



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCC NO. 16 OF 2017

BOARD OF TRUSTEE MERU DIOCESE KIRIMARA PARISH.....APPELLANT

VERSUS

DORES WANJA BORE.....RESPONDENT

(An Appeal from decision of Hon. Mumassabba (R.M) in Chief Magistrate's Court

Civil Case No. 125 of 2015 delivered on 19th October 2017.)

J U D G M E N T

This appeal arises from the judgment in *C.M.CC No.125 of 2014 in the Chief Magistrate's Court at Chuka* which was delivered on 19th October 2017. In the suit the Plaintiff Doris Wanja Bore who is now the Respondent in this appeal, had sued the Board of Trustees Meru Diocese Kirimara Parish, the appellant claiming general and special damages for injuries sustained in a road traffic accident involving a motorcycle and a motor vehicle registration number KUZ 073 which was owned by the Appellant. It was the plaintiff's case that she was a pillion passenger on a motorcycle along Kibugua- Itugururu road when it was hit by the appellant's motor vehicle KUZ 073. As a result of the collision the respondent sustained bodily injuries. It was the contention by the respondent that the respondent's driver/agent was too negligent and was to blame for the accident.

1. At the trial, the respondent's evidence was not controverted. The trial Magistrate held that the appellant was 100% liable for the accident. The respondent had relied on a medical report by Doctor Njiru filed in court on 2nd July 2020. According to the doctor, the plaintiff had sustained the following injuries:-

- Contusion on the forehead.
- Right ankle joint and left forearm
- Compound fracture of the right patella
- Fracture of the supraconallar
- Tenderness on the knee with slight limp
- She had developed chronic osteoarthritis and would need lifelong analgesics and physiotherapy.

The court awarded the respondent a global sum of Kshs.1,400,000/- for pain and suffering and loss of amenities and Kshs.3,500 special damages, costs and interests.

2. The appellant filed the Memorandum of Appeal dated 17th November 2017 and raises the following grounds:-

1. That the learned magistrate erred in law by finding the Appellant 100% liable in negligence regardless of the evidence tendered against such a finding whilst Kenyan law has not reached the stage of liability without fault.

2. That the learned magistrate erred in law and in fact by failing to appreciate that no negligence was established as against he Appellant and as such no liability could attach.

3. That the learned magistrate misdirected herself by fully relying on the evidence of a discredited eye witness and thus arriving at an erroneous decision.

4. That the learned magistrate erred both in law and in fact for considering irrelevant matters in arriving at the said decision in favour of the Respondent as against the Appellant.

5. That the learned magistrate erred in both law and in fact when she awarded a sum of Kshs.1,400,000/- as damages for injuries suffered which amount is manifestly excessive and high in the circumstances and connotes an erroneous estimate of the damages suffered.

6. That the learned magistrate erred in law and in fact in failing to consider or ever adequately adopt and appreciate the written submissions of the Appellant on record.

7. That the learned magistrate erred both in law and in fact in failing to find that the Respondent's pleadings and evidence tendered thereof were incapable of sustaining any award of damages

It is desired that the appeal be allowed and the costs of the appeal be granted to the appellant.

3. The appeal was disposed of by way of written submissions. The appellant filed submissions dated 28th February 2020. He submits that even when an accident occurs, the plaintiff still has to prove that he was owed a duty of care which was breached in order for negligence to attach. He relies on the case of *Jamal Ramadhan Yusuf & Another -v- Ruth Achieng Onditi & Another (2010)* and submits that the plaintiff did not tender enough evidence to prove fault on the part of the defendants. That statements and allegations that are not supported by evidence should remain as such. That their claim of negligence ought to have failed since there cannot be liability without fault. That the respondent did not adduce sufficient evidence to prove negligence on the part of the defendant's driver.

4. On quantum the contention by the applicant is that the injuries were soft tissue injuries with no permanent disability. That Kshs.800,000/- would have been a sufficient award. He relies on *Joseph Kyalo Maundu-v- Moses Musau Muleka & Another [2019] eKLR* which quoted with the approval the court of Appeal decision in *Bashir Ahmed Butt-v- Uwais Ahmed Khan 1982 -88 KARS* where it was stated-

“ 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.....”

He submits that a reasonable amount ought to have been awarded in relation to the injuries sustained.

They further rely on the case of *Sosphinaf Company Limited -v- James Gatiku Ndolo NRB C.A No. 315/2001* where the Court of Appeal stated that –

“ The assessment of damages for personal injury is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the Judge is guided by such factors as the previous awards and principles developed by the court, ultimately what is reasonable award is an exercise of discretion by the trial Judge and will invariably depend on the peculiar fact of each case.”

They contend that the court must ensure that the awards make sense and result in fair compensation. It is the contention by the appellant that the lower court failed to be guided by legal principles and the Judgment ought to be set aside.

5. The appellant has urged this court to re-evaluate and analyze the evidence tendered before the lower court with a view to arriving at its own independent finding. That this legal principle was stated in *Selle -v- Associated Motor Boat Co. Ltd (1968) E.A.* where the court held that-

“ An appeal to this court from 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 conclusion, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance to this respect in particular this court is not bound necessarily on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistency with the evidence in the case generally.”

6. For the respondent, submissions were filed on 5th August 2020. It is submitted that three witnesses testified, that is the plaintiff, the doctor who produced the medical report and the police officer who produced the P3 form. The respondent submits that the appellant did not call any evidence to controvert her evidence. The appellant further submits that the respondent was a pillion passenger and the appellant never joined a 3rd party. It is the contention by the respondent that there was sufficient evidence as to how the accident occurred, the respondent was a pillion passenger and could not be blamed for the accident.

7. On quantum of damages the respondent submits that the evidence of the doctor was not challenged. They submit that the respondent was admitted in hospital for nine months, she had sustained a fracture of the left humerus bone. At the time she left hospital she was using crutches with an extremely bowed right leg due to mal-union. The doctor concluded that the respondent will require life long use of analgesics and physiotherapy. Due to the malunion the respondent will never again be able to walk unaided. That the court concluded that the respondent was entitled to damages. The respondent urges the court to uphold the decision of the trial magistrate and dismiss the appeal.

8. I have considered the Memorandum of Appeal. The submissions by both parties and the proceedings before the trial court. There are two main issues which arise for determination. These are, liability and whether the quantum of damages was excessive in the circumstances

of this case. In making this determination the main consideration is whether the respondent discharged the burden to prove her case to the required standards. In this case the burden of prove is on a balance of probabilities.

This court has a duty to evaluate the evidence which was tendered before the trial court and come up with its own independent finding in the matter as stated in Selle & Another -v- Associated Motor Boat Company Ltd (Supra). The High Court in Ahmed Muhammed Noor -v- Abdi Aziz Osman [2019] eKLR Justice Mrima, while considering the principle in Selle & Another, had this to say”

“16. As the first appellate Court, it is well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348.”

This finding is valid and I am positively persuaded by the finding. The legal and evidential burden of establishing the facts in support of a party’s case lies with the plaintiff. This is determined by considering the question as to who stands to lose if the burden is not discharged.

”**Section 107 and 108 of the Evidence Act** provides:-

107. Burden of proof

(1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

9. The legal burden of proof in a case lies on the plaintiff or the claimant but the evidential burden may shift depending on the circumstances of the case and the evidence adduced by the plaintiff. The question is whether the plaintiff discharged the burden of proof. The proceedings before the trial magistrate show that the plaintiff/respondent tendered evidence which proved that indeed an accident occurred and the defendant’s motor vehicle was involved. The plaintiff adduced evidence to prove that she indeed sustained grievous injuries as a result of the accident. The court noted that she appeared in court on crutches and could not stand. She adduced evidence that she sustained the injuries in a road traffic accident. The evidence by the plaintiff was not controverted. It is trite that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The evidence cannot be controverted by allegations in the statement of defence if the defendants fails to call a witness to adduce evidence and be cross-examined to test the evidence. It follows that the statement of defence is nothing more than mere allegation. The issue of uncontroverted evidence was addressed by Justice Mwongo in Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) -v-Thomas Ondiki Oduor & Another 2019 eKLR where he stated:-

“22. There are any authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.

23. In the case of Shaneebal Limited v County Government of Machakos [2018] eKLR, Odunga, J, relied on the cases below in reaching his judgment. In Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

24. Similarly, in Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

25. In Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Mulwa J, however in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a

court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

26. In light of all these authorities, I am of the view that the position taken by the trial magistrate in dismissing the suit was not warranted. I would reverse the lower court's determination and substitute with this court's determination, that the plaintiffs proved their case on balance of probabilities, and are entitled to damages.

27. In this regard, no evidence of apportionment of liability being available, 100% liability is attributed to the defendants jointly and severally."

In this case the failure by the defendant to adduce evidence, not only to challenge the evidence but to give their side of the story must impact this appeal negatively. The defendant did not controvert the evidence tendered by the plaintiff. It is only the plaintiff who led evidence on how the accident occurred due to the manner of driving by the defendant's driver and/or agent and the vehicle was defective at the time as it only had one head lamp. The doctor's evidence on the nature of injuries that the Plaintiff sustained was not controverted. The respondent discharged the burden of proof to the required standard- that is, on a balance of probabilities.

10. On quantum, it is trite that comparable injuries should attract comparable damages. In considering whether the damages are too high or too low, it would be good practice to consider the award of damages made by courts for comparable injuries.

The injuries as stated by the doctor, PW2, was soft tissue injuries to the forehead, left hand and right ankle joint as well as fracture to the right patella bone and femur.

*Omondi J in **HASHIM MOHAMED SAID & ANOTHER V LAWRENCE KIBOR TUWEI [2018] ECLR** an award of KShs 200,000/= was given for the single injury of supracondylar fracture of the left femur. This award was reduced from Kshs. 300,000/=.*

Waweru J in **ELIZABETH WAMUYU WANJOHI V JOHN MURIITHI MBANYA & 2 OTHERS [2015] ECLR** awarded the sum of Kshs 1.5million as a global award where the injuries were soft tissue injuries to the spinal region, dislocation of right elbow and fracture of right suprachondylar knee.

Mulwa J in **CONTINENTAL HAULIERS LTD & 2 OTHERS V ISACK KIPKEMEI BITOK [2019] ECLR** opined on almost similar injuries, and made the following references;

"14. Quantum of damages need not be a misery but realistic, reasonable and comparable to similar awards for comparable injuries though no injury can be completely similar to another - Rosaline Violer Akinyi -vs- Celestine Opiyo Wagwau (2017) e KLR.

15. Section 78(2) C.P.A enjoins the Court on appeal to exercise its original jurisdiction in dealing with an Appeal, in this case re-assessment of the damages. In Civil Appeal No.17 of 2017 Mwavita Jonathan –vs- Silvia Onunga (2017) e KLR, the court set aside an award of Kshs.1,000,000/= and substituted it with an award of Kshs.400,000/= for left knee commuted fracture, blunt chest injury, dislocated right knee and sprains to the cervical spine of the neck and lumber sacral spine.

16. In Ibrahim Kalema Lewa –vs- Estee Co. Ltd Nbi HCCA No. 475 of 2012 (2016) e KLR, the High Court upheld on award of Kshs.300,000/= in 2016 where injuries sustained were inter trochariteric fracture or left femur with physical disability assessed at 25%.

In Kenyatta University –vs- Isaac Kamau Nyuthe (Supra) for fracture of right femur, soft tissue injuries to head and bruises of right knee, and with a permanant incapacitation of 20%. The court on appeal reduced an award of Kshs.700,000/= to Kshs.350,000/= in 2014".

In this case, the trial magistrate in this Judgment stated that the plaintiff did not prove her claimed occupation of farming and did not prove any income. This ought to have affected the claim for loss amenities and loss of future earning capacity. The trial magistrate despite finding that the damages were not proved ended up holding that she should be awarded the same as part of the damages. It follows that some of the damages awarded were not deserved as they were not proved. The decision by the trial magistrate was unsubstantiated. The respondent was 66 years. The trial magistrate erred in principle as part of the damages awarded in the global sum was without basis. I therefore find that I have reasons to interfere with the award of damages by the trial magistrate.

In conclusion:

The respondent's evidence that the applicant was solely to blame for the accident was not controverted. It follows that the trial magistrate did not err in apportioning 100% liability on the appellant. On quantum, the award was too high and based on matters which were not proved. The appellant has urged this court to find that an award of Kshs.800,000/- would be reasonable. I find that considering the injuries sustained, I find that an award of Kshs.800,000/- in general damages is reasonable. For the reasons stated, I find that the appeal on liability is without merits is dismissed. The appeal on quantum succeeds. I order that the award of damages by the trial magistrate is set aside. It is replaced with an award of **Kshs.800,000/-** general damages for pain and suffering. I award the respondent half the costs of this appeal.

Dated, signed and delivered at Chuka this 17th day of December 2020.

L.W. GITARI

JUDGE

17/12/2020

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

17/12/2020