REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO 16 OF 2018

CONSOLIDATED WITH CIVIL APPEAL NO 20 OF 2018

FREDRICK ACHOKA.....APPELLANT

-VERSUS-

ZIPPORAH MUTINDI MUSYA.....RESPONDENT

(Being an appeal against the Judgment delivered by Hon. L.P. Kassan-

Senior Principal Magistrate delivered at Mavoko PMCC No. 1026 of 2015 on 30.1.2018)

BETWEEN

ZIPPORAH MUTINDI MUSYA.....PLAINTIFF

-VERSUS-

FREDRICK ACHOKA.....1st DEFENDANT

FREDRICK ACHOKI.....2nd DEFENDANT

JUDGEMENT

1. The suit in the trial court arose out of road traffic accident in which the Respondent was a pedestrian along in the EPZ Region on 12th May, 2015 when motor vehicle KCA 937Q registered in names of the 2nd defendant and beneficially owned by the Appellant occasioned an accident in which the Respondent was injured and the respondent pleaded negligence. The respondent sought special damages and general damages in respect of injuries as particularized in Paragraph 5 of the plaint.

2. The appellant in his defence denied the accident, denied negligence on his part, the particulars of loss and injuries. The appellant pleaded that the accident was as a result of the negligence of the respondent as particularized in paragraph 7 of the defence. The 2nd defendant was removed from the suit.

3. The decision of the trial court gave rise to an appeal by the appellant that was filed on 20.2.2018 and a cross appeal by the respondent that was filed on 26.2.2018. The same were consolidated by this honorable court. The appellant's and respondent's appeals are on quantum and liability and the parties agreed to canvass same via written submissions which they filed and exchanged.

4. Learned counsel for the appellant submitted on two issues that were considered errors; that is apportionment of liability and quantum. On the issue of apportionment of liability, counsel submitted that the respondent ought to have borne greater liability than the 20% that the court apportioned to her. Reliance was placed on the case of **Wakim Sodas Limited vs. Sammy Aritos (2017) eKLR.** Counsel added that the respondent did not establish causation hence urged the court to apportion equal liability.

5. Learned counsel submitted that the trial magistrate applied wrong principles in the award of damages by considering the report of the doctor of Mediheal Diagnostic and Fertility Centre that included 2 injuries that were not in the report of **Dr Wandugu** and were not in the pleadings. Reliance was placed on the case of **Rosemary Wanjiru Kungu vs. Elijah Macharia Githinji & Another (2014) eKLR.** Counsel added that the sum of Kshs 200,000/- ought to have been awarded and reliance was placed on the case of **Purity Wambui Muriithi vs. Highlands Mineral Water CO Ltd (2015) eKLR**. Counsel urged the court to allow the appeal in its entirety and set aside the judgement

of the trial court and substitute it with a reasonable award and that the respondent's appeal be dismissed with costs.

6. The Respondent submitted that, there were 2 issues for determination in this appeal; whether the trial court erred in its apportionment of liability at 80:20, and whether the trial court erred in awarding the respondent Kshs 500,000/-.

7. On the issue of liability, counsel submitted that the evidence of the appellant that he entered the road and hit 2 girls who were chasing each other on a footpath meant that the trial court ought to have found the appellant 100% liable. On the issue of quantum, counsel submitted that the award of Kshs 500,000/- be enhanced to Kshs 1,000,000/-and reliance was placed on the case of **Ben Mengesa vs. Edith Makungu Lande (2013) eKLR**.

8. The role of the Appellate court is now a matter of judicial notice, that is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that reach an independent conclusion as to whether to uphold the judgment, this was observed in the case of **Selle vs. Associated Motor Boat Co. [1968] EA 123**

9. The evidence that was rendered in trial was as follows; Pw1 was the respondent who testified that on the material day she was hit by a motor vehicle that was being driven at high speed off the road. In cross examination she stated that there was a corner and that as a result she could not see the oncoming motor vehicle. According to her though she was in the company of others, she was the only one who was hit by the vehicle. In her evidence, since the vehicle stopped away from the scene, that was an indication that the vehicle was being driven at a high speed.

10. After the accident, the Respondent was taken to Athi River Shalom. She produced in court the abstract and the P3 form as well as the treatment notes together with receipts.

11. Pw2 was **Dr Wandugu** who testified on the examination carried out on the respondent and prepared the report that was exhibited.

12. DW1 was the appellant who testified that on the material day he was driving at 20kph and he entered the road and saw 2 girls who were chasing each other and he hit them. He told court that he hit them on a footpath. On cross examination his testimony was that the 2 girls came from the footpath onto the road and he saw them after he had taken the bend.

13. The trial court found that it appeared that there was a bend at the point of impact and disputed the fact that the appellant was driving at 20kph for at that speed it was possible to stop. The court apportioned liability at 80:20 against the respondent and awarded general damages of Kshs 500,000/- and special damages of Kshs 33,720/-.

14. Cognizant of my duty in the appellate court, having analyzed the evidence that adduced by both parties together with the pleadings and the submissions in support and against the appeal, the issues for determination in this appeal are:-

1) Whether negligence has been proven against the appellant and if so what is the extent of liability

2) Whether the case for disturbing award herein has been made

3) If yes, how much is the Respondent entitled to

15. The Respondent testified that on the date of the accident, a vehicle that was driving at high speed injured her and it was her case that the appellant be found 100% liable and that she be awarded Kshs 1,000,000/- as damages.

16. Pw2 confirmed the injuries and according to the medical report dated 7.8. 2015 that was prepared by Pw2, with regard to an examination that was carried out on an even date there is indication of permanent impairment but there was no percentage indicated. Pw2 indicated that there was permanent impairment of the bending movement. The report indicated that the respondent suffered harm as a result of trauma to the head, lower back, wrist joint and elbow joint. Pw2 relied on treatment notes from Athi River Shalom hospital and the P3 form. It is noted that the note from Athi River Shalom Community Hospital dated 17.5.2015 indicate that the respondent was put on pain management drugs as well as antibiotics and vitamins. There is also a report dated 21.5.2015 from Mediheal Diagnosttic Fertility Centre prepared by a radiologist who noted that the respondent had posterior disc protrusion that caused indentation of the anterior thecal sac and impingement of right sided exiting nerves.

17. In this appeal the appellant is challenging the trial court's finding on apportionment of liability. As to whether the apportionment of liability was proper, in **Khambi and Another vs. Mahithi and Another [1968] EA 70**, it was held that:

> **"It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.**

18. That seems to have been the position in **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142** and **Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981**, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

19. In this case the learned trial magistrate found that if the vehicle was being driven at 20km/h as was alleged it was possible to apply brakes

that would bring the vehicle to a halt. It was further found that since the vehicle was joining the main road, the driver ought to have given way and that ought to have affected the speed of the vehicle.

20. I agree with the findings of the learned trial magistrate as regards the negligence of the driver. In **Usha vs. Bachubhai and Others [1965] EA 433**, it was held by **Duffus, JA** that:

> **"Each case must depend upon its own particular circumstances. The speed at which a prudent driver approaches an intersection must bear some relation to the nature of the intersection. Such matters as the width of the roads, the number of traffic lanes and the general visibility must always be relevant and each case be considered on its own facts. If a driver exercises proper care, he approaches a crossing with his foot off the accelerator and ready on the brake to deal with any traffic from the minor road by slowing down or stopping, is no doubt to be related to the facts of that case and the nature of the crossing in question. It cannot apply with full force to all crossings. At a dangerous intersection, a driver could not justifiably place complete reliance upon an expectation that traffic on the minor road would conform to the requirements of the "Yield" sign. He could not, of course, be expected to cope with every form of reckless or outrageous conduct on the part other road users, but ordinary prudence would require him to approach at a speed which, combined with a proper lookout, would leave him able to take reasonable avoiding action if the need became apparent. What is reason reasonable is a question of degree depending on the particular circumstances. If he did not do so, or deprived himself of his opportunity to take avoiding action by not keeping a proper lookout, that could be negligence contributing to an accident…The learned trial Judge found as a fact that the second respondent did not know that he was approaching the cross-roads and the only substantial ground of appeal is the appellant's complaint that the second respondent should have known of the existence of this cross-roads if he had been keeping a proper look-out. This would be a question of fact and the court has some difficulty in arriving at what were the findings of the learned Judge on this point…It is clearly the duty of any driver of a motor vehicle to be always on the alert and to be keeping a look-out for all factors which may be relevant to his passage on the road and should always take into consideration not only traffic approaching him or overtaking him on the main road, but other traffic or pedestrians that may be likely to come on to the road."**

21. It was similarly held in **Suleimani Muwanga vs. Walji Bhimji Jiwani and Another [1964] EA 171,** by **Udo Udoma, CJ** that that:

> **"It is clear from the evidence, I find, that by the driver of the Volkswagen bus turning as he did, he was, in the circumstances of this case, driving his vehicle in a most dangerous manner across the road. It is clear on the evidence that the driver of the omnibus was also not keeping a proper lookout while attempting to overtake the Volkswagen; for if he did, he would have seen clearly in time to slow down his vehicle when the driver of the Volkswagen bus put out his hand indicating that he was turning to the right side of the road. If, on the other hand, the driver of the omnibus did keep a lookout, he must have been travelling at such a speed, which is considered unreasonable in the circumstances of this case, which probably accounts for his inability to bring his bus to a stop in time to avoid the collision."**

22. On the other hand, the Plaintiff testified that though she was in company of others she completely failed to notice the approach of the motor vehicle. In **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142**, it was held that 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.

23. There is therefore no basis upon which I can interfere with the learned trial magistrate's apportionment of liability.

24. Both parties are dissatisfied with the quantum. The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See **Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 at 345.**

25. 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."**

26. 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…"**

27. 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."**

28. 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…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."**

29. 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 been 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."**

30. As indicated in the medical reports, it seems that the respondent suffered pain. Having considered the injuries sustained I am of the view that the injuries did not warrant an award of Kshs 500,000.00. Based on the authorities cited, I find that the said award was manifestly excessive in the circumstances. Considering the inflationary tendencies, I set aside the said award and substitute therefor an award of Kshs 350,000.00. Save for that the appeal fails.

31. As both parties have not wholly succeeded, each party will bear the costs of this appeal.

32. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 28th day of November, 2019

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Geoffrey