REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL NO. 120 OF 2016

CLIFF BENARD NYAGAKA.....1ST APPELLANT

GUANGO DAIRY PRODUCTS.....2ND APPELLANT

VERSUS

YIMING WANG.....RESPONDENT

(Being an Appeal from the whole of the judgment and decree of Honourable J. Kituku, Senior Principal Magistrate in Kiambu in CMCC No. 203 OF 2014 delivered on the 12th October, 2016)

J U D G M E N T

1. The appeal before me is against the subordinate court's judgment delivered on the 12th October 2016. The Respondent was on the 13th May 2014 knocked down by the Appellant's vehicle registration No. KBD 828G along the Northern bypass causing him sustain serious injuries.

He sued the Appellants being the driver and owner or the vehicle respectively for negligence stated the particulars of negligence and sought compensation for pain and suffering. Special damages were pleaded as Kshs.1,177,752/=.

2. Upon trial the Appellants were found wholly to blame for the accident. An award of Kshs.3,000,000/= was granted for pain and suffering.

> It is the above findings on liability and *quantum* of damages that the Appellants appealed from by their Memorandum of Appeal dated15th November 2016.

3. The Appellant faults the trial Magistrate on his findings that the Appellants were 100% liable for the accident stating that such finding was not based on the evidence on record as the Respondent contributed to the said accident.

4. In their statement of defence dated the 9th September 2014 the Appellants denied the totality of the Respondent's statement of claim by its plaint dated 5th August 2014 and attributed negligence on the Respondent. Particulars are stated, specifically walking carelessly and without due care, dashing onto the path of a moving vehicle, and failing to keep a proper look out for his own safety.

5. The Appellants called one witness, DW1, a Medical Consultant who had reviewed the Respondent's injuries. As demanded of an Appellant court, it is my duty to reconsider and re-evaluate the evidence and come up with my own findings and conclusion.

It is trite that this court will not interfere with the trial court's exercise of its discretion unless it is satisfied that the decision is based on no evidence or the court misapprehended the evidence in material aspects and thus arrived at clearly wrong decision - **Mbogo -vs- Shah (1968) EA 93, Mwanasokoni -vs- Kenya Bus service Ltd (1982-88) 1 KAL as well as Butter -vs- Butter (1984) e KLR.**

6. **ISSUES FOR DETERMINATION.**

> ***1. Whether the Respondent contributed to the occurrence of the accident and if so to what extent.***
>
> ***2. Whether the awards in general and special damages are inordinately high and erroneous.***

7. The Respondent called four (4) witnesses and testified as **PW1.** His evidence was brief that on the material date at about 7.00 pm it was dark, and while standing off the road waiting to cross to the other side, a vehicle that had no lights veered off the road and knocked him down upon which he sustained serious injuries and was rushed to Aga Khan hospital. He stated the injuries he sustained and medical fees and

expenses he incurred.

8. He produced documents listed in his bundle of documents filed on the 8th August 2014 as exhibits.

In particular these documents are clinical expenses (PExt.1), treatment notes- (PExt.2), police abstract PExt 3 and P3 form – PExt 4 both produced by PW2, a traffic police officer, copy of records (PExt.5), Discharge summary from Aga Khan Hospital - (PExt. 6) and Dr. Wandugu medical report - (MFI.7) but later produced by the Doctor as - (PExt.7) and the Doctors court attendance fees - (PExt. 7) He blamed the driver for driving at a high speed and losing control of the vehicle when it was dark.

9. Upon cross examination the Respondent reiterated that he was standing off the road waiting to cross, that there was no pedestrian crossing, was a straight section and he could see the oncoming vehicles but was standing off the road. He denied that he had entered the road. He further denied misjudging the vehicles distance as he was not on the road.

10. **PW2** was **PC Justus Chibero** a traffic police officer who produced the police abstract as an exhibit. He confirmed that the P3 form was filled and issued from the station. He was however not the investigating officer and that no one was charged but matter referred to insurance.

11. Dr. Antony Wandugu examined the Respondent and prepared a report that he produced as **P Ext.7**. He confirmed having been paid Kshs. 10,000/= for court attendance fees and produced the receipt **PExt 8**.

PW4 was an investigator and a photographer. He prepared a report upon taking photographs of the scene of accident which he produced as **P Ext. 12** though he did not record a statement at the police station.

Upon cross examination by the trial Magistrate, this witness stated that he was a trained investigator.

12. **The Appellants called one witness, Dr. Wambugu a consultant surgeon.** He reviewed the Respondent and prepared a report – **DExt. 1(a)** dated 9th May, 2016. I have taken the liberty to re- consider the totality of the evidence as would the trial court because the issues for determination are based on the evidence.

13. **Section 78 (2) of the Civil Procedure Act** enjoins an Appellate court to exercise the same powers and perform as may be the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted therein.

14. The Appellants Submissions are that the Respondent failed to discharge its burden of proof to the required standard that the Appellant's driver caused the accident by its failure to call eye witnesses who had recorded witness statements and by allowing **PW4** an investigator to testify without having recorded and filed a witness statement in conformity with **Order 1 of the CPR.**

15. It is further the Appellants case that the Respondent failed to produce the vital documents marked for identification MFI 4, MFI 5, MFI 6 and MFI 7 (ii) these being P3 form, copy of records of motor vehicle and payment receipt discharge summary Aga Khan Hospital and Medical report by Dr. B.N Njihia dated 16th May 2014 from Aga Khan Hospital in line with **section 35 of the Evidence Act.** Citing the case **Kenneth Nyaga Mwige vs Austin Kiguta and 20 others (2015) e KLR** that held

> ***"if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial Judge and the Judge cannot use the document as evidence"***

16. It is submitted that the above documents were not admitted as exhibits.

The Respondent denied the above and submitted that all the documents were produced and marked as exhibits – pages 184-191 of the typed proceedings.

17. I have considered the documents at issue. The said documents were indeed produced as exhibits and therefore admitted. The learned judges of Appeal in the case **Kenneth Nyaga** (Supra) held that if documents are only marked for identification and not produced as exhibits, then a court cannot rely on them.

18. I have also noted that the Appellants did not object to any of the Respondents documents being produced as exhibits. That issue having not been raised during the hearing cannot be raised on appeal – **Civil appeal no 119 of 2015 Julian Adoyo Ongunga and Another –vs- Francis Kiberege Bondera (2016) e KLR.**

19. In any event I have satisfied myself from the record that the Respondent produced the said documents in support of his case-paragraph 9 above. I therefore decline to accept the Appellants submissions on that issue.

20. **LIABILITY.**

The appellants denied having been liable in negligence in their defence. They failed to call any evidence to testify on how the accident occurred and to prove the particulars of negligence attributed to the Respondent. It is trite that failure to testify by a party in support of its pleadings leaves the other party's evidence unchallenged. It was incumbent upon the Appellants to prove their allegations against the Respondent – Section 107 & 108 Evidence Act. That having not been done the Appellants cannot urge the court to discredit the Respondent's evidence there being no basis for that.

21. The 1st Appellant had the control of the accident vehicle. An accident does not just happen. There must be some negligence by the person in control or another whose negligence may have caused it.

22. The Respondent testified on how the accident occurred. Despite repeated attempts by the Appellant's advocate to sway his evidence, he was firm and was not shaken that he was not crossing the road and did not dash onto the path of the oncoming vehicle as he was standing outside the road when he was knocked by the appellant's vehicle that lost control.

23. In **Benard Mutisya Wambua –vs- Swaleh Hashil (2017) eKLR,** in similar circumstances the court held that

> ***"....By his pleadings and uncontroverted evidence, the Plaintiff has described the occurrence in a manner supporting the inference of negligence on the part of the Defendant's driver..."***

24. **And in Embu Public Road Service Limited -vs- Riimi (1968) EA 22 the court rendered that**

> ***"...where the circumstances of the accident give rise to inference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with absence of negligence..."***

25. Considering the above circumstances and the appellants failure to offer any probable cause of the accident by evidence the driver cannot escape liability.

Upon the available evidence I find that the 1st Appellant was wholly liable for the accident. Even if the investigators **(PW4)** evidence was to be rejected as not credible, that alone would not change the Respondents firm testimony that stands uncontroverted.

26. I therefore come to the findings and conclusion that the 1st Appellant was wholly liable. The appeal fails on that ground.

27. **Was the 2nd** Appellant vicariously **liable for** the 1st Appellants **negligence?**

PExt.5 – copy of records of motor vehicle and the police abstract **PExt.3** show that as at 28th May, 2014 the date of the accident, motor vehicle registration No. KBD 826G was registered to the 2nd Appellant. That vehicle was being driven by the 1st Appellant. The Appellant's defence that it did not own the vehicle nor that the 1st Appellant was not the driver is therefore a sham.

28. It was the duty of the Appellants to tender evidence that the 1st Appellant was not its authorized driver or agent. How could the Respondent prove otherwise if the Appellants failed to testify? Unless otherwise proved information in a police Abstract produced without objection by the opposite party is held to be truthful.

29. The police abstract was produced and admitted as an exhibit – PExt 3- without any objection by the Appellants. The driver is named as the 1st Appellant. Without any evidence to the contrary, the court is left with no alternative but to hold the driver of a vehicle as duly authorized agent of the owner. The owner being a company its vehicles cold only be driven by its authorised agents and employees – **Kenya Bus Service Limited - vs- Dina Kawira Humprey (2003) e KLR.**

30. Having come to the above findings that the 1st appellant being the driver of the accident vehicle lost control of the said vehicle and veered off the road and knocked the Respondent, and the Appellants having failed to attach any negligence to the Respondent both Appellants are jointly and severally liable in negligence and consequential injuries and damages to the Respondent. The appeal on liability is thus dismissed.

31. ***QUANTUM*** **OF DAMAGES FOR PAIN AND SUFFERING AND LOSS OF AMENITIES.**

The Respondent's injuries are stated in the Medical Report by **PW3** Dr. Antony Wandugu dated 14th July 2014 and **DW1** Dr. Wambugu Mwangi dated 9th May 2016. The Respondent was a Chinese National and a Civil Engineer then working for China National Acro-Technology International Engineering Corporation atTwo Rivers Ruaka project in Kiambu County.

32. Dr. Wandugu's report is very detailed. Main injuries are stated as

- **Communited fracture of the base of skull Bleeding into ipsilateral mastroid air cells**
- **Chronic subdural haematoma left fronto-parietal occipital region**
- **Otorrhoena - ® side**
- **Loss of consciousness**
- **Fracture communuted left tibia – metaphysed**

- **Fracture proximal ® ulna**
- **Blood loss**

Current complaints

- **Headaches on and off**
- **Lack of concentration**
- **Pain (R) arm disabling him from performing strenuous tasks**
- **Pain left leg at injured area, disabling him from standing for long, walking fast, long distances running or climbing stairs.**

33. Report by Dr. Wambugu

- **Fracture of left tibia**
- **Fracture base of skull**
- **Bruises left upper central incissor**
- **Multiple bruises**
- **No fracture of right ulna**
- **Present complaints**
- **Pains left leg on exertion**
- **No reported fits**
- **Shortening or leg, held**
- **Mud wasting of the quadriceps noted**
- **Left upper central incissor enamel broken.**
- **8% permanent disability**
- **limping gait**
- **Predisposed to onset of osteoarthritis changes left knee joint.**

34. It is upon the above injuries that the trial court awarded Ksh.3,000,000/= million for pain and suffering.

As rightly submitted by the Appellants citing the case **Easy Coach Limited –vs– Emily Nyangosi (2017) e KLR** quoted from H. West and Sons Limited -vs- shepherd (1964)

> ***"...Money cannot renew a physical frame that has been battered and shattered. All that courts can do is to awards sums that must be regarded as giving reasonable compensation...."***

35. The Appellants submit that a sum of Ksh.1 million is reasonable while the Respondent urge the court to uphold the trial courts award of Ksh.3,000,000/=.

36. I have considered the totality of the injuries and the Respondent's complaints. I have also considered comparable awards in the following decisions;-

- **Geoffrey Mwaniki Muruzi -vs- Ibero (K) Limited and Another (2014) e KLR** where the Plaintiff sustained extensive fractures of the left tibia and fibula, extensive damage to soft tissue of left leg and fracture of collar bone. Damages awarded Kshs.2 million – in 2014.

- **James Gathirwa Ngugi -vs- Multiple Hauliers (EA) Limited and Another (2015) e KLR.** For comminuted fracture of right tibia compound comminuted fracture of the right fibula, fracture of left proximal radius, fracture of left ulna, head injury and soft injuries, a sum of Kshs.1,500,000/= for pain and suffering were awarded in 2015.

37. I am minded that damages ought to be within the comparable and set out decided cases and within the Kenyan economy.

It is also trite that an Appellate court will not disturb an award of damages unless it is shown to have been inordinately high or low as to represent an entirely erroneous estimate of the damage. – **Butt -vs- Khan (1977) 1 KAR.**

38. I have considered the trial courts awards. It is not clear what guided the court to award Kshs. 3,000,000/= damages for pain and suffering. It is not stated which decided authorities guided the trial court other than what the parties proposed. There is no indication that the court applied the principles upon which such damages ought to be assessed.

39. Having stated so and seeking guidance from comparable awards stated above and taking into account that no two injuries are exactly similar, I find that the award on general damages to be excessive and thus calls for this court's interference.

40. Accordingly I allow the Appeal on *quantum* of **damages and set aside the trial court's award for pain and suffering** and re-assess the same downwards to Kshs.2,000,000/=.

41. **SPECIAL DAMAGES** must be pleaded and proved. A sum of Kshs.1,177,752/= was pleaded.

The Respondent produced documents and hospital receipts to support the above. Hospital expenses are stated as Kshs.1,135,968/=.

I have seen the inpatient final bill at Aga Khan University Hospital, Nairobi, dated the 1st June 2014. It is for Kshs.895.968/04. A summary of the payments are also stated as Kshs.1,000,000/= with an over payment of Kshs.104,032/=.

42. I am satisfied that the sum of Kshs.895,968/= was paid to the hospital.

Medical report charges of Kshs.5,000/= and the Doctors court attendance fees too were paid. But as the Doctor was the Respondent's witness it is my view that his court attendance expenses ought to be paid by the Respondent. I disallow the said sum of Kshs.5,000/=.

43. I agree with the Appellant that the proved special damages are **Kshs.926,752** and not the sum of Kshs.1,777,752/=. That sum is set aside and substituted with a sum of **Kshs.926,752/=** as duly proved.

44. The Appeal therefore succeeds in the matter of *quantum of damages*. The trial court's judgment is set aside and substituted with the following awards:

1. Liability -100% against the Appellants jointly and severally (upheld)

2. Quantum of damages

(a) For pain and suffering and loss of amenities –Kshs.2,000,000/=.

(b) Special damages – Kshs.926,752/=.

(c) Interest shall accrue on 2(a) and (b) at court rates from date of the trial court's judgement.

3. As the appeal succeeds in part, each party shall bear their own costs of the appeal.

Dated and signed at Nakuru this 27th day of March 2019.

J.N. MULWA

JUDGE

Dated, signed and delivered at Kiambu this 10th date of April 2019.

C. MEOLI

JUDGE