**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 5 OF 2019**

**WEST KENYA SUGAR CO. LIMITED .....APPELLANT**

**VERSUS**

**LILIAN AUMA SAYA .....RESPONDENT**

*(from the judgment and decree of Hon. Cheruto C. Kipkorir, SRM, in Mumias SPMC Civil Suit No. 277of 2017 dated 13/12/2018)*

**JUDGMENT**

1. The respondent herein sued the appellant at the lower court claiming general and special damages on complainants that the appellant's motor vehicle tractor registration number KTCB 893 Q hauling a trailer registration number ZD 0730 had knocked down the respondent while she was a pillion passenger on a motor cycle along Emanani – Matungu road upon which the respondent sustained injuries. The trial court entered judgment on liability for the respondent in the ratio of 80:20 and awarded Ksh. 110,000/= in general damages and Ksh. 6,000/= in special damages. The appellant was dissatisfied by the verdict and filed the instant appeal. The grounds of appeal are that:-

> *(1) The learned trial magistrate erred in law and fact in apportioning liability against the appellant at 80% or at all in view of the evidence adduced.*
>
> *(2) The learned trial magistrate erred in law and fact in failing to hold the respondent largely and/or wholly to blame for the accident.*
>
> *(3) The learned trial magistrate erred in law and fact in failing to hold the respondent as having not proved her case against the appellant thereby dismissing the same.*
>
> *(4) The learned trial magistrate erred in law and fact in failing to consider the totality of the evidence hence arriving at a wrong decision.*
>
> *(5) The learned trial magistrate erred in law and fact in failing to consider the submissions by the appellant and the evidence tendered by the appellants; particularly that of DW1.*
>
> *(6) The learned trial magistrate erred in law and fact in awarding damages which were excessive in the circumstances so as to amount to an erroneous estimate considering the injuries pleaded and proved.*

3. The grounds of appeal were expounded by the written submission of the advocate for the appellant **Mr. Onyinkwa**. The appeal was opposed by the respondent through the written submissions of her advocate **Mr. Mukisu**.

4. The respondent testified in the case as PW1 and called two witnesses, PC Odada PW2 and Dr. Andai PW3. The case for the respondent was that on the 18/8/2017 she and a colleague were travelling as pillion passengers in an unidentified motor cycle from Emanani towards Matungu. That on reaching Emanani Primary School there was a tractor that was following them from behind. That the tractor rammed on them from behind. She fell down and lost consciousness. She later found herself at Soal Medical Centre with injuries. She was treated there and at Shianda Health Centre. She reported the accident at Mumias Traffic Base where she was issued with a police abstract. She learnt that the tractor belonged to the appellant. She was examined by Dr. Andai PW3 who prepared her medical report. She sued the appellant. During the hearing the police officer PW2 produced the police abstract as exhibit, P.Ex4. Dr. Andai produced the medical report as exhibit, PEx5 (a).

5. The police officer PW2 stated that he was the investigating officer in the case. That he received the report of the accident and went to the scene. He found the tractor at the scene but the motor cyclist had fled away from there. He compiled the investigation file and sent it to the office of the Director of Public Prosecutions. The file had not been returned by the time he testified in court. He said that he blamed the driver of the tractor who did not keep distance.

6. The respondent called one witness, Derrick Galo Anzenze, DW1 who stated that he was a driver for the respondent. That on the material day he was driving the above said motor vehicle to his factory from Emakale. That on reaching Emanani junction he started to turn right when a motor cycle with two female passengers started to overtake him from behind. That the motor cycle avoided hitting his vehicle and turned into a ditch. There was no contact between the tractor and the motor cycle. That at the time the accident occurred the motor cycle was in front of the tractor. The pillion passengers were injured. The rider of the motor cycle was not injured and fled from the scene.

7. The respondent denied that the rider of the motor vehicle had overtaken at a junction. She said that the driver of the motor vehicle did not indicate that he was overtaking and hence knocked them down.

8. The appeal is on both liability and quantum. The duty of the court in a first appeal is as was stated by the Court of Appeal in **Abok James Odera T/a A. J. Odera Associates –Vs- John Patrick Machira T/a Machira & Co. Advocates (2013) eKLR** that:-

> ***"On the first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on evidence on record and not introduce extraneous matter not dealt with by the parties in the evidence."***

**Liability –**

9. In apportioning liability between the appellant and the respondent the trial magistrate held as follows:-

> ***"The submissions of the parties under this head reiterated the manner in which the accident occurred and the reasons why they blamed each other. The police officer indicated how the accident occurred and blamed the driver of the lorry and added that was his recommendation and he was to be charged as a result. The accident occurred on 19/8/2017 and I will agree that the plaintiff in her evidence gave a different date. However the police abstract and the evidence of the police officer shows the accident occurred as pleaded. The evidence shows that the investigating officer found the driver at the scene as well as the pillion passengers. He also explained where the point of impact was. Since the evidence of the parties does differ I will rely on the evidence of the police officer who took both versions of the case and still blamed the driver for the accident for the reasons outlined. I will however find that the plaintiff in this case as well as in SPMCC No. 278 of 2017 did endanger themselves by being carried in the same motor cycle which was specifically pleaded as an act of negligence. PW1 herein did concede that happened she did not avail any evidence to show that in spite of that the driver of the tractor is to be blamed wholly. I will thus apportion liability in the ratio of 80:20 in favour of the plaintiff."***

10. Mr. Onyinkwa submitted that there was no basis for the trial court to hold the appellant 80% liable for the accident. That the investigating officer admitted that the tractor was to turn. That the actions of the rider of the motor cycle in fleeing the scene of the accident depicted guilt on his part. That the trial magistrate relied on the evidence of the investigating officer that the driver of the motor vehicle was to blame for occasioning the accident when he did not even have the police file and the sketch maps in court. Therefore that no evidence was led that the driver of the tractor was negligent in his driving. That the case was not proved on a balance of probabilities.

11. Mr. Mukisu on the other hand submitted that the respondent herein was merely a pillion passenger who in no circumstances would have contributed to accident in a greater extent than that which the trial court apportioned. That neither the respondent nor the cyclist was enjoined as a third party in the suit. That the appellant did not prove contributory negligence against the respondent. That it would be absurd to find a pillion passenger wholly to blame for the accident. That the trial court opted to rely on the evidence of the investigating officer who heard the version of both sides and blamed the appellant's driver for the accident. That the trial court was correct in apportioning liability against the appellant at 80%.

12. Counsel further submitted that it is now settled law that where evidence relating to a traffic accident is insufficient to establish negligence of any party, the court ought to find the parties equally to blame. However that the respondent had in the case discharged the burden of proof. Counsel urged the court to dismiss the appeal.

13. I have considered the evidence adduced in court by the parties. In her judgment the learned trial magistrate found that the respondent and the appellant's driver had given different versions as to how the accident occurred. She opted to believe the evidence of the investigating officer on the basis of his evidence as to where the point of impact was. She stated that the respondent did not show that the driver of the tractor was wholly to blame for the accident. That the pillion passengers endangered themselves by consenting to be carried on the same motor cycle. She thereby apportioned liability between the parties.

14. The respondent was only a passenger on the motor cycle. A passenger cannot be held liable when a vehicle he/she is travelling in is involved in accident – See **Rosemary Wanjiku Kungu –Vs- Francis Mutua Mbuvi & Another (2014) eKLR**. The respondent therefore cannot be held liable for occasioning the accident.

15. The driver of the tractor, DW1, said that there was no contact between the tractor and the motor cycle. The investigating officer PW2 said that he found the tractor and its driver at the scene. Why would the driver of the tractor have remained at the scene of the accident when there was no contact between his vehicle and the motor cycle? Moreso, the driver of the tractor said that the tractor was inspected to ascertain whether it had any damage. The appellant did not produce the inspection report to show that the tractor had no damage. This is information that was within their knowledge – See section 112 of the Evidence Act. The inference to be drawn by the failure to produce the inspection report is that the evidence contained therein was adverse to their case. It is my finding that there was an accident between the tractor and the motor cycle. That would explain why DW1 remained at the scene while the motor cyclist fled away from the scene. I agree with the trial magistrate that it is the tractor that hit the motor cycle from behind as testified by the respondent and confirmed by the investigating officer. The respondent had proved on a balance of probability that the driver of the tractor was the one to blame for occasioning the accident.

16. The trial court held that he respondent should bear some blame for her injuries for agreeing to board a motor cycle carrying two passengers. A motor cycle is required by law to carry a single passenger at a time. The finding of the trial court that the respondent was liable for the injuries to the extent of 20% cannot be faulted. The apportionment of liability between the appellant and the respondent at 80:20 was sound and is therefore upheld.

**Quantum -**

17. The medical report by Dr. Andai indicated that the respondent sustained –

- *Blunt injury to the chest.*

- *Blunt injury to the back.*

18. The doctor described the injuries as soft tissue injuries that he expected to heal fully within one year from the date of examination.

19. The advocate for the appellant had at the lower court submitted in favour of Ksh. 100,000/= in general damages. He had cited the case of **Mumias Sugar Company Limited –Vs- Julius Abuko Shibia (2015) eKLR** where the High Court reduced the award from Ksh. 200,000/= to Ksh. 100,000/=. The respondent in the case had sustained blunt injury to the head and neck, blunt injury to the right shoulder, blunt injury to the back and complaints of neck pain on and off with backache. Counsel submitted that the award in the case under consideration of Ksh. 110,000/= was excessive. That a sum of Ksh. 50,000/= would have been sufficient.

20. The respondent's advocate had requested for a sum Ksh. 350,000/= in general damages and had cited the case of **Atanas Barasa –Vs- Jesca Olala Kanali, Bungoma HCCA No. 62 of 2008** where the award was reduced to Ksh. 250,000/= for soft tissue injuries in the form of painful right shoulder joint, painful neck, pain on chest and right foot. In this appeal counsel cited the case of **Francis Ochieng & Another –Vs- Alice Kajimba (2015) eKLR** where Majanja J. awarded Ksh. 350,000/= for mild head injuries, sub-conjuctual haemorrhage and periorbital sccymosis on both eyes.

21. The principles under which an appellate court would be justified to interfere with an award of damages made by a lower court are when court is satisfied that either that the lower court 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 wholly erroneous estimate of the damage – See **Kemfro Africa Limited t/a "Meru Express Services (1976)"and Another –Vs- Lubia & Another No. 2 (1985) KLR 30**.

22. I have looked at the authorities cited by the advocates for the parties. The respondent herein had sustained soft tissue injuries. I am of the view that the award in the authority relied on by counsel for the respondent at the lower court of Ksh. 250,000/= was on the higher side for soft tissue injuries that were not aggravated in degree. The authority cited by counsel in this appeal, **Francis Ochieng & Another –Vs- Alice Kajimba** (supra), had far more serious injuries than were sustained by the respondent in the case under consideration. On the other hand the injuries sustained by the respondent in case of **Kenya Shell Limited –Vs- Simon Kimani Tumbo & Another** (supra) cited by the advocate for the appellant were comparable to the injuries sustained by the respondent in the case under consideration. A sum of Ksh. 100,000/= was upheld in that case in the year 2017.

23. I have looked at some other authorities for soft tissue injuries. In the case of **Ndungu Dennis –Vs- Ann Wangari Ndirangu & Another (2018) eKLR**, Joel Ngugi J. awarded Kshs. 100,000/- for soft tissue injuries to the lower right leg and soft tissue injuries to the back (trunk). In the case of **Philip Musyoka Mutua –Vs- Mercy Ngina Syovo (2018) eKLR,** Edward M Muriithi J. awarded Kshs. 120,000/- for injuries to the lower limbs and right knee. From the foregoing, I find that the award made in the case under consideration was not excessive in relation to the injuries sustained by the respondent. The award was close to the range of the authority cited by the advocate for the appellant. There are no grounds for the court to interfere with the award.

24. There is no dispute on the award on special damages and it thereby stands.

25. The upshot is that there is no merit in the appeal. The same is dismissed with costs to the respondent.

**Delivered, dated and signed in open court at Kakamega this 30th day of January, 2020**

**J. NJAGI**

**JUDGE**

In the presence of:

Mr. Ondieki holding brief for appellant

Mr. Mbaka holding brief for Mukisu for respondent

Appellant - absent

Respondent - absent

Court Assistant - Polycap

30 days right of appeal.