



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 83 OF 2018**

**ALFRED MAKOMA.....1<sup>ST</sup> APPELLANT**

**NICHOLAS MWEU.....2<sup>ND</sup> APPELLANT**

**=VERSUS=**

**LUCIA MBUKI MWANZIA.....RESPONDENT**

**[An appeal from the Judgment of Hon. I M Kahuya (Senior Resident Magistrate)**

**delivered on 5<sup>th</sup> April, 2018 in Civil Case No. 322 of 2017**

**before the Chief Magistrate's Court at Machakos]**

**BETWEEN**

**LUCIA MBUKI MWANZIA.....PLAINTIFF**

**-VERSUS-**

**ALFRED MAKOMA.....1<sup>ST</sup> DEFENDANT**

**NICHOLAS MWEU.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Respondent herein in her plaint dated 6<sup>th</sup> June, 2017 sued the Appellants claiming General Damages, Special Damages of Kshs 584,893.94, Future Medical Expenses amounting to Kshs 600,000/= Costs of the suit and interests.

2. According to the plaint, the 1<sup>st</sup> Appellant was the sole registered owner of motor vehicle Reg. No. KBQ 336U while the 2<sup>nd</sup> Appellant was the beneficial owner thereof.

3. It was pleaded that on or about 7<sup>th</sup> June, 2014 the Respondent was lawfully travelling in motor vehicle registration no. KAM 001L along Machakos-Kangundo Road when at Tumba Area Motor Vehicle Reg. No. KBQ 336U was so negligently, recklessly and/or carelessly driven, managed and/or controlled by the defendants themselves and/or their authorised servant, agent and/or driver that it was allowed to turn abruptly and without warning, entering into the lane of motor vehicle registration no. KAM 001L colliding into the said vehicle thereby occasioning the respondent severe injuries whose particulars were outlined in the plaint. The Respondent also relied on the doctrine of *res ipsa loquitur*, the Traffic Act and the Highway Code and contended that the Appellants were vicariously liable.

4. According to the Respondent as a result of the said accident, she suffered moderate head injury GCS 13/15 with epistaxis, sustained blunt neck injury, cut wound on the left eyelid, blunt injury to the left eye, lacerations on the forehead, blunt injury left wrist, fracture left radio-ulna and fracture of the tibia.

5. According to the Respondent, on 7<sup>th</sup> June, 2014 she was travelling in motor vehicle registration no. KAM 001L along Machakos-Kangundo Road. At Charity area there was an oncoming lorry Motor Vehicle Reg. No. KBQ 336U. As the said lorry approached, without signalling and or warning, it turned onto the lane in which the vehicle carrying the Respondent was driving and in the process violently collided therewith. After the accident, the Respondent lost consciousness and found herself at Mater Hospital where she was admitted for 3 weeks. Before being referred to Mater Hospital, she was rushed to Machakos Level 5 Hospital. It was her evidence that she suffered moderate head injury GCS 13/15 with epistaxis, sustained blunt neck injury, cut wound on the left eyelid, blunt injury to the left eye, lacerations on the forehead, blunt injury left wrist, fracture left radio-ulna and fracture of the tibia. After the accident, she reported the accident at Machakos Police Station where she was issued with a P3 form and a police abstract was issued. She also produced the treatment chits, medical reports, police abstract, P3 form and copy of the records as exhibits.

6. The Respondent stated that she was not healed and was still experiencing joint aches on her leg especially during cold season.

7. It was her case that the driver of the lorry was to blame for the accident and she prayed for compensation. She confirmed that she required Kshs 300,000/= to remove the metal implant from her body and that the said sum was an estimate from a private hospital.

8. At the end of the evidence of the Respondent, the Respondent's case was closed and the Appellants opted not to adduce any evidence.

9. In her judgement the learned trial magistrate found that being a passenger in motor vehicle registration no. KAM 001L, the Respondent neither had control over its operations nor those of the Appellant's vehicle hence the doctrine of *res ipsa loquitur* shielded her. Since the blame was placed on the Appellants' vehicle which was accused of driving on the wrong lane and which evidence remained uncontroverted and unchallenged and no third party proceedings were taken out against the driver of the Plaintiff's vehicle, the learned trial magistrate found the Appellants 100% liable for the accident by virtue of the doctrine of vicarious liability. She proceeded to award the Respondent Kshs 750,000.00 general, damages, future medical expenses in the sum of Kshs 600,000.00 and Kshs 584,894.00 as special damages together with costs and interests.

10. Aggrieved by the said decision, the Appellants appealed against the decision based on the following grounds:

**(1) The learned Magistrate erred in Law and fact in holding and finding that the Respondents were solely or in any way to blame for the accident giving rise to the suit before the lower court.**

**(2) That, the learned Magistrate erred in Law and fact in holding and awarding a sum of Kshs 750,000/= for general damages, Kshs 600,000/= for future medical expenses and Kshs 584, 894/= for special damages which sum was grossly excessive.**

**(3) That, the learned Magistrate finding quantum was erroneous for the reasons that the award for general damages and future medical expenses was in complete variance with the evidence presented to the court and was manifestly excessive.**

**(4) That, the learned Magistrate erred in Law and fact in making an award of damages that was manifestly excessive and unsupported by the evidence before her.**

11. In this appeal it is submitted that the learned trial magistrate appreciated that there was no direct evidence placing blame on the appellants' vehicle and that the evidence was inconclusive. It was therefore submitted that it was not clear why the court concluded that the appellant was solely to blame when two vehicles were involved. To the appellants at the very least the court ought to have apportioned the appellants' blame at 50%. As regards the failure to join third party, it was submitted that the Appellants had no duty to do so.

12. Based on the decisions in **Fatuma Abdalla vs. Tusks Restaurant Ltd & Another [2000] eKLR** and **Omar Musa Hassan and Another vs. Rashid Salim and Another Nbi HCCC No. 239 of 1995**, the appellants submitted that an award of Kshs 500,000.00 would have been appropriate had the Respondent proved her case.

13. In opposing the appeal, it was submitted on behalf of the Respondent that the Respondent did not in any case contribute to the occurrence of the accident as she was a mere passenger and therefore not in control of either M/v Reg. No. KAM 001 L or M/v Reg. No. KBQ 336 U. My Lord PW1's testimony was very clear that M/v Reg. No. KBQ 336 U owned by the Appellants veered off its lawful lane onto the lane of M/v Reg. KAM 001 L hence causing the accident. It was therefore submitted that the driver of M/v Reg. No. Reg. No. KBQ 336U owed a duty of care to other road users and the same was not exercised.

14. It was emphasised that the Appellants did not call any witness to controvert the Respondents evidence regardless of the fact that they filed a witness statement for one **Benard Nzomo Musyoki** who was the driver of M/v Reg. No. KBQ 336 U. It was noted that PW 1 was only cross – examined on her injuries and as to where she received treatment. The issue of how the accident occurred never came up and as such her evidence in examination in Chief stands.

15. To the Respondent, it was incumbent upon the Appellants to enjoin a 3<sup>rd</sup> Party from which they could seek indemnity and in this regard the Respondent relied on the High Court in Civil Appeal No. 8 of 2017 -**Edward Wasamba Onyango (Minor) vs. The Chairman Board of Governors - Agoro Yombe Secondary School** in which the decision in HCCC No. 303 of 1991 - **Esther Michele vs. Meharia Nduta** was cited for the position that "if the Defendant alleges that he is not to blame them he ought to institute 3<sup>rd</sup> Party proceedings against the driver he attributes blame to."

16. The court was therefore urged to uphold the trial courts Judgment at 100% liability as against the Appellants.

17. As regards the quantum, it was submitted that the discharge summary, P3 Form and medical report clearly indicated the injuries suffered

by the respondent. The court relied on the Respondent's testimony and the abovementioned exhibits to reach its conclusion. The medical report by **Dr. Kimuyu** clearly indicated the Respondent's injuries as a moderate head injury GCS <sup>13</sup>/<sub>15</sub> with epistaxis, blunt injury left eye, lacerations on the forehead, blunt injury left wrist, fracture of left radio – ulna and a fracture of left tibia. She further opined that the Respondent had multiple healed scars on the forehead, left upper eyelid with prominent left eyeball, left leg scars approximately 15cm below the knee and had a stiff and tender left knee joint and was yet to recover at the time of examination which was on 6/06/2017 which was about 3 years after the accident. She further opined that the Respondent had inserted implants which were *in situ* and would require removal at an estimated cost of Kshs 300,000/= each for the left –upper limb and left leg giving a total of Kshs 600,000/=. She further opined that complete recovery may not be achieved.

18. It was therefore the Respondent's case that the trial court's award of **Kshs 750,000/=** for General damages was way too low as the Respondent suffered a lot of pain and is never to fully recover from her injuries. In the Respondent's view an award of Kshs 4,000,000/= under this head would suffice.

19. On the issue of future medical expenses, it was submitted that **Dr. Kimuyu's** report was very clear that the Respondent would require Kshs 600,000/= for removal of the implants and we submit that the same is not high and that the trial court did not err in awarding the same since no contrary report or evidence was produced before it. The court was urged not to interfere with the said award.

20. Regarding special damages of Kshs 584,894/=: it was submitted that the Respondent produced receipts that were stamp duty complaint and no objection was raised during the production of the same and as such the court did not err in awarding the same.

21. In support of her submissions the Respondent relied on **James Njau Kariuki –vs- Mary Goreti Wakwibubi & Joseph Wafula Ndieyira. Eldoret HCCC 2 of 2015** where the Plaintiff sustained similar injuries and Kshs 3,000,000/= was awarded for pain, suffering and loss of amenities before the High Court and **Regina Mwikali Wilson –vs- Stephen M. Gichuhi & Peter M. Muinde HCCC 728 of 2007 Nairobi**, where the Plaintiff also sustained similar but less severe injuries and Kshs 2,500,000/= was awarded by the High Court.

### **Determination**

22. I have considered the foregoing. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

**“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has 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 demeanour of a witness is inconsistent with the evidence in the case generally.”**

23. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

24. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

**“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”**

25. Nevertheless, in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 the Court of Appeal held that:

**“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

26. In this case, it is clear that the issue to be resolved is whether the respondent, based on the evidence presented before the Trial Court proved her case. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

27. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

28. The two provisions were dealt with in Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

**“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”**

29. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

30. In this case, the respondent was clearly a passenger in motor vehicle M/v Reg. KAM 001 L. According to the Respondent the accident was caused by the fact that M/v Reg. No. Reg. No. KBQ 336U veered off its lane onto the lane of motor vehicle M/v Reg. KAM 001 L and collided with motor vehicle M/v Reg. KAM 001 L. That was the only evidence on record as the Appellants did not offer any evidence in rebuttal. In cross examination, the Respondent was only cross-examined on the injuries. It was not put to her that the accident was caused in a manner other than the way she saw it. In cases where the plaintiff’s case is unchallenged the trial court cannot be faulted for not believing it.

31. In this case even if the driver of M/v Reg. KAM 001 L was negligent, that negligence cannot be attributed to the passengers therein. This was the position adopted by Trvelyan, J in Gian Singh Panesar and Others vs. Lochab and Another [1966] EA 401 where he held that:

**“...this finding only affects the first plaintiff, who was the driver, for the passengers in the car were not identified with the driver’s negligence. In such circumstances it is no defence for the defendants to prove that someone else contributed to the accident.”**

32. In the circumstances of this case since the Respondent’s evidence was clear as to who was to blame which evidence was not rebutted there was no need to join the driver or owner of M/v Reg. KAM 001 L.

33. As regards the quantum, the Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

**“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”**

34. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

**“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own**

figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

35. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

36. I have considered the award made and the authorities relied upon. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. 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 and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably 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...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

37. In my view the award made by the learned trial magistrate were well within the range of awards made in similar cases. Even if this court had been of the opinion that it would have awarded a different figure, that is not a ground for interfering with the award.

38. In the premises, I find no merit in this appeal which I hereby dismiss with costs.

39. Orders accordingly.

**Judgement read, signed and delivered in open Court at Machakos this 23<sup>rd</sup> October, 2019.**

**G. V. ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Muema for Miss Thoronjo for the Respondent**

**Miss Nyanjiro for Mr Manwafu for the Appellant**

**CA Geoffrey**