a daunting task as it involves many imponderables and competing interests which a delicate balance must be found.

23. The respondent submitted that the Appellants application dated 30<sup>th</sup> November 2018 which sought to have additional evidence taken was dismissed in the ruling dated 2<sup>nd</sup> of May 2019. The ruling was never challenged in any manner; respondent submitted that, the Honourable Court is estopped from reconsidering the issue, as it is now *Res Judicata*.

24. Respondent further submitted that adequate evidence was tendered before the trial Court. That the appellants' Dr. Malik made a positive finding that the patient exhibited occasional disorientation and inappropriate behaviour and he seemed mentally disturbed

25. Respondent cited several authorities which include **Susan Kanini Mwangangi & another v Partick Mbithi Kavita [2019] eKLR** where the case stated that in percentage terms, a party who is liable to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probability. And in **Hellen Gathoni Mbuthia & another v Nelson Wachira Murage [2016] eKLR** the gist of the case being that the purpose of cross examination is three fold: (a) to elicit evidence in support of your case; (b) to cast doubt on or undermine the witness evidence so as to weaken your opponent's case and to undermine the witness credibility (c) to put your case and challenge disputed evidence.

26. Further in **Jonas Akuno O'Kubasu v Republic [2000] eKLR** the gist of the case being that when the question arises as to which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses and in **Simon Mburu Wanjiku Vs Charles Wamugu Wamiti [2009] eKLR** the gist of the case being that the Trial Magistrate assessed the demeanour of the witness and on appeal the Judge did not have a reason to question the impression of the trial magistrate.

27. Appellant submitted that the fact that the driver was not charged with traffic offence is not proof that he was not negligent and cited the case of **Margaret Njeri Magua Vs Wamoni Mwangi [2007] eKLR** where that position was held; further in **Stephen Psiwa Cheprot v Mary Muthu Muia & another [2018] eKLR** the court held that the decision on who to charge where there is a collision rests on the police and the parties have no control; respondent submitted that she was able to prove negligence on the part of the Appellants.

28. On issue of ownership of motor vehicle, respondent submitted that the issue of ownership did not arise in the lower court and cannot be allowed at this stage. She cited the case of **Pipeline Company Limited Vs Lucy Njoki Njuru (suing as the legal representative of the Estate of John Wamae (Deceased))** where court held that the Defendants cannot be heard to propose a different figure which were not canvassed at the trial and **P. M. M. (minor suing through the mother and next friend M. N. M.) v Family bank Limited & another [2018] eKLR** the gist of the case being that submissions cannot take the place of evidence and do not constitute evidence.

29. Finally that the Appellants admitted the authority to drive the motor vehicle and in **Kenya Power & Lighting Co. Ltd v John Makori [2016] eKLR** the gist of the case being that having admitted the Respondents treatment notes by consent as evidence the Appellant cannot in the same breath challenge their authenticity.

30. On quantum respondent cited the case of **John Maseno Ngala & another v Dan Nyanamba Omare [2006] eKLR** and **Charles Kimani Ng'ang'a Vs Kenya Power and Lighting Company Limited [2006] eKLR** that was to the effect that Kshs 2,500,000 was not excessive in any way and **Kemp and Kemp: the Quantum of Damages volume 1 Para 19-004** the gist being that it is not the function of the appellate court to substitute its opinion for that of the trial judge. And loss of earnings **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros Vs Augustine Munyao Kioko [2006] eKLR** the gist of the case being that "we do not subscribe to the view that the only way to prove profession f a person must be by production of certificates and the only way of proving earnings is equally the production of documents."

31. In conclusion respondent submitted that the Appellants have failed to demonstrate to the required standard that damages awarded by the Trial Magistrate were excessive, unreasonable and or unwarranted.

### ANALYSIS AND DETERMINATION

32. This being the first appellate court, I am required to re-evaluate evidence adduced in the lower court and arrive at an independent determination. This I do while minded of the fact that unlike the trial court, I never got the opportunity to take evidence first hand and observe demeanour of witnesses. For this I give due allowance.

33. On perusal of lower court record, I note that the respondent availed 5 witnesses and appellant's one witness.

34. In respect to liability, PW3 police officer who testified confirmed that the patient herein who was pedal cyclist was crossing the road when the accident occurred. He said the driver was unable to stop the vehicle to avoid the accident, he further stated that the police abstract does not indicate point of impact.

35. PW5 who testified that she was at the scene and that she saw the patient herein ahead holding his bicycle waiting to cross the road at a junction and suddenly he saw him being dragged in the middle of the road.

36. The Police officer who testified said the police abstract does not show place of impact. I am however of the view that if the patient was seen by PW5 being dragged in the middle of the road, it shows that he had started crossing the road; it is unlikely that he was standing on the side waiting to cross as she alleges. PW5 said that before the collision, she heard sounds of vehicle brakes; this shows the driver attempted to avoid the accident.

37. On the other hand, if the cyclist was pushing the bicycle, he must have been moving slowly and the driver should have been able to see him at reasonable distance. No other eyewitness testified. The fact that the driver has not been charged with traffic offence does not absolve him from blame. Based on evidence adduced the court is able to apportion blame.

38. In view of the evidence above, contribution of 20% of liability on part of the cyclist is lower. In view of evidence on record, I am inclined to interfere with apportionment of liability and apportion 40% to the cyclist and 60% to the driver.

39. On injuries, PW2, 3 and 4 medical reports by the two doctors show that the patient sustained head injuries. Both reports further show that the patient exhibited mental illness.

40. From the foregoing and having compared injuries sustained by respondent, I do not see reason to interfere with quantum.

41. Appeal therefore partly succeed.

42. **FINAL ORDERS**

1. Finding on liability set aside and replaced with apportionment of 40:60 in favour of respondent/plaintiff.

2. Quantum to be subjected to apportionment as per 1 above.

**Judgment dated, signed and delivered at Nakuru this 30<sup>th</sup> day of January, 2020**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Schola/Jenifer - Court Assistant

M/s Sambu holding brief for Maina Counsel for 1<sup>st</sup> and 2<sup>nd</sup> appellant

No appearance for Counsel for respondent