REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL NO. 5 OF 2019

WINFRED NDUNGE MUSYOKA.....APPELLANT

VERSUS

MARTIN MUGO GATITI.....1ST RESPONDENT

CAROLINE MBOGO.....2ND RESPONDENT

(*Being an appeal against the judgement delivered by Hon E.W. Wambugu SRM*

*on 20.12.2018 in Kithimani PMCC No. 191 of 2017***)**

BETWEEN

WINFRED NDUNGE MUSYOKA.....PLAINTIFF

VERSUS

MARTIN MUGO GATITI.....1ST DEFENDANT

CAROLINE MBOGO.....2ND DEFENDANT

JUDGEMENT

1. Vide a plaint filed in the trial court on 17.8.2017**,** by the appellant, the appellant on 4.3.2017 was a passenger in a motor vehicle registration number KBN 324Q being driven along Mwala road and was controlled by the 1st respondent and owned by the 2nd respondent, when the was driven while the door was open and that the appellant fell off and sustained injuries as particularized in paragraph 7 of the plaint. The appellant pleaded negligence as particularized in Paragraph 6 of the Plaint and sought general damages and interest and costs of the suit. The appellant pleaded res ipsa loquitor and vicarious liability.

2. In their joint defence, the respondents denied the accident; denied ownership of the suit vehicle and denied negligence and further denied that the appellant was a passenger. They denied the injuries and loss and pleaded that the accident was caused by the negligence of the appellant and prayed that the suit be dismissed with costs.

3. After hearing the matter, judgment was delivered on 20.12.2018 in favour of the Respondents against the Appellant, wherein the trial magistrate found that liability had not been proven hence dismissed the suit for want of proof. The Appellant was dissatisfied with the decision and filed the instant appeal wherein counsel took issue with the dismissal of the case against the respondents; the denial of the appellant's claim; the failure to consider the appellant's submissions; the failure to consider the evidence of the appellant and the award of inordinately low damages. Counsel prayed that the judgement of the lower court be set aside and that the respondents be found 100% liable; that a commensurate award of damages be made and that the appellant be awarded costs.

4. The appeal was canvassed vide written submissions that both parties filed and exchanged. Learned counsel for the appellant submitted that the trial magistrate went into error when he dismissed the whole case against the respondents. According to counsel, there was no contradiction between the appellant's pleadings and the evidence. Counsel submitted that it was undisputed that the appellant was a

passenger aboard the suit vehicle and witnessed the accident and that the driver of the suit vehicle was blamed for the accident.

5. It was counsel's argument that the proof of the accident meant the doctrine of *res ipsa loquitur ought to have been relied upon to infer negligence.*

6. On the issue of general damages, it was counsel's argument that an award of **Kshs. 3,000,000/=** in general damages be awarded to compensate the Appellant for pain, suffering and the proposed amount of Kshs 1,400,000/- by the trial magistrate was inordinately low.

7. Learned counsel for the respondents vide submissions filed on 30.1.2020 agreed with the finding of the trial court**.** Counsel submitted that whereas the appellant testified that she was pushed out of the vehicle, this was not indicated in the plaint. Reliance was placed on the case of **CMC Aviation Ltd v Cruis Air Ltd (1) 1975 KLR 103.** On the issue of quantum, counsel submitted that an award of Kshs 250,000/- would be sufficient.

8. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that reach and to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**.

9. The evidence in the trial court was thus; **Pw1 was Cpl Grace Muita** who testified that according to the records at the police station, the conductor of the suit vehicle pushed the appellant out of the vehicle after passing her from the stage she was to alight. On cross examination, she testified that the abstract did not blame anyone for the accident.

10. **Pw2** was the **appellant** who testified that the conductor of the suit vehicle opened the door before she could alight and he pushed her ought hence she sustained fractures on her left and right leg and pelvic cuts on her ankle and knee. She was walking with the aid of a walking stick. On cross examination, she testified that she did not try to alight as the vehicle was moving but that the conductor opened the door and pushed her out as the vehicle was in motion. She told the court that she had her safety belt on and the vehicle hit her twice.

11. **Pw3** was **Dr. Muli Simeon Kioko** who examined the appellant and noted that as a result of the accident she sustained injuries on the pelvis and left lower limb. He reported that the x-ray conducted on the appellant revealed that she had a fracture over her left pelvic bone and right pelvic bone. After the appellant closed her case the respondents' were to conduct their defence. The respondents however closed their case without calling any witnesses.

12. Having considered the pleadings and the evidence on record, the following issues are to be determined.

a) Whether the court can infer negligence on the part of the respondents.

b) Whether the respondents are liable for damage and loss the appellant claims to have suffered.

c) Whether the court may interfere with the finding of quantum by the trial court.

13. The answer to any of the above issues will depend and depends on the amount of evidence adduced by a party having the legal burden to do so. See s**ections 107**, **108** and **109** of the **Evidence Act, Chapter 80 of the Laws of Kenya** that place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. The learned author ***WVH Rodgers,*** **Winfield and Jolowicz on tort 17th Edition Sweet and Maxwell, 2006 at 132** as well as case law stated that the elements of negligence remain this:

(A) there is a duty of care owed by a defendant -

(i) the defendant would foresee the reasonable possibility of his conduct injuring another and causing him loss**;** **Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd or Wagon Mound (No. 1) (1961) 1 All ER 404** and

(ii) the defendant would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

In assessing whether the defendant took reasonable steps, the court will consider:

(a) The degree or extent of the risk created by the actor's conduct;

(b) The gravity of the possible consequences of the risk of harm materializes;

(c) The utility of the actor's conduct; and

(d) The burden of eliminating the risk of harm. See **Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The "Wagon Mound" (No 2)) [1967] 1 AC 617**

(B) the defendant breached the duty.

(C) there was damage or injury.

(D) the injury was caused by the breach.

14. It is undisputed that the respondents owed a duty of care to the passengers of the suit vehicle. The evidence on record also points to the fact that the respondents' driver moved the vehicle whilst the appellant was yet to alight or and was pushed off the vehicle whilst it was moving. From the evidence on record, the evidence of Pw1 is independent and had no inclination of bias, but the appellant would be more inclined to give evidence that speak in her favour. The respondents opted not to give evidence of their version of the accident to rebut or controvert the evidence that was set up against them and as such on a balance of probabilities, the appellant's version is probably true. From the evidence I find that it had been proved that there was breach of duty of care owed by the respondents and in resolving the 1st issue, the court can infer negligence on the part of the respondents. The conduct of pushing the appellant out of a moving vehicle borders on recklessness. In any case it was expected of the 1st respondent as driver to ensure that the vehicle was static at the time the appellant alighted. The fact that the appellant suffered injuries is clear proof that the vehicle was in motion at the time she was disembarking and this lends credence to her claim that she had been pushed out of the moving vehicle. It is not uncommon on the roads for matatu conductors to mishandle passengers. It was thus incumbent upon the respondents to rebut the version of the appellant but they did not and hence the court must believe the version of the appellant. It was the duty of the 1st respondent as servant of the 2nd respondent to ensure that passengers reached their destinations safely.

15. The respondent has agreed with the trial court which found that the pleadings were at variance with the evidence, hence negligence was not proven. I disagree with the same. **In Pushpa d/o Raojibhai M Patel v The Fleet Transport Company Ltd (1960) E.A. 1025** it was observed that

> *"It is a statutory and necessary rule that a party is bound by his pleadings, but if particulars are given in undue details and what is passed varies from then in ……which are immaterial. It remains the duty of the court to see that justice is done and leave to award will be given at any stage; if on the other hand, the particulars given have misled the defendant or led him to shape his case in a certain way that would be a different matter*.

16. It would be unjust to allow the respondents go scot free on the erroneous belief that the case against them was not proven merely because the pleadings did not indicate that the appellant was pushed off a moving vehicle. In this regard, I find that whether or not the appellant was pushed from the vehicle is too immaterial compared to the reckless act of the respondents' agent putting the appellant in harm's way on the path of a moving vehicle and this was pleaded in item 6d of the plaint where negligence was particularized to the effect that the life of the passengers were endangered. The respondents' driver clearly could have averted the risk that was occasioned as a result of his actions but opted to turn a blind eye. As the appellant was a passenger she had no control in the manner in which the vehicle was managed. She was to be allowed to alight without any hitch. As the 1st respondent drove the vehicle while the appellant had not alighted fully and being pushed by the conductor, then I find the respondents wholly liable in damages to the appellant and I attribute their liability at 100%. The circumstances did not reveal any contributory negligence on the part of the appellant as she was injured while in the course of alighting from the respondent's' vehicle. PW1 was not an eye witness as she only received the report of the accident afterwards and that her opinion that she could not know whom to blame did not exempt the respondents from blame in any way since the appellant sustained injuries whilst in their hands. The findings by the learned magistrate was therefore arrived at in error and must be interfered with.

17. Having established the issue of liability, the remaining issue is on the quantum of damages. The medical report and the evidence of Pw3, that is unrebutted speaks about the fact that the appellant sustained injuries as a result of the accident hence the loss was occasioned by the actions of the respondents. *In the case of* ***Board of Governors Kangubiri Girls High School v Jane Wanjiku Muriithi & another [2014] eKLR*** it was held that when a car is proved to have caused damage by negligence, a presumption arises that the owner is responsible for the driver's liability. I therefore have no hesitation in finding that the 2nd respondent is responsible for the driver's failure to exercise care on the road on the material date leading to the appellant sustaining injuries.

18. On the aspect of quantum, in the case of **Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** the court listed some principles to guide the court in awarding general damages, *viz*;

> *a. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.*
>
> *b. The award should be commensurate to the injuries suffered.*
>
> *c. Awards in decided cases are mere guides and each case should be treated on its facts and merit.*
>
> *d. Where awards in decided cases are to be taken into consideration then the issue of an element of inflation has to be taken into consideration.*
>
> *e. Awards should not be inordinately high or too low.*

19. The Appellant avers that the Learned Magistrate's award was ***extremely low***. She asked the court to review the evidence and facts on record and increase the award. On the other hand, the respondent sought that the amount be reduced as it was excessive.

20. The Court of Appeal in **Henry Hidaya Ilanga v Manyema Manyoka (1961) EA 705, 709, 713** listed the grounds that warranted interference with the award of damages by the trial court and the grounds were; Firstly, if the trial court in assessing the damages, took into consideration an irrelevant factor, failed to take into account a material factor or otherwise applied a wrong principle of law. Secondly, it may intervene where the amount awarded by the trial court is so inordinately low or inordinately high that it is a wholly erroneous estimate of the damage sustained.

21. From the record, the court after considering the injuries suffered by the appellant relied on the case of **Gilbert Nicholas Otieno v Crop**

Development CO Ltd & Anor (2009) eKLR and proceeded to propose the award of Kshs 1,400,000/-.

22. In **George Njenga and Another v Daniel Wachira Mwangi [2017] eKLR** the court affirmed Kshs. 800,000/- as general damages awarded to the plaintiff who sustained a pelvic fracture, unstable left knee and ankle joint, soft tissue injuries to the trunk and posterior chest and laceration on the anterior aspect of the left leg.

23. In **Penina Waithira Kaburu v LP [2019] eKLR** the court affirmed Kshs. 2,000,000/- as general damages where the victim suffered severe pelvic injury with fracture of pubic ischial ricin, trauma of the bladder and urethra, rapture of the urethra, loss of sexual function and permanent incapacity.

24. In the instant case, I agree with the finding of the trial court and maintain the award of **Kshs 1,400,000/-** as general damages since the same appears to be reasonable in the circumstances to cater for pain, suffering and loss of amenities.

25. On the aspect of special damages, **Kshs 7,025/-** was awarded. However, the legible receipts give a total of **Kshs 6,030/-;** the other receipt is blank and nothing can be made of the writings thereto and as such I award **Kshs 6,030/-** as special damages.

26. The upshot is that the appeal succeeds. The judgement of the trial court is hereby set aside and in its place judgement be and is hereby entered for the appellant as against the respondents as follows:

a) Liability against the appellants…….....100%

b) General damages for pain and suffering…Kshs 1,400,000/

c) Special damages…… Kshs 6,030/

d) Costs of the suit and interest.

27. The appellant is awarded the costs of the appeal.

Orders accordingly.

Dated and delivered at Machakos this 29th day of May, 2020.

D. K. Kemei

Judge