



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 43 OF 2015

JENNIFER MATHENGE.....PLAINTIFF

VERSUS

PATRICK MURIUKI MAINA.....DEFENDANT

(Being an Appeal from the Judgment of the Honourable E.H. KEOGO Principal Magistrate Baricho

Delivered on 14/10/2015 at The Baricho Principal Magistrate Court in RMCC 28 of 2014)

JUDGMENT

The respondent had filed a case against the appellant seeking damages for injuries sustained as a result of a Road Traffic accident on 11-08-2013 along Makutano - Sagana road. The trial court apportioned liability at 80: 20 in favour of the respondent since there was nothing he did to avoid the accident. On the issue of quantum, the court stated that the only injury confirmed was compound fracture of the femur which resulted in amputation of the right leg resulting in 70% permanent disability. It awarded the respondent general damages of Kshs; 1,600,000/=, diminished earning capacity of Kshs; 800,000/=, costs of artificial prosthesis limb at Kshs; 1,500,000/= and special damages of Kshs; 167,566/=

The appellant has appealed against the judgment of the trial magistrate and has raised the **following grounds:-**

1. The learned trial magistrate erred in law and in fact in finding the Appellant 80% liable in negligence to the Respondent in view of the evidence adduced and the statement of defence filed.
2. The learned trial magistrate further erred in law in finding that the Plaintiff was only 20% to blame for the accident.
3. The learned trial magistrate erred in law and in fact in awarding damages for loss of diminished earning capacity when the said claim was neither adequately pleaded nor proved to the required standards
4. The learned trial magistrate erred in law and in fact in awarding a sum of Kshs; 1,500,000/= for costs of prosthesis and subsequent replacement, yet the claim thereof was not specifically pleaded and specifically proved as by law required.

The appellant prays that the appeal be allowed with costs, the judgment of the trial magistrate be set aside and/or varied. When the appeal came up for hearing the parties agreed to dispose the appeal by way of written submissions.

For the appellant submissions were filed by: Lesinko Njoroge & Gathogo Advocates, while the respondents submissions were filed by; S.N. Ngare & Company advocates.

For the appellant it is submitted that; the trial magistrate erred by attributing 80% negligence against the appellant. The defendant called a witness who was the driver of motor-vehicle registration KBE 124 and his testimony was that he was a qualified PSV driver of reputable experience and that on the material day of the accident he was driving within the speed limit 76 KM/HR.

He gave evidence that much as he was driving carefully, the accident could not have been avoided, and though he did try, the plaintiff suddenly crossed the road from the side of the road without indicating, and the rider ignored the driver's hooting and continued crossing the road from left side and entered the defendant's right lane. He could not have swerved to the right lane as he could have collided head on with an oncoming motor-vehicle, and the fact that there was an oncoming motor vehicle from the right lane was indeed confirmed by the Plaintiff.

It is further submitted that by turning to the right the driver was reasonable as it would have resulted to more tragedy, and the driver testified that he had never been charged or convicted in any traffic offence.

He further submits that the police abstract which was relied on by the plaintiff does not indicate if investigations were ever done and if so who was charged.

The appellant's submits that the underlying question is if the driver was never faulted by the police and he gave controverted evidence that the plaintiff was negligently crossing the road from left to right how then was liability visited against the defendant.

He relied on the case of Alfred Kioko Muteti -versus- Timothy Miheso & Another (2015) eKLR which emphasized the un reliability of inconclusive police abstract in improving facts, and also the case of; Odhambo & another -versus - Telecom Kenya where the court of appeal stated;

“in addition there was no evidence that the 1st defendant was even faulted by the Police for the occurrence of the accident. The police a abstract produced does not show that anyone was charged with a traffic offence. The abstract showed that the matter was pending under investigations.”

He submits that it is trite law that there can be no liability where there is no fault, and he relies on the case of : Kiema Mutuku – versus- Kenya Hauliers Service Limited quoted with approval in Dharmagma Patel & Another -versus - T.A (minor) suing through his mother and next friend HH 9 (2014) eKLR Where the court stated that there is no liability with no fault and there must be prove of negligence where the claim is based on it,

it was stated:

“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. “

He submits that having failed to prove fault on the driver's part no liability should have sufficed and we pray that the court finds so.

Error in finding that the plaintiff was only 20% liable.

It is submitted that the plaintiff did testify during cross-examination that he could see the vehicle approach for about five minutes, he also stated that there was an oncoming vehicle from the opposite direction. In spite of being aware of the looming danger, the plaintiff still saw it fit to enter Mark Five Hotel in the defendant's and controverted testimony, the plaintiff was crossing the road from left side to the right and ignored hooting from the driver. That to make matters worse the plaintiff was carrying four pillion passengers, a fact which was not controverted having exceeded the pillion passenger limit it is apparent that he must have lost control of the motor-cycle hence resulting in the accident.

That judging from his conduct in those circumstances he cannot be merely 20% negligent.

Error in Awarding the plaintiff loss of diminished earning capacity:

The plaintiff did not adduce any evidence that he had been working in the first place. That the award under this head is therefore, not justified having not been proved.

It is further submitted that been an award for general damages it must be strictly proved on a balance of probabilities, and not merely pleaded and left hanging for the courts' intervention.

He relied on the case of; Cecilia Mwangi & Another -versus- Ruth W. Mwangi C.A 251 of 1996 cited with approval in S.J. -versus- Francesco Dinelo and another (2015) eKLR where it was stated;

“loss of earning is a Special damage claim. It must be specifically pleaded and proved”

The damages under the head of loss earning capacity “can be classified as proved on a balance of probability.”

It is submitted that; the plaintiff stated that he operated a licensed shop, to succeed under this head, the plaintiff should have proved that he was incapacitated in a way that he could no longer operate his shop.

The doctor opined that the plaintiff had healed completely a fact that he himself confirmed.

The plaintiff never proved that ever since the accident occurred the earning capacity had diminished. The burden of proof was not discharged.

He submits that the plaintiff cannot be compensated for their loss but can only be awarded what is fair, and that this position has

been upheld that defendants are not wrongdoers who ought to have been punished through high awards in general damages. See the case of: S. J -versus- Francesco Dinelo & Another (2015) eKLR.

Error in awarding the Plaintiff 1, 500,000/= for costs of Prosthetics and subsequent replacement

It is submitted that on the face of the judgment the learned magistrate adopted that the plaintiff would need a replacement six times in his lifetime as he would live up to 60 years of age.

That there was no medical evidence to show that the plaintiff would live up to that age, and given the preponderances and uncertainties of life, one cannot say a person will live up to 60 years. The correct approach would have been to adopt a reasonable multiplier.

The appellants' finally submit that in the right of the foregoing they invite the court to intervene in moderating the award given by the trial magistrate as it is within its power to disturb awards that are manifestly inordinately high as the one in this case.

For the Respondent

It is submitted that the apportionment of liability was well grounded in law and evidence. That the trial court weighed the evidence adduced by both parties and arrived at a fair decision, and that the appellant has not demonstrated how the court erred in arriving at apportioning of liability.

On quantum it is the respondents' submissions that the respective damages awarded are not excessive and that the learned trial magistrate correctly directed himself both in law and in fact at arriving at the award.

Liability

The respondent raises the issue as who should be blamed for the accident, and submits that the appellant is largely to blame for the accident. That the trial court was correct in relying on the respondents version of the accident. It is evident that the appellant evidence gave conflicting and contradictory evidence on how the accident occurred.

The appellants version of the accident was generally that the respondent emerged from off the road and joined the road. Defence witness 1 (John Munene Gitonga) in examination in chief testified that in the material day he was driving the suit motor-vehicle from Nairobi headed to Kerugoya and on reaching the scene of the accident a motor-cycle suddenly emerged from a junction from the left and abruptly entered the road. Due to proximity there was nothing he could do to avoid the accident.

He further stated that there was an oncoming motor-vehicle which swerved to its right, as he had also swerved to the right, and it is testimony that the rider was ferrying four pillion passengers. In cross-examination he stated that he first saw the respondent five meters away when he joined the tarmac. At that point the front tyres of motor-cycle were on the tarmac and he stated that he did not see the respondent emerge from a footpath or a homestead. He further stated that he applied brakes and hooted and when he re-examination he stated that there was a footpath which he thought came from a homestead, and he further stated that the respondent appeared from a feeder road.

He submits that this testimony is patently contradictory. The respondent further submits that the evidence of PW2 Inspector Agnes Magiri testified that the initial report of the accident to the police was that both the motor-cycle and motor-vehicle were heading to the same direction. On reaching the location of the accident the motor-vehicle rammed to the moto-r-cycle as it was entering Mark Five Restaurant.

She further stated that the respondent was carrying two pillion passengers who were his children aged 19 and 10 years.

She further stated that from the damage of the motor-cycle the respondent did not come from left crossing the road.

She added that the driver of motor-vehicle had reported that the respondent was carrying two pillion passengers.

Pw3, who is the respondent testified that he was taking his two children to swim at Mark five hotel, and when he reached the hotel he slowed down as he was riding on the left so as to turn to the right. He was waiting for an oncoming motor vehicle to pass so as to pass to the right.

The suit motor-vehicle however hit him from behind, as it was overtaking.

He stated that there were no homes near the scene or any feeder roads, and further that the driver of the motor-vehicle did nothing to avoid the accident.

Pw4 on the other hand stated that the suit motor-vehicle that took them and hit the respondent as it was trying to go back to its lane. That the respondent did not join the road from the left side, and there was no feeder road on the left, and that the respondent was only carrying two children.

The decision of the trial magistrate was that he believed the version of the respondent on how the accident occurred and noted

that defence witness 1 was unable to explain whether there was a feeder road or a foot path, and that the respondent did not join the road and was preparing to turn to the right.

The respondent urges the court to also believe his version of the accident as it is more plausible and consistent.

The respondent further submits that the appellants' driver was driving at very high speed.

The respondent relies on the case of; **Butt -versus - Khan (1982) 1KAR** where it was stated;

“high speed can be prima facie prove of negligence in some cases, a person travelling within or at the permitted speed limit may be immune from prosecution from traffic offence. It is another matter as far as a matter of negligence is concerned.”

It is further submitted that the appellants' driver having in his possession a lethal machine had a greater duty of care than the respondent. He refers to case of; **Isabella Wanjiru -versus- Washington Matele (1982) 1KAR 186** and **Pitty Gathigia Baaru & Another - vrs- Kenya Bus Services & Another (2005) eKLR.**

The respondents submits that the appellant has not shown that the trial court acted on wrong principles or misapprehended the evidence on record.

There is thus no basis to interfere with the decision and the respondent prays that the decision on liability be affirmed.

QUANTUM

1. The respondent submits that in order to disturb the award of damages made the learned trial magistrate the appellant had to show that the trial court disregarded any of the principles in awarding damages as stated in the case of; **Kenfro Africa Limited & Another -versus- Lubia & another (1982 -1988) KLR AND Catholic Diocese of Kisumu -versus- Sophia Achieng Tete (Civil Appeal No. 284 of 2001).**

2. The award on diminished earning capacity, the respondent submits that the claim on diminished earning capacity is general damage claim and accordingly prove thereof is on a balance of probabilities.

The award on future medical expenses

It is submitted that the claim was pleaded and need not be specifically proved as it is a claim under the rubric of general damages. The respondent urges the court to uphold the award of damages by the trial court.

I have considered the appeal, submissions and the proceedings before the trial magistrate. This is a 1st appeal and as such the role of the court is to re-evaluate, re-assess and re-analyze the evidence which was tendered before the trial court and come up with his own finding. This has been stated in various authorities and in: **Abok James Odera Trading as Odera & Associates - versus – John Patrick Muchira & Company Advocates (2013) e KLR** Court of Appeal re-stated the duty of the first appellate court which is that Court has to re-evaluate the evidence and come up with its own finding and also determine whether the conclusions reached by the trial court are to stand or not, and give reasons either way.

I have considered the evidence which was tendered before the trial magistrate, the respondent testified as PW3 Patrick Muriuki Maina stated that on 11th August, at 2p.m he was going to Mark Five Restaurant which is along Sagana Makutano road riding a motorcycle KMDB 650N and he was with his two children who were going for swimming at Mark Five Hotel.

When he approached the hotel he slowed down to enter the hotel, he was to turn to the right to enter Mark Five Hotel, there was an oncoming motor vehicle so he had to give time for it to pass.

There was a motor-vehicle which was from behind which hit him while overtaking. The accident motor-vehicle knocked him while he was in the process of overtaking the vehicle was KBE 124Y Toyota Hiace.

The respondent testified that he sustained injuries on the right leg which has affected his normal chores.

In cross-examination he testified that he was ahead of the motor-vehicle about 100 meters and he saw the motor-vehicle following him for about five(5) minutes, and he saw it using his side mirror. There was another motorcycle which was following him but the motor-vehicle over took it. He denied that he joined the road from right towards Makutano. He also denied that he suddenly crossed the road.

He told the court that the driver of the accident motor vehicle was not charged of any traffic offence and that he fully healed.

Pw4 (Kennedy Kariuki) testified that he was travelling from Makutano on a motorcycle towards Lukenya where his home is located and after a short distance a matatu passed them and proceeded on the overtake another motorcycle which was ahead. The motor vehicle which overtook him was KBE 124Y, there was an oncoming motor vehicle so when he returned to his lane he knocked the motorcycle which was a head of him. The motorcycle was knocked when it was on the road and had indicated to turn

right. There were two children who were pillion passengers.

In cross examination he maintained that the victim did not cross the road. He also denied that the rider was carrying four passengers.

The appellant's witness DW1 (Joseph Munene Gitonga) testified that on the material day he was driving the motor vehicle KBE 124Y from Nairobi going to Kerugoya. At 2p.m he passed Makutano, a motorcycle appeared from the left and crossed the road without checking I was very close I knocked it, I was driving at 76KM/PH, there was nothing he could do to avoid the accident. There was an oncoming motor vehicle which swerved to its right as I had swerved to the right. The rider was carrying four pillion passengers he was to blame for the accident.

In cross examination the witness stated that he did not see the victim emerge from a foot path, there was a motorcycle on the left and another on the right. I did not see the plaintiff emerge from a homestead. There was an oncoming motor-vehicle and when I saw the motorcycle I braked, the distant was short but I applied brakes and swerved to the right, the oncoming motor-vehicle also swerved to the right. He swerved to the right on impact. He reported the accident and told the police that the rider had four passengers.

On being re-examined the witness stated that the motorcyclist appeared from the left, that there was a footpath which I thought comes from homestead. The impact of the motor vehicle was on the left side of the body, side mirror head lamp and windscreen, he said he was not overtaking the rider appeared from a feeder road.

Dw2 (Agnes Magiri) testified that he is an Inspector of Police at Sagana Police Station. She received the report of the accident, both vehicles were heading in the same direction. The motor vehicle KBE 124Y rammed in the motorcycle which was entering Mark Five Restaurant. The motorcycle had two pillion passengers who were his children aged 19 and 10 years respectively. She produced a police abstract Exhibit. 2.

In cross examination she told the court that the rider did not come from left crossing the road and that the damage on motor-vehicle reveals otherwise. The driver was not charged with any offence.

The trial magistrate found that the accident happened as presented by the plaintiff and his witness, however could have equally avoided the accident and/or minimized the impact by some actions of evasion, in the circumstances I will apportion liability in the ration of ; **80:20** whereby the plaintiff will bear **80 %** contribution as there is nothing he did to avoid the accident.

I have considered the evidence and I find that as per the evidence adduced by PW2, Pw3 and Pw4 both the motor-vehicle and the motorcycle were heading in the same direction with the respondent being in front of the motor-vehicle and on reaching the scene of the accident the motor-vehicle rammed the respondent as he was entering Mark Five Restaurant.

Having considered this evidence I find that the trial magistrate arrived at the correct decision as it is supported by the evidence. The appellant was indeed largely to blame for the accident he was driving at a speed of 76 KM/PH which in the circumstances was excessive as stated in the case of; **Butt -versus- Khan (supra) "the speed limit fixed under Traffic Act is for general good conduct on the parts of the drivers, if an accident happens in the absence of provable circumstances which will exonerate the driver even travelling at half speed will not afford a defence in a case of negligence."**

In the circumstances of this case where the appellant was overtaking there was an oncoming motor-vehicle a speed 76 KM/PH was excessive in the circumstances and in determining negligence that speed is considered excessive when determining the question of negligence. In the case of; **Micheal Hubert Kloss & another -versus- David Seroney & 5 others (2009) eKLR**

On the issue of determination of liability in road traffic accident, the Court of Appeal proceeded to state; the determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in **Stapley -vs- Gypsum Mines Limited (2) (1953) A.C 663 at P. 681 as follows;**

“ to determine what caused an accident from the point of view of legal liability is a most difficult task. IF there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.....

“ the question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

In this case the appellant gave self-contradictory evidence on how the accident occurred. However, the respondent and his witness gave consistent evidence on how the accident occurred it puts the blame on the appellant. It is not hard to tell who was to blame for the accident and this is a case which was to determine who was negligent. Although the appellant was not charged does not mean that he was not to blame for the accident.

Indeed a traffic offence is a Criminal in nature and the standard of prove is higher.

In civil proceedings the standard of prove is that of balance of probabilities It is determined on a consideration of who was at fault.

In the case of; **Kiema Mutuku -versus- Kenya Cargo Hauliers Limited (Supra)** it was stated that there is no liability without fault and there must be prove of negligence where the claim is based on negligence.

“ 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.”

The respondent at paragraph 5 of his plaint in the lower court had pleaded the particular of negligence against the appellant.

The respondent discharged the burden as he proved some of the particulars needed in the plaint. He discharged the burden to prove the particular of negligence and therefore proved that the appellant was at fault.

On the issue of police abstract it was relied on by the respondent to prove that the appellant was to blame, my view is that the abstract was produced to prove the fact of the accident. It is the responsibility of the police to charge traffic offenders and the respondent had alleged negligence which I find he proved on a balance of probabilities.

ON QUANTUM

The issue of damages was considered in the celebrated case of: **Kemfro Africa Limited T/a Meru Express Service Gathogo Kanini -versus- A. M. Lubia & Olive Lubia (1982 -1988) KLR 727** where the Court of Appeal held;

“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 wither 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 in ordinally low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

Refer to: **Power Lighting Company limited & another -versus- Zakayo Saitoti Naingola & another (2008) eKLR.**

The court held;

On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages;

- 1. Damages should not be inordinately too high or too low**
- 2. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.**
- 3. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.**
- 4. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan Shillings, then at the time of the judgment.....**

This court has taken note of the court of appeal decisions to the effect that an award of damages is a matter of the courts discretion and can only be interfered with if among others

- The award is inordinately too high or too low**
- It is based on cursory principles. The principles applied by the lower court in the assessment was that of taking a narrative of the injuries by the witnesses.**
- Calling for proof of the same by visual observation if pointed out and medical records.**
- By seeking guidance from other decisions and this is what the learned trial magistrate did and this is evident of the record. The court, therefore makes a finding that no wrong principles was applied in the assessment on quantum.**

Perusing through the plaint filed on 19/05/2014, the respondent pleaded for **“general damages for pain, suffering and loss of amenities and diminished earning capacity and costs of artificial prosthesis”** Therefore it is misleading for the appellant to claim that the same were not pleaded.

The issue pending is on whether the same were proved to the required standard.

Loss of diminished earning capacity.

PW1 indicated that the respondent complained of not being able to go round, difficulties in doing day to day chores including his business and difficulties in using crutches. That the respondent will still be limited in movement even with prosthesis.

Pw3 confirmed that the injuries affected his normal duties since he cannot ride his motor-cycle even with an artificial prosthesis to transport rice to his customers.

Pw3 confirmed that PW3 used to sell rice at makutano.

Artificial prosthesis limb;

PW1 indicated that the respondent's leg was amputated leaving a stump of about 6 inches and could present challenges in fitting an appropriate leg. That the one that can fit would require being fitted around the wrist and estimated the leg to cost Kshs; 250,000/=. That the respondent would face difficulties with the artificial leg and it has a lifespan of 5 years.

The appellant did not adduce any evidence to refute the above claims for loss of diminished earning capacity and artificial prosthesis limb. In addition, he has not stated any irrelevant factor that the trial court considered or that it misapprehended the evidence. Therefore there is no justification of interfering with the award.

The award on diminished and incapacity, the appellant had pleaded that, he used to sell rice and was earning Kshs; 30,000/= which he could no longer do. The PW1 (Dr. Wokabi) assessed the respondent degree of incapacity at 70% and stated that even with prosthetics the respondent will be limited with the number of activities he can do. The respondent testified that the injuries had affected his normal chores, he could no longer ride a motor-cycle which he used in his business of transporting rice and this the claim on diminished earning capacity is general earning claim and prove is on a balance of probabilities.

See the court of appeal in: **Butler -versus- Butler (1984) KLR 225** held as follows;

- **“Loss of earning capacity is a different head of damages from actual loss and future earnings, the difference is that compensation for loss of future earning is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.”**

See also; **S. J. -vrs- Francesco Dinelo & Another (Supra)** where the court of appeal held that;

- **“Loss of earning capacity is compensated by an award in general damages once proved.”**

This damages the claim was pleaded under the head of general damages and was proved on a balance of probabilities. The appellant has failed to demonstrate that the trial magistrate in assessing damages took into account an irrelevant factor or left out into account a relevant one on that short of this the amount is so inordinately or so inordinately high that it must be a wholly erroneous estimate of the damage.

I would therefore have no reason to interfere with the discretion of the trial magistrate in assessing the quantum of damages. The upshot is that the trial magistrate having properly considered the evidence arrived at the correct finding on liability and quantum of damages, in the circumstances I find that the appeal is without merit and is dismissed with costs.

Dated, Signed at Kerugoya this 29th day of May 2020.

L. W. GITARI

JUDGE