



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 150 OF 2019

BASH HAULIERS LIMITED.....APPELLANT

VERSUS

ANASTACIA NDINDA KIMONYE.....RESPONDENT

(Being an Appeal from the Judgment and decree of the Chief Magistrate's Court at Machakos

Hon E.H. Keago, SPM in Machakos CMCC No. 776 of 2018 on 6th November, 2019)

BETWEEN

ANASTACIA NDINDA KIMONYE.....PLAINTIFF

=VERSUS=

BASH HAULIERS LIMITED.....RESPONDENT

JUDGEMENT

1. By a plaint dated 17th December, 2018, the Respondent herein sued the Appellant claiming general and special damages, costs and interests arising from an accident which occurred on 6th October, 2017 along Mombasa-Nairobi Road at Kyumbi Junction. According to the Respondent, on that day, he was lawfully walking towards Makutano Kyumbi Market and while standing on the left side at the stage, the driver of motor vehicle reg. No. KCE 801S/ZD 0664 DAF/TRAILER, which was owned by the Appellant drove, controlled and/or managed the said motor vehicle that it hit the Respondent while reversing as a result of which the Respondent sustained injuries. The Respondent pleaded the particulars of negligence, injuries and special damages which were disclosed as Kshs 550,480/-.

2. In her evidence the Respondent relied on her witness statement in which she stated that on 6th October, 2017 at around 1:00 hours while she was standing at a stage on the way to Nairobi on her left side she heard a loud bang and found herself down unconscious upon being hit by a lorry trailer that was reversing. She subsequently regained consciousness at Bishop Kioko Hospital where she had been admitted. Upon inquiry, she was informed by a nurse that she had been involved in an accident and sustained blunt injury to the left head, blunt injury to the chest, fracture of the distal radius, degloving injury to the left foot with 6 x 4 dorsum aspect, crushed foot with toe dislocation, wiring done and multiple friction burns on the left thigh and arm. She was admitted at the hospital from 16th October, 2017 to 1st December, 2017 and after recovery she went to Machakos Police Station where she was issued with a P3 form which was filled at Machakos Level 5 Hospital and was also issued with a police abstract. In her evidence the driver of the said lorry was to blame for the accident.

3. In her oral evidence she explained that she was taken to Machakos level 5 Hospital before she was transferred to Bishop Kioko Hospital where she was admitted from 6/10/17 to 1/12/17. At the said Hospital she was fitted with metal plates on her left hand and her skin was grafted. She exhibited the discharge summary, the P3 form, the medical reports prepared by **Dr Mutunga** and **Dr Wokabi**, the police abstract report, the copy of the records from the registrar of motor vehicles, the demand letter and the receipts for the expenses incurred. According to her the driver of the said vehicle was to blame since he was not careful and she was extremely off the road.

4. In cross-examination she admitted that she had not seen the vehicle before she was hit but insisted that she was off the road. In her

evidence she had seen the parked trailer which knocked her as it was reversing. She stated that as a result of the accident she lost consciousness and had not fully recovered as she was unable to walk long distances and was unable to carry heavy weights.

5. In the statement of defence, the Appellant denied the occurrence of the accident and the particulars of negligence and contended that if the accident occurred it was caused by the negligence of the Respondent particulars whereof were pleaded and reliance was placed on the doctrine of *volenti non fit injuria*. The particulars of injuries and damages were also denied and it was sought that the suit be dismissed with costs.

6. In support of the case, the Appellant called **Christopher Otieno Omwenga**, who testified as DW1. According to him, on 6/10/17, while at Machakos Junction he was driving motor vehicle KCE 801 S ZD 0664 and he was supposed to park on the right. He however found another motor vehicle coming so he reversed to give way. He then heard screams and stopped. When he came out, he found a lady had been knocked. He then went to Kyumbi police station where he reported and the motor vehicle was later taken to the station and inspected. He was however not charged of any traffic accident and no effects were found on the vehicle. It was his evidence that he was authorised to drive and produced his driving licence and certificate of examination of the vehicle. According to him, he was given cash bail of Kshs 10,000.00 and was told to attend court but was never charged.

7. In his evidence the victim was at the rear of the vehicle and though he checked on his side mirror he did not see the immediate rear of the vehicle and had not seen anybody before. He stated that he could not see the rear of the vehicle which was 40 feet and insisted that the victim was on the road at the entry of the parking.

8. In his judgement the Learned Trial Magistrate apportioned at the ratio of 70:30 in favour of the Respondent and awarded of Kshs. 2, 485,326/- in damages.

9. In this appeal it is submitted on behalf of the appellant that the trial magistrate wrongly evaluated evidence and as a result, arrived at a wrong determination on both the issue of quantum and liability. Based on the evidence on record, the Court was urged to take judicial notice of the fact that trailers would not be parking at the Matatu terminus but have their own designated parking bays given their nature and size. The court was also urged to take judicial notice of the nature of the road along Makutano Junction where the accident occurred and where the lorries and trucks normally park is different from the Matatu terminus. Further, the court ought to take further judicial notice of the fact that if you stand directly behind a trailer, then you are in the blind spot of the driver, and it would be humanly impossible for him to see you despite prudent use of the side mirrors and that DW1 testified that the Respondent was standing behind the carrier which was 40 feet hence he could not see her even after diligently checking both side mirrors.

10. It was submitted that the version of PW1 of how the accident took place cannot be relied on as she has stated in her statement that she only heard a loud bang which evidence was corroborated by the fact that the defendant was not found to blame for the accident. It was noted that no evidence was tendered before the court by the plaintiff through calling of witnesses to corroborate her assertions that the defendant's vehicle hit her while on the matatu terminus. Further, the plaintiff failed to call the investigating officer to shed light as to why she claims that the defendant was to blame for the accident.

11. In support of the submissions, the appellant relied on **Julius Muriuki Mutiria vs. Joseph Mogere & 2 Others [2017] eKLR**, **Andrew Kamau Waweru vs. Guchu Muruguri & Another [2002] eKLR**, **Leonard Kamenwa Njenga vs. David Maina Mbugua [2019] eKLR** and **Hussein Omar Farah –vs- Lento Agencies, C.A No. 34/2005 Nairobi** and submitted that a pedestrian has a duty to take care of his own safety while crossing or walking on a road and to have due regard for other road users including motor vehicles and regard of the Highway Code as was held in the case **Julius Omollo Chanda & Another -vs- Samson Nyaga Kinyua** that was quoted in the case of **Leonard Kamenwa Njenga v David Maina Mbugua [2019] eKLR** and the Court of Appeal decision of **Patrick Mutie Kamau & Another – vs – Judy Wambui Ndurumo**, the court held that pedestrians too owe a duty of care to other road users to move with due care and follow the highway code.

12. According to the Appellant, by failing to produce evidence of the same the plaintiff has failed to discharge the burden of proof as required in section 109 of the **Evidence Act** and contended that clearly in this case, the accident was caused by the plaintiff's failure to pay regard to her own safety and to stand along the road when it was not safe to do so. It was submitted that it is left to our imagination how the Respondent stood on the road behind a trailer that was still parking and failed to notice the same when it started to reversing. It was contended that the Trial Magistrate erred in his judgment in holding that the two versions of how the accident occurred did not mean that the plaintiff entered into the driving lane of the defendant. Accordingly, this was improper to apportion more blame in respect of the defendant when no tangible evidence was adduced to support this assertion held by the Trial Magistrate contrary to the holding by the Court of Appeal in the case of **Hussein Omar Farah –vs- Lento Agencies, C.A No. 34/2005 Nairobi**. While the trial magistrate correctly stated that the plaintiff was indeed standing somewhere where her safety was compromised and further that she should have been alert of her surroundings, it was submitted that the trial magistrate erred in holding the appellant 70% to blame. This submission was based on the holding of **Ngaah, J** in **Phyllis Wairimu Macharia vs. Kiru Tea Factory [2016] eKLR** and it was contended that from the circumstances surrounding the accident it was the unchallenged evidence that the Respondent stood dangerously behind the defendant's vehicle and in its blind spot. In any event it would have been impossible for the driver to have anticipated that a person would have been so negligent as to endanger their lives by dangerously standing behind a moving truck and its blind spot. According to the Appellant, from the evidence on record, the appellant was the author of her own misfortune since irrespective of the circumstances under which the accident occurred, it was always going to be risky as well as illegal for her to stand at the blind spot of a truck and relied on the case of **United Millers Limited & Another vs. John Mangoro Njogu [2016] eKLR** whereby they quoted the case of **Judicial Committee in Letang vs. Ottawa Electric Railway Company[2]** and submitted that since the appellant willingly placed herself in the dangerous position of standing behind a moving truck, the doctrine of *volenti non fit injuria* applies as she assumed the risk which a reasonable person would not have undertaken. It was submitted that the Respondent ought to be found 100% liable for assuming the risks and being the author of her own misfortune. Accordingly, the Court was urged to allow this appeal in its entirety with costs to the Appellant.

13. As regards the quantum, the Appellant relied on the case of **Reuben Mongare Keba vs. L P N [2016] eKLR** where **Okwany, J** reduced the lower court award of Kshs.1,200,000/- to Kshs.800,000/- as general damages, the case **Dennis Kaveke vs. Neil Kusumo [2019] eKLR** where **Nyakundi, J** in allowing the appeal reduced the award of general damages made by the trial court Kshs.1,500,000/- to

Kshs.1,000,000/- on general damages; and the case of **Erick Nyarangi Ondora & another v JMO & 3 Others [2019] eKLR** where **Mwongo, J** reduced the award on general damages from Kshs. 1,800,000/- to Kshs. 1,200,000/-. The Appellant's view was that putting in mind these are very recent authorities and therefore the issue of inflation does not arise, **Kshs. 700,000/=** will be adequate compensation and that this Court should be inclined to award the same.

14. On special damages, it was submitted that the special damages pleaded in the plaint were not proved. According to the Appellant, the trial magistrate erred in relying on invoices as proof of specials in making the award of Kshs. 550,000/-.

15. On the part of the Respondent, it was submitted that considering the evidence and testimony on record, the trial Court erred in finding the Appellant 70% liable for the accident.

16. In the cross-appeal it was submitted that the learned trial Magistrate erred in law and fact in awarding the respondent inordinate low damages; that the learned trial Magistrate erred in law and fact in not awarding damages for loss of future earnings and/or loss of earning capacity pleaded and proved by the respondent; that the learned trial Magistrate erred in law and fact in awarding the respondent 30% contribution; and that the learned trial Magistrate erred in law and fact in his award of interest on special damages from the date of Judgement.

17. According to the Respondent, arising from the said severe injuries and the permanent debilitating disabilities the respondent has suffered and will continue to suffer for the rest of her life, the award of Kshs 3,000,000 /= as general damages by the Honorable Magistrate was on the lower side. In fact, it pales in comparison to the awards made in injuries of a similar nature which are in the region of Kshs 4,500,000/=. In support of its submissions, the Respondent relied on **F.G vs. John Mwangi Ndung'u & Anor (2011) eKLR**, and **Alex Wachira Njuguna vs. Gathuthi Jea Factory and Anor (2010) eKLR**.

Determination

18. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

19. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

20. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

21. However, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

22. In this case, it is clear that the issue to be resolved is whether the appellant, based on the evidence presented before the Trial Court proved her case. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

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.

23. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

24. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court of Appeal held that:

“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

25. It follows that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

26. In this case, according to the Respondent, on the material day, she was standing at a stage on the way to Nairobi on her left side when she heard a loud bang and found herself down unconscious upon being hit by a lorry trailer that was reversing. The next thing she knew was that she regained consciousness at Bishop Kioko Hospital where she had been admitted. In her evidence the driver of the said lorry was to blame for the accident. In cross-examination she admitted that she had not seen the vehicle before she was hit but insisted that she was off the road. In her evidence she had seen the parked trailer which knocked her as it was reversing.

27. On the other hand, the Appellant, though DW1 stated that while parking, he met another motor vehicle so he reversed to give way. While doing so, he heard screams and stopped and when he came out, he found a lady had been knocked. In his evidence the victim was at the rear of the vehicle and though he checked on his side mirror he did not see the immediate rear of the vehicle and had not seen anybody before. He stated that he could not see the rear of the vehicle which was 40 feet and insisted that the victim was on the road at the entry of the parking.

28. From the evidence on record, it is clear that DW1 was reversing when the Respondent was hit by the vehicle. It is also clear that the Respondent did not notice the said vehicle reversing before she was hit by the vehicle. While DW1 stated that it was not possible for him to know that the Respondent was behind the vehicle due to the length of the vehicle, in **Zarina Akbarali Shariff and Another vs. Noshir Pirosetha Sethna and Others [1963] EA 239** the East African Court of Appeal opined that:

“A driver is never entitled to assume that people will not do what experience and common sense teach him that they are, in fact, likely to do. It is true that in some circumstances it is not reasonably possible for a driver to do anything to save a pedestrian from consequences of the pedestrian’s own act, just as the pedestrian can sometimes truly say that, although he knows that drivers are sometimes negligent, he could not reasonably have been expected to avoid the particular act of negligence which has caused him injury. It is not correct that drivers are entitled to drive on the assumption that other road users whether drivers or pedestrians, would behave with reasonable care. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all forms, but he is not entitled to put out of consideration the teachings of experience as to the form those follies commonly take... it is his duty to keep a proper look-out of all the vehicles or pedestrians who are using or may come upon the road from any direction and if he fails to do so and as a result an accident happens, then he is negligent even though there has been greater negligence on the other party. It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other party may be.”

29. Similarly, in **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434**, the Supreme Court of Uganda held that

“Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently.”

30. In **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142**, Potter, JA held that:

“There can be no excuse for the driver’s complete failure to see the pedestrian, or for the pedestrian’s complete failure to see the car. There is no reason for a pedestrian’s complete failure to see a motorist and vice versa....The doctrine of last opportunity is obsolete as no distinction can be drawn between negligence after seeing danger and negligence in not seeing it beforehand. The two causes of the accident cannot be severed and so the trial Judge was right to find both were at fault.”

31. In my view a driver of a vehicle cannot assume that there would be no one behind his vehicle while reversing. A prudent driver is expected to seek the assistance of a turnboy to guide him in making sure that the sea behind him is clear before beginning to reverse the vehicle. To make an assumption that no one would be behind the vehicle connotes some level of negligence on his part particularly where the vehicle does not have a reverse signal. In this case the Respondent stated that she was not aware that the vehicle was reversing and DW1 did not state that the vehicle had a reverse signal or alarm. According to DW1 the first time he became aware of the accident was when he heard screams. In Mutua vs. Mwaniki Mombasa HCCC No. 818 of 1988 [1993] KLR 313, Wambilyangah, J held that:

“As to how the accident happened there is the only evidence of the defendant’s driver to the effect that the deceased was lying across the road due to drunkenness when he was run over and was thereby killed by the defendant’s motor vehicle. The defendant’s driver had not yet been licensed to drive a motor vehicle when the accident happened – so that even if the deceased was having a drunken sleep in the middle of the road a prudent driver who is keeping a lookout for obstacles might have noticed that not every obstacle in the driver’s path must be run over and crushed. The fact that the defendant’s driver was unqualified to drive precludes any possibility that he drove competently i.e. with the degree of care and attention which a prudent driver would exercise.”

32. In Mwadime vs. Yamani and Another Civil Appeal No. 11 of 1975 [1975] EA 246, it was held that:

“the presence of a stationary bus on the first respondent’s off-side of the road should have alerted him to the possibility of a pedestrian suddenly emerging onto the roadway from behind the stationary bus at the time he was passing it...It is the duty of every driver to guard against possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other party may be.”

33. In Rosemary Wanjiru Kungu vs. Elijah Macharia Githinji & another [2014] eKLR the Court found that:

“Therefore his evidence on how the accident took place could only be at best hearsay. Without any evidence to the contrary, this Court finds that the accident took place when the driver of the suit motor vehicle was reversing. He ought to have had a proper lookout before reversing and the fact that the accident took place without him noticing the plaintiff can only be explained on the ground of negligence. In Meru Packers Limited vs. Hebert Liatema Omwaka Civil Appeal No. 78 of 2001, it was held that where a moving vehicle crashes against another which is stationary and in a parking bay it is the culprit of the accident. Similarly, where a vehicle crashes a pedestrian in a parking bay, in the absence of an explanation coming from the driver of that vehicle, it is my view that the driver ought to be held liable. It follows that the next issue - whether the plaintiff proved her case to the required standards – must similarly be answered in the affirmative.”

34. In Augustine Muriungi Mukindia vs. Moffat Mwandiki [2019] eKLR the Court opined that:

“Without evidence to the contrary I find that the accident took place when the driver of the suit motor vehicle was reversing and in the process hit the deceased. The appellant having control of his motor vehicle he had the obligation to check that it was all clear before reversing. Certainly, the appellant was liable and the trial magistrate did not error when he apportioned liability at 100%.”

35. Taking cue from the above decisions, the Learned Trial Magistrate cannot be faulted for finding that DW1 was negligent to some extent. As regards the apportionment of liability, in Khambi and Another vs. Mahithi and Another [1968] EA 70, it was held that:

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

36. That seems to have been the position in Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

37. According to Zarina Akbarali Shariff and Another vs. Noshir Pirosha Sethna and Others [1963] EA 239:

“The findings of a trial Judge as to degrees of blame to be attributed to two or more tortfeasors involves an individual choice or discretion and will not be interfered with on appeal save in exceptional circumstances.”

38. Similarly, in Masembe vs. Sugar Corporation and Another [2002] 2 EA 434 it was held that an apportionment of liability made by a trial Court will not be interfered with on appeal save in exceptional cases as where there is some error of principle or the apportionment is manifestly erroneous.

39. The question that arises is whether based on the evidence before the court, the trial court could properly arrive at the decision he did. In

my view considering the fact that DW1 did not take any steps at all to confirm that there was no one behind the vehicle before beginning to reverse shows that he was negligent. Even if the vehicle was one that he could not possibly see what was at the rear, he could have taken adequate steps to ensure that in light of the absence of automatic warning sound, that he sought assistance from another person. He failed to do this and the trial court was perfectly entitled to apportion liability in the manner he did. I have to reason to interfere with the apportionment of liability.

40. As regards the quantum, the general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 at 345.

41. I agree with the position of Court of appeal in Cecilia W. Mwangi & Another –vs- Ruth W. Mwangi [1997] eKLR, as follows:

“It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees...we would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd –vs- Shephard [1964] AC 326 at page 345:

‘But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.’

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in Lim Pho Choo v Camden and Islington Area Heath Authority [1979] 1 ALL ER 332 at page 339 and this approach was also adopted by this court in the case of Tayab v Kinanu [1982-88] 1 KAR 90.

Lord Denning MR said:

‘In considering damages in personal injury claims, it is often said: “the defendants are wrongdoers so make them pay in full. They do not deserve any consideration.” That is a tedious way of putting the case. The accident, like this one may have been due to a pardonable error much as may befall any of us. I stress this so to remove the misapprehension, so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.’

The reason why this passage is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably the injured party but not so as to smart the defendant.”

42. However, the Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

43. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or

other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

44. As regards quantum, according to the medical report of **Dr. Wokabi**, the Respondent herein sustained extensive skin loss on left foot and ankle, friction burns on left knee, multiple fractures and dislocation of the left knee, fracture of left radius and blunt soft tissue injuries to the trunk. The permanent disability was assessed at 18%. The Court awarded Kshs 3,000,000.00 in general damages. I have considered the injuries sustained as well as the authorities relied upon. Although the learned trial magistrate cited the authorities relied upon by the parties he did not make any specific finding as to which of them was or were relevant to the matter. In my view the most relevant authority in so far as the award of damages is concerned are the decisions in **Dennis Kaveke vs. Neil Kusumo [2019] eKLR** where the court reduced the award of general damages made by the trial court Kshs.1,500,000/- to Kshs.1,000,000/- on general damages; and the case of **Erick Nyarangi Ondora & Another vs. JMO & 3 Others [2019] eKLR** where the court reduced the award on general damages from Kshs. 1,800,000/- to Kshs. 1,200,000/-. In both cases which were decided in 2019, the permanent disability was assessed at 18%.

45. Consideration the time lapse between the time when the said decision was handed down as well as the inflation, it is my view that an award of Kshs 1,500,000.00 would be reasonable.

46. Consequently, this appeal in so far as the award of general damages is concerned succeeds and I set aside the award of Kshs 3,000,000.00 and substitute therefor with Kshs 1,500,000.00. This shall be discounted by 30% being the contribution leaving a sum of Kshs 1,050,000.00. I however see no reason to interfere with the award for special damages since what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.**

47. It was therefore held by the Court of Appeal in **Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657** that:

“The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of.”

48. Similarly, in **Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] KLR 716**, the Court of Appeal held as follows;

“Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

49. That was the position in **Woodruff vs. Dupont [1964] EA 404** where it was held by the East African Court of Appeal that:

“The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them... The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself”. The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.”

50. Save for the foregoing the appeal and the cross-appeal otherwise fail.

51. Each party will bear own cost of this appeal and it is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 15th December, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Munyao for Mr Ojienda for the Respondent

Mr Kiwinda for the Appellant

CA Geoffrey