**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL APPEAL NO. 45 OF 2018**

**ELIJAH KINYUA MWANGI.....APPELLANT**

**-VERSUS-**

**HAGGAI IKELO WANANGASA.....1ST RESPONDENT**

**KUNAL HARDWARE & STEEL LIMITED.....2ND RESPONDENT**

***(Appeal from the judgment and decree (M. Kasera, PM) dated 31st October 2018 at the Chief Magistrate's court, Kajiado)***

**JUDGMENT**

1. This is an appeal from the judgment and decree of **Hon. M. Kasera**, Principal Magistrate, delivered on 31st October 2018. In that judgment, the learned magistrate dismissed the appellant's suit for damages arising from a road traffic accident that occurred on 29th June 2017 within the compound of Twyford Ceramics (Kenya) Company Limited within Kajiado County.

2. The appellant was aggrieved with that judgment and lodged a memorandum of appeal dated 29th November 2018 and filed on 30th November 2018, raising the following grounds of appeal, namely:

> ***(1.) That the learned trial magistrate erred in law and fact in finding that the plaintiff was to blame for the accident without any evidence.***
>
> ***(2.) That the learned trial magistrate erred in law and fact in failing to analyze and consider the evidence presented by the plaintiff.***
>
> ***(3.) That the learned magistrate erred in law and fact in failing to appreciate that all the plaintiff was required to do was to prove his case on a balance of probabilities.***
>
> ***(4.) That the learned trial magistrate erred in law and fact in finding that the plaintiff was involved in a scuffle with other employees when the matter had not been pleaded.***
>
> ***(5.) That the leaned trial magistrate erred in law in relying on hearsay evidence.***
>
> ***(6.) That the learned trial magistrate erred in failing to assess the quantum of damages that she would have awarded the appellant had he been successful***
>
> ***(7.) That the judgment of the trial magistrate is contrary to Order 21 rule 4 of the Civil Procedure Rules, 2010.***

3. This appeal was disposed of by way of written submissions. On 24th June 2020 during the hearing conducted virtually due to the prevailing situation, both Mr. Kaberia for the appellant and Mr. Maanzo for the respondent, agreed that the appeal be disposed of by way of their written submissions already filed.

4. The appellant argued grounds 1, 2, 3, 4 and 5 together while grounds 6 and 7 were argued separately. Regarding grounds 1, 2, 3, 4 and 5, the appellant attributed negligence to the 1st respondent for driving the motor vehicle at an excessive speed; driving without due care and attention, failing to have regard for the safety of employees of Twyford Ceramics Ltd and the people reasonably expected to be within that compound and failing to control the motor vehicle in a way that would have prevented the accident among other defaults.

5. The appellant faulted the trial court for finding that he was the author of his own misfortune when in fact the accident was due to the 1st

respondent's negligence; that the trial court was wrong for finding that he was playing with his colleagues when he was hit by the vehicle, a fact that had not been pleaded.

6. The appellant relied on Order 2 rule 4(1) (b) of the Civil Procedure Rules for the submission that matters which if not pleaded may take the other side by surprise should be pleaded. He therefore argued that the issue of him playing with colleagues, and being thrown towards the vehicle's path was not pleaded and that parties must be bound by their pleadings. He relied on ***Dakianga Distributors (K) Limited V Kenya Seed Company Limited*** [2015] eKLR on that point.

7. The appellant also argued that even if the issue of him playing with his colleagues had been pleaded, it was not proved. He submitted that the 1st respondent did not see him playing with colleagues but only said he heard someone say the vehicle had run over someone. This, he argued, was hearsay evidence and relied on ***Kinyati V Republic*** [1984] eKLR.

8. He also submitted that the 1st respondent's evidence on how the accident occurred fell within the realm of hearsay and argued that the trial court was required to decide the case on the balance of probability. He relied on ***Kanyungu Njogu v Daniel Kimani Maingi*** [2000] eKLR for the submission that there must be evidence to enable the court say that one version of evidence by one party is more probable that the other.

9. According to the appellant, he testified that he was on the pavement when the 1st respondent made a U-turn as a result the vehicle went to the pavement and the front tyre ran over him. He submitted the medical report by Dr. Mwende K. Ndibo dated 21st July 2017, showed that he sustained a fracture of the left bilateral malleolus and dislocation of the left ankle, which confirmed that the injuries were concentrated on the left lower limb. This, therefore, supported his case that he was hit by the front tyre of the vehicle.

10. The appellant went on to argued that the 1st respondent should have exercised due care. He relied on ***Equator Distributors v Joel Muriu & 3 Others*** [2018] eKLR*;* ***Mary Njeri Mungai v Peter Macharia & Another*** [2016] eKLR and ***Premier Dairy Limited v Amarjit Singh Sagoo & Another*** [2013] eKLR.

11. Regarding ground 4, the appellant submitted that the trial magistrate did not assess damages it would have awarded had he succeeded in his case. He relied on ***Joseph Wabukho Mbayi v Fridah Lwile Onyango*** [2019] eKLR, for the submission that the trial court not being the final court should assess what it would have awarded had the plaintiff succeeded.

12. On ground 7, the appellant submitted that a judgment in a defended suit should contain a concise statement of the case points for determination, the court's decision and reasons therefor. He relied on Order 21 Rule 4 of the Civil Procedure Rules and faulted the trial court's decision that did not comply with this rule.

13. With regard to quantum, the appellant submitted that he suffered a fracture of left bilateral malleolus, dislocation of the left ankle joint and had tenderness on that ankle, and that, he prayed for Kshs. 700,000/= and relied on ***Akamba Public Board Services v Abdikadir Adan Galgalo*** [2016] eKLR and ***Vincent Mbogholi v Harison tunje Chilyalya*** [2017] eKLR and where an award of Kshs. 800,000/= was reduced on appeal to Kshs. 500,000/= and the other case an award of Kshs. 500,000/= was made.

14. According to the appellant, the respondents had relied on ***Parodi Giorgio v John Kuria Macharia*** [2014] eKLR where an award of Kshs. 350,000/= was reduced on appeal to Kshs. 200,000/=. He urged the court to award him Kshs. 700,000/=.

15. The respondents filed written submissions dated 4th November 2019 and filed on 6th November 2019. The respondents submitted that the appellant's evidence before the trial court was contradictory; that he testified that the vehicle ran over his foot but in cross-examination stated that it hit him from behind.

16. According to the 1st respondent, after the vehicle had been loaded, he closed the door, entered vehicle, started the engine and when the vehicle started moving, he heard loaders calling on him to stop as the vehicle had ran over someone. It was stated that the loaders were playing and pushed the appellant to the vehicle. According to the respondents, since the appellant was playing with colleagues, this was a fact of contributory negligence and it was not necessary to plead the fact that he was playing with his colleague.

17. The respondents submitted that the circumstances under which the incident occurred were clearly stated before the trial court. They relied on ***Nicholas Watuma Mutua v Republic*** [2015] eKLR for the submission that circumstantial evidence is as good as any evidence if it is properly evaluated and can prove a case with the accuracy of mathematics.

18. It was further argued that the 1st respondent was not driving at high speed, which was not in any case, allowed within the premises; that the appellant had a duty to keep a proper outlook and keep his own safety and that a pedestrian owes a duty to other highway users to move with due care. According to the respondents, the police adjudged the appellant to be on the wrong and that he was to blame for the accident.

19. On whether the trial court failed to comply with Order 21 rule 4, it was submitted that the trial court complied with the law, considered evidence and made a determination, even though the judgment was brief. They relied on ***Hafid Maalim Ibrahim v Economic Freedom Party & 3 Others*** [2018] eKLR to support their position.

20. Regarding quantum, the respondents maintained that the appellant is not entitled to damages, not even of Kshs. 700,000/=. It was argued, relying on ***Joseph Mutembei v James Mworia & Another*** [2018] eKLR which cited ***Kigaraari v Aya*** [1982-88] 1 KAR 768, that damages must be within the limits set out by decided case, and also within the limits of the economy, as large awards are invariably passed to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance premiums and increased fees.

21. In the respondents' view, at the time of the hearing of the suit, the appellant had adequately recovered; had not suffered permanent

incapacity and no future complications were anticipated. They therefore submitted that the amount sought is inordinately high compared to the injuries sustained. They relied on an ***Easy Coach Limited v Emily Nyangasi*** [2017] eKLR citing ***Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others*** [1986] eKLR, for the submission that inordinately high awards will lead to monstrously high insurance premiums and other costs which should be avoided for the sake of everyone in the country.

22. According to the respondents, injuries in the decisions relied on by the appellant were more serious than those the appellant sustained. They relied on ***Parodi Giorgio v John Kuria Macharia*** [2014] eKLR where the plaintiff sustained fracture of the navicular bone, left foot, blunt trauma on the right hip and blunt trauma on the left femur with permanent incapacity of 2% and was awarded Kshs. 200,000/=. The respondents submitted that an award of Kshs.200, 000 will be appropriate in the circumstances of this case.

23. I have considered this appeal; submissions made on behalf of the parties and the authorities relied on. I have also perused the record and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to re-evaluate the evidence, reconsider it afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

24. In ***Gitobu Imanyara & 2 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."***

25. In ***Nkube v Nyamiro*** [1983] KLR 403, the Court of Appeal again held that:

> ***"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."***

26. And in ***Selle and another v Associated Motor Boat Company Limited and others*** [1968] EA 123, the East African Court of Appeal held that:

> ***"An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appear either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."***

27. The appellant testified, relying on his statement filed together with the plaint on 23rd August 2017, that on 29th June 2017 at 3.30pm, he was working at Twyford Ceramics Kenya Company Ltd where they were loading vehicles. The 1st defendant turned and the vehicle ran over his leg. In the statement, the appellant stated that on the material day, he was standing on the walk-way with colleagues within Twyford Ceramics premises. The 1st respondent, driver of motor vehicle KBL 787D Isuzu FH Lorry lost control and the vehicle went off to the walk-way running over his left foot. He was taken to the company clinic for first aid and later to Kajiado Level 5 hospital where an x-ray was taken and a plaster of Paris applied on the leg. He spent Kshs. 1,000/= for treatment; Kshs. 550/= on the copy of records and Kshs. 3,000/= for the medical report.

28. In cross-examination, the appellant told the court that he was away from the vehicle; that they were about 40 loaders and that he was talking to his supervisor when the driver made a U-turn heading to the gate and ran over his left leg with the front tyre. He said that the vehicle was from behind him.

29. The 1st respondent also testified, relying on his witness statement dated 6th October 2017. He testified that on 29th June 2017, he was at Twyford Ceramics Yard to load tiles; that after the vehicle had been loaded he closed the door and entered the vehicle, made a U-turn and as he was leaving, loaders pushed each other 4 meters away from where the vehicle was. He then heard someone say that he had hit a person. He stopped took the man to hospital and an x-ray showed fractured foot. He made a report to the police the following day but the police asked them to agree between themselves.

30. He told the court that no one was ahead of him when the vehicle was turning and when he was told that he had hit someone, he came out of the vehicle and found the loaders on the left side of the vehicle and that the appellant had been ran over by the rear wheel. He took the person to hospital and paid for treatment charges. His employer told him that he would report the matter to the insurance company. His witness statement contained a similar version of events.

31. In cross-examination, the 1st respondent admitted that he made a U-turn and was seeing about 10 loaders; that they had some scuffle and that after the matter was reported, the police blamed the appellant. He reiterated that he was driving the vehicle carefully but the loaders started a scuffle and pushed one of them onto the path of the vehicle.

32. After considering the evidence, the trial court concluded that the appellant did not prove negligence and that he was the author of his own misfortune thus dismissed the suit prompting this appeal.

33. I have considered the evidence and re-evaluated it myself. The appellants' case is that the accident was caused by the 1st respondent's negligence. He pleaded particulars of negligence in the Plaint as already adverted to earlier in this judgment. The 1st respondent on his part

denied causing the accident as claimed by the appellant and blamed the appellant for the accident.

34. The respondents further denied particulars of negligence and, in particular, that the motor vehicle was driven in a negligent manner or that the accident was solely caused by the 1st respondent's negligence. The respondents pleaded that the accident was caused by the appellant's sole negligence or contributory negligence and pleaded particulars of such negligence, that the appellant did not keep a proper look out; failed to take care of his own safety; failing to heed the presence of that particular motor vehicle; failing to stand clear of the parking area and idling on the part of the road meant for vehicles without ascertaining whether it was safe to do so.

35. From the pleadings filed before the trial court, as well as the submissions before both the trial court and this court, the question that arises for determination in this appeal is who was liable for the accident. Put differently. Whether the appellant proved negligence against the 1st respondent on a balance of probability.

36. The appellant's case is that the 1st respondent drove the vehicle in a negligent manner and caused it to run over his left leg injuring him. He stated that he was standing on the pavement when he was run over by the vehicle. The 1st respondent on his part stated that he carefully drove the vehicle, made a U-turn and when he was driving out, someone alerted him that the vehicle had injured the a person. He stopped; stepped out of the vehicle and noted that the appellant had been run over by one of the vehicle's tyres. He contended that the appellant was pushed by colleagues on to the road, a fact the appellant disputed. None of the parties called a witness. The evidence before court on how the accident occurred was, therefore, that of the appellant and the 1st respondent only.

**Liability**

37. In a civil claim, the law requires a plaintiff to prove his or her case on a balance of probability. That is to say; negligence must, as a matter of fact, be proved before one can be held liable for the accident.

38. 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."***

39. Further, in ***Kirugi & another v Kabiya & 3 others*** [1987] KLR 347, it was held that:

> ***"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."***

40. In this case it was the duty of the appellant to prove on a balance of liability that the 1st respondent caused the accident. The appellant contended that the 1st respondent drove the vehicle negligently, a position the trial court did not accept. The respondents on their part argued that the appellant and his colleagues were playing and they pushed the appellant on to the path of the vehicle causing the accident. The trial court accepted this version and dismissed the appellant's claim holding that he was the author of his own misfortune.

41. The trial court was confronted with evidence from the appellant only that the vehicle went off the road onto the pavement and ran over to his left foot. He did not call a witness to support his testimony. On the other hand, the 1st respondent contended that he made a u-turn and that the loaders had a scuffle and pushed the appellant onto the road causing the accident. He also did not call a witness. The 1st respondent seemed to suggest that the accident took place on the road and not on the pavement as the appellant argued.

42. The question that arises is whether either the appellant or respondents proved their respective cases that it was the appellant or the 1st respondent that caused the accident. In other words, who was to blame for the accident?

43. I have perused the evidence on record and considered it myself. The versions of both the appellant and the respondents confirm that an accident occurred and that the vehicle ran over the appellant's leg. The fact that the accident occurred is not therefore not in doubt. What is in dispute is who caused that accident. The appellant blames the 1st respondent while the respondents blame the appellant.

44. The appellant testified that the 1st respondent made a U-turn and the vehicle went off the road on to the pavement and injured him. It was for that reason that he attributed negligence to the 1st respondent. If that be true, the 1st respondent was required to ensure the safety of those on the pavement as the vehicle was not supposed to go off the road. That would be negligence on the 1st respondent's part.

45. The 1st respondent on his part blamed the appellant, stating that he was playing with colleagues who pushed him to the path of the vehicle causing the accident, which the appellant, however, denied. From the 1st respondent's testimony, although he told the court that the appellant was playing with colleagues who pushed him on to the path of the vehicle causing the accident, he nevertheless told the court that it was someone who alerted him that the vehicle had run over the appellant. That, in my view, is evidence that the 1st respondent did not see the appellant being pushed on the road. Had he seen the appellant being pushed, he would have stopped to avoid the vehicle running over him.

46. The appellant was also under duty to be vigilant and avoid the accident. The fact that a moving vehicle could make a U-turn and run over his foot without noticing, is clear evidence that the appellant was not attentive of what was happening within his surroundings. He was aware

that motor vehicles were turning in the area given that he was a loader, and should have been more careful not to expose himself to danger. Failure to do so amounted to contributory negligence.

47. In ***Machindranath Kermath Kersar v D. S Mylarappa & other*s**, Civil Appeal NO 3041 of 2008, **S.B Sinha,J.** writing for the Supreme Court of India stated on the meaning of negligence:

> ***"A suit for damages arises out of a tortious action. For the purpose of such action, although there is no statutory definition of negligence, ordinarily, it would mean omission of duty caused either by omission to do something which a reasonable man guided upon those considerations, ordinarily by reason of conduct of human affairs would do or be obligated to, or by doing something which a reasonable or prudent man would not."*** (see also ***Municipal Corporation of Greater Bombay v Laxman Iyer*** 2003 SCC 731, SCC P. 736 par a 6)

48. That is omission to do something reasonably expected on person, or doing something a reasonable person was not expected to do amounts to negligence. In the present appeal, both the appellant and 1st respondent failed to observe the duty of care as a result of which the accident occurred. Had either off them exercised reasonable care, the accident would have been avoided.

I say so because neither the appellant nor the 1st respondent called witnesses. There was therefore no independent evidence to corroborate either the appellant's testimony or that of the respondent. That being the case, and considering the evidence on record, the conclusion I come to, is that both the appellant and the 1st respondent were equally to blame for the accident. The trial court did not consider the responsibility of parties towards each other given that the area has a lot of both vecular and human traffic.

**Quantum**

49. The next question to address is on quantum. The appellant sustained a fracture of the left bilateral malleolus and dislocation of the left ankle. These injuries were confirmed by the medical report by Dr. Mwende K. Ndibo dated 21st July 2017. The appellant asked the court to award him general damages of Kshs. 700,000 for pain and suffering. The respondent held the view that the appellant was not entitled to any damages. They however submitted that any damages should not exceed Kshs. 200, 000 since the injuries had healed.

50. Although the trial court dismissed the appellant's suit, it did not assess the damages it would have awarded had he succeeded. The trial court should always even when dismissing a case for personal injuries, assess the damages it would have awarded had that plaintiff succeeded. That is important for purposes of considering damages on appeal should the losing party opt to appeal.

51. In ***Joseph Wabukho Mbayi v Frida Lwile Onyango*** [2019] eKLR stated;

> ***"…[T]he law requires that even if the plaintiff/appellant who has sued for damages does not prove liability, the court, not being the final court, must asses what it would have awarded him, had he proved his case on a balance of probabilities."***

52. I have considered the injuries the appellant suffered and the fact that he had no permanent incapacity. The injuries appear to have healed at the time of the hearing the suit with no residual defects. Dr. Mwende K. Ndibo was also clear in his medical report done about one month after the accident, that there was no long term disability was expected. I have also considered the authorities relied on by the parties both at the hearing of the suit before the trial court and in this appeal.

53. In ***Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others*** [1986] eKLR, the court warned that inordinately high awards will lead to monstrously high insurance premiums and other costs which will be passed on to the public and should, as much as possible, be avoided. Further, in ***Kigaraari v Aya*** [1982-88] 1 KAR 768, the court held that damages must be within the limits set out by decided case. Further, in ***Arrow Car Ltd v Bimomo & 2 others*** [2004] 2 KLR, the court stated that comparable injuries should as much as possible be compensated by comparable awards. And in ***Denshire Muteti Wambua v Kenya Power and Lighting Co. Ltd (***CA No.60 of 2004), it was stated that awards have to make sense and have to have regard to the context in which they are made. They have also to strike a cord of fairness. (See also ***Kim Pho Choo v Camden & Islington Area Health Authority*** (1979) 1 All ER 332.)

54. The appellant relied on ***Akamba Public Board Services v Abdikadir Adan Galgalo*** [2016] eKLR where on appeal, an award of Kshs. 800,000/= was reduced on to Kshs. 500,000/=, and ***Vincent Mbogholi v Harison tunje Chilyalya*** [2017] eKLR where an award of Kshs. 500,000/= was made.

55. The respondents on their part, relied on ***Parodi Giorgio v John Kuria Macharia*** [2014] eKLR, where the plaintiff who sustained fracture of the navicular bone, left foot, blunt trauma on the right hip and blunt trauma on the left femur with permanent incapacity of 2% and was awarded Kshs. 200,000/=

56. Considering the injuries the appellant suffered and the authorities relied on, it is clear to this court, that the appellant did not suffer any permanent incapacity. There was also no complaint that the injuries had not healed at the time the suit was heard. The Doctor's report confirmed there was no possibility of permanent disability.

57. That being the case, and given the fact that awards must not be so high but must reflect the injuries suffered, and taking into account the awards in the decisions relied on, I am of the view that an award of Kshs 250,000 would fair and appropriate in the circumstances of this case,

58. The appellant prayed for special damages of Kshs. 4,500/= made up of Kshs. 3000 for the medical report; Kshs. 550/= for copy of records and Kshs. 950/= for medical expenses. He attached a copy of a receipt for Kshs. 3000/= from Dr. Ndibo for the medical report and a

copy of record for motor vehicle KKBL 787D. The other documents for the claim for medical expenses are illegible and therefore not proved. The appellant's claim for special damages succeeds for Kshs. 3000/= for the medical report and Kshs. 550 for copy of records totaling to Kshs. 3,550/=. Both general and special damages are subject to 50% contributory negligence on the part of the appellant.

59. Consequently the appellant's appeal is hereby allowed and the judgment of the trial court set aside. In place therefor, judgment is hereby entered for the appellant against the respondent on liability at 50%. The appellant is hereby awarded general damages of Kshs. 250,000/= and special damages of Kshs. 3550/=. These awards are subject to 50% contributory negligence which brings general damages to Kshs. 125,000 and special damages to Kshs. 1775/=.

60. The appellant is hereby awarded an aggregate sum of Kshs. 126,775/=. The appellant shall also have costs for the suit before the trial court and interest. However, each party shall bear own costs for this appeal.

61. Orders accordingly.

**Dated, Signed and Delivered at Kajiado this 24th day of July 2020**

**E. C. MWITA**

**JUDGE**