REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 260 OF 2018

CONSOLIDATED WITH CIVIL APPEAL 261 OF 2018

MACKENZIE MARITIME (K) LIMITED....................................APPELLANT

VERSUS

JUMA DZOMBO JUMA..1ST RESPONDENT

SAMUEL MUTUA MUTAVA..2ND RESPONDENT

(*Being an appeal against the Judgment of Hon. F. Kyambia delivered on the 30.11.2018 in Mombasa CMCC No. 1901 of 2015 and Mombasa CMCC No. 1837 of 2016)*

J U D G M E N T

1. This Court vide order issued on the 20/5/2020 ordered that Appeal No. 260 of 2018 and No. 261 of 2018 be consolidated and heard together and a determination made in Appeal No. 260 of 2018. However, even though the two Appeals emanate from the same cause of action, and deal with the same fact, in Civil Appeal 261 of 2018, The Appellant herein was sued as a 2nd Defendant vide amended Plaint filed on 10/3/2017, while in Civil Appeal 260 of 2018, the Appellant was enjoined in the trial Court suit as a Third Party. In this Judgment, for the purposes of order, I will refer to the two plaintiffs in the lower Court as the 1st Respondents, while the Defendant will be referred to as the 2nd Respondent.

2. This Appeal arises from the Judgment of **Hon. Francis Kyambia** in ***Mombasa CMCC No. 1901 of 2015*** *and* ***Mombasa CMCC No. 1837 of 2016.*** The 1st Respondents vide Plaint dated 29/9/2015 in **(*CMCC No. 1901 of 2015)*** and Plaint dated 13/9/2016, Amended on 17/1/2017 and further amended on 2/7/2018 in **(*CMCC No. 1837 of 2016)*** successfully sued the 2nd Respondent and the Appellant (the Third Party/2nd Defendant) for injuries they sustained due to carelessness and recklessness of the 2nd Respondent.

3. The 2nd Respondent vide Statements of Defence filed on the 10/11/2015 in **(*CMCC No. 1901 of 2015)***, and amended Statement of Defence filed on 12/1/2017, and Amended on 9/3/2017 in **(*CMCC No. 1837 of 2016) denied*** all the allegations of negligence, occurrence of the accident, and the injuries sustained by the 1st Respondents as a result of the alleged accident. The 2nd Respondent attributed contributory negligence on the part of the 1st Respondents and stated that the 1st Respondents/Plaintiffs were not entitled to any award in damages at all. Further, the 2nd Respondent enjoined the Appellant as a Third party to the suit in **(*CMCC No. 1837 of 2016)*** and sought to be fully indemnified by the Appellant since the accident was allegedly caused by the negligence of the Appellant's driver. In response to the Third Party Notice by the 2nd Respondent, the Appellant/third party filed its Statement of Defence on the 3/3/2017 denying the allegations of negligence in **(*CMCC No. 1901 of 2015).***

4. After hearing the parties, the trial Court entered Judgment for the 1st Respondents. It found that the Appellant herein and the 2nd Respondent were liable for the accident and apportioned liability at 70% against the 2nd Respondent and 30% against the Appellant, and awarded **Juma Dzombo Juma** (1st Respondent) a total of Kshs. 800,000/= General damages and special damages Kshs. 2000/=, while **Francis Zebedeo Mogere** (1st Respondent) was awarded a total of Kshs. 4,386,290/= as General damages Kshs. 2,200,000/=; Kshs. 150,000/= Future Medical care; Kshs. 1,080,000/= loss of future earnings; Kshs. 600,000/= Domestic nursing and for special damages he was awarded as pleaded.

5. Dissatisfied with the said Judgment and Decree, the Appellant herein, filed the consolidated Appeal setting out eight grounds of Appeal vide Memorandum of Appeals dated 7/12/2018. The grounds of Appeal precisely are as follows: -

a) **That the Learned Trial Magistrate court erred in law and fact by arriving at a decision that was not based on the evidence on record, descended into the arena of litigation and thus erroneously apportioned liability against the Appellant.**

b) **The Learned Trial Magistrate court erred in law and fact by not determining that the 2nd Respondent was wholly to blame for causing the accident subject matter of the proceedings before it.**

c) **The Learned Trial Magistrate court erred at law and fact by failing to reach a finding that the 1st Respondent had proved any of the particular of negligence and/or breach of duty of care attributed to the Appellant and as set out in the Plaint.**

d) **The Learned Trial Magistrate Court erred at law and fact by finding that the Appellant liable howsoever for the accident subject matter of the proceeding before it and which was in stark contrast to the evidence adduced by the 1st Respondent.**

e) **The Learned Trial Magistrate court erred at law and in fact by disregarding the expert evidence of the police and their investigations, which exonerate the Appellant's driver as culpable for causing the accident subject matter of the proceedings before him.**

f) **The Learned Trial Magistrate court erred at law and in fact by not giving proper weight to the evidence that the 2nd Respondent had been convicted on his own plea of guilty by the Traffic Court after being charged with causing the accident subject matter of the proceedings before him.**

g) **The Learned Trial Magistrate court erred at law and in fact by making an award in damages that was way out of line with other decided cases exhibiting similar injuries and circumstances.**

h) **The Learned Trial Magistrate court erred at law and in fact by making an order for costs against the Appellant.**

6. By consent of the parties, the two appeals were consolidated and argued by way of written submissions**.**

7. In his arguments in support of the Appeal, **Mr. Oloo** Learned Counsel for the Appellant submitted and stressed the fact that the 1st Respondents did not prefer a suit against the Appellant in **(*CMCC No. 1901 of 2015)*** and were very clear in mind that it was the 2nd Respondent who was culpable for causing the accident. As a consequence of that clarity of mind, counsel submitted, the 1st Respondents never proved their case on a balance of probabilities as against the Appellant.

8. The counsel added and submitted that from the evidence of the police officer (PW3), and pursuant to the investigations, and the police abstract, there is no doubt that the 2nd Respondent ought to have been held liable for causing the accident. Further, Counsel submitted that the 2nd Respondent upon being charged in a Traffic Court, he readily pleaded guilty to the traffic offence of careless driving, and was fined a sum of Kshs 30,000/=and that the "guilty plea" in the traffic case was entered voluntarily and without coercion from any quarters.

9. On damages, Counsel submitted that the award of Kshs. 800,000/= as general damages for pain, suffering and loss of amenities was inordinately high and not in line with other similar as decided cases and as **per Dr. Ndegwa's** Medical report dated 24/6/2015, **Juma Dzombo Juma** (the 1st Respondent) sustained a fracture of the right fibula and a 3 cm cut on his right leg, and for which injuries he was treated as an outpatient. **Mr. Oloo** cited the case of **Harun Muyoma Boge vs Daniel Otieno Agulo (2015) eKLR** where the Plaintiff sustained a fracture to his right tibia among other severe injuries and the Court awarded Kshs. 150,000/= as general damages.

10. On the award of a sum of Kshs. 4,386,290/= to **Francis Zebedeo Mogere**(1st Respondent), which was made up of General damages for pain, suffering and loss of amenities, future medical care, loss of future earnings, cost of domestic nursing and special damages, Counsel submitted that the award was inordinately high and not supported by factual evidence on record and the award was not in line with other decided cases.

11. Mr. Oloo further submitted that the trial Court did not give any basis or reason for awarding **Francis Zebedeo Mogere**(1st Respondent) a sum of Kshs. 2,200,000/= as General damages for pain, suffering and loss of amenities. Further, Counsel submitted that as per **Dr. Ndegwa's** medical report dated 20/4/2016, the 1st Respondent had an estimated 58% disability, and sustained the following injuries:

a) Compound comminuted and displaced fracture of the right femur involving the distal shaft, both condyle and extending into the knee joint with leakage of synovial fluid.

b) Comminuted and displaced fracture of the distal left femur.

c) Comminuted fracture of the upper right tibia

d) Dislocation of the right accromio-clavicular joint

e) 14 cm long and deep cut wound on the lower thigh.

***f)* Cut wound above the right eye.**

12. On the item of domestic nursing, Counsel submitted that the doctor who proposed the sum of Kshs 10,000 per month was not an expert in

the human resource field, and that a sum of Kshs. 5000/= was more realistic and ought to have been adopted by the trial magistrate.

13. On special damages, **Mr. Oloo** submitted that the receipts produced by the 1st Respondent were questionable, because they did not possess a revenue stamp as required under the Stamp Duty Act.

14. On liability, **Mr. Mutubia** Learned Counsel for the 1st Respondent **(Juma Dzombo Juma**) submitted the police officer who testified as PW3 confirmed that the investigations showed that it was the Appellant's Motor vehicle that rammed into the 2nd Respondent motor vehicle causing it to veer off the road, and hit the 1st Respondent who was parked at the side of the road. Further, Counsel submitted that it was the 2nd Respondent's testimony that the Appellant's driver pulled on his left forcing him to pull to the extreme left and collide with the 1st Respondents. Therefore, the trial magistrate having heard the evidence of the witness ought not to be faulted on his finding, which was based on the facts before him.

15. On quantum**, Mr. Mutubia** submitted that the award of damages is discretionary and the appellate Court can only interfere with such award where the Appellant demonstrates that the trial Court acted upon a wrong principle of law.

16. For her client, Miss Muyaa, Learned Counsel for the 2nd Respondent submitted that the trial Court misapprehended the law which resulted in an erroneous finding on liability when it held that the 2nd Respondent was more to blame than any other party because he pleaded guilty to a traffic charge.

17. On the issue of assessment of damages, Counsel submitted that the authorities cited by the 1st Respondents were way out of league because the injuries suffered were higher in magnitude compared to the injuries suffered by the Respondent and the trial Court ought to have kept its assessment within the range of award on that 2015 decision making a reasonable adjustment to cater for inflation and passage of time.

Analysis & Determination

18. This being a first appeal, this court is under a duty to re-evaluate, reappraise and reassess the evidence in totality and to make its own conclusions. It must however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123, Peters vs Sunday Post Limited [1985] EA 424** as well as in **Abok James Odera T/A A.J. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**

19. Having read the record in satisfaction of the court's mandate, I do find the following two issues to isolate selves for determination by the court: -

a) Whether liability was proved against the Appellant?

b) Whether there exists a justification to interfere with the assessment of damages by the trial court?

20. I have considered the record of appeal fully and from the onset, I note that the occurrence of the accident, the injuries sustained by the 1st Respondents, and the liability of the 2nd Respondent were not disputed. The Appellant's contention is that the 2nd Respondent failed to prove any or contributory negligence on its part but the Court nevertheless apportioned liability to it at 30%. It is therefore contended that the erred in court finding that the Appellant was liable for negligence that resulted in the accident, which caused the 1st Respondent to sustain injuries and apportioning liability at 30% against the Appellant.

21. That the burden of proof was on the 1st Respondent to prove his case against the 2nd Respondent and the Appellant in civil suit 1837 of 2016 is not in doubt. Further, there was a burden of proof on the 2nd Respondent to prove his case as against the Appellant having enjoined it as Third Party to the suit in Civil Suit 1901 of 2015 in order for the Appellant to indemnify him if at all the Court was to find the 2nd respondent liable in negligence.

22. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR**, the Court observed and reiterated the law as follows:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

23. The same position was similarly affirmed by the court of appeal in ***Nandwa -vs- Kenya Kazi Ltd (1988) eKLR,*** in which the court observed**:**

> **"In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie interference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs favour unless the defendant's evidence provides some answer adequate to displace that interference."**

24. The Appellant takes the position that the 2nd Respondent ought to have been adjudged wholly liable for the said accident since the police preferred charges of careless driving contrary to Section 49 (1) of the Traffic Act against him, he pleaded guilty to the aforesaid offence, he was fined the sum of Kshs. 30,000/= and he has never filed an Appeal against his conviction.

25. Looking at the applicability of a criminal conviction in a civil suit, **Section 47A** of the Evidence Act reads –

> "**A final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence shall after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein whichever is the latest shall be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."**

26. The Court of Appeal in **Robinson -Vs- Oluoch (1971) EA 376** interpreted the provision and stated –

> **"The Respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying, as Mr. Sharma would have us say, that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. That is not what S. 47A states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the Plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."**

27. This Court is bound by the finding in **Robinson -Vs- Oluoch (supra)** that being charged and convicted of careless driving connotes a degree of negligence. However, that is not to say that the person convicted for such an offence is necessarily the only person whose negligence caused an accident, and that it cannot be determined that a third party, like the Appellant here, was also to blame for the said accident. That is the argument by Miss Muyaa for the 2nd Respondent advanced and we find that to be the accurate exposition of the law. Proof of liability however, must be established from the evidence led. That is where the courts mandate to conduct complete review of the evidence must be employed.

28. In this case the two respondents, as plaintiffs at trial, together with the two drivers of the motor vehicles; DW1 and DW2; must remain the eyewitnesses to the accident. The totality of their evidence was that while the 1st respondents had parked their motor cycles off the road, there occurred a collision between the two motor vehicles belonging to the appellant and the 2nd Respondent as a consequence of which the 2nd respondents motor vehicle lost controller veered off the road and knocked the 1st respondents thus occasioning the two the injuries for which damages were sought.

29. Up to that level it can be said safely that an occurrence of a collision between two motor vehicle cannot be the only reason for one of the motor vehicles to lose control veer of the road and hit members of the public parked off the road. The dispute must be seen to be who between the two drivers was to blame or more to blame. That determination must thus take into account the explanation by the two on how the accident occurred. The 2nd respondents account was that it was the appellants motor vehicle that hit his while the appellant contends the opposite. In my analysis of the evidence I do find that the explanation by the 2nd respondent was more improbable on how the accident occurred. More improbable because even if his vehicle had been hit, he was approaching a junction within a built up area. He was expected to be driving at no more than 50kph. That is a speed at which even if a collision was to occur suddenly a prudent and observant driver is expected to control the vehicle into safe halt. It is not the speed at which one would loss control and go landing into a butchery. The evidence by the four witnesses portray the 2nd respondent to have been the sole contributor to the accident. I do determine that it was not the collision between the two vehicles that was the proximate cause of the accident but rather it is the manner of driving that lead to the collision and the loss of control hence injury to the 1st respondent.

30. In the judgment appealed against, the trial court in coming to his decision in the matter made the following observations and deductions: -

> **"I have carefully examined the evidence and liability and it is clear that the accident was caused by acts of driving omission by the two drivers herein. The only issue I need to determine is the degree of blameworthiness. The 2nd defendant's driver told the court in reaching the junction he slowed down to ensure that it is safe to join the main road and then towards Jomvu. That evidence is not rebutted by the 1st defendant. All I can state is that the second defendant's driver ought to have stopped. On the other hand the 1st defendants told the court he hit the 2nd defendant's vehicle veered off the road due to the impact and hit the plaintiff the only probable explanation why the 1st defendant veered of the road is that he was driving at a high speed. In deed the 2nd defendant and the 1st plaintiff all said that the 1st defendant vehicle was being driven at a high speed. This might have informed that police to charge the 1st defendant with careless driving…**
>
> **In the instant case the 1st defendant was charged, pleaded guilty and convicted and fined he so admitted. In this circumstance I hold the 1st defendant more to blame and I apportion liability at 70% against the 1st defendant and 30% against the 2nd defendant"**

31. Being an appellate court, I can only interfere with findings of fact when the same is not in sync with the evidence led, contrary to it or when it perverts the evidence on record. In ***Mwanasokoni vs Kenya Bus Services Ltd [1985] KLR 931*** the Court of Appeal said:-

“Accordingly on when a finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere”.

32. In the excerpt I have quoted above the trial court makes no finding of any omission or commission by the appellant to ground the apportionment of liability. Even my own review of the evidence reveals no omission or commission by the appellant in the causation of the accident. In those circumstances it is and was not open to have the appellant burdened with 30% of the liability. There was nothing before the court to justify a finding of wrong on no evidence hence that finding cannot be left to stand but must be set aside. I do set it aside and in its place I find that the appellant had no fault on causation of the accident and he is accordingly absolved from any liability.

Should the assessment of damages be faulted and

interfered with?

33. The point of contention in the Appeal on quantum is that the quantum of damages awarded in the lower Court, was viewed as inordinately high by Appellant. In determining this issue the court is guided by the principles enunciated by the Court of Appeal in the case of ***Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30*** where it was held that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.” see also Butt v Khan (1981)KLR 349 and Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR.

34. I have reviewed the entire record and I am unable to find the

trial court, in making the awards, to have taken into account any irrelevant matter or failed to take into account any relevant matter so as to make an awards that are manifestly too high as to amount to an erroneous estimate of damages. In deed, the duty to assess damages is known to be a difficult one[1], invokes judicial discretion[2] and it is not enough that had I sat I would have given a lesser sum. In sum, the challenge by the appellant that the awards were high finds no support on the record before me and it is important to note that an award made in the past binds no court thereafter being an estimate and the purpose is compensatory which must be informed by the fact and circumstances of each case. Many years ago, in his usual language, Madam JA, warned litigants that for damages to serve the purpose of compensating the injured, figures must not remain static. In ***Ugenya Bus Service v James Kongo Gachohi**, **Civil Appeal No. 66 of 1981*** **the judge stressed: -**

“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award I do not aim for precision.

I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.

I also know that the days of small and stingy awards are gone. They were decidedly misery in any event, like Kshs 20,000 for the loss of a forearm or Kshs 50,000 for the loss of an eye. Even without the curse of inflation they were niggardly.”

35. The upshot then is that I find no merit on the challenge of the awards. While I allow the appeal on liability, the limb on damages stands dismissed. I thus make the following orders: -

a) **Judgment on liability entered at a ratio of 70%:30% in favour of the 1ST Respondents against the 2nd Respondent and the Appellant is hereby set aside;**

b) **The 2nd Respondent’s liability is apportioned at 100%.**

c) **The awards made in favour of the 1st Respondents are upheld**

d) **The costs of the appeal are to the appellant to be paid by the 2nd respondent.**

Dated, signed and delivered at Mombasa this 25th day of September, 2020

P.J.O. OTIENO

JUDGE

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[1] *Sosphinaf Company Limited v James Gatiku Ndolo* ***[2006]eKLR***

[2] Butt Vs Khan (1982-88) 1 KAR,1