REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 100 Of 2018

BETWEEN

JOSEPH SEREMANI.....1ST APPELLANT

JULIUS OTACHI.....2ND APPELLANT

AND

STELLA BOSIBORI MOREKA.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. N. S. Lutta, SPM dated 26th September 2018 at the Magistrates Court in Kisii in Civil Case No. 101 of 2017*)

JUDGMENT

1. On 29th December 2016, the respondent was riding motor cycle registration number KMDX 409H as a pillion passenger when it collided with the 1st appellant's motor vehicle registration number KBB 598B which was being driven by the 2nd appellant at Nyabonge area along the Kisii – Marani road. The respondent sustained injuries and filed a suit seeking damages. After hearing the suit, the trial magistrate found the appellant fully liable and awarded the respondent the following damages:

General damages	Kshs. 2,500,000/-.
Special damages	Kshs. 319,793/-
TOTAL	Kshs. 2,819,793/-

2. The appellants are aggrieved by the trial court's finding on the issue of liability and quantum of damages. The first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123, 126**). I will deal with the issue of liability first.

3. The respondent (PW 1) adopted her written statement in which she recalled that on 29th September 2016, she was a pillion passenger on the motor cycle when the 1st appellant's vehicle, which was being driven at a very high speed, lost control and knocked down the motor cycle causing her to suffer injuries. In cross-examination, PW 1 stated that the motorcycle was on its lane and she could not recall whether the rider or anyone else was charged with a traffic offence. PC Caleb Osodo (PW 2) produced the police abstract and confirmed that the road accident had taken place as alleged by the respondent. He told the court the rider of the motorcycle was charged in ***Kisii Traffic Case 6/2017*** for the offence of careless driving, convicted and fined Kshs. 30,000/-. The appellants did not call any witnesses.

4. The trial magistrate held that the respondents case was uncontroverted hence that appellants were fully liable.

5. Counsel for the appellants adopted the grounds set out in the memorandum of appeal dated 24th October 2018. They condemned the trial magistrate for treating the evidence and submission superficially before coming to a decision. They complained that the trial magistrate did not consider the police abstract and the fact the PW 2 confirmed that the motor cycle rider was to blame and that he was convicted for the offence of careless driving. They also contended that the respondent failed to prove her case on the balance of probabilities.

6. Counsel for the respondent rebutted that appellants' case by pointing out that the respondent's evidence was not rebutted and was sufficient to support the finding of liability in her favour. He further submitted that the respondent was a pillion passenger and could not shoulder any blame for the accident and that in any event, the appellants did not join the motorcycle rider hence the court could not apportion

any liability.

7. Having considered the entirety of the evidence I have outlined above, I am forced to reach the same conclusion as the trial magistrate. The respondent's evidence was uncontroverted. She gave evidence that the appellants' motor vehicle was speeding before its collided with the motor cycle. PW 2 confirmed the fact of the collision. In ***Moses Theuri Ndumia v I G Transporters Limited and Another*** **MSA CA Civil Appeal No. 42 of 2018 [2018] eKLR**, the Court of Appeal discussed the effect of failure of a party to call evidence and citing various decisions, observed as follows:

> *[12] In the absence of any evidence from the defence, we are persuaded there was preponderance of evidence by the appellant that amounted to a prima facie case and it required to be countered by the respondents. If the respondents had information that the impact of collision was in the centre of the road, we are persuaded under the provisions of Section 112 of the Evidence Act, they had a responsibility to adduce that evidence so as to disprove the appellant and the police officer who produced the abstract form. See KENYA POWER & LIGHTING CO LTD –VS – PAMELA AWINO OGUNYO CIVIL APPEAL NO 315 OF 2012 where a Bench of this Court differently constituted had the following to say;*
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> > *"We note, in any event, that the appellant made various allegations in its statements of defence against the respondents. These included, inter alia, that the appellant was not the supplier of electricity in the stated region where fire damage took place; that the damaged crop was illegally planted in an area reserved for the appellant as a way-leave for its power lines and electric cables and that the respondents had failed to leave adequate space between the crops and electric poles so as to prevent the possibility of the crop being burnt in the event that a fire broke out. A party who asserts or alleges that certain facts exist has a legal burden to prove those claims – Section 107- 109 of the Evidence Act which place a burden of proof or what may be called evidential burden of proof on the party making the assertion. In JANET KAPHIPHE OUMA & ANOTHER V MARIE STOPES INTERNATIONAL KENYA (KISUMU) HCCC NO 68 OF 2007 Ali Aroni, J. Citing EDWARD MURIGA through STANLEY MURIGA V NATHANIEL D. SCULTER CIVIL APPEAL NO 23 OF 1997 had this to say on the said provisions of the Evidence Act;*
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> > *"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence"*

8. The appellants' submitted that the respondent should have been blamed since the motor cycle rider was convicted of the offence of careless driving and that he was fully liable. In their defence, the appellants pleaded contributory negligence as against; *"the Plaintiff and/or the owner and/or the rider of motor cycle registration number KMDX 409H on which the Plaintiff was travelling as a pillion passenger."* They further pleaded that, *"[D]ue to the said utter negligence, the rider of motor cycle registration number KMDX 409H one Joseph Nyangau Asumbo (hereinafter referred to as "the rider") was consequently charged for inter alia, careless driving contrary to section 49(1) of the Traffic Act, Chapter 403 of the Laws of Kenya in Traffic Criminal Case Number 06/17 at the Kisii Magistrate's Court and fined."*

9. It is trite law that a court cannot make orders against a person who is not a party before it. When a party in a proceeding makes an allegation against another who is not a party, it is mandatory for the party making the allegation to join such a party to those proceedings. For that purpose, **Order 1 Rule 15** of the ***Civil Procedure Rules*** provides as follows:

> *15(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-*
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> *a) that he is entitled to contribution or indemnity; or*
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> *b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and,*
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> *c) .....*
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> *shall apply to the court within fourteen days after the close of pleadings for leave of court to issue a notice (hereinafter called a third party notice) to that effect and such leave shall be applied for by summons in chambers exparte supported by affidavit.*

10. It was therefore incumbent on the appellants, who claimed relief or contribution from the motor cycle rider, to join him as a third party. A similar situation arose in ***Ntulele Estate Transporters Ltd & Anor v Patrick Omutanyi Mukolwe*** **BGM HCCA No. 67 of 2011[2014] eKLR where the** court held as follows:

> *Secondly, having failed to join the estate of the motorcyclist as a party to the proceedings, I do not think any blame could be attributed to a party who had not been joined in the proceedings . In the case of* ***Benson Charles Ochieng & Anor v Patricia Otieno HCCA 69 of 2010 (UR)*** *the court held:-*
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> *"The trial court could not have apportioned liability between the appellants and a person who was not a party to this suit. This court is unable to agree with the Appellant's argument which was to the effect that the Respondent ought to be blamed for not joining the third party into the proceedings. This cannot be because it is the Appellants who will bear the consequences of any failure to include the third party into the proceedings. Mutatis Mutandis, in the present appeal, it is the Appellants who were to face the consequences for failure to join the motorcyclist to the suit. Having failed to join that party, the argument as to contribution of negligence fail."*

11. As a matter of fact the rider of the motor cycle, having been convicted of the offence of careless driving, was to blame for he accident.

However, it is established that even in such cases the conviction did not absolve the other party as it was still open to the court to apportion liability (see ***Robinson v Oluoch*** **[1971] EA 376** and ***Philip Keptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende*** **[1982-88] 1 KAR 1036). In this case, the** third party was not joined therefore foreclosing the possibility of absolving the appellants from any liability. Since the respondent was a passenger and the particulars of negligence pleaded were against the rider, she could not be blamed for the accident. I therefore affirm the trial court's finding on liability.

12. The thrust of the appellants' case on the issue of quantum of damages awarded by the trial court is that general damages awarded were too high in the circumstances. In considering this issue, I am guided by what the Court of Appeal stated in ***Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another*** **(No.2) [1987)] KLR 30** that:

> *[T]he principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.*

13. The respondent pleaded that she sustained the following injuries: facial bruised. Tenderness on the anterior chest wall, compound fracture on the right tibia/fibula, fracture of the pelvis, fracture of the right ankle joint and amputation of the right leg below the knee. She produced a Hospital Discharge summary from Tenwek Hospital. She also produced the report by Dr Ezekiel Ogando Zoga who examined her on 22nd February 2017. He confirmed the injuries sustained by the respondent and noted the she had lost use of 50% of the use of the right leg and had generalised body pains. He concluded that the respondent sustained multiple severe fractures and classified the injury as maim.

14. Based on the injuries, the respondent proposed Kshs. 3,000,000/-. She relied on the case of ***Kurawa Industries Limited v Dama Kiti and Another*** **MLD HCCA No. 37 of 2015 [2017] eKLR** where the plaintiff in that case sustained a crush injury on the left leg, fracture shaft of the left radius, compound comminuted fracture of the left femur, fracture of the 5th, 6th, 7th and 8th ribs of the left ribs and soft tissue injuries on the abdomen. The court affirmed an award of Kshs. 2 million shillings in 2017.

15. The appellants proposed Kshs. 500,000/- as general damages. The appellants relied on the case of ***Akamba Public Road Services v Abdikadir Adan Galgalo*** **VOI HCCA No. 21 of 2015 [2016] eKLR** where the court reduced an award of Kshs. 800,000/- and awarded Kshs. 500,000/- in 2016. The plaintiff sustained a fracture of the right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle. The doctor assessed permanent disability at 3%.

16. In considering the level of damages to award, the Court of Appeal held in ***Sosphinaf Company Limited v James Gatiku Ndolo*** **NRB CA Civil Appeal No. 315 of 2001 [2006]eKLR** that:

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

17. I have considered the decisions cited by both parties before the trial magistrate and I find the case cited by the appellants bears little relationship to the injuries sustained by the respondent in this case. The respondent sustained multiple fractures and an amputation of the left leg. While the court is guided by the cases cited to it, ultimately the duty of this court is to ensure that award for injuries in similar cases are consistent and fairly compensate the claimant. The Court of Appeal observed in ***Stanley Maore v Geoffrey Mwenda*** **NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

> *Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.*

18. The case cited by the appellant, ***Kurawa Industries Limited v Dama Kiti and Another*** **(Supra)**, is apposite. The claimant in that case had his leg amputated amongst other injuries including multiples fracture and soft tissue injuries. The trial magistrate considered both cases cited by the parties. I cannot say the trial magistrate erred in coming to the conclusion he did bearing in mind the principles in ***Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another*** **(Supra)**.

19. The appeal lacks merit and is dismissed with costs to the respondent which I assess at Kshs. 50,000/-.

DATED and DELIVERED at KISII this 18th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr Lugano instructed by Ogejo, Omboto and Kijala Advocates for the appellants.

Mr Nyangosi instructed by T. O. Nyangosi &Company Advocates for the respondent.