



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 6 OF 2017**

**PHILIP MWAGO.....APPELLANT**

**VERSUS**

**LILIAN NJERI THUO.....RESPONDENT**

**JUDGEMENT**

**INTRODUCTION:**

1. The suit filed by the respondent in the lower court was as a result of an accident that occurred when she was a passenger in the appellant's motor vehicle.
2. She averred that on or about 19<sup>th</sup> April 2012, she was lawfully travelling as a passenger in the appellant's motor vehicle registration number KBM 125S along Juja road when the appellant, his driver, servant and/or controlled the said motor vehicle that he caused the same to lost control and ram into another motor vehicle as a consequence whereof, the respondent sustained serious injuries.
3. The appeal is in respect to the judgment against the appellant delivered on the 9<sup>th</sup> day of December, 2016 by Hon. D. W. Mburu in Milimani CMCC No. 2043 of 2013 at Nairobi in which the appellant was held 100% liable for the accident. The respondent was also awarded Kshs. 500,000/= as general damages for pain and suffering and Kshs.10,065/= as special damages as well as costs and interest of the suit.
4. The appellant being aggrieved by the said decision brought the appeal on various grounds as follows:

**GROUND OF APPEAL:**

- (a) **The learned trial magistrate erred in law and fact in finding the appellant 100% liable for the injury sustained by the respondent.**
- (b) **The learned magistrate erred in law and fact by failing to apportion liability to the respondent when the appellant could not be entirely blamed for her injuries.**
- (c) **The learned magistrate erred in law and fact by awarding general damages that are inordinately high and manifestly excessive so as to amount an erroneous estimate in the circumstances.**
- (d) **The learned magistrate erred in law and fact by taking into account irrelevant factors in awarding general damages.**

5. The parties were given directions to canvass appeal via submissions which they filed.

**APPELLANT'S SUBMISSIONS:**

6. The appellant submitted that the respondent failed to discharge his burden of proof against the appellant. The appellant submitted that the trial court failed to apportion liability as against the respondent despite the respondent having failed to adduce sufficient evidence to prove vicarious liability.
7. The court in *Anyarinzwa vs Gasperis [1981] KLR 13* held as follows:

**“For one to establish vicarious liability or the owner of motor vehicle is liable for an accident, it must be shown that the agent/driver at the material time was acting on the owner's benefit. Mere knowledge or permission of the owner is not**

enough to establish vicarious liability.”

8. The court in *Vyas Brothers Limited vs Shadrack Lagat [2016] eKLR* quoted with approval the case of *Shighadai vs Kenya Power & Lighting Company Limited & Another [1988] KLR* where the Court of Appeal held inter alia:

**“The owner of a vehicle is liable not only for the negligence of its own if that driver is his servant acting in the course of his employment but also if the driver is his agent that is to say if the driver is with the owner’s consent, driving the car on the owner’s business or for the owner’s purpose.”** (Emphasis mine).

9. The appellant submitted that for the Principle of Vicarious Liability to be proved, the respondent had a duty to prove that the agent/driver was acting on the owner’s behalf and for the owner’s benefit however the respondent failed to prove that the driver at the time of the accident was driving motor vehicle registration number KBM 125S on behalf of the appellant.

10. The appellant further submitted that the police abstract did not blame the appellant for the accident nor charged with an offence of careless driving.

11. The appellant submitted that the respondent’s claim against the appellant was untenable as the evidence on record proves that the appellant was not vicariously liable for the accident. The appellate court should therefore apportion liability as against the respondent for failing to discharge its duty in accordance with section 107 and 109 of the Evidence Act Cap 80 Laws of Kenya.

12. The appellant submitted that the general damages awarded was inordinately high for reasons that the trial court did not take into consideration the weight of the evidence adduced by the appellant and/or took into consideration irrelevant factors when awarding the general damages.

13. The appellant submitted that the trial court in awarding the general damages was only guided by the respondent’s report dated 16<sup>th</sup> October 2012 whereby Dr. W. M. Wokabi stated that the respondent had sustained fracture of the left humerus and went ahead to award permanent disability of 8%. However the respondent was not admitted in view of the injuries sustained and the doctor confirmed that the fractures have since united. Further the appellant having adduced evidence to prove that he was not vicariously liable for the accident implies that the trial court ought not to have awarded the general damages at all.

14. The appellant further submitted that the trial court erred in finding the respondent partial permanent disability was caused by the accident whereas evidence on record specifically proves that the respondent at the time of the accident was not wearing a seat belt nor did she choose to alight from the said motor vehicle which was allegedly speeding.

15. The appellant submitted that the misfortune of the permanent disability was due to the respondent’s own inaction or failing to take necessary precaution and therefore the appellant ought not to be blamed for it. Furthermore, the doctor who examined the respondent did not adduce further evidence to support the awarding of 8% permanent disability.

16. The appellant submitted that the trial court erred in law and fact by awarding Kshs.500,000/= as general damages rather than awarding Kshs.250,000/= as pleaded in the appellant’s submissions. The appellant is guided by the case of *Hassan Noor Mahmoud vs Tae Youn Ann [2001] eKLR* where the court awarded general damages of Kshs.200,000/= for similar injuries as the respondent herein.

#### **RESPONDENT’S SUBMISSIONS:**

17. The respondent discharged the burden of proof as she proved she was lawfully in the appellant’s motor vehicle registration number KBM 125S and that she was owed a duty to care by the appellant. The respondent further proved that the accident occurred as a result of the appellant’s driver negligence by overtaking and over speeding. The respondent further proved that she sustained a fractured left humerus as a result of the accident thereby suffering injuries.

18. The appellant did not call any witnesses at the lower court to rebut the claims levelled against him by the respondent and his 2 witnesses. He filed his submission where he started challenging the issue of vicarious liability without leading any evidence on the same. In *Mugunya & Others vs Abdalla* it was stated that:

**“...where the thing is shown to be under the management of the appellant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the appellants that the accident arose from want of care.”**

19. The motor vehicle registration number KBM 125S was under the management of the appellant’s driver and he was careless and reckless in over speeding and overtaking thereby causing the accident. The appellant having not led any evidence to absolve the driver or himself from blame is vicariously liable for the negligence of his driver and he is 100% liable as it was held in the lower court judgment.

20. It is the respondent’s submission that the respondent discharged her burden of proof in the matter and this honourable court should not disturb the judgment of the subordinate court. She prayed that the appeal be dismissed with costs to the respondent.

21. The appellant in the appeal is also aggrieved with the quantum of damages as awarded by the trial court. The respondent submitted for an award of Kshs.800,000/= in respect of general damages while the appellant submitted for Kshs.250,000/=. The honourable trial magistrate exercised his discretion and awarded the respondent Kshs.500,000/=. This is not an amount that can be said to be so inordinately high considering that as a result of the accident which was caused by the appellant’s negligence, the respondent’s left humerus was fractured and

this is also evidenced by the medical report of Dr. Wokabi.

22. In *Aziz Kassim Lakha vs Standard Limited t/a East African Standard [2009] eKLR* the court restated the principle to guide the court while interfering with an award for general damages was set down in the case of *Butt vs Kiyani [1981] KLR 349*, as hereunder:

**“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”**

23. The respondent submitted that the award of Kshs.500,000/= was not inordinately high considering it was a broken humerus with 8% residual functional disability. The trial magistrate also noted that he carefully considered the submissions and the relevant authorities as cited by the parties in arriving at the figure and therefore he did not proceed on wrong principles. The trial magistrate also relied on the medical report of Dr. Wokabi and the Discharge Summary from Avenue Hospital in assessment of quantum and he did not misapprehend the evidence as he clearly stated the respondent sustained a fractured humerus.

24. The respondent relied on the case of *Philip Kipkorir Cheruiyot vs Nebco K Lted & Another [2006] eKLR* where Justice Kimaru after considering the submissions of the parties awarded general damages for pain and suffering of Kshs.600,000/= for the following injuries:

**a. Fracture of the femoral head and dislocation of the right shoulder joint – as the femoral head was resected the shoulder joint has been disrupted. This joint has permanently impaired.**

**b. Fracture of the right humerus in the mid shaft has united but there is tenderness at the fracture sight.**

**c. Injury to the radial nerve has resulted into wasting of all muscles of his arm. Bring a right handed.**

25. The case relied on by the respondent was decided in 2006 and the honourable trial magistrate exercised his discretion in the year 2016 and awarded the respondent Kshs.500,000/=. This is not inordinately high considering the respondent suffered a fractured humerus and the honourable magistrate infact exercised his discretion to award a lower amount than the one submitted. The passage of time and the inflation rate prompted the respondent to submit for a higher figure.

26. The respondent in the subordinate court also relied on the cases of *HCCC No. 109 of 2005, Nakuru – Vincent Cheruiyot Rono vs Mombasa Maize Millers* where the court awarded Kshs.400,000/= as general damages in the year 2006 for various soft tissue injuries without any fractures.

27. Taking to account that there was 8% residual functional disability as evidence by the medical report of Dr. Wokabi and the inflation rate since the above cases were decided the respondent submit that Kshs.500,000/= is not inordinately high and urge the court not to interfere with the amounts awarded by the honourable trial court as general damages.

28. The respondent also relied on the case of *Mulatya vs Kenya Railways Corporation [2004] eKLR* where Justice Khaminwa awarded Kshs.400,000/= as general damages for a comminuted fracture of the humerus and a head injury. The respondent urged the court to rely on this case as it is more relevant as the injuries are similar and not do disturb the award of Kshs.500,000/= as awarded by the trial magistrate.

#### **EVIDENCE ADDUCED:**

29. During the trial the respondent testified how the accident occurred and she adopted her statement as her evidence. She testified that on 19th April 2012, she was travelling with her friend from Mathare to Nairobi town in his motor vehicle registration number KBM 125S.

30. The driver was driving at a very high speed and she requested him to slow down but he declined. When they reached a place called Mlango Kubwa along Juja road, he tried to overtake a lorry which was in front, but there was an oncoming motor vehicle. He tried to get back to his lane but he was unable and he rammed into the lorry from behind thereby occasioning her injuries due to the impact.

31. The respondent produced the motor vehicle copy of records that proved that the appellant was the owner of motor vehicle registration number KBM 125S.

32. The respondent called PW3 one PC Duke Mogaka who produced the police abstract and a copy of the OB extract. PW3 testified that the appellant was blamed for the accident as his vehicle KBM 125S was overlapping when the accident occurred. He also testified that the appellant's driver escaped after the accident and that is why they charged the appellant personally for failing to keep records of his driver. PW3 also testified that the respondent was one of the passengers who was in the motor vehicle and she was injured.

33. The respondent further testified that she was taken to Avenue Hospital where she was first treated and an x-ray was done which revealed a fracture of left humerus. She was later discharged and continued with treatment at Maragua District Hospital. She produced the treatment notes, the P3 form and other documents in support of her claim that also proved that the injuries were as a result of the accident.

34. The respondent called PW1. Dr. Wokabi who produced the medical report dated 16th October 2012. PW1 testified that the respondent had sustained a fractured left humerus following the accident.

#### **ISSUES:**

35. After going through the proceedings, evidence on record and parties submissions, I find the issues are ; ***Whether the respondent proved that the appellant was 100% liable? whether the award of Kshs. 500,000/= as general damages for pain and suffering was inordinately high?What is the order as to costs ?***

36. The defence never tendered any evidence.

#### **ANALYSIS AND DETERMINATION:**

37. When the matter came up for hearing, the respondent testified in support of her claim and also called the evidence of a doctor and a police officer. The respondent discharged the burden of proof as she proved she was lawfully in the appellant's motor vehicle registration number KBM 125S and that she was owed a duty to care by the appellant.

38. The respondent further proved that the accident occurred as a result of the appellant's driver negligence by overtaking and over speeding. The respondent further proved that she sustained a fractured left humerus as a result of the accident thereby suffering injuries.

39. The motor vehicle registration number KBM 125S was under the management of the appellant's driver and he was careless and reckless in over speeding and overtaking thereby causing the accident.

40. The appellant having not led any evidence to absolve the driver or himself from blame is vicariously liable for the negligence of his driver and he is 100% liable as it was held in the lower court judgment.

41. The police officer confirmed that the accident occurred and that the driver of KBM 125S was to blame for the accident for overlapping. The police officer further stated that the driver escaped and the owner of the motor vehicle (appellant) was charged with the offence of failing to keep records of the driver. The defence did not tender any evidence.

42. The appellant did not call any witnesses at the lower court to rebut the claims levelled against him by the respondent and his 2 witnesses. He filed his submission where he started challenging the issue of vicarious liability without leading any evidence on the same.

43. In *Mugunya & Others vs Abdalla* it was stated that:

***"... where the thing is shown to be under the management of the appellant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the appellants that the accident arose from want of care."***

44. On liability, it was the trial court finding that the respondent who was a passenger could not have contributed to the occurrence of the accident. The appellant employed a driver and failed to maintain proper records. He must now shoulder liability even in absence of his driver. I don't find any reason to disagree with that finding.

45. I thus find it justified on strength of evidence tendered that the appellant was liable at 100% as he did not tender any evidence to rebut that of the respondent and police officer.

46. On quantum the court relies on the case of *Aziz Kassim Lakha vs Standard Limited t/a East African Standard [2009] eKLR* the court restated the principle to guide the court while interfering with an award for general damages was set down in the case of *Butt vs Kiyan [1981] KLR 349*, as hereunder:

***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."***

47. The respondent sustained a fracture of the left humerus as documented in the medical report of Dr. Wokabi and summary from Avenue Hospital. A permanent disability of 8% was recorded. Counsel for the respondent proposed an award of Kshs.800,000/= while the defence proposed Kshs.250,000/=.

48. The respondent submitted for an award of Kshs.800,000/= in respect of general damages while the appellant submitted for Kshs.250,000/=. The honourable trial magistrate exercised his discretion and awarded the respondent Kshs.500,000/=. The question is whether this amount can be said to be so inordinately high considering the injuries sustained being left humerus was fractured as evidenced by the medical report of Dr. Wokabi.

49. This court finds no justification to disturb the award of damages as it is not demonstrated that it is so inordinately high as to represent an entirely erroneous estimate. It is not shown that the trial court proceeded on wrong principles or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high.

50. Thus the court upholds the award of Kshs. 500,000/= as it was not inordinately high considering it was in regard to a broken humerus with 8% residual functional disability. The trial magistrate carefully considered the submissions and the relevant authorities as cited by the parties in arriving at the figure and therefore he did not proceed on wrong principles.

51. The trial magistrate also relied on the medical report of Dr. Wokabi and the Discharge Summary from Avenue Hospital in assessment of quantum and he did not misapprehend the evidence as he clearly stated the respondent sustained a fractured humerus.

52. The respondent had relied on the case of *Philip Kipkorir Cheruiyot vs Nebco K Lted & Another [2006] eKL* where Justice Kimaru after considering the submissions of the parties awarded general damages for pain and suffering of Kshs.600,000/= for the following injuries:

*?Fracture of the femoral head and dislocation of the right shoulder joint – as the femoral head was resected the shoulder joint has been disrupted. This joint has permanently impaired.*

*?Fracture of the right humerus in the mid shaft has united but there is tenderness at the fracture sight.*

*?Injury to the radial nerve has resulted into wasting of all muscles of his arm. Bring a right handed.*

53. The case relied on by the respondent was decided in 2006 and the honourable trial magistrate exercised his discretion in the year 2016 and awarded the respondent Kshs.500,000/=. This is not inordinately high considering the respondent suffered a fractured humerus and the honourable magistrate infact exercised his discretion to award a lower amount than the one submitted. The passage of time and the inflation rate prompted the respondent to submit for a higher figure.

54. The respondent in the subordinate court also relied on the cases of *HCCC No. 109 of 2005, Nakuru – Vincent Cheruiyot Rono vs Mombasa Maize Millers* where the court awarded Kshs.400,000/= as general damages in the year 2006 for various soft tissue injuries without any fractures.

55. Taking to account that there was 8% residual functional disability as evidence by the medical report of Dr. Wokabi and the inflation rate since the above cases were decided the respondent submit that Kshs.500,000/= is not inordinately high and urge the court not to interfere with the amounts awarded by the honourable trial court as general damages.

56. The respondent also relied on the case of *Mulatya vs Kenya Railways Corporation [2004] eKLR* where Justice Khaminwa awarded Kshs.400,000/= as general damages for a comminuted fracture of the humerus and a head injury. The respondent urged the court to rely on this case as it was more relevant as the injuries were similar and not do disturb the award of Kshs.500,000/= as awarded by the trial magistrate.

57. On special damages the respondent pleaded and proved special damages of Kshs.10,065/=. I allow the claim.

*i. Thus the court finds no merit in the appeal and dismisses the same with costs to the respondent.*

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**