



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 46 OF 2018

MARIQUETA NKOYAI M'THIRINGI (Suing as the personal representative of the late)

GEOFFREY MUTUMA THIRINGI..... APPELLANT

VERSUS

SHADRACK MWENDWA1ST RESPONDENT

BENJAMIN IBUA2ND RESPONDENT

(Being an appeal from the judgment of the Hon. S. Abuya SPM delivered on 30th April, 2018 in Meru CMCC No. 222 of 2012)

J U D G M E N T

1. By a plaint dated 16/7/2012, **GEOFFREY MUTUMA THIRINGI** (“deceased”) sued the respondents in the trial Court for general and special damages. He claimed that he had sustained injuries in an alleged road traffic accident that occurred along Keeja – Mitunguu earth road on 5/12/2011. He died while the suit was pending and the appellant took over the suit on behalf of his estate.
2. In the plaint, it was alleged that the deceased was lawfully walking along Keeja – Mitunguu road at about 4:00pm when the 1st respondent so negligently drove, managed and or controlled the 2nd respondent’s motor vehicle registration number KAV 959V Isuzu lorry (“the said vehicle”) that he caused the same to veer off its course and knock down the deceased. The deceased suffered injuries for which he claimed damages.
3. The respondents defended the suit vide their joint statement of defence dated 22/10/2012. They denied the appellant’s claim and blamed the deceased for the accident. They too set out what they alleged to be the particulars of negligence on the part of the deceased and pleaded contributory negligence.
4. By a judgment made on 30/4/2018, the trial Court found for the appellant and apportioned liability at 50:50 and awarded damages of Kshs.557,301/=. Aggrieved by that decision, the appellant has appealed to this Court setting out two grounds which are that; *the trial Court erred in apportioning liability at 50:50 and that the damages awarded are inordinately low.*
5. This being a first appeal, this Court is enjoined to re-appraise and re-evaluate the evidence afresh with a view of making its own independent findings and conclusions but, bearing in mind that it did not have the opportunity of seeing the witnesses testify. See **Selle v. Associated Motor Boat Company Ltd [1968] EA 123** and **Peter v. Sunday Post Limited [1958] 424.**
6. As at the time of the trial, the deceased had already passed on. The appellant testified as **Pw1**. She told the court that she was at home on the material date when she received a call at night that the deceased had been hit by the said vehicle. He had been rushed to Chogoria Mission Hospital where he was unconscious for 5 days. He remained in hospital for 23 days. She produced documents to support the claim for special damages totaling Kshs.59,500/-.
7. **Dr. Charles Njeru (Pw2)** told the court that the deceased sustained a pelvic fracture, bruises on the pelvic region, dislocation of left hand on the 2nd and 3rd metacarpal calpal joints, deep cut wound on the palmar aspect, with several tendons and muscles, sprained left foot and ankle joint and a cut wound on the plantar aspect left foot.
8. **Corporal Gladys Kamuren (Pw3)** was a traffic officer from the Meru Central Police Station. She told the court that on the material day, the deceased was a passenger in the said vehicle which was being driven by the 1st respondent. The deceased jumped from the said vehicle while it was in motion. He was at the rear of the said vehicle when he jumped out of the said vehicle.
9. On his part, the 1st respondent told the court that on the material day, he was leaving Keju after loading hardcore in the said vehicle. He

was with his conductor. After driving for about 200 metres, he heard noises from the quarry workers. He stopped the said vehicle and went behind it. He found the deceased lying on the ground with injuries. He established from the bystanders that the deceased had fallen from the said vehicle. He took the deceased to hospital and reported the incident to the police.

10. It is on the foregoing evidence that the trial Court found that the appellant had proved her case on a balance of probability and apportioned liability at 50:50.

11. The first ground was that the trial Court erred in apportioning liability at 50:50. It was submitted on behalf of the appellant that the trial Court had found that the appellant had proved her case to the required standard. That in **P. W. v. Peter Murithi Ngari [2017] Eklr**, the court increased the apportionment of liability from 50:50 to 75:25 where a pedestrian was knocked by a vehicle. It was urged that this Court do likewise and increase the apportionment to 75:25.

12. It was submitted for the respondents that the trial Court was right in having apportioned liability between the deceased and the respondents. The case of **Haji v. Marair Freight Agencies Ltd [1984] Eklr**, was cited in support of the proposition that, where there is proof that both parties are to blame but there is no means of distribution between them, the blame should be distributed equally between them.

13. The Court has reviewed the testimony of the witnesses. None of the witnesses for the appellant explained how the accident occurred. **Pw1** gave hearsay evidence that she was told that the deceased was knocked by the said vehicle. In the plaint, it had been alleged that the deceased was a pedestrian lawfully walking along the road when the said vehicle veered off the road and knocked him. It was not explained on which side of the road the deceased was. It was also not clear whether the said vehicle was oncoming or it hit him from behind.

14. On the contrary, the 1st respondent was categorical that the deceased fell from the said vehicle. He had not allowed him to board the same. That he was only alerted by bystanders that someone had fallen from the said vehicle. **Pw3** who testified for the appellant told the Court that the deceased was a passenger in the subject vehicle. Indeed the Police Abstract itself showed that the deceased was a passenger and not a pedestrian.

15. In view of the foregoing, and reviewing the pleadings and the evidence, this Court is in doubt if the appellant proved any of her particulars of negligence pleaded. To the contrary, the respondents were able to prove that the deceased was negligent in *'hanging perilously on a moving motor vehicle when he knew it was dangerous to do so'*.

16. In view of the foregoing, I find that the appellant must have been lucky to have the judgment in her favour. The apportionment of liability at 50:50 was generous to say the least. That ground fails.

17. The second ground was that the trial Court erred in failing to appreciate the issues of law under consideration in the Court of Appeal decisions of **Sabina Nyakenya Mwanga v. Patrick Kigoro & Another [2015] Eklr** and **Millicent Atieno Ochuonyo v. Katola Richard [2015] Eklr**.

18. It was submitted for the appellant that the award of the trial Court was inordinately low considering the injuries that the deceased sustained. The appellant relied on the said two cases and the case of **Peace Kemuma Nyangera v. Michael Thuo & Another [2014] Eklr**, and submitted for an award of Kshs.3,000,000/-.

19. On the other hand, it was submitted for the respondents that it had not been demonstrated that the trial Court had wrongly exercised its discretion in assessing the damages. That since the trial Court gave its reasons for the decision it had arrived, its decision should not be faulted.

20. This Court's jurisdiction on appeals against quantum is well settled. In **Butt v Khan [1978] eKLR**, the Court held:-

"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".

21. It was the appellant's submission that the assessment of damages by the trial Court was inordinately low given the nature of injuries and in light of the decisions in **Sabina Nyakenya Mwanga v Patrick Kigoro & Ano (2015) eKLR** and **Millicent Atieno Ochongo v Katola Richard (2015) eKLR**.

22. The Court has considered the said decisions of **Sabina Nyakenya Mwanga** (supra) and **Millicent Atieno Ochongo** (supra). In the first case, the court awarded Kshs.3,000,000/-. However, the injuries were serious as opposed to the present case. In that case, the claimant suffered amongst other injuries, multiple fractures of the pelvis, right upper arm, distal femur right thigh bone, right patella knee and distal radial wrist.

23. In the **Millicent Atieno Ochongo** case, the claimant sustained pelvic injuries with fracture of the right pubic ramus and diastasis of the symphysis pubic. There were other injuries and the permanent incapacity was assessed at 20%. Likewise, the injuries in the **Peace Kemuma Nyangera v. Michael Thuo & Another** case were serious as compared to those of the deceased.

24. In the present case, the deceased sustained a pelvic fracture, bruises on the pelvic region, dislocation on the 2nd and 3rd metacarpal joints, deep cut wound on the palmar aspect with severed tendons, sprained left foot and ankle joint and a cut wound on the plantar aspect.

25. In **Francis Kagunda Mwangi v. Samuel Ngugi & 2 Others [2017] Eklr**, the respondents sustained the fracture of the left femur, fracture of the 3rd, 4th, 5th, 6th and 7th ribs, lacerations on the left chest wall, fractures of the right metacarpals and bruises on the right hand. The degree of incapacity was assessed at 25%. He was awarded Kshs.500,000/-.

26. In **George Okewe Osawa v. Sukari Industries Limited [2015] Eklr**, the appellant sustained a fracture of the pelvis. Majanja J set aside an award of Kshs.80,000/- and substituted therefor an award of Kshs.400,000/-. In **Hassan Farid & Another v. Sataiya Ene Mepukori & 6 Others [2018] Eklr**, an award of Kshs.450,000/- was made for deep facial cut wound, blunt injury to the back, fracture of the metacarpal bone of the right thumb, comminuted fracture of the right humerus and blunt injury to both thighs.

27. Finally, in **George Njenga & Another v. Daniel Wachira Mwangi [2017] Eklr**, the High Court maintained an award of Kshs.800,000/- for a plaintiff who sustained a pelvic fracture, unstable left knee joint, unstable left ankle joint, soft tissue injuries to the trunk and posterior chest and laceration on the anterolateral aspect of the left leg.

28. In view of the foregoing, I find that the trial Court cannot be faulted for assessing damages at Kshs.500,000/- in light of the injuries which the deceased sustained.

29. Accordingly, I find the appeal to be without merit and dismiss the same with costs.

DATED and DELIVERED at Meru this 25th day of June, 2020.

A. MABEYA

JUDGE