REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO 69 OF 2011

ALBERT SAMBAI.....1ST APELLANT

INDIANA INSTITUTE FOR GLOBAL. HEALTH K.LTD.....2ND APELLANT

VERSUS

SUSAN NASIMIYU MAUNDA.....RESPONDENT

**[*An appeal from the judgment and decree in original Bungoma CMCC 269/2010*

***delivered on 7.7.2011 by F.KYAMBIA Senior Resident Magistrate*]**

JUDGEMENT

By plaint dated 9/04/2010, the respondent in this appeal SUSAN NASIMIYU MAUNDA sued the Appellants ALBERT SAMBAI and INDIANA INSTITUTE FOR GLOBAL HEALTH LTD seeking general damages for pain and suffering from injuries sustained in a road accident involving motor vehicle registration number KAW 620D owned by 2nd Appellant and driven by 1st Respondent along Bungoma - Webuye road on 10.12.2009. The respondent was a lawful pillow passenger on a bicycle and due to negligent driving of motor vehicle registration number KAW 620D the driver and/or agent of the 2nd appellant that he caused and/or permitted the same to violently collide onto the plaintiff in consequence whereof the plaintiff sustained severe injuries. The particulars of negligence on the part of the appellants were pleaded and nature of injuries sustained tabulated in paragraph 6 of the plaint.

The Appellants in its defence denied any negligence or liability in respect of the accident and averred that the accident was caused solely or substantially contributed to by the respondent. Particulars of the negligence on the part of the Respondent were stated.

The 1st and 2nd appellant in their statement of defence averred that the Respondent caused or substantially contributed to the accident due to the Respondent negligence in failing to have proper lookout for other road users and failing to keep correct side of the road. Appellants also denied particulars of injuries and special damages under paragraph 6 of the plaint.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

> ***" This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .***
>
> ***However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).***

Evaluating the evidence on record, the Respondent testified as PW1.She testified that on 10.12.2009 she boarded a boda boda at Nzoia junction and when the boda boda rider attempted to cross the road a motor vehicle came speeding and hit her and she fell down. She testified she was injured and taken to Bungoma District Hospital and on x-ray she was found to have sustained fracture on lower limb, cut on the head, friction on the back right shoulder and bruises on right upper limb, pain on the chest. She testified she was issued with P3 form and motor vehicle was registration number KAW 620D.She blamed the 1st Defendant who did not take the necessary precaution

Pw2 No. 73646 PC Moses Kimithia of Bungoma Traffic Base testified with regard to the accident that occurred. He told court that the accident involved M/v KAW 620D make Prado and an unknown pedal cyclist on the 10th December 2009 at around 9.00am and was reported and case is still pending for investigation and said pillon passenger sustained injuries.

Pw3-Dr.Kubasu testified he examined Respondent pm 10/12/2009 and she was admitted at Bungoma DISTRICT Hospital and he concluded the injuries sustained were grievous harm both soft and skeleton injuries.

The Appellants did not offer any evidence in rebuttal they did not controvert the plaintiffs evidence. After the close of the respective parties' cases their advocates filed written submissions both on liability and on quantum. The trial court awarded general damages of Kshs.500,000 and special damages of Ksh.14,905/=. The entire award was thus shs.514,905/=.

The appellants then filed this appeal faulting the judgment and decision on the following grounds:

i. That the learned trial magistrate erred in fact in making findings that were out rightly unsupported by facts adduced in court;

ii. That the learned trial magistrate erred in apportioning liability against the defendants(Appellants) who is in the first place was absolved of blame by the Plaintiff herself and;

iii. That the learned trial magistrate erred in law in awarding the plaintiff award that was inordinately excessive given the injuries suffered.

The Respondent also filed a cross appeal faulting the judgment and decision on the following grounds:

i. THAT the learned magistrate erred in law and in fact in apportioning liability against Respondent yet she was a pillow passenger in the bicycle;

ii. THAT the learned magistrate erred in law and in fact in apportioning liability against Respondent and failing to appreciate that onus was on the Appellants to issue a third party notice to the cyclist;

iii. THAT the learned magistrate erred in law and in fact in failing to address her mind on evidence adduced and hence made an erroneous determination;

iv. THAT the learned magistrate in assessing the quantum of damages took into account wrong decision and gave an award that was low in the circumstance.

By consent of the parties, this appeal was canvased by way of written submissions. Mirembe for the appellants submitted that the burden of proof of any fact or allegation is on the respondent which she must prove a causal l nexus between the Appellants' negligence and her injuries and she must have adduced on balance of probability that a connection between the two can be drawn. He submitted that not all injuries are necessarily a result of someone's negligence stating supporting authority of **STATPACK INDUSTRIES LTD VERSUS JAMES SMITH MONYAO,NAIROBI HCC APPEAL NO.152 0F 2013**.He submitted Respondent knew well the risk she was facing and considerably contributed to the occurrence of the accident. He submitted respondent has not sufficiently demonstrated that appellants' motor vehicle rammed into them carelessly or negligently and he concluded his submission that there is nothing to connote negligence on part of the appellants.

The Respondent did not file any submissions with regard to the appeal at hand or on the cross appeal.

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellants and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal are:

i. Who was liable for the material accident and whether the trial court erred in law and fact in apportioning liability between the appellants and respondent at 50:50?

ii. Whether the quantum of damages awarded was inordinately low in the circumstances.

iii. What order should this court make?

Apportionment of liability

On the first issue of who was liable for the accident It is imperative at this juncture to determine how the accident occurred and who was responsible for the same. I have considered evidence on record and the Respondent herein alleges the appellants for caused the said accident on ground that the said motor vehicle was been driven at high speed within a market place and that the 1st Defendant did not take any precaution and he hit the Respondent together with the cyclist. The Appellants did not offer any evidence but state in their submission that Respondent during cross examination she clearly stated that the cyclist was to be blamed for the accident. The question that arises at this stage is whether the Appellants are to be blamed for the accident or the accident occurred as result of negligence on part of Respondent and cyclist. From evidence on record the Respondent states that accident occurred when cyclist was attempting to cross the road and I quote ''**…** ***saw the motor vehicle 100 meters away. But cyclist continued to cross the road. He was supposed to have stopped***…'' further the Pw3

police officer confirmed the same which makes it clear that the accident was largely contributed to by the cyclist but also from evidence on record the 1st defendant was speeding at market place and in my opinion 1st defendant did not take precaution of other road users and the trial court in this circumstance apportioned liability on the appellants at 50% and respondent at 50%.In my view, both the Respondent and cyclist directly contributed to the occurrence of the accident. As the appellant does not offer any evidence on how the accident occurred the trial court apportioning of liability at 50:50 was right.

Quantum of damages

On quantum of damages the appellants complains that the learned trial magistrate erred in law in awarding the plaintiff/Respondent award that was inordinately excessive given the injuries suffered. The respondent on the other hand states in his cross appeal that the trial magistrate awarded damages that were inordinately low.

It is trite law that a court of law sitting on Appeal can only interfere with an award for damages if the award is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages. The respondent suffered injuries as a result of a road accident. Particulars of the injuries were:

1. Deep cut wound parietal of skull 4 cm
2. Blunt injury to the chest
3. Bruises to right forearm
4. Deep cut wound on the shoulder
5. Fracture of right femur

The p3 form filled indicated the degree of injuries.

The trial court on 7.7.2011 awarded a sum of Kshs.500,000/= on general damages and Kshs.14905/= on special damages. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in ***Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR*** thus:

> ***1. "The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past".***

I have re-evaluated the injuries sustained and that being the case, I find that the award of kshs.500,000/= as general damages plus kshs.14905/= as special damages and less Kshs.257,452/50/= making a total award of Kshs.257,452/50/= for such injuries was in the circumstances of this case sufficient to compensate the respondent for the injuries sustained. The complaint that the award was inordinately low or too high is not merited and I dismiss it. I find no reason to interfere with the award and therefore I uphold the award by the trial magistrate.

The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

Dated and Delivered at **Bungoma** this **20th** day of February, **2019.**

S.N.RIECHI

JUDGE