



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCA NO. 11 OF 2019**

**ROSEMARY KAARI MURITHI.....APPELLANT**

**VERSUS**

**BENSON NJERU MUTHITU.....RESPONDENT**

**CONSOLIDATED WITH**

**HCCA NO.10 OF 2019**

**ROSEMARY KAARI MURITHI.....APPELLANT**

**VERSUS**

**IRENE NYAMBURA NJEU.....RESPONDENT**

**AND**

**HCCA NO. 9 OF 2019**

**ROSEMARY KAARI MURITHI.....APPELLANT**

**VERSUS**

**KENNETH MWITI MBUBA.....RESPONDENT**

**AND**

**HCCA NO. 8 OF 2019**

**ROSEMARY KAARI MURITHI.....APPELLANT**

**VERSUS**

**LETICIA KAWIRA KANGA.....RESPONDENT**

**J U D G E M E N T**

1. This appeal consolidates appeals numbers 8, 9, 10 of 2019. The appeals arose from the judgment delivered through ***Chuka Chief Magistrate's Civil Case Nos. 90 of 2018, 91 of 2018, 92 of 2018 and 93 of 2018***. In those suits the Respondents had claimed both special and general damages for a road traffic accident which involved Motor vehicle Registration No. KBL 317 M belonging to the Appellant and motor cycle Registration No. KMEA 002 E along Chuka- Kathwana road at Mariani Area.

2. At the trial, **Chuka CMCC NO. 91 of 2018** was used as a test suit on liability and the trial court determined that the Appellant was 90% to blame for the accident having overtaken another vehicle when it was unsafe to do so and the Plaintiff was found 10% to blame for the accident.

3. On damages, the trial court quantified damages as follows:-

**(a) CMCC 90/2018**

(i) General damages	-	850,000/-
(ii) Special damages	-	<u>133,309/-</u>
<b>Sub Total</b>	-	<b>983,309/-</b>
Less 10% liability net		
<b>Total</b>		<b><u>885,000/-</u></b>

**(b) CMCC NO. 91 of 2018**

(i) General damages	-	650,000/-
(ii) Special damages	-	40,000/-
Less 10% Liability		_____
Net Total	-	<b><u>621,000/-</u></b>

**(c) CMCC No. 92 of 2018**

(i) General damages for pain and Suffering	-	Kshs.700,000/-
(ii) Loss of earning capacity	-	Kshs.300,000/-
(iii) Future medical expenses	-	Kshs.200,000/-
(iv) Special damages	-	Kshs.106,000/-
Less 10% liability	-	_____
<b>Net total</b>		<b><u>Kshs.1,175,000/-</u></b>

**(d) CMC NO. 93 of 2018**

(i) General damages	Kshs. 750,000/-
(ii) Special damages	Kshs. 33,000/-
Less 10% liability	_____
<b>Net Total</b>	<b><u>Kshs. <del>Kshs.</del>704,700/-</u></b>

4. The Appellant herein felt aggrieved by the judgment of the trial court on both liability and awards and filed the appeals which have been consolidated and canvassed in this appeal. In her memorandum of appeal the Appellant has listed the following grounds namely:-

**(i) That the learned Chief Magistrate erred in law and fact in the manner he apportioned liability when it was obvious the Respondent had acted negligently in the circumstances.**

(ii) That the learned magistrate erred in law and fact in the assessment of damages and arrived at awards that are inordinately high in the circumstances and not commensurate to the injuries suffered by the Respondent.

(iii) That the learned magistrate misdirected himself by using wrong principles and failing to consider other conventional awards in the assessment of damages payable.

(iv) That the trial magistrate did not consider the submissions and legal authorities cited and thus arrived at wrong decisions on liability and quantum.

5. The Appellant has made written submissions on quantum but the appeals are both on liability and quantum. I will first consider the question of liability which is common in all the appeals but consider quantum separately because the Respondent suffered different injuries as shall be seen later in this judgment.

6. On liability, the Appellant despite raising grounds of appeal expressing her dissatisfaction, has made no representation on liability in her written submissions. That notwithstanding I have, for the interest of justice re-evaluated the evidence tendered at the trial court on the question of liability. While it is true that the Appellant offered no evidence in her defence, the evidential burden always rests on the Plaintiff or a party alleging negligence.

7. The evidence tendered at trial indicated that Kenneth Mwiti Mbuba in Civil Suit No. 93 of 2018 and in Appeal No.9/2019 was a rider in motorcycle Registration No. KMEA 002 E, and was carrying 3 passengers namely; Leticia Kawira Kanga (Civil Appeal No. 8/2019- Civil suit 91/2018), Benson Njeru (Civil Appeal No.11/2019- Civil suit No.90/2018) and Irene Nyambura Njeu (Civil Appeal No.10/2019, Civil suit No.92 of 2018). This court finds that while the accident was caused by the Appellant, the rider substantially also contributed to the attendant liability for which the Appellant was ordered to shoulder. The question, I ask myself is whether it is proper to let boda bodas in general get away with impunity of illegality carrying excess pillion passengers. My answer to the question is in the negative. A rider who knowingly and deliberately breaks the law by carrying more pillion passengers than permitted by the law should be held accountable for his actions. In this instance, Kenneth Mwiti Mbuba was not held accountable for carrying excess passengers and should have shouldered more liability than 10% attributed to him by the trial court. I am also inclined to find that a person who voluntarily gets on a boda boda when he/she finds that there are more than one should equally be held accountable and hence culpable. To that end this court finds that the trial court apparently misdirected himself on that score and had he done so certainly he would have attributed more liability to the Respondent. I find that the Appellant should have been found 60% liable and I hereby do find that the Appellant was 60% liable while the Respondents were 40% liable for either carrying excess pillion passengers or being excess pillion passengers and hence causing more liability to the Appellant after the accident occurred.

8. On quantum, in regard to Civil Appeal No.11/2019 this court finds that the award on special damages was erroneous because the respondent had pleaded for Kshs.30,500/- special damages and under the provisions of **Order 2 Rule 4**, it is trite that special damages must be pleaded specifically. A claimant is also required to specifically prove the amounts claimed. In this instance, the Respondent pleaded Kshs.30,000/- but only proved the following specifically;

(i) Medical report - Kshs.3000/-

(ii) Receipt for crutches - Kshs.1000/-

(iii) Receipt for demand letter - Kshs.2,500/-

**Total proved - Kshs.6,500/-**

9. The trial court awarded the Respondent **Kshs.133,309/-** based on invoice from PCEA Chogoria Hospital (P Exhibit 4) but from that invoice it is clear that the NHIF cleared the medical fees. The Respondent could not make the same claim from the Appellant because that would amount to double payment and improper profiteering from the accident. Besides that I also find that it was not open for the trial court to give an award that had not been specifically pleaded. The Respondent was therefore only entitled to Kshs.6500/- in special damages as that was specifically pleaded and proved as required by law.

10. On general damage, the Respondent suffered the following injuries;

a. Bruises of the chest and right hand

b. Tender, swollen, bruised right knee

c. Allusion fracture of the pelvis

The Respondent in his submissions asked for Kshs.1,500,000/- as general damages while the Appellant proposed an award of Kshs.500,000/- citing comparative awards in various decisions cited. The trial court awarded Kshs.850,000/- general damages which I find to be reasonable and not too excessive to invite my intervention.

11. In regard to Civil Appeal No.8/2019, Leticia Kawira Kanga had pleaded for special damages for Kshs.42,900/- . At the trial she tendered the following;

(i) Demand letter receipt	-	Kshs.2,500
(ii) Medical report fees	-	<u>Kshs.3,000/-</u>
<b>Total</b>	-	<b><u>Kshs.5,500/-</u></b>

She also tendered an invoice of Kshs.36475 from Chogoria Hospital which again was fully settled by NHIF. She tendered no document to prove that he repaid Kshs.36,475/-. This court finds that the trial court erred by awarding special damages of kshs.40,000/- when there was proof of only Kshs.5,500/-.

On general damages, the Respondent suffered a swollen ankle, a cut wound on the hip and fracture of 1<sup>st</sup> metatarsal. The Respondent's counsel had submitted that an award Kshs.1,359,146/- would be fair while the Appellant's counsel contended that an award of Kshs.450,000/- would suffice. The trial court awarded Kshs.650,000/- taking into consideration the authorities cited and I do not find the award to be so excessively high as to fault the trial court for being wrong on principle. I will not disturb the award made of **Kshs.650,000/-**.

12. In regard to Civil Appeal No.10/2019 (CMCC 92/2018) the special damages pleaded was Kshs.20,500/-. The amount proved was Kshs.5,500/- (Demand letter Kshs2500/- and medical report - 3000/-)

The trial court awarded Kshs.106,000/- based on an invoice which indicates that the NHIF paid Kshs.102,000/-. This court finds that the award of special damages of Kshs.106,000/- was erroneous. The amount specifically proved and payable was Kshs.5,500/- .

13. On the claim of future medical expenses, this court finds that the parties later agreed to include by consent the claim which was supported by the doctor when he testified. I am therefore inclined not to interfere with that award.

14. For general damages, the Respondent suffered a swollen right knee, lacerated cut wound on the right hip and fracture of right knee patellae. The Respondent counsel had submitted that an award of Kshs.1,200,000/- would be fair while the Appellant submitted that an award of Kshs.500,000/- would be fair. The trial court awarded Kshs.700,000/- which I consider a bit high in view of the nature of injuries suffered. An award of Kshs.500,000/- in my view as suggested by the Appellant was more than sufficient. The award on general damages is therefore revised to kshs.500,000/-

15. In regard to Court of Appeal No.9/2019 (Chuka CMCC No. 93 of 2008), the Respondent sustained the following injuries a cut wound on the right hip, displaced hip joint with open reduction surgery. He also suffered tenderness and swollen right hip. The Respondent had proposed Kshs.1.2 million while the Appellant proposed 500,000/-. The trial court awarded 750,000/-. Given the authorities cited by both parties, I find no basis to interfere with the award given by the trial court.

16. On special damages, the Respondent had pleaded for Kshs.17,855/- At the trial he tendered the following receipts;

(i) Demand letter	2,500/-
(ii) Medical report	<u>3,000/-</u>
<b>Total</b>	<b><u>5,500/-</u></b>

He also tendered two invoices of Kshs.17,230/- and 12,355/- from Chogoria Hospital which indicated that the same were settled by NHIF. He was not entitled to an award of Kshs.106,000/- because for one, he never pleaded for it and secondly, the said amount was paid for by NHIF and the award therefore amounted to benefitting from money he had not paid out. The only amount specifically proved was Kshs.5,500/-. The amount awarded of Kshs.33,000/- special damages was erroneous because the amount was not specifically pleaded and proved.

17. In the end, this court partly allows the appeal in the following terms:-

a. The trial court's decision on liability between the parties that 90% to 10% in favour of the Respondent is set aside and for the reasons aforesaid liability is apportioned as follows:-

- (i) The Appellant shall shoulder 60% liability
- (ii) The Respondents shall each shoulder 40% liability

On quantum the awards made by the trial court are set aside and the following awards are made;

(i) Civil Appeal No.8/2019 (Leticia Kawira Kanga)

Special damages - Kshs.5,500/-

General damages	-	Kshs.650,000/-
<b>Sub total</b>	-	<b>Kshs.655,500/-</b>
Less 40% contributory		
Negligence	-	<u>Kshs.262,200/-</u>
<b>Total amount awarded</b>	-	<b><u>Kshs.393,300/-</u></b>

(ii) Civil Appeal No.9/2019 (Kenneth Mwiti Mbuba)

General damages	-	Kshs.750,000/-
Special damages	-	Kshs.5,500/-
Loss of earning capacity	-	200,000/-
<b>Sub total</b>	-	<b>Kshs.955,500/-</b>
Less 40% contributory negligence	-	<u>Kshs.382,200/-</u>
<b>Total amount</b>	-	<b><u>Kshs.573,300/-</u></b>

(iii) Civil Appeal No.10/2019 (Irene Nyambura Njeu)

General damages	-	Kshs.700,000/-
Future medical expenses	-	Kshs.200,000/-
Special damages	-	<u>Kshs.5,500/-</u>
<b>Sub total</b>	-	<b>Kshs.905,500/-</b>
Less 40% contributory negligence	-	<u>Kshs.362,200/-</u>
<b>Total amount</b>	-	<b><u>Kshs.543,300/-</u></b>

(iv) Civil Appeal No. 11/2019 (Benson Njeru Muthitu)

General damages	-	Kshs.850,000/-
Special damages	-	<u>Kshs.6,500/-</u>
<b>Sub total</b>	-	<b>Kshs.856,500</b>
Less 40% contributory negligence	-	Kshs.342,600/-
<b>Total amount</b>	-	<b><u>Kshs.513,900/-</u></b>

In addition to the above I will award the Appellant half costs in this appeal but the costs in the lower court is upheld subject to this court's decision on liability. This order as observed above, shall apply in Court of Appeal No. 8, 9 and 10 of 2019.

**Dated, signed and delivered at Chuka this 12<sup>th</sup> day of March 2020.**

**R.K. LIMO**

**JUDGE**

**12/3/2020**

Judgment dated signed and delivered in the open court in presence of Madi for Appellant and Kaaria holding brief for Kijaru for Respondent.

**R.K. LIMO**

**JUDGE**

**12/3/2020**