



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 67 OF 2015**

**SABATIA JACKSON ASEMBU.....APPELLANT**

**-VERSUS-**

**PETER NYAMWANGE.....1<sup>ST</sup> RESPONDENT**

**JOSEPH QUEDEYA MWANGALE**

**(suing as legal representative of the estate**

**of the deceased Cornel Ababu).....2<sup>ND</sup> RESPONDENT**

(Being an appeal from the Judgment and Decree of Hon. T. Olando, Resident Magistrate, delivered on 10 June 2015 in Eldoret CMCC No. 488 of 2012)

**JUDGMENT**

[1] This appeal was lodged herein on **29 June 2015** by the Appellant, **Sabatia Jackson Asemбу**, from the Judgment and Decree of the Resident Magistrate, **Hon. T. Olando**, in **Eldoret CMCC No. 488 of 2012: Peter Nyamwange vs. Rev. Evat Vandeni Ham, Nundoroto Farm & Sabatia Jackson Asemбу**. The 1<sup>st</sup> Respondent, **Peter Nyamwange**, had sued the Appellant and the other Respondents before the lower court in connection with injuries that he sustained in a road traffic accident that occurred on **3 December 2011** along the Eldoret-Kapsabet Road.

[2] It was the contention of the 1<sup>st</sup> Respondent before the lower court that he was then lawfully riding on a **Motor Cycle Registration No. KBG 495N** King Bird, when the Appellant, as the driver of the **CAT Caterpillar Chassis Number 3KK 03260, No. B5505931**, so negligently drover the said machine that he caused or permitted it to violently knock down the 1<sup>st</sup> Respondent, thereby occasioning him bodily harm. Hence, the particulars of negligence, the injuries and special damage suffered by the 1<sup>st</sup> Respondent were duly supplied in paragraphs 4 and 5 of the **Plaint dated 15 June 2012**.

[3] The Appellant entered appearance and filed a Defence before the lower court through the firm of **M/s Omwenga & Co. Advocates**. He denied the allegations set out in the 1<sup>st</sup> Respondent's **Plaint**. He denied that he was driving the Caterpillar in question at the material time, or even that an accident occurred as alleged. In the alternative, the Appellant averred, at paragraph 6 of the Defence dated **9 August 2012**, that, if an accident occurred as alleged, then the same was wholly occasioned and/or substantially contributed to by negligence on the part of the 1<sup>st</sup> Respondent and the owner/rider of Motor Cycle **Registration No. KBG 495N**. The particulars of the negligence alleged were also supplied in Paragraph 6 of the said Defence.

[4] Thereafter, on the **23 September 2013**, the Appellant filed an application under **Order 1 Rule 15(1)** of the **Civil Procedure Rules, 2010**, for leave to issue a Third Party Notice against the 2<sup>nd</sup> Respondent, **Josephat Quedeya Mwangale**, in his capacity as the legal representative of **Cornel Ababu** (deceased) the owner of **Motor Cycle Reg. No. KBG 495N**. That application was allowed on **17 January 2014** and notice given accordingly. The Third Party was served and directions given by the lower court on **29 October 2014** that the dispute between the Third Party and the Defendants be determined during the hearing of the main suit.

[5] The matter was thereafter listed for hearing in which the 1<sup>st</sup> Respondent called four witnesses. The 3<sup>rd</sup> Defendant also testified in support of his case. Thus, on the basis of that evidence and the written submissions that were filed by the parties' respective Advocates, the lower court delivered the impugned Judgment dated **10 June 2015**. The Learned Trial Magistrate found as a fact that the accident occurred as alleged by the 1<sup>st</sup> Respondent and proceeded to apportion liability at 50:50 as between the Appellant and the rider of **Motor Cycle Reg. No. KBG 495N**, in respect of which the owners of the Caterpillar, who were the 1<sup>st</sup> and 2<sup>nd</sup> Defendants before the lower court, and the Third

Party herein, were roped in, albeit in a vicarious capacity.

[6] On quantum, the lower court, having given due consideration to the evidence and the relevant authorities that were brought to its attention, considered an award of **Kshs. 300,000/=** to be sufficient compensation for the injuries sustained by the 1<sup>st</sup> Respondent as General Damages for pain and suffering, together with a Special Damages component of **Kshs. 63,076/=**, interest and costs.

[7] Being dissatisfied with the award, the Appellant filed this appeal on **29 June 2015** against the said Judgment and Decree on quantum on the following grounds:

[a] That the Learned Trial Magistrate erred in law and in fact in failing to dismiss the 1<sup>st</sup> Respondent's suit with costs as he had not proved his case on a balance of probability against the Appellant as required by law.

[b] That the Learned Trial Magistrate erred in law and fact in holding the Appellant 50% liable for the alleged accident when there was no sufficient evidence to that effect.

[c] That the Learned Trial Magistrate erred in law and in fact in failing to hold the Respondents wholly liable for the accident.

[d] That the Learned Trial Magistrate erred in law and in fact in failing to hold the 2<sup>nd</sup> Respondent wholly liable for the accident.

[e] That the Learned Trial Magistrate erred in law and in fact in awarding the 1<sup>st</sup> Respondent Special Damages of **Kshs. 63,076/=** that were not proved to the required standard in law.

[f] That the Learned Trial Magistrate erred in law and in fact by failing to evaluate the injuries sustained by the 1<sup>st</sup> Respondent as evidenced on the medical chits and/or reports.

[g] That the Learned Trial Magistrate erred in law and in fact in making an award in General Damages of **Kshs. 300,000/=** that was so excessive as to amount to an erroneous estimate of the loss or damage suffered by the 1<sup>st</sup> Respondent.

[h] That the Learned Trial Magistrate erred in law and in fact in disregarding relevant evidence on record hence resulting in a wrong decision.

[i] That the Learned Trial Magistrate erred in law and in fact in awarding the costs of the suit to the 1<sup>st</sup> Respondent.

[j] That the Learned Trial Magistrate's decision albeit, a discretionary one, was plainly wrong.

[8] Accordingly, it was the Appellant's prayer that the appeal be allowed; that the Judgment of the lower court delivered on **10 June 2015** be set aside, and the same be substituted with a proper finding/judgment; and that the Respondent be ordered to pay the costs of this appeal.

[9] The appeal was canvassed by way of written submissions pursuant to the directions issued by the Court on **27 June 2017**. Accordingly, the Appellant's written submissions were filed on **8 November 2017** by **M/s Omwenga & Company Advocates**; while the written submissions of the 1<sup>st</sup> Respondent were filed by **M/s Chepkwony & Company Advocates** on **18 September 2017**. Counsel for the Appellant formulated five issues from the ten Grounds of Appeal raised in the Memorandum of Appeal dated **29 June 2015**, namely:

[a] Whether the Learned Trial Magistrate erred in law and in fact in holding the Appellant 50% liable for the subject accident;

[b] Whether the award of **Kshs. 300,000/=** as General Damages is so excessive as to amount to an erroneous estimate of the loss or damage suffered by the 1<sup>st</sup> Respondent;

[c] Whether the Special Damage award of **Kshs. 63,076/=** was based on strict proof as required by the law;

[d] Whether the Learned Trial Magistrate erred in law and fact in awarding costs of the suit to the 1<sup>st</sup> Respondent; and,

[e] Whether the decision of the Learned Trial Magistrate was plainly wrong on the basis of the evidence adduced before the lower court.

[10] On liability, Counsel for the Appellant cited the provisions of **Section 107, Section 108 and Section 109** of the **Evidence Act, Chapter 80 of the Laws of Kenya**, in urging the Court to find that the 1<sup>st</sup> Respondent failed to discharge the burden of proving his case on a balance of probabilities; and therefore that there was no basis for holding him 50% liable. It was further argued that, based on the injuries suffered by the 1<sup>st</sup> Respondent, namely, a cut wound on the left leg and an ankle that was swollen and tender, as well as fractures on the left tibia and fibula, an award of **Kshs. 300,000/=** was inordinately high, granted that the 1<sup>st</sup> Respondent had fully healed by the time he testified before the lower court. The case of **Garton Limited vs. Nancy Njeri Nyoike [2016] eKLR** was cited in support of the argument that an appellate court can interfere with an award of damages if satisfied that the lower court acted on wrong principles of law, or misapprehended the facts. Counsel further urged the Court to take into consideration authorities in which lesser awards were made for comparable injuries; such as **JMN (Minor suing through next friend and father WVN) vs. Petroleum & Industrial Services Ltd [2014] eKLR** in which **Kshs. 180,000/=** was awarded for soft tissue injuries as well as fracture of the right tibia and fibula bones.

[11] With regard to the Special Damages award of **Kshs. 63,076/=** Counsel for the Appellant relied on **Agnes Wanjiku Ndegwa vs. Kenya Power & Lighting Company Ltd [2014] eKLR** and **Leonard Nyongesa vs. Derrick Ngula Righa [2008] eKLR** to augment his submission that special damages must not only be specifically pleaded but also proved by production of payment receipts for which stamp duty had been paid. The Court was therefore urged to set aside that award as no such receipts were produced before the lower court. Thus, the contention of the Appellant was that, on the whole, the 1<sup>st</sup> Respondent did not prove his case on a balance of probabilities and was therefore not entitled to costs of the suit; and therefore that the Learned Magistrate committed an error of principle warranting the intervention of this Court.

[12] On behalf of the 1<sup>st</sup> Respondent, it was submitted that sufficient evidence was laid before the lower court to demonstrate that the accident in question did occur and that the 1<sup>st</sup> Respondent was injured as a result of that accident. Counsel drew the Court's attention to the medical documents produced before the lower court, including the Discharge Summary, the In Patient Invoice, **Dr. Lelei's** letter dated **19 August 2012**, as well as the Medical Report prepared by **Dr. Aluda**, all of which went to buttress the evidence of the 1<sup>st</sup> Respondent and his claim. It was therefore the contention of Counsel for the 1<sup>st</sup> Respondent that the appeal was brought in bad faith, granted that liability was apportioned at 50:50 between the Appellant and the Third Party.

[13] This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded, while bearing in mind that the Court did not have the benefit of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

**"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[14] The 1<sup>st</sup> Respondent testified before the lower court as **PW1** on **15 March 2013** and thereafter called three witnesses, namely, **Dr. Paul Kipkurui Rono of Moi Teaching and Referral Hospital (PW2)**, **PC George Omoro (PW3)** and **Dr. Samwel Aluda (PW4)**. According to the 1<sup>st</sup> Respondent, on **3 December 2011**, he had been picked from church by the deceased, **Cornelius Ababu**, using his motor cycle. That as the deceased was riding his motor cycle along the **Eldoret-Kapsabet Road** at about 7.00 p.m., there came a Caterpillar from the direction of **Kapsabet Town** heading towards **Eldoret** direction whose driver was so negligent that he caused it to collide with the motor cycle on the left side of the road.

[15] The 1<sup>st</sup> Respondent further told the lower court that, as a result of the collision, he suffered a fracture on the left leg below the knee. He was taken to hospital where he was admitted for treatment till **15 December 2011**. Upon his discharge, he reported the accident to **Eldoret Central Police Station** and had his statement recorded. He was then issued with a Police Abstract and a P3 Form which he took to **Moi Teaching and Referral Hospital** for completion. He thereafter saw **Dr. Aluda (PW4)** for a second examination. He identified, before the lower court, the Discharge Summary and the Invoice issued to him at **Moi Teaching and Referral Hospital**. He also produced the receipts for the expenses he incurred in connection with his treatment. They were marked the **Plaintiff's Exhibits No. 2(a), 2(b) and 2(c)**. He also identified the Police Abstract and the search conducted by his Advocates at the Motor Vehicles Registry along with a receipt for **Kshs. 1,000/=** issued by the **Kenya Revenue Authority** for the search. They were marked the **Plaintiff's Exhibits 3 and 6(a) and 6(c)** before the lower court. The 1<sup>st</sup> Respondent blamed the Appellant for the accident in that he caused the Caterpillar to collide with the motor cycle on the left lane where the motor cycle was rightfully on.

[16] **Dr. Rono (PW2)** confirmed to the lower court that the 1<sup>st</sup> Respondent was admitted at **Moi Teaching and Referral Hospital** on **3 December 2011** after having been involved in a road traffic accident; and that he sustained fractures of the tibia/fibula bones of the left lower limb. He further confirmed that the Plaintiff was taken to theatre for internal treatment of the fractures and stayed in the hospital until his discharge on **15 December 2011** as shown in the Discharge Summary and Invoice issued by **Moi Teaching and Referral Hospital**, which he produced as the **Plaintiff's Exhibit No. 1(a) and 1(b)**. **PW2** also produced the P3 Form that he filled and signed in respect of the 1<sup>st</sup> Respondent.

[17] **PW3** similarly confirmed that a report was made to the Police Station of the fatal accident that involved **Motor Cycle Registration No. KBG 459W, King Bird** and a **Caterpillar Chassis No. 3KK03260** next to National Petrol Station along **Eldoret-Kapsabet Road**. He further stated that the occurrence was investigated by **PC Richard Okuku**, who had been transferred to **Nakuru**, and that the Investigating Officer's recommendation was that the file be heard by way of inquest. He produced the Police Abstract as the **Plaintiff's Exhibit No. 3** before the lower court.

[18] **Dr. Samwel Aluda (PW4)** told the lower court that he examined the 1<sup>st</sup> Respondent on **18 April 2012** and compiled a Medical Report to that effect which he produced as the **Plaintiff's Exhibit No. 5(a)**. That, for his services, he charged and was paid **Kshs. 1,500/=**, for which he issued a receipt marked the **Plaintiff's Exhibit No. 5(b)**. He confirmed that the 1<sup>st</sup> Respondent had presented to him a history of having been involved in a road traffic accident on **3 December 2011** and that he examined him after about 4 months and that the major injuries were the fractures of the left tibia and fibula of the left lower limb. He also confirmed that the injuries had healed by the time of examination.

[19] In his defence, the Appellant conceded that on **3 December 2011**, he was driving a Caterpillar from **Kapsabet to Eldoret Town**; but contended that on reaching **Teleview**, a motor bike rider came from the right side and that in the process of overtaking a Nissan motor vehicle, the motorcycle collided with the Caterpillar on the left side of the road, facing **Eldoret** direction. He blamed the rider of the motor cycle for the accident for not having kept his distance from the Nissan motor vehicle and for not being watchful.

[20] Having given due consideration to the entire body of evidence adduced before it, the lower court came to the conclusion that:

**"Considering the defence given by DW1 I find that both the driver and the rider equally contributed to the accident and as**

**such I would apportion liability between them at 50%:50%...The 1<sup>st</sup> and 2<sup>nd</sup> defendants were the owners of the caterpillar as stated by the 3<sup>rd</sup> defendant and the police abstract as such they are vicariously liable for the actions of the driver. The 3<sup>rd</sup> party was the owner of the motor cycle as such he is vicariously liable for the actions of the rider..."**

[21] Having carefully considered and re-evaluated the evidence adduced before the lower court, there is no disputation that the accident in question did occur as alleged by the 1<sup>st</sup> Respondent between the **Caterpillar Chassis No. 3KK03260** that was being driven by the Appellant at the time, and the **Motor Cycle Registration No. KBG 459W, King Bird**. The Appellant conceded as much in his evidence before the lower court. Likewise, it is not contested that the rider of the motor cycle died as a result of the injuries he sustained in the accident; and that is why his personal representative was enjoined herein as a Third Party to represent his estate.

[22] That the 1<sup>st</sup> Respondent was a pillion passenger on the motor cycle aforementioned is also not in dispute. He similarly sustained injuries that were not the subject of controversy before the lower court. At any rate the same were proved on a balance of probabilities by the evidence adduced by the 1<sup>st</sup> Respondent and his three witnesses. Accordingly, and as was rightly pointed out by Counsel for the Appellant, the issues that present themselves for re-evaluation before this Court are:

[a] Whether the Learned Trial Magistrate conclusions on liability are tenable;

[b] Whether or not the award of General and Special Damages was hinged on the correct principles given the evidence adduced by the parties;

[c] What order ought to be made on costs.

[23] On liability, it was imperative for the Plaintiff before the lower court to demonstrate culpability, or blameworthiness. Needless to say that the burden was on the 1<sup>st</sup> Respondent to prove the particulars of negligence set out in Paragraph 4 of the Complaint filed on **21 June 2012**. Those particulars included allegations that the Caterpillar was being driven on the wrong side of the road; and that it was being driven in a meandering manner as alleged. The 1<sup>st</sup> Respondent also pleaded the doctrine of *Res Ipsa Loquitur*. In similar vein, the Appellant pleaded negligence and provided particulars thereof. While not all of the particulars were proved before the lower court, the evidence presented shows that the Appellant was at fault for driving the Caterpillar on a public road at night without sufficient indication of its presence on the road. The 1<sup>st</sup> Respondent told the lower court that he just saw the Caterpillar when the two motor vehicles collided; and that the accident occurred on the left lane where the motor cycle had right of way.

[24] Since the Appellant also maintained that the accident occurred on the right lane facing **Kapsabet** direction on the lawful path of the Caterpillar, it was for the Learned Trial Magistrate to determine who between the Appellant and the 1<sup>st</sup> Respondent was telling the truth; noting that the police investigations were unable to ascertain who, between the two parties, was responsible for the accident. The Learned Trial Magistrate sought guidance from the cases of **Re B [2008] UKHL 35** and **Peter Okello Omedi vs. Clement Ochieng [2006] eKLR** to come to the conclusion that, since there was no clear proof as to who exactly was to blame for the accident, both the motorbike rider and the Appellant were equally blameworthy, hence the apportionment of liability at 50%:50%. I find no reason to disagree with that conclusion or to find that there was an error of principle in that finding. Indeed, in **Barclays Steward Limited & Another vs. Waiyaki [1982-88] 1 KAR 1118** it was held thus:

**"The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Ranger Rover crushed it...Collision is a fact. It is however not reasonably possible to decide on the evidence of Waiyaki and Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame.**

[25] Hence, I find instructive the words of Sir Kenneth O'Connor in **Peters vs. Sunday Post Limited [1958] EA 424** that:

**"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."**

[26] I would accordingly uphold the decision of the lower court on liability. On quantum of damages, I am mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. Hence, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**, the Court of Appeal restated this principle as follows:

**"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages."**

[27] Likewise, in **H. West & Son Ltd vs. Shephard [1964] AC 326**, it was acknowledged that:

"...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 of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably 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."

[28] Accordingly, to determine whether or not that assessment was reasonable I have given due consideration to the authorities that were drawn to the attention of the lower court by Learned Counsel for the parties and note that:

[a] In Clement Gitau vs. GKK [2016] eKLR wherein a minor suffered a fracture of the left distal tibia and fibula as well as minor bruises, the lower court's award of **Kshs. 600,000/=** was upheld by the High Court.

[b] In Akamba Public Road Services vs. Abdikadir Adan Galgalo [2016] eKLR, the Plaintiff suffered a fracture of the right tibia leg bone and a blunt injury to the ankle, the lower court's award of **Kshs. 800,000/=** was reduced to **Kshs. 500,000/=** on appeal.

[c] Similarly, in Stephen Mutisya Muumbi vs. Peter Mutuku Katuli [2008] eKLR an award of **Kshs. 600,000/=** was made as General Damages for a fracture of the tibia/fibula.

[29] In the light of the foregoing comparable awards, I would find no reason to disturb the award made by the Learned Trial Magistrate. Moreover, it was not shown by the Appellant that there was an error in principle committed by the Learned Trial Magistrate to warrant interference by this Court. Similarly there was no demonstration that an error of principle was committed by the lower court in determining the Special Damages due to the 1<sup>st</sup> Respondent herein. An amount of **Kshs. 88,276** was pleaded, but only **Kshs. 63,076/=** was awarded by the lower court on the basis of strict proof by way of receipts.

[30] Regarding the argument that the receipts produced were not admissible for failure to comply with the provisions of Section 19 and 20 of the Stamp Duty Act, I was referred to Agnes Wanjiku Ndegwa vs. Kenya Power & Lighting Company Ltd [2014] eKLR and Leonard Nyongesa vs. Derrick Ngula Righa [2008] eKLR for the proposition that a party wishing to claim expenses paid to him under the special damages claim and on proof of such claim must have complied with the Stamp Duty Act. However, the Court of Appeal, in Paul N. Njoroge vs. Abdul Sabuni Sabuni [2015] eKLR was of a contrary view. It held that:

"The finding is often made by lower courts that documents which do not comply with the Stamp Duty Act, Cap 480, Laws of Kenya were invalid and inadmissible in evidence. But this Court has held that to be erroneous and accepts the view it took in the case of Stallion Insurance Company Limited v. Ignazio Messina & Co S.P.A [2007] eKLR..."

[31] The Court proceeded to reiterate its position on the matter by emphasizing the position earlier adopted by Law J. (as he then was) in Suderji Nanji Limited vs. Bhaloo [1958] EA 762 that:

"...before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ... The appellant has never been given the opportunity to pay the requisite stamp and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the 2<sup>nd</sup> Defendant/Respondent and he must be given the opportunity...We would adopt similar reasoning in finding that the trial court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the Stamp Duty Act. At all events, the act itself provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof..."

[32] Accordingly, I would uphold the lower court Judgment and dismiss this appeal with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF FEBRUARY 2019

OLGA SEWE

JUDGE