



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 35 OF 2016

AZHAR ALI.....APPELLANT

VERSUS

SHEIKHA MOHAMED.....RESPONDENT

(Being an Appeal from the Judgment and decree of the Senior Principal Magistrate in Mombasa Hon. Lesootia delivered on the 17th March, 2016 in the Senior Principal Magistrate Court at Mombasa Civil Suit No.2960 of 2007)

JUDGMENT

1. The Respondent filed a case being SPMCC Mombasa Case No. 2960 of 2007 against the Appellant seeking an award of general and special damages as well as the costs of the suit. Those are damages that resulted after the accident which occurred on 28th June, 2007.
2. As pleaded in the plaint, the Respondent was walking along Nyerere Avenue in Mombasa when the appellant and/or his authorized driver allegedly negligently drove motor vehicle KAV 776W thereby causing the said motor vehicle to collide into the Respondent and occasioned he serious injuries.
3. As a result of that accident, the Respondent stated in her plaint that she suffered the following injuries:-
 - a) Severe head injury;
 - b) Injuries to the lips and nasal bridge;
 - c) Loss of 4 upper incisors teeth;
 - d) Fracture right humerous; and
 - e) Fracture pelvis.
4. In his defence, the Appellant denied the Respondent's claim and stated that he was not the owner of Motor Vehicle registration Number KAV 776W, and if any accident did occur the same was wholly or substantially contributed by the negligence of the plaintiff. Some of the particulars of the respondent's negligence which the appellant attributed to as having caused the accident were pleaded thereof.
5. In its Judgment dated 17/3/2016, the trial court found both parties liable and apportioned liability in the ratio of 70%:30% in favour of the Respondent. He awarded general damages at Kshs.1,500,000/= and Kshs.99,128/= less 30% contribution.
6. The judgment is the subject of this appeal. The appellant by his Memorandum of Appeal has faulted that judgment on the basis of the following grounds :-
 - a) **That the learned magistrate erred in law and in fact in reaching a decision that was contrary to the weight of evidence adduced before the court, and in holding that the Plaintiff had proved her case on a balance of probability on the issue of negligence.**
 - b) **That the learned trial magistrate erred in law and in fact in apportioning liability in the manner that he did.**
 - c) **That the learned trial magistrate exercised his discretion in apportioning liability wrongly by acting contrary to the weight of evidence that was before the court.**

d) That the learned magistrate erred in law and in fact in failing to consider the Appellant's submissions and pleadings while determining the issue of occurrence and blameworthiness for the said accident thus arriving at an erroneous conclusion.

e) That the learned trial magistrate erred in law and in fact in assessing and awarding quantum of Kshs.1,500,000/= as general damages for pain and suffering which was too inordinately high hence an erroneous and unreasonable estimate of general damages for pain and suffering and loss of amenities.

f) That the learned trial magistrate erred in law and in fact in failing to consider judicial precedent and in taking into account things that he ought not to have considered and failing to take into account things he should have considered hence arrived at an assessment of damages that was erroneous.

7. I will try to give some snippets of that judgment to try and show how the trial magistrate arrived at his decision.

“...I have considered submissions by the defendants and take note of PW3'S testimony that the Plaintiff was hit while crossing the road. By the balance of probabilities it is the court's finding that the Plaintiff have established that an accident occurred involving herself and the Defendant's motor vehicle.”

“...It is worth noting that the accident took place at night and so when the Plaintiff was crossing the road both the Plaintiff and the 1st defendant had a duty to themselves as road users. There is no evidence that the 1st Defendant braked but PW3 testifies the 1st Defendant veered off the road an attempt I believe was intent on avoiding the accident. I will therefore apportion liability at 30% as against the Plaintiff and 70% as against the Defendants.”

8. In considering this appeal, I will be guided by the case of **Selle vs Associated Motor Boat Co.** [1968] E.A. 123 at page 126 where the Court of Appeal stated :-

“.....(the) principles upon which this court acts in such an appeal are well settled. Briefly put they are but this court must reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demenour of a witness is inconsistent with the evidence in the case generally.”

9. Bearing in mind the principles in that case, I proceed to examine the evidence adduced in the lower court. The Plaintiff testified as PW1. She told the court that on the material day she was standing outside Islamic Centre along Nyerere Avenue when the accident occurred. That she was standing on the pavement waiting for matatu. Immediately after the accident she became unconscious but was treated at Pandya Hospital. She was however stood down for her to produce further medical receipts which were not then available.

10. PW2 was Doctor A. Adede. He told the court that he examined the Respondent on 9/7/2014 following the accident and prepared a medical report which he produced as P.Exh 10. He opined that the Plaintiff suffered 10% permanent disability as result of a fracture of the pelvis, right hand and the loss of 4 teeth which would result in difficulty in speech and biting. The Plaintiff also had a disfiguring facial scar. According to the Doctor, the Plaintiff would incur future medical expenses of Kshs.40,000/= for dental implant and Kshs.90,000/= for removal of right humerous right bone. On cross examination, PW2 stated that the costs for removing implants is estimated at Kshs.90,000/= in a private hospital while for a public hospital it would cost about Kshs.50,000/=.

11. PW3, NO.77589, P.C Peter Mwenda, of Central Police Station, traffic unit told the court that the accident involving M/v Reg. Number KAV 776W and a pedestrian was reported on 28/6/2007. A case against the owner of the M/v (the Appellant herein) was pending under investigations. He told the court that the M/v driver veered off the road from the right to the left side although none was blamed by the Investigating Officer. On cross-examination, he told the court that the Plaintiff was crossing the road when the accident took place.

12. The Defence opted not to call any evidence in support of the statement of defence.

13. When the appeal came up for hearing on 14/3/2019, by consent of the parties' respective advocates, the court gave directions that the appeal be disposed by way of written submission. Both filed their submissions and opted not to highlight the same. Consequently, a judgment date was fixed and I will consider the submissions as follows:

Appellant's submissions

14. The counsel for the Appellant combined grounds number 1,2,and 3 as one and submitted that the trial magistrate erred in making a finding on negligence contrary to the evidence on record and holding that the Appellant had proved her case on balance of probabilities. It is averred that the Plaintiff had pleaded in her plaint that she was walking when she was hit by the motor vehicle but testified that she was standing on the pavement in her examination-in-chief. The Appellant argues that this evidence is contradictory and mere proof of the accident could not be prima facie evidence of negligence. Since the Plaintiff gave two versions of facts, the court ought to have held the case as not proved and dismissed the same. As such the Respondent did not discharge her burden of proof. This argument is supported by excerpts from the cases of **Kabugu Mutua –VS- Kenya Bus Services Ltd HCCC No. 4045 of 1998**, **Josphine Makau Ngegi –vs- Mohamed Sheikh Omar Bin Dahman HCCC No.312 of 1995**.

14. On the 4th ground of Appeal, the Appellant submitted that the Trial Magistrate erred in principle in failing to consider the Pleadings and submissions by the Appellant in its finding on negligence. It is argued that, although the Respondent pleaded particulars of Negligence by the

Appellant, she did not reiterate any of those particulars in her evidence in-chief. Further that the allegations that she was standing at the pavement of the road was not pleaded anywhere in the pleadings. The court ought to ignore that allegation and find that the Plaintiff was crossing the road when she was hit by the M/v. In her evidence in-chief, the Respondent did not blame anyone for the accident and as such the Plaintiff avers that the burden was not discharged. The counsel called to aid various authorities including the cases of ***Muthoni Nduati – vs-Wanyoike Kamau & 5 others HCCC No. 1661 of 1980, Galaxy Paint Co. Ltd –vs-Falcon Guards Ltd Civil Appeal No. 219 of 1998 and Amalgamated Sawmills Ltd-vs-Aandrew Nyamonyo Onyancha [2011] eKLR.***

16. The Appellant submits on grounds 5 and 6 with regard to award of damages together that the trial magistrate failed to ascertain what injuries were suffered by the Respondent. First, it is argued that the Medical report produced by Dr. Ndegwa indicated that the Plaintiff suffered, among other things, loss of teeth which are not included by the report of Dr. Udayan Sheth who was among the doctors who treated the Respondent when she suffered the injuries. As such, it is argued that the trial magistrate's assessment of damages was based on the wrong findings on the injuries suffered by the Respondent, hence he misdirected himself.

17. The counsel further submitted that comparable injuries must attract comparable award on damages. He relied on the following cases:

- ***Fast Choice Co. Ltd –vs- Catherine Damaris Maina H.C.C.A No. 273 of 2009***, where the respondent suffered bilateral fractures of the superior and inferior ramii, scar of the anterior aspect of the knees with full range, movements and other systems normal. The court awarded Ksh.400,000/= on general damages.
- ***George Okewe Osawa -vs- Sukari Industry Ltd H.C.C.A 66 OF 2015***. In this case, the Plaintiff suffered a fracture of pelvis and the Court awarded Kshs.400,000/= on general damages.
- ***Francis Wachiuri Murage & Another -vs- P.G.K (Minor suing through P.MG as next Friend) [2016] eKLR***, where the Plaintiff suffered Cut wound on the left forehead and eyebrow, pelvic fractures involving left superior and inferior Public ramii, fracture of the right olecranon-elbow, and blunt object injuries to the abdomen with tenderness. The court awarded Kshs.400,000/= as general damages.
- ***In Kenya Power & Lighting Co. Ltd-vs-Benson Aseka Anyanzwa [2017] eKLR***, the court awarded Kshs.300,000/= for head injuries with loss of consciousness, injuries on the chest, in the mouth with loss of teeth, on the back, left and right shoulder, left and right Knees, left and right leg with bruises and the groin and a fracture on the left hand.

18. In conclusion, the Appellant submitted that the trial magistrate erred in relying on an authority with more severe injuries than those suffered by the Respondent herein and he therefore misdirected himself in awarding Kshs.1,500,000/= for general damages which is inordinately high. The Appellant suggested an award between Kshs.4,00,000/= to Kshs.500,000/= as sufficient compensation for the injuries suffered.

Respondent's Submissions

19. The Respondent's submissions are concisely brief. With regard to liability, it is submitted that the Police Officer who testified as PW3 stated in his evidence in chief that the vehicle veered off the road and knocked the Plaintiff. Further that the Plaintiff in her testimony stated that she was standing outside Muslim center along Nyerere Avenue when she was hit by the Defendant's motor vehicle. On the other hand, the Defendant/Appellant opted to close his case without calling any witness. No evidence was called to rebut the Plaintiff's assertions and as such the Respondent submits that she proved her case on balance of probabilities and the appeal on liability should be dismissed.

20. On quantum the Plaintiff submits that there are three medical reports on record. One prepared by Dr. Udayan Sheth, Dr. S.K Ndegwa and the third by Dr. A. Adede. It is only Dr. A. Adede who testified and produced his report. The injuries as per Dr. Adede's report were listed thereunder. The Doctor formed a conclusion that the Plaintiff suffered 10% permanent disability and would further incur expenses on future medication. Similarly, Dr. Ndegwa's Report showed that the Plaintiff had suffered a 15% permanent disability and would be required to undergo future medical expenses. Lastly although Dr. Sheth stated the Plaintiff had suffered 10% disability he did not address himself on future medication.

21. In support of the submissions on quantum, the counsel for the Respondent relied on the cases of:

- ***Joseph Kahinda Maina -vs- Evans Kamau Mwaura & 2 others Civil case 635 of 2009***. In this case the court awarded Kshs.2,400,000/= for the following injuries; *head injury, fracture of 6 teeth, Injury to the right Chest wall causing pneumothorax, Fracture of the pelvis and Diastasis of the Right sacro-iliac joint respectively.*
- ***Peace Kemuma Nyangere –vs- Michael [2014] eKLR***. The Plaintiff suffered Fracture of the Sacrum bone, fracture of the right superior pubic ramus of the pubic bone (right hip), fracture of right ischium bone part of the pelvis, haematoma on the thighs, Haematoma in the lumbar-sacral-lower part of the spine between the thighs. The court awarded Kshs.2,500,000/= for general damages.
- ***Sabina Nyakenya Mwanga-vs-Patrick Kigoro & another H.C.C No. 9 of 2012***. The court awarded Kshs.3,000,000/= where the Plaintiff suffered fracture of the humerus, fracture of the pelvis, fracture of the right knee, fracture of the condyle femur, bruises on the face, severe retroperitoneal haemorrhage and multiple soft tissue injuries.

22. The Plaintiff concluded that the judgment by the trial court was very fair and the appeal lacks merit both on quantum and liability and should therefore be dismissed.

Analysis and Determination

23. I have considered the grounds of appeal, the evidence tendered before the trial court, the rival written submissions made on behalf of both parties and the authorities cited. I have also read the judgment of the learned trial magistrate.

24. In addressing myself to the complaints made by the appellant on the trial court's finding on liability, it is important to weigh the same with the evidence on record. The Plaintiff testified that she was standing outside Islamic center along Nyerere Avenue waiting for matatu when she was knocked by the Defendant's motor vehicle. She became unconscious after the accident and woke up in the hospital. Pw3, testified that the motor vehicle veered off the road from the right side to the left side and knocked the Respondent down. The Respondent on his side did not call any witness to testify on what transpired.

25. In his submissions, the Appellant avers that the Respondent had pleaded in her plaint that she was walking when she was knocked by the Defendant's motor vehicle. Further that the police officer on cross-examination testified that the Respondent was crossing the road when she was hit by the vehicle. It is the Appellant's case that the contradiction should be a basis of finding that the Respondent failed to prove her case.

26. Given the foregoing summary of the evidence that was placed before the trial court, the magistrate found that the Plaintiff was crossing the road when she was hit by the Defendant's motor vehicle. He held that both had a duty of care on themselves and apportioned liability in the ratio of 30%:70% in favour of the Plaintiff. This in my view means that the learned trial magistrate had applied his mind to the evidence tendered by PW3, the Police officer in reaching his conclusion.

27. It is trite law that an appellate court can only interfere with findings of fact made by the lower court if such findings were based on no evidence or on a misrepresentation of the evidence or if the trial court in reaching its decision applied the wrong legal principles. **See the case of *Sumaria & Another V Allied Industrial Limited*, [2007] 2 KLR 1; *Jabane V Olenja*, [1986] KLR 661; *Simon Muchemi & Another V Gordon Osore*, [2013] eKLR.**

28. Given the evidence adduced by PW1 and PW3 regarding the events that led to the accident, it is not in doubt that the accident did occur. Although the Appellant avers that he did not cross examine the Respondent, the lower court record shows that on 22/10/2015 the Appellant's advocate said that he did not wish to cross examine her. I must say that the Respondent's evidence was not shaken by the appellant. I do not see the reason why the defendant and/or his driver failed to testify so as to give their version on how the accident did occur. One may therefore agree that there was prima facie evidence that the defendant and/or his driver was negligent for not exercising due control of the M/v KAV 776W. In the case of ***Hallwell vs. Venables* [1930] 99 LJKB 353**, it was held that:

“A driver of motor vehicle is held to have sufficient control over his vehicle and its surrounding circumstances to attract the operation of the principle in a suitable case. It is part of the experience of mankind that if a driver is exercising reasonable care, it is not usual for vehicles to overturn. In this case the vehicle overturned and therefore *res ipso loquitur* applies.”

29. In this case I am guided by the findings in the case of ***Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981* [1983] KLR 142**, where it was held that there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. There is no reason for a pedestrian's complete failure to see a motorist and vice versa. On the foregoing, the Defendant has not led any evidence to show that the accident happened in inadvertent circumstances that he could not escape.

30. The Appellant further claimed that the Respondent did not blame anyone for the accident. I find the argument misconceived because the Respondent had already pleaded under paragraph 5 of her plaint blame on the Appellant. I know of no law which requires a Plaintiff to plead blame in his/her testimony having pleaded the same in the Plaint.

31. The evidence on record and with regard to the dicta in the case of ***Isabella Wanjiru Karangu (Supra)***, the circumstances of this case infer that there was negligence on both the parties. Since the Appellant failed to adduce any evidence, my independent analysis of the evidence adduced in this case leaves me with no doubt that the trial magistrate's finding was not only based on the evidence on record but was also based on good legal principles. I do not therefore find any reason to disturb it and it is hereby upheld.

32. Regarding the appeal on quantum, the appellant has submitted that the award of KShs.1,500,000/= was excessive and was not comparable to past awards made for similar injuries. I will begin with the argument by the Appellant that the trial magistrate was misguided on the injuries suffered by the Respondent. In this regard, the Appellant submitted that the medical report by Dr. Udayan Sheth did not indicate the Respondent suffered teeth injuries as indicated in the medical report prepared by Dr. Ajoni Adede. I have considered the two medical reports. Dr. Adede's report is dated 9/7/2014. It indicates that the Respondent suffered the following injuries:

- **head injury, loss of upper 4 incisors no. 11,12, 21 and 22,**
- **Fracture right humerus arm bone,**
- **fracture of the pelvis (right superior and inferior pubic bones),**
- **cuts on the lips and nasal bridge**

33. The one by Dr. Udayan Sheth is dated 27th Feb. 2009. He indicated that the Respondent suffered the following injuries;

- **Fracture of the right humerus bone**
- **Fracture superior and inferior bone of the right pelvic bone**
- **Multiple soft tissue injuries**
- **Facial bruises**
- **Cut wound over nose lips.**

34. I also noted from the record that there was a third medical report by Dr. S.K Ndegwa. In his report, he indicated that the Plaintiff suffered the following injuries:-

- **Severe head injuries with:**
- Aavulsion of teeth number 11, 12, 21 and 22
- Cut wound on the nasal septum
- Cut wound on the forehead
- Cut wound on the lower lip
- **Comminuted and displaced fracture of the upper 1/3 of the right humerus**
- **Fracture of the right superior Pubic ramii and pubic body**
- **Blunct trauma to the lower back with loss of lumbar lordosis due to muscle spasms**

35. Though the medical report by doctor Udayan Sheth was prepared earlier than Dr. Adede's report, it is Dr. Adede who testified before the trial court. The findings in his report were tested in cross-examination. On cross examination, Dr. Adede stated that he was not aware if the Respondent had been examined by Dr. Udayan Sheth. His findings as put by him in the evidence on cross-examination were based both on physical examination of the appellant and appraisal of medical documents. He told the court that he saw the missing teeth and the Medical report by Dr. Udayan Sheth omitted the teeth injuries. On the other hand, the evidence of **Dr. Udayan Sheth** was not tested in cross-examination as he never gave any testimony in court. I therefore find no justification in the appellant's submission that the trial magistrate misapprehended the injuries suffered by the Respondent. Furthermore, Dr. Adede's findings that the Respondent sustained injury on his teeth is corroborated by the medical report by Dr. S.K Ndegwa. In the result, this court agrees with the trial magistrate in considering Dr. Adede's report to ascertain the injuries sustained by the Respondent.

36. I have considered the parties submissions and authorities cited with regard to the awards of general damages for pain and suffering and loss of amenities. in the preceding paragraphs. I will not belabor to repeat the same here. The Appellant suggests an award for Kshs.400,000/= to Kshs.500,000/= while the Respondent agrees with the award of the trial magistrate and seeks this court to uphold the same.

37. In the case of **Butt vs Khan (1977) 1 KAR**, the court therein also rendered itself on the same issue and held as follows:-

“An Appellate court will not disturb an award for damages unless it is 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.”

38. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

39. However, this assessment is not without limits. A court must have the presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

40. In the case of **P. N. Mashru Limited v Omar Mwakoro Makenge [2018] eKLR**, the Plaintiff suffered loss of consciousness at the time of the accident, fracture of the femur distal third, fracture of the temporal bone with heamatoma, head injury to the right frontal parietal bone with brain oedema, left subdural heamotama. The Plaintiff also suffered five (5%) incapacity and court upheld an award of awarded Kshs.1,200,000/= on general damages.

41. In the case of **Boniface Njiru v Tohel Agencies and Another [2011]eKLR**, the plaintiff therein 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 therein awarded him a sum of Kshs. 1,000,000/= as general damages for pain, suffering and loss of amenities.

42. Bearing in mind the nature of injuries that were sustained by the Respondent herein, the sum of between Kshs.400,000/= to Kshs.500,000/= as general damages for pain and suffering and loss of amenities as suggested by the Appellants would be manifestly low and this court disagrees with Appellant in that regard.

43. Accordingly, having considered the evidence that was adduced in the Trial Court, the written submissions and the case law that was relied upon by the Appellant herein, this court came to the firm conclusion that the Learned Trial Magistrate applied the correct principles in assessing the general damages and future medical expenses. The same were assessed with moderation and were not inordinately high or too low in the circumstances for this court to interfere with the same. The respondent has to undergo future medication which the court should take note of.

44. It is therefore, the considered view of this court that the award of Kshs.1,500,000/= general damages for pain and suffering and loss of amenities that the Learned Trial Magistrate awarded the Respondent herein was fair and reasonable in the circumstances of the case.

Disposition

45. For the reasons foregoing, the upshot of this court's judgment is that the Appellant's Appeal dated 4th April, 2016 and filed on 6th April,

2016 is devoid of merit and the same is hereby dismissed with costs to the Respondent herein.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 28th day of May, 2020.

D. O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes