**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CIVILAPPEAL NO. 40 OF 2018**

**RISA SAMPALA.....APPALLANT**

**VERSUS**

**DAVID KEREMBU.....1ST RESPONDENT**

**AGNES KWAMBOKA OKEYO.....2ND RESPONDENT**

***(Appeal from the judgment and decree (Okuche, SRM) dated 26th October, 2019***

***at the Senior Resident Magistrate Court, Loitokitok in SRMCC NO. 2 of 2017)***

**JUDGMENT**

1. This Appeal arises from the judgment and decree (Okuche, SRM), dated 26th October, 2019 at the Senior Resident Magistrate Court, Loitokitok. In that suit, the 2nd respondent sued the appellant and the 1st respondent for damages arising from a road traffic accident that occurred on 3rd December, 2016 along Loitokitok- Emali Road in which the she sustained bodily injuries.

2. The trial court found in favour of the 2nd respondent and awarded general damages of Kshs. 650,000 and Kshs. 80,000 for future medical expenses. The court did not award special damages. The trial court also awarded costs of the suit and interest.

3. The appellant was aggrieved by the finding on both liability and quantum. He filed a memorandum of appeal dated 27 th November, 2019 and raised the following grounds, namely:

> ***1. The learned trial magistrate erred in law and misdirected himself when he failed to consider the applicant's submissions on both points of law and facts.***
>
> ***2. The learned Magistrate's decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.***
>
> ***3. The learned Magistrate erred in law and misdirected himself when he failed to consider the provisions set out in the insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013 CAP 405.***
>
> ***4. The learned Magistrate erred in law and fact in finding the 1st defendant/appellant 20% liable in view of the evidence produced before the trial court and in particular the following***
>
> ***(a) That the plaintiff failed to prove her case on liability against the 1st defendant.***
>
> ***(b) The 2nd defendant never put in any evidence nor did they call any witnesses in their defence.***
>
> ***5. The Learned Magistrate erred in law and in fact in awarding quantum of damages inconsistent with injuries pleaded and proved to have been sustained by the plaintiff.***
>
> ***6. The learned Magistrate having misapprehended and misunderstood the extent and severity of the injuries erred in law and fact in relying on authorities which were irrelevant and thus arrived at an award that is so manifestly high as to be erroneous.***

***7. The Learned Magistrate erred in assessing an award, hereunder, which was inordinately high and wholly erroneous estimate of the loss and damages suffered by plaintiff:***

***(a) General damages - Kshs. 650,000***

***(b) Future medical expenses-Kshs. 80,000***

***Net award - Kshs. 730,000***

***8. The learned Magistrate erred in awarding an excessive sum for the injuries suffered in the face of the evidence adduced and submissions made by appellants counsel on liability and quantum.***

***9. The learned Magistrate erred in awarding costs of the suit and interest to the plaintiff.***

4. There is also a cross appeal by the 2nd respondent against quantum only. In her memorandum of appeal she complained that the award of both general damages and future medical treatment is inordinately low. She wanted the judgment of the trial court interfered to that extent.

5. During the hearing of the appeal, Mrs. Morabwa, learned counsel for the appellant, submitted highlighting their written submissions dated 19th November, 2019 and filed on 21st November, 2019, that liability was not proved against the appellant. She submitted that the appellant was the driver of motor vehicles KBS 076T, a Nissan Matatu while the 2nd respondent was a passenger in the motor vehicle. According to counsel, the accident occurred following a coalition between motor vehicles KBX 076T and KCF 368U and that the evidence before the trial court placed blame on the driver of motor vehicle KCF 368U and no negligence was established against the appellant.

6. Counsel submitted that the appellant produced exhibits before the trial court and the driver of motor vehicle KBX 076T testified and also blamed the driver of motor vehicle KCR 368U; that CPL Martin Kariuki was called by the appellant to testified and also blamed the driver of KCF 368U.

7. Further submission was that the 2nd respondent also called PW2, PC Ndulo Mwati, a police officer who testified that the driver of KCF 368U was to blame for the accident. It was argued, therefore, that the burden of proof against the appellant was not discharged.

8. On quantum, it was submitted that kshs. 650,000/- was inordinately high and that Kshs. 300,000/- would have been sufficient.

9. Mr. Mwambi learned counsel for the 1st respondent opposed the appeal. He submitted also highlighting their written submissions dated and filed on 14th October, 2019 in opposing the appeal. He supported the decision of the trial court and urged the court not to disturb the award both on liability and quantum.

10. Counsel submitted that road users have a mutual duty and that award of damages is discretionary and this court should only interfere where it is shown that it was inordinately low or high. He urged the court to dismiss the appeal and cross appeal. Counsel relied on several authorities.

11. Mr. Orenge, learned counsel for the 2nd respondent also opposed the appeal, and moved his cross appeal against quantum only. He submitted relying on their written submissions dated 2nd September, 2019 and filed on 18th September, 2019, that the trial court arrived at the correct decision on liability. On quantum, he argued that the trial court awarded general damages of Kshs. 650,000 which were inordinately low given the injuries the 2nd respondent sustained.

12. According to counsel the 2nd appellant sustained a fractured pelvis and injury on the left arm. In counsel's view, an award of Kshs. 2,500,000 would have been adequate compensation. He also submitted that Dr. Wokabi had recommended Kshs. 400,000 for future medical treatment. He urged that Kshs. 80,000 given for future medical treatment be enhanced to Kshs. 425,000. He urged the court to dismiss the appeal and allow the cross appeal. He relied on several authorities to support his arguments.

**13.** I have considered this appeal, submissions by counsel for the parties and the authorities relied on. This being a first appeal, it is by way of retrial and parties expect this court to analyze and reconsider the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

**14.** In ***Gitobu Imanyara & Others v Attorney General*** **[**2016] eKLR**,** the court of appeal held:

***"This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself 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 allowances in this respect"***

15. And in ***Nkube v Nyamiro*** [1983] KLR 403, the same court held:

***"A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his***

***conclusion***"

16. PW1, Agnes Kwamboka Okeyo, a business lady testified that adopted her witness statement dated 28th February, 2017 as evidence before the trial court. In the statement, she stated that on 3rd December, 2016 she was travelling as a passenger in motor vehicle KBX 076T when the motor vehicle colluded with motor vehicle KCF 368U along Loitokitok – email road. She suffered bodily injuries and was treated at Kilome Maternity Nursing Hospital. She blamed both motor vehicles for the accident. Documents produced as exhibit included a demand letter, plaintiff's identity card, P3 form, Discharge summary from Kilome Maternity Nursing Hospital and Guru Nanak Hospitals, receipts from Kilome Maternity Nursing Hospital and bundle of other receipts from various hospitals and pharmacies.

17. In cross-examination, she told the court that she was travelling in the motor vehicle when the collusion occurred; that she was seriously injured; was admitted at Kilome Maternity Nursing Hospital and later transferred to Guru Nanak Hospital. She stated that she was sitting on the front seat and that the weather was clear. She further stated that she still carries on with her business of selling cloths but cannot do heavy tasks/duties.

18. PW2 No. 80481 PC Philip Mulwa, a police officer attached at Loitokitok police station performing traffic duties, testified that on 3rd December, 2016 at around 3.35 pm an accident was reported at Simba Cement Ap. Camp. The Administration police officers called them to the scene. He proceeded to the scene with PC Mwangi and that they established that motor vehicle KCF 368U, a Toyota Pickup being driven from Loitokitok to Emali, changed lanes and when it was about to overtake Motor vehicle KBX 076T, a heard of Zebras came crossing the road. This forced the driver of the pickup swerved to the right to avoid the Zebras. He rammed on the side of motor vehicle KBX 076T causing the two vehicles to veer off the road and rolled. As a result, passengers in Motor vehicle KBX 076T and KCF 368U were injured. He told the court that later passengers recorded statements and were issued with P3 forms. He produced the police abstract as PEX 2.

19. In cross-examination, the witness maintained that the pickup encroached onto the lane of KBX 076T and that the driver of KBX 076T was not to blame for the accident. He testified that there is yellow line on the road and a sign of animal crossing; that the driver of KBX 076T was on his lane and that the scene is at a corner. He stated that the pickup hit the Matatu on the side and that it was not a head on collusion. He blamed the driver of the pick up to some extent.

20. DW1, Dr. Leah Wainaina, a general practitioner, testified that on 19th June, 2017 she examined the 2nd respondent and relied on the treatment notes, medical reports from Dr. Wokabi and Dr. Kamau and clinical examination. She stated that the 2nd respondent sustained a de gloving injury on the left upper arm with permanent disability of 3%. On future medical treatment, she testified that the 2nd respondent would require physiotherapy at a cost of Kshs. 25,000 and that she did not require corrective surgery. According to the witness, a CT scan showed a hairline fracture which was diagnosed 3 weeks after the accident. In her view, this was not due to the road traffic accident of 3rd December, 2016. She produced the medical report as DEX 1 and that of Dr. Kamau as DEX 2.

21. The witness told the court that the injuries noted at Kilome Hospital were severe tissue injuries as could be seen from the discharge summary from that Hospital. According to the witness, one could not stay with a fracture for two weeks. She also maintained that the treatment notes did not disclose injuries which required a corrective surgery. She testified that she examined the patient on 6th June, 2017, while Dr. Kamau examined her on 4th August, 2017. She referred the patient to an orthopedic who assessed the cost to be Kshs. 25,000/-.

22. DW2 CPL. Martin Kariuki, the officer in charge of Loitokitok Traffic Sub Base, testified that on 3rd December, 2016 an accident was reported at Simba Cement area, involving two motor vehicles, KBX 076T, a matatu and KCF 368U, a Toyota Pickup. KCF 368U hit KBX 076T on the side and both vehicles overturned. According to the witness, the driver of KCF 368U claimed he was avoiding hitting wild animals when the accident occurred. He testified that they did not establish who was to blame for the accident. In cross-examination, the witness told the court that he was not the investigating officer but that motor vehicle KCF 368U had encroached on the lane of KBX 076T .

23. DW3, Justus Mutua, the driver of Motor vehicle KBX 076T, testified that on 3rd December, 2016 he was driving his motor vehicle from Nairobi to Taita Taveta. On reaching Merueshi, he met a double cabin vehicle, KCF 368U which started to overtake his vehicle. He slowed down to allow it pass. KCF 368U hit his vehicle on the right side which made him swerve off the road. According to this witness, there were no wild animals crossing the road. He blamed the driver of KCF 368U for the accident.

24. From the evidence and submissions, two issues arise for determination, namely; which motor vehicle was to blame for the accident and whether the award of damages was inordinately high or inordinately low.

**Who was to blame for the accident**

25. The appellant has argued that the trial court erred in law in holding them 20% liable which was against the weight of the evidence. According to the appellant, liability against him was not proved. In in ***East Produce (K) Limited v Christopher Astiado Osiro*** (Civil Appeal N0. 43 of2001), it was held that:

> ***"It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."***

26. That is to say negligence must as a matter of fact be proved before one can be held liable for the accident. The trial court considered the evidence on record and stated with regard to liability;

> "***It is the evidence of PW2 that motor vehicle registration number KCF 368U did change its lane when it was about to bypass***

***motor vehicle registration KBX 076T which was being driven from Emali to Taveta. This was because there was a heard of Zebras which was crossing the road. It is when it did hit the matatu on the right side. It is his evidence that there was a signage of animal crossing at the scene of the accident. This is also the evidence of DW2 and Dw3. Dw3 was the driver of the said matatu registration No. KBX 076T. These witness lays blame on the driver of KCF 368U. The driver of motor vehicle KCF 368U was not called to give evidence in court. Although the 2nd defendant did file a defence, they did not give evidence that would simply mean that the evidence of Pw1, pw2, DW1 and DW3 remains uncontested and that the second defendant should be wholly to blame for the accident."***

27. The trial court then went on to observe that according to the evidence of PW2, there is a signage at the scene of the accident warning of crossing wildlife. It also observed that according to the evidence of PW1, PW2, DW2 and DW3, the accident was as a result of Zebras that were crossing the road at the time.

28. The trial court then concluded on liability:

"***The presumption is that at such signage, all traffic are (sic) supposed to slow down and in the event of the animals crossing then the vehicular traffic must stop. There is evidence that these wild game was crossing. These (sic) both vehicles did not stop even though KCF 368U hit KBX 076T on its lane it goes without saying that KCF 368U must have been speeding. Both vehicles were therefore to blame for the accident. I will apportion liability at the ratio of 20% against the 2nd defendant in regard to the accident"***

29. I have considered the evidence on record and the impugned judgment. There are essentially two appeals. The appeal and cross appeal. The appeal challenges both liability and quantum while the cross appeal is on quantum only. With regard to the appeal, the issue is whether the appellant should have been held partly to blame for the accident.

30. PW1 testified that motor vehicle KCF 368U hit the vehicle she was travelling in. Her evidence was supported by that of DW3, the driver of motor vehicle KBX 076T. PW2 also confirmed that KCF 368 U changed lanes and hit KBX 076T. He however stated that there was a claim that a herd of Zebras was crossing the road at the time. He however did not give clear evidence that the animals were indeed crossing at the time of the accident or not.

31. DW2 on the other hand stated that KCF 368U hit KBX 076T on the side and that the driver of KCF 368 U claimed that he was avoiding animals that were crossing the road at the time. There was no independent eyewitness who told them that zebras were crossing the road. This is so given that DW3, the driver of motor vehicle KBX 076T was emphatic that there were no zebras. He stated that "**there were no wild animals on the road."**

32. The trial court correctly stated that where there is signage, for animals crossing the vehicles should slow down. He also correctly concluded, in my view, that motor vehicle KCF 368U must have been speeding when it hit KBX 076T causing it to veer of the road. The trial court however apportioned liability 20% to 90% percent arguing that since there was a signage warning of animals crossing, both motor vehicles should have slowed down.

33. This conclusion presents a problem. There was evidence that the driver of KCF 368U was overtaking when he suddenly changed lanes and as a result he his vehicle hit KBX 076T. That was confirmation that he was evidence of negligence. Second, this was at a bend which required him to be more careful when approaching the bend. Third, there was no clear evidence that there were zebras crossing the road at the time. DW3, the driver of KBX 076T, testified that there were no zebras crossing the road. PW2 was not at the scene and therefore he could not factually confirm that here were zebras crossing the road which made the driver of KCF 386U change lanes thus hitting KBX 076T.

34. It is also worth of note that the driver of KCFU 368U did not testify which left PW1 and DW3 as the only eye witnesses who testified. There was no other version on how the accident occurred except that of those two witnesses. For that reason, the trial court was in error in holding the driver of KBX 076T also liable for the accident. There was no evidence to support this finding.

**Whether quantum was high or low**

35. The second issue is on quantum. The trial court awarded general damages of Kshs. 650,000 and Kshs, 80,000 for future medical expenses. In arriving at those awards, the court stated the defendant: "suggested Kshs. 200,000 while the plaintiff suggested Kshs. 2,500,000/- The medical reports by Dr. Wokabi and Dr. Leah Wainaina played a major role in the award. Dr. Wokabi opined that the 2nd respondent suffered excessive de gloving injuries on the left should and left arm; blunt injuries on the left side of pelvis and abdomen; hemorrhage fracture of left viral bone and blunt injury to the chest.

36. On the other hand, Dr. Wainaina found a fractured pelvic region which was diagnosed two weeks after the accident. The Doctor, however, found that the respondent had suffered de gloving injury of the left arm and hairline fracture of the Elian wing leading to 3% permanent incapacity. Whereas Dr. Wokabi suggested a figure of Kshs. 400,000 for specialized procedures, Dr. Wainaina suggested kshs. 25,000 for physiotherapy since, in her view, there was no need for corrective surgery.

37. Based on these medical reports the trial court awarded Kshs. 650,000 general damages and Kshs. 80,000 for future medical expenses. Both the appellant and 2nd respondent have criticized those awards. The appellant argued that it was inordinately high while the 2nd respondent contended that it was inordinately low. The appellant suggests a sum of Kshs. 300,000 general damages and Kshs. 25,000 future medical expenses while the 2nd respondent argued that Kshs. 2,500,000 general damages and Kshs. 425,000 future medical expenses will be fair compensation.

38. I have considered the arguments from both sides and the impugned awards. I have also perused the respective medical reports relied on by both sides. Award of damages is an exercise of discretion and an appellate court should not readily interfere with exercise of discretion unless the trial court took into account irrelevant factors or failed to take into account relevant factors and arrived at a wrong decision.

39. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal stated;

> ***"[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

***40.*** In ***Butt v Khan*** [1981] KLR 349, ***Law, J.A*** observed that:

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

***41.*** And in ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (***1982 –88) 1 KAR 727, it was held that;

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, 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 a wholly erroneous estimate of the damage"***

42. In this appeal, Dr. Wokabi did not testify before the trial court after parties agreed to do away with his testimony. On the other hand, Dr. Wainaina testified and justified her report. She stated that there was no evidence that the 2nd respondent had suffered the injury of fracture of the pelvis when she was admitted at Kilome Maternity and Nursing Hospital. The discharge summary and treatment notes did not also show this. She further stated that the fracture, if any, was discovered two weeks after the accident. In her view, such an injury would have caused much pain which was not said to be the case.

43. Dr. Wainaina also opined that the injuries the 2nd respondent suffered did not require corrective surgery and, therefore, the award of Kshs. 80,000 for future medical expenses was on the higher side. In her view, the 2nd respondent only required physiotherapy at a cost of Kshs, 25,000.

44. Regarding general damages, the principle of law is that an appellate court should not interfere with the trial court's discretion unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial court proceeded on wrong principles, or that the court misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.( ***Butt v Khan*** *(*supra)

45. The trial court considered the evidence before it and made an award of Kshs. 650,000 which the appellant argued was inordinately high as to represent an erroneous estimate. The 2nd respondent termed it low. I have perused the medical reports by Dr. Wokabi Dr. Wainaina and Dr. Kamau. They are in agreement that the 2nd respondent suffered a fracture of the pelvis which resulted into some permanent incapacity which Dr. Wokabi placed at 10% while Dr. Wainaina put it at 3%. Whatever the degree, they are in agreement that the 2nd respondent suffered some serious injuries. Dr. Wainaina argues that the fracture could not have been sustained in the accident since it was discovered three weeks later. That in my view is no enough to rule out the fact that the injury could have been sustained during the accident.

46. On the material on record, I do not think there is sufficient reason to fault the trial court on its award. Having exercised its discretion and made the award it made, I do not think it was so inordinately high as to represent an erroneous estimate to warrant interference by this court. regarding the 2nd respondent's argument that he award was inordinately low, I am not satisfied either.

47. What about the award on future medical expenses? The trial court awarded Kshs. 80,000 which the appellant has criticized as high and the 2nd respondent thinks it is low.

48. The nature of the injury requiring further treatment and what nature of treatment is disputed at least from the medical reports. According to Dr. Wokabi, the 2nd respondent will require a corrective surgery. Dr. Wainaina thinks otherwise. According to Dr. Wainaina, the 2nd respondent will only require physiotherapy and not corrective surgery. She puts the cost at Kshs 25,000.

49. The trial court awarded Kshs. 80,000 on this award. On the medical evidence by Dr. Wainaina, the 2nd respondent does not require surgery. That being the case and since Dr. Wokabi did not testify to justify his view, I find that the award of Kshs. 80,000 for future medical expenses was on the higher side. Award for future medical treatment must be shown to be a real prospect and that it will require that amount to treat the person. in the present appeal there was no concrete evidence that 2nd respondent suffered injuries that would require that kind of amount to treat. In the circumstances of this case, Kshs. 30,000 would be appropriate under his head.

50. Having considered the appeal submissions and the authorities and having evaluated the evidence on record, I am satisfied that the appeal

has merit. On liability, I find that the trial court was in error in finding the driver of motor vehicle KBX 076T liable for the accident. It is my finding that the Driver of motor vehicle KCF 368U was solely to blame for the accident. The appeal succeeds to that extent.

51. On quantum, I am unable to fault the trial court on this head. The award of general damages of kshs. 650,000 is therefore, upheld. On future medical expenses, I find that the award of Kshs. 80,000 was on the higher side and is interfered with and set aside. The 2nd respondent is awarded Kshs. 30,000 under this head.

52. The final orders are that the 2nd respondent shall have the general damages of **Kshs. 650,000** and future medical expenses of **Kshs 30,000** making a total of **Kshs. 680,000.** The 2nd respondent shall also have costs and interest before the trial court.

53. The cross appeal is found without merit and is dismissed. Each party shall bear costs of the appeal and cross appeal. Orders accordingly.

**Dated, signed and delivered at Kajiado this 23rd day of April, 2020**.

**E.C. MWITA**

**JUDGE**