



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 9 OF 2020**

**KENYA POWER & LIGHTING COMPANY LTD.....APPELLANT**

**VERSUS**

**ROSE ANYANGO.....1<sup>ST</sup> RESPONDENT**

**HIGHRISE ENTERPRISES.....2<sup>ND</sup> RESPONDENT**

***(Appeal from the judgment, decree and order in Bondo PM's Court Civil Suit***

***No 45 of 2017 delivered by Hon S. Mathenge, Resident Magistrate on 19/2/2020)***

**JUDGEMENT**

**Introduction**

1. The appeal herein is against the judgement, decree and order of the learned Resident Magistrate Hon. S.W. Mathenge delivered on the 19<sup>th</sup> February 2020 at Bondo Principal Magistrate's Court.
2. The 1<sup>st</sup> respondent herein filed suit against the appellant for general damages, special damages, costs and interest, for injuries she alleged to have sustained on 26/4/2016 when travelling aboard motor vehicle registration number KBA 524K which was hit by motor vehicle registration number KBG 079C belonging to the appellant
3. The appellant denied the plaintiff's claim and put the respondent to strict proof and in turn placed blame on the 1<sup>st</sup> respondent and her driver for causing the accident. The appellant sought to enjoin the 2<sup>nd</sup> respondent as a 3<sup>rd</sup> party who failed to enter appearance in the matter.
4. The trial court after considering the pleadings by both parties found the appellant 100% liable for causing the accident and proceeded to award the 1<sup>st</sup> respondent general damages of Kshs. 100,000 as well as costs and interest. The trial court declined to award the 1<sup>st</sup> respondent special damages of Kshs. 1,300 on account that the same were not proven.
5. Being dissatisfied with the trial court's decision, the appellant filed his memorandum of appeal dated 25<sup>th</sup> June 2020 setting out the following 7 grounds of appeal:
  - a) *That the learned trial magistrate erred in holding the appellant 100% liable for the occurrence of the accident.*
  - b) *That the learned trial magistrate erred in law and in fact failing to appreciate the defense of the appellant and thereby arriving at a wrong and erroneous conclusion condemning the appellant 100% liable.*
  - c) *That the learned trial magistrate erred in law and in fact in awarding damages in favour of the plaintiff without any legal and/or evidential justification.*
  - d) *That the learned trial magistrate erred in law and in fact in failing to appreciate the long established principle of stare decisi, bringing law into confusion and thereby deriving an erroneous finding/conclusion.*
  - e) *That the learned trial magistrate erred in law and in fact in failing to appreciate as follows;*
    - i. *That the evidence adduced in support of the plaintiff's case was incongruous with the pleadings.*

ii. That the plaintiff's pleadings and the evidence tendered in support thereof did not show that the appellant was liable.

f) That the learned trial magistrate erred in law and in fact in holding the appellant 100% liable without regard to the defendant's submissions.

g) That the learned trial magistrate erred in law and in fact in entering judgement in favour of the plaintiff against the defendant in spite of the plaintiff's miserable failure to establish his case.

6. The parties agreed to canvass the appeal through written submissions.

### **Appellant's Submissions**

7. It was submitted by the appellant's counsel that the 1<sup>st</sup> respondent failed to prove negligence on the part of the appellant's driver contrary to the court's finding in the case of **Treadsetters Tyres Ltd v John Wekesa Wepukhulu (2010) eKLR** and further that the appellant's driver had not been charged with any traffic offence in relation to the accident as the police officer who testified as PW3 testified that preliminary investigations placed the blame of the accident on the driver of the vehicle boarded by the 1<sup>st</sup> respondent. The appellant further submitted that the 1<sup>st</sup> respondent was to blame for boarding the motor vehicle that was being driven negligently and for failing to put on a seat belt.

8. The appellant further relied on the case of **Hussein Omar Farah v Lento Agencies (2006) eKLR** where it was held that if there was no concrete evidence to determine who was to blame between the two drivers, both should be held equally liable.

9. The appellant further submitted that the trial court erred in failing to acknowledge that the onus of proof was on the person alleging negligence as was held in the case of **East Produce (K) Limited v Christopher Astiado Osiro Civil Appeal No. 43 of 2001.**

10. It was the appellant's submission that the 1<sup>st</sup> respondent's case ought to be dismissed and the appeal allowed with costs to the appellant. Reliance was placed on the case of **Nairobi HCCA No. 438 of 2000 Kenya Bus Services Ltd v David Kanyari Mwangi** where the High Court dismissed the respondent's claim with costs for failure to establish negligence on the part of the appellant. The appellant also relied on the case of **Morrison Mbuthia Maina & Another v Jane Wanjiku Mwangi & Anor (2006) eKLR.**

### **1<sup>st</sup> Respondent's Submissions**

11. The 1<sup>st</sup> respondent's counsel submitted that she proved her case on a balance of probabilities as required and relied on the case of **Kirugi & Anor v Kabiya & 3 Others (1987) KLR 347.**

12. It was further submitted that the liability in negligence in civil cases was not comparable to that in criminal cases in which the standard of proof is that of beyond reasonable doubt and as such even where one is charged with a traffic offence, tried and acquitted of the charges for insufficiency of evidence, they may still be culpable in negligence.

13. It was submitted that though PW2 Inspector Maloba blamed the driver of the matatu boarded by the 1<sup>st</sup> respondent for causing the accident, no police file was presented before court to confirm the same and further as per the police abstract, the investigations were still not concluded and so the Police Inspector had not established the person who was responsible for the accident.

14. It was further submitted that no evidence was adduced by the appellant to counter that which was adduced by the 1<sup>st</sup> respondent as the appellant chose to close their case without tendering any evidence and as such the 1<sup>st</sup> respondent's testimony remained uncontroverted. Reliance on this proposition was placed on the cases of **Sammy Ngugi Mugo v Mombasa Salt Lakes Ltd & Anor (2014) eKLR**, **Eric Juma & 2 Others v Fredrick Gacheru & Anor (2016) eKLR** and **Embu Public Road Services Ltd v Riimi (1968) EA 22B.**

### **Analysis & Determination**

15. It is now established that the role of this court on first appeal is to re-evaluate all the evidence adduced in the lower court and to reach its own conclusions in respect thereof, as espoused in *Sielle v Associated Motor Boat Company* and restated in **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR.**

16. I have considered the pleadings herein as well as the evidence adduced in the trial court and the oral rival submissions by and on behalf of both parties herein. In my humble view, the main issues for determination are:

a) ***Whether the trial magistrate erred in finding the appellant 100% liable for the accident;***

b) ***Whether the general damages awarded to the 1<sup>st</sup> respondent were justified.***

a) ***On Whether the trial magistrate erred in apportioning liability at 100% against the appellant,***

17. The 1<sup>st</sup> respondent testified that she was travelling in motor vehicle KBA 524K on the material date heading to Bondo when a vehicle for the appellant crossed the road and hit their vehicle leading her to sustaining various injuries. It was her testimony that the accident was caused due to the negligence of the appellant's driver. PW2 Inspector Maloba testified that preliminary investigations laid the blame on the

driver of the Nissan Matatu that the 1<sup>st</sup> respondent had boarded.

18. The appellant closed its case without tendering any evidence other than the denials in its defence and submitted that the 1<sup>st</sup> respondent had failed to prove negligence on the part of the appellant's driver. The appellant has similarly argued in this appeal that the 1<sup>st</sup> respondent failed to prove negligence on the part of its driver, and relied on the testimony of Inspector Maloba who stated that the driver of the matatu boarded by the 1<sup>st</sup> respondent, from preliminary findings, was to blame for the material accident. The appellant further submitted that the 1<sup>st</sup> respondent was liable for the accident as she failed to put on a seat belt and further negligently boarded a vehicle that was being driven carelessly.

19. This court observes that other than allegations in the defence and submissions in this appeal, the appellant did not adduce any evidence to the effect that the respondent was not wearing a safety belt or that she negligently boarded the matatu that was involved in the accident. That being the position, the opportunity to defend their case was lost when the appellant failed to file its statements of witnesses and calling witnesses to prove the allegations in the defence.

20. The trial magistrate had only the evidence of the 1<sup>st</sup> respondent to consider in his judgment. The 1<sup>st</sup> Respondent was an eye witness to the accident and there was no contrary evidence. The police abstract issued to her by the police did not attribute any negligence to any of the parties since the matter was still pending under investigations at the time the abstract was issued. It was clear from the 1<sup>st</sup> respondent's evidence that the matatu she was travelling in was hit by the appellant's car that was approaching from the opposite direction and attempting to overtake another vehicle thus straying into the lane of the matatu.

21. In my humble view, the appellant's driver was in a position to avoid the accident in broad daylight. In the absence of any evidence to the contrary, I am of the considered view that the 1<sup>st</sup> respondent proved, on a balance of probabilities that the appellant's driver was to blame for the accident.

22. Accordingly, it is my finding and holding that the learned magistrate reached the correct finding of 100% liability against the appellant as there was no evidence showing how the matatu which the 1<sup>st</sup> respondent had boarded contributed to the occurrence of the accident. Being driven on the road in itself is not a ground to being liable for an accident. Even the police officer MALOBA did not state how that other vehicle could have contributed to the occurrence of the material accident which accident was still being investigated by the police. It is trite law that pleadings and submissions are not evidence. The 1<sup>st</sup> respondent, in my humble view and from the evidence adduced, discharged the burden of proving negligence on the part of the appellant's driver, which evidence was never controverted or at all.

**b) Whether the general damages awarded to the 1st respondent were justified.**

23. In determining whether an appellate court can interfere with a trial court's award on general damages it is noteworthy that the appeal court must be satisfied that either the magistrate or the judge in assessing damages, took into account an irrelevant factor or left out a relevant one or that short of this, the amount awarded was so inordinately low or so inordinately high that it must be a wholly an erroneous estimate. See **Julius Chelule & Another v Nathan Kinyanjui [2013] eKLR**.

24. The 1<sup>st</sup> respondent pleaded details of soft tissue injuries on the head, neck, back, chest, arms, elbow, knee joints and ankle. Dr. LW. Okombo who examined the 1<sup>st</sup> respondent produced a medical report detailing that she sustained the following injuries;

- a) Head injury with loss of consciousness
- b) Injury on the right knee with swelling

25. The 1<sup>st</sup> respondent submitted before the trial court that Kshs. 200,000 would suffice for general damages. The appellant on its part submitted that Kshs. 50,000 would suffice for general damages.

26. I have considered the authorities cited by both parties in support of their cases and of those cited by the 1<sup>st</sup> respondent in the trial court, only that of **Kitale Hauliers Limited v Emmanuel Soita Simiyu (2013) eKLR** is comparable to the instant case whereas those cited by the appellant are of more comparable injuries.

27. In **Channan Agricultural Contractors Ltd v Fred Barasa Mutayo [2013] eKLR** the High Court reviewed downwards an award of Kshs. 250,000/= to Kshs. 150,000/= for "moderate soft tissue injuries that were expected to heal in eight months" time. In **George Kinyanjui T/A Climax Coaches & Anor. v Hussein Mahad Kuyale [2016] eKLR** where the High Court reviewed downwards an award of Kshs. 650,000/= to Kshs. 109,890/= for soft tissue injuries.

28. In **Dickson Ndungu Kiremba v Theresia Atieno & 4 Others [2014] eKLR** the High Court reviewed downwards an award of Kshs. 255,000/= to Kshs. 127,500/= for soft tissue injuries which produced no complications and finally in the case of **Purity Wambui Muriithi v Highlands Mineral Water Company Ltd [2015] eKLR** the Court of Appeal revised downwards an award by the High Court of Kshs. 700,000/= to Kshs. 150,000/= for injuries to the left elbow, pelvic region, lower back and left knee.

29. Given the factors considered by courts in awarding damages, comparable awards and comparable injuries must be taken in to account in revising quantum of damages. In the instant case, and having considered the injuries and damages awarded by the trial court, I find that the award compared well with the cited cases. Accordingly, I find no reason to interfere with the trial court's award of general damages. I uphold the same.

30. In the end, I find this appeal devoid of merit. I dismiss it with costs to the 1<sup>st</sup> Respondent.

31. File closed.

**Orders accordingly**

**Dated, Signed and Delivered at Siaya this 16<sup>th</sup> Day of December, 2020**

**R.E. ABURILI**

**JUDGE**