REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 336 OF 2018

GERALD NZOIA NDONGA.....APPELLANT

VERSUS

SUSAN MUKOMA.....1ST RESPONDENT

ABEL MUKOMA.....2ND RESPONDENT

(Appeal arising from the judgment by Hon. M.W Murage, SPM, delivered in NBI CMCC NO. 3487 OF 2016)

(CORAM: F. GIKONYO J.)

JUDGMENT

1. The Appellant was aggrieved by the whole decision of the trial court in which: (1) liability was apportioned at the ratio of 90%:10% against the Respondent and the Appellant respectively; (2) an award of Kshs. 1,500,000 was made for pain and suffering and loss of amenities; (3) Kshs. 1,090,000 for loss of earning capacity; (4) Kshs. 3000 special damages; and (5) costs and interest. He filed this appeal and challenged liability and quantum of damages.

2. The grounds of appeal contained in the Memorandum of Appeal dated 20th July 2018 could be summarized into three issues;

a. Whether the Appellant was liable for contributory negligence;

b. Whether the trial court adopted wrong age, salary and multiplier in assessing loss of earning capacity; and

c. What is the appropriate remedy herein?

Duty of court

3. As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses. See**: SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. What must be avoided however is mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern should be to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such is a style that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed.

ANALYSIS OF EVIDENCE AND DETERMINATION

Claim

4. According to **PW1 Gerald Nzola Ndonga,** on 29th August 2009 he boarded a matatu at Shauri Moyo area. On arrival at Mareba Stage along Lunga Lunga road he alighted. While at the stage waiting to cross the road he was hit by motor vehicle KBB 412G which was being driven very fast. The driver ran off after hitting him. This was corroborated in a material manner by **PW2 Boniface Muia Kilonzo** who was together with him. **PW2** tried to pull **PW1** away after seeing the vehicle but it was too late.

5. **DW1Abel Ngugi Mukoma** stated that he was driving motor vehicle KBB 412G along the Lunga Lunga Road at a speed of 40 KPH when the **PW1** ran through the road as he was drunk. **PW1** was attempting to cross from the left hand to the right hand side. He swerved towards the right side but the appellant was hit by the left front corner of the vehicle.

6. The appellant had the burden of proving that the accident happened as alleged. In support of his case, he called **PW2** a witness who saw what happened. However, **DW1** gave a different version of the accident but his version was not corroborated whatsoever. His assertions that the **PW1** was drunk were not backed up by any evidence. Furthermore, the pictures showing the point of impact are not conclusive for they are photocopies and are not clear.

7. Therefore, I do find that the appellant was hit while standing at the stage waiting to cross the road. The trial magistrate apportioned liability at 90:10 in favour of the appellant. This is what aggrieved the Appellant who says that he cannot be liable for contributory negligence. The trial magistrate was of the opinion that the appellant did not demonstrate what he did to avoid the accident despite the fact that the driver of the motor vehicle failed to control the said vehicle. I find the decision by the Court of Appeal in the case of **Isabella Wanjiru Karanja v Washington Malele [1983] eKLR** Potter JA to be particularly pointed to the issue at hand when he stated as follows

> **"There are two elements in the assessment of liability, namely causation and blameworthiness. See Baker v Willoughby [1970] AC 467. In my opinion 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. I would not disagree with the learned judge's finding that the appellant's speed was excessive in the circumstances, but the failure to keep a proper look out would seem to be the predominant factor.** [Emphasis added] **I respectfully agree that the learned judge was right to apportion the blame 75 per cent to the appellant driver and 25 per cent to the respondent pedestrian.**

8. What does the evidence portend? The appellant was hit while standing at designated area. According to the evidence adduced the respondent drove the motor vehicle recklessly into the stage. The appellant was expected to be on the look-out and vigilant as there were vehicles driving down the road. As it was said, there could be no justification for a pedestrian to completely not see the vehicle approaching him. PW2 was vigilant and he saw the vehicle. PW2 tried to pull the Appellant to save him from being hit but it was too late. I do not find anything which shows that the Appellant attempted to avoid being hit. He did not demonstrate that he kept a proper look out to avoid the accident. In the circumstances, I find that the apportionment of liability in the ratio on 90:10 in favour of the appellant against the respondent was fair assessment of blameworthiness. It be noted that there is no strict rule that a pedestrian cannot be liable for an accident; it will all depend on the circumstances of each case.

Loss of Earning

9. In assessing damages the Court of Appeal in the renown case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR** held as follows:

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka,* [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto,* [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles."**

10. The appellant alleges that in assessing loss of earning the trial magistrate adopted wrong age, salary and multiplier. On the issue of age, the trial magistrate adopted the age of the appellant at 46 years based on the medical report. The report dated 8th March 2016 stated that the appellant is aged 46 years. Though, the accident took place in 2009 which means that at the time of the accident the appellant was 39 years. In such cases where permanent disability has been awarded it would be most unfair not to factor that the person may have been incapacitated from the time of the accident. Cases take long and medical reports may be done much later after the injury and the incapacitation. Thus, I take the view that the trial magistrate relied on and adopted the wrong age.

11. On salary, **PW1** testified that he would at times earn Kshs. 800/- , Kshs. 600/-, Kshs. 400/-, Kshs. 200/- a day and at times earn over Kshs. 1,000/-. **PW2** who worked together with the appellant told the court that he earned Kshs. 800/-. According to the respondents is that the court ought to adopt the minimum wage of Kshs. 6,130/- per month. The issue of establishing a person's earnings especially in a situation where documentation is not provided or may not be obtained was tackled by the Court of Appeal in the case of **Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR** where it held that:

> **"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."**

12. From the evidence it is clear that the Appellant was employed. Except, amount of money earned by the appellant was not consistent as it varied from Kshs. 200/- to Kshs. 1,000/- and above per day and was also dependent on his attendance. It is however knowable. In the circumstances, it would be fair and practical to get an average of the said amounts to establish the appellant's salary. Thus, I will adopt the average of the appellant's salary at Kshs. 600/- per day.

13. Lastly, the trial magistrate used a multiplier of 10 years on the assumption that the appellant would live for 56 years. Bryam Ongaya J in the case of **Charles Mwaniki Muchiri v Coastal Kenya Enterprises Ltd [2016] eKLR** stated that:

"The court has taken judicial notice that the prevailing general mandatory retirement age in Kenya is 60 years of age so that the plaintiff would have had 33 years of active service"

14. According to the World Health Organization the life expectancy of Kenya is at 64 – 69 years (See: https://www.who.int/countries/ken/en/ - date 22nd October 2019).

15. Since the appellant was 39 years at the time of the accident and taking into account life expectancy and retirement age of 60 years, a multiplier of 21 years of active employment or gain is most appropriate and fair. Accordingly, the award under this limb be as follows:

Kshs. 600 x 30 x 12 x 21 x 75/100 = Kshs. 3,402,000/- .

Of general damages

16. According to the appellant the award of Kshs. 1,500,000/- as general damages was low and erroneous. In the trial court the appellant pleaded in his submissions that an amount of Kshs. 2,000,000/- for pain, suffering and loss of capacity would be sufficient. The respondent proposed Kshs. 500,000/-. The respondent sustained major head injuries leading to swelling of the brain and right eye sight progressively deteriorated and became blind, fracture of the condyles of the right humerus and stiffness of the elbow contributing to 75% disability. In **Charles Komoso Toton v Reuben Cherutich Chebon & another[2012]eKLR** the court awarded Kshs. 1,600,000/- as general damages for severe head injury with fracture of the base skull resulting in loss of sight in the right eye, fracture of the right humerus head with dislocation of the right shoulder joint and fracture of the left humerus in the lower one third. In light thereof, I find the award of Kshs. 1,500,000/- to be neither excessively low nor high. It is fair compensation. Hence, I will not disturb it.

Orders

17. From the foregoing I find that the appeal has merit only to the extent that:

a) The award of Kshs. 1,090,000/- is set aside and I award Kshs. 3,402,000/- for loss of earning. All the other items remain as awarded by the trial court. The award is subject to 10% contributory negligence.

b) Each party cater for its own costs of the appeal.

Dated and signed at Meru this 23rd day of October 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 28th day of October, 2019

L. NJUGUNA

JUDGE