



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 502 OF 2017**

**SUNDRIES BARGAINS (NAIROBI) LIMITED.....APPELLANT**

**-VERSUS-**

**RICHARD KARINGA MWANGI.....RESPONDENT**

**(Being an appeal from the judgement of the Chief Magistrate's Court, Milimani**

**Commercial Courts, Nairobi by Hon. P. Muholi (Mr.) – Resident Magistrate dated 23<sup>rd</sup> August 2017)**

**JUDGEMENT**

1. The respondent filed suit against appellant seeking general and special damages, costs and interest. He claimed motor vehicle KAM 576L lost control and knocked him down as result of which he sustained injuries. He blamed the appellant driver for causing the accident.
2. Appellant filed defence and denied the allegations and blamed the respondent for causing the accident and/or contributing to the occurrence of the same.
3. The matter was heard and respondent succeeded and on liability apportioned same 90:10% in his favour and on quantum he was awarded:-

. General damages 600,000/=

. Special 15,928/=

**Total 615,928/=**

Less 10% 61,592/=

Balance 554,336/=

4. Being aggrieved by the said verdict the appellant lodged instant appeal and set out the following 5 grounds:-

**(1) The honourable learned magistrate erred in fact and law by holding that accident involving the appellant's motor vehicle registration number KAM 576L, Isuzu Lorry and the respondent occurred on 20<sup>th</sup> day of March 2010, when there was no evidence before him to support such finding.**

**(2) The honourable learned magistrate erred in law and in fact by holding the appellant 90% liable for the occurrence of an alleged accident on 20<sup>th</sup> March 2010 when there was no evidence to support its occurrence or the appellant's involvement in it.**

**(3) The honourable learned magistrate erred in law by failing to take into consideration the evidence tendered by the police officer who was called to produce the police abstract and the appellant's witness which demonstrated that it was highly unlikely that the respondent would have walked without assistance from the alleged scene of the accident and further that the motor vehicle would not have been freed before inspection, if at all an accident resulting in personal injury to the respondent had indeed occurred.**

**(4) The honourable learned magistrate misdirected himself in law by failing to follow the case law relied upon by the parties in support of their respective submissions in clear departure from the doctrine of state decisis.**

**(5) The honourable learned magistrate erred in law and in fact in awarding quantum of damages which cannot be sustained by the prevailing economic realities in the country.**

5. The parties were directed to file submissions to canvass appeal.

**APPELLANT'S SUBMISSIONS:**

6. It is the appellant's submission that without any corroborative evidence from the police, coupled with unbelievable claim by the respondent that he was able to walk unassisted after a loaded 14 tons lorry ran over his legs, the learned magistrate committed a serious error of judgment when he held that an accident involving the appellant motor vehicle registration number KAM 576L and the respondent had occurred on 20<sup>th</sup> March 2010, and blaming the appellant's driver Mr. Anthony Kang'ethe responsible for it.

7. On submission on Ground 2 of the appeal, this ground is to the effect that the learned magistrate erred (based on the material evidence presented before him), to hold the appellant's 90% liable for the alleged accident, given that there was no material evidence presented before him to warrant that holding.

8. In his judgment, the learned magistrate appeared to blame the appellant for not calling the turn boy whose written statement had already been admitted and who passed on during the pendency of the suit (a fact brought to his attention).

9. In *Peter Okello Omedi vs Clement Ochieng [2006] eKLR, M. Warsame J* (as he then was), stated as follows:

**“The court was confronted by two opposing versions as to how the accident involving the respondent and the motor vehicle driven by the appellant has occurred. The court conceded that the respondent had a duty of care to other road users but there is no evidence to show that the respondent had discharged his duty of care to the appellant to uphold the apportionment of liability as was done by the trial court.”**

10. At paragraph 4 the learned Judge stated as follow:-

**“The factors that made the trial court to determine liability at 80-20 is not clear. A party who called no witness to justify his evidence or reception of his evidence cannot be said to have proved his case to warrant 20% liability against him.”**

11. In the case appealed from, no investigation was done by the police, the alleged scene of the accident was not visited by the investigating officer (as the respondent ran away from the station), and no-one was blamed, it, therefore, submit that the learned magistrate had no basis for holding the appellant 90% liable.

12. In his evidence in court, PW2 Dr. Theophilus Wangata testified that:

**“He suffered fracture of the right fibula, pain and psychological he can get post traumatic osteoarthritis.”**

13. In his closing sentence on cross examination he said that:

**“Someone has to assist him. The other leg cannot step down.”**

14. The answer was given in response to a question as to whether a person who sustains a fracture of the fibula could walk unsupported.

15. On his part, the respondent stated on cross examination as follows:

**“I still walk (sc). I was only injured on the leg only. I slid fell down and ran over my leg. The rest was minor injury.”**

16. Notwithstanding all the evidence pointed to the fact that injury, if any, which the respondent may have sustained was minor in nature, the learned magistrate went on to award an amount of Kshs.600,000/=, as general damages.

17. It therefore, urged the honourable court to interfere with the learned magistrate's assessment of general damages and reduce the same to Kshs.200,000/=, taking into consideration the prevailing economic realities in the country.

18. In the foregoing premises the appellant prays that the honourable court be pleased to:

**a) Set aside the lower court's finding on liability and award of general and special damages as there was no sufficient evidence before the learned magistrate to support the respondent's allegation and substitute it with an order dismissing the respondent's suit in the lower court.**

19. Respondent had not filed submissions at the time of preparing the judgement.

**EVIDENCE ADDUCED:**

### **Respondent's Case:**

20. The respondent called 4 witnesses in support of his case. PW1 was police constable John Ouko attached to Kasarani traffic base, he confirmed that an accident was reported involving motor vehicle registration number KAM 576L and a pedestrian. He produced the police abstract report.

21. PW2 was Dr. Theophilus Wangata a general medical practitioner who examined the respondent. He confirmed fracture of the right fibula and was treated at Kiambu District Hospital. He relied on the P3 form, treatment notes and x-ray request form. He confirmed that at the time he re-examined him the patient had a limping gait and swelling on right foot. He told court that on such an injury, one can walk from the scene of the accident or he can be assisted.

22. PW3 was Geoffrey Ndungu Ng'ang'a attached to Kiambu District Hospital. He confirmed that from the records the respondent was treated at their hospital on 23/3/2010. He produced the treatment card from Kiambu District Hospital. He also confirmed that he was familiar with the handwriting of the clinical officer who treated the patient and identified her as Rhoda Kamau.

23. PW4 was the respondent himself, he told court that he was walking along Thika at Githurai 45 when he was suddenly knocked from behind by a motor vehicle registration number KAM 576L which had veered off the road. He stated that the motor vehicle ran over his foot, he was taken to Kasarani Police Station and later rushed to Kiambu District Hospital and later for further treatment at Aga Khan Hospital and follow-up treatment at Kenyatta National Hospital. He told court that due to the injuries he cannot walk for long distances and he is constantly in pain.

24. He blamed the driver for driving negligently, not hooting or warning him and veering off the road. He produced the police abstract, P3 form, treatment notes from Kenyatta National Hospital, treatment notes from the Aga Khan, copy of records, demand letter and bundle of receipts. The respondent then closed his case.

### **Appellant's Case:**

25. The appellant called 1 witness, Anthony Kangether Waithaka. He told court that he was the driver of the accident motor vehicle on that day. He testified that he was at Githurai 45 offloading goods at Stanmatt Supermarket. He told court that the turn boy asked him not to move further because he had noticed a pedestrian underneath the lorry.

26. He disembarked from the lorry and found the pedestrian speaking to the turn boy and asking him to open the door, so that they take him to hospital because he had been injured on the right leg ankle.

27. He took him to Kasarani Police Station and moments later the respondent disappeared before they had taken him to hospital. He then closed his case.

### **ISSUES**

28. After going through the proceedings, pleadings and the submissions on record, I find the issues are; ***whether the respondent proved his case on balance of probabilities on liabilities and if yes to what extent? was the award inordinately high to warrant the court to interfere with the same? What is the order as to costs?***

### **ANALYSIS AND DETERMINATION:**

29. This being the first Appellate Court it is duty bound to re-evaluate the evidence, assess it and come to its own conclusion bearing in mind the fact that It did not have the opportunity of seeing or hearing witnesses who testified at trial (***See Selle vs. Associated Motor Boat Company Ltd (1968) EA 123.***)

30. In the case of ***Mbogo vs. Shah & Another (1968) EA 93*** the Court clearly stated thus:

***“..... It is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”***

31. The respondent testified that he was injured by the motor vehicle and the accident was reported to Kasarani Police Station. He told court that he was walking on the side of the road when he was hit by the motor vehicle from behind. The police officer who testified as PW1 confirmed that an accident was reported at their station.

32. The driver who testified as DW1 told court that he was told by his turn boy not to move further because there was a person beneath the lorry. The appellant submitted that there was no accident because the lorry was 14 tons and that there is no way the respondent would have walked if he was ran over.

33. The respondent in their submission showed that the driver was told by the turn boy not to move because there was a pedestrian lying underneath the lorry and this shows that the accident occurred on the path of the respondent. He told court that the appellant driver contradicted himself by stating that he had stopped and at the same time stating that he was joining the main road.

34. I have considered those rival arguments, the first conclusion is that an accident occurred involving the respondent and the appellant's motor vehicle for the reasons that the driver did not see what happened but the turn boy informed him that there was someone beneath the lorry and even cautioned him not to move further. It is therefore probable that by the time the conductor/turn boy saw the motor vehicle and the pedestrian he had already been injured.

35. Secondly, is the issue of liability. The trial court established that an accident occurred. The driver who testified as DW1 did not witness what happened, his testimony is based on what he was told by the conductor, who unfortunately, though recorded statement was not called to testify in court.

36. The respondent on the other hand stated that he was knocked by the lorry which ran over him. This evidence would have been challenged if the defence called the turn boy who appears to have noticed what happened or how the accident occurred. In the absence of any other evidence as to how the accident occurred the only version available would appear to be that of that of the respondent.

37. However, the matter was reported to the police but was yet to be investigated by the police. It was alleged that the scene of the accident was not visited by the investigating officer (as the respondent was said to have ran away from the station), and no-one was blamed. It therefore, would cause and inference that the respondent's version may not be wholly truth as he does not say why he never recorded statement blaming motor vehicle of the accident to enable police blame him if at all he was wholly to blame.

38. Thus the trial court erred (based on the material evidence presented before him), to hold the appellant's 90% liable for the alleged accident, given that there was no material evidence presented before him to warrant that holding.

39. In his judgment, the learned magistrate appeared to blame the appellant for not calling the turn boy whose written statement had already been admitted and who passed on during the pendency of the suit (a fact brought to his attention).

40. Although the driver would appear not to have been careful as to his surroundings, because he could not even notice that he had knocked someone, and was in control of the lethal weapon and ought to have exercised much higher care the respondent did not explain what he did to avoid the accident and why the driver was not blamed by the police for the accident. Therefore, I will apportion liability at 60%; 40% in favour of the respondent.

41. The next issue relates to quantum. The respondent claims to have sustained fracture of the lower right fibula, swollen right leg, blisters right foot, soft tissue injuries and fracture of the 2<sup>nd</sup> metatarsal.

42. It relied on the medical report by Dr. Wanganta, which confirmed fracture of the right fibula, the transfer form from Aga Khan also confirmed fracture of fibula. The radiology report from Aga Khan dated 21/3/2010 confirmed multiple fracture distorted involving the fibula and multiple tarsal and metatarsal bones.

43. The treatment documents confirmed the injuries as pleaded. It is therefore not in doubt that the respondent sustained the injuries as pleaded which is supported by the medical documents presented in court.

44. The respondent have submitted and urged the court to award Kshs.1,500,000/= and made reference to the case of **Margaret Aoko Diero vs African Lint Transporters Limited & Anor 1 eKLR** where the respondent sustained fracture malleoli of tibia and fibula and multiple soft tissue injuries, and the court awarded Kshs.1,250,000/=. However, the injuries in this particular authority were much severe than the present suit.

45. **Sarco Industries Limited vs David Mwangi kKmotho HCCA No. 12 of 2005** where the respondent sustained fracture of tibia and fibula, fracture left elbow and deep cut wound left forehead and the court awarded Kshs.1,000,000/=. They also referred to **Hussein Abdi Hashi vs Hassan Noor HCCC No. 550 of 2000** where the court awarded Kshs.800,000/=.

46. The appellant submitted and made reference to the case **No. HCCC No. 334 of 2004 – Isaac Mwenda Michemi vs Mutegi Mwangi [2004]** where the court awarded Kshs.100,000/= for fracture of left tibia and fibula.

47. They also referred to **HCCC No. 879 of 2002 Samuel Mungai Njau vs Wananchi Sanitary & Hardware Limited [2004] eKLR** where the court awarded Kshs.150,000/= for fracture tibia and fibula, fracture of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> metatarsal of the right foot.

48. Lastly, the case of **HCCC No. 2068 of 2002 – Hassan Noor Mohamoud vs Tae youn Ann [2001]**, where the court awarded Kshs.200,000/= for fracture in the lower 1/3 of the tibia and fibula.

49. All the authorities, by the respondent refer to more serious injuries than the injuries sustained by the respondent herein, while the ones by the appellants though relevant were decided more than 15 years ago and may not reflect the current trend of awards.

#### **General Principles:**

50. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike (**See Stanley Maore vs Geoffrey Mwenda - Nyeri Civil Appeal No. 147 of 2002 [2004] eKLR**). I would also add what the Court of Appeal stated in **Mbaka Nguru & Another vs James George Rakwar Nrb Civil Appeal No. 133 of 1998 [1998] eKLR** that:

***“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”***

51. In reaching an appropriate award, the court ought to consider the value of the shilling and the state of the economy. The court should avoid astronomical awards but strive to ensure that the final award makes sense and fairly compensates the claimant (**See *Kigaraari vs AYA [1982-88] 1 KAR 768, Ugenya Bus Service vs Gachoki Nakuru Civil Appeal No. 66 of 1981 [1982] eKLR* and *Jabane vs Olenja [1986] KLR 661***).

52. **In Civil Appeal No. 118 of 2018 *Civicon Ltd vs Gladys Omwancha & Others***, Gladys sustained fracture of tibia and fibula and had been awarded Ksh. 1 million but in appeal same was reduced to 450,000/=.

53. I find that the award was inordinately high bearing in mind the nature of injuries and the authorities cited and as such it represented an entirely erroneous estimate of damages. Thus am inclined to reduce the award to Ksh. 400,000/= for general damages.

54. Thus the appeal succeeds to that limited extent otherwise the appeal is dismissed with no orders as to costs.

55. The final orders are;

***i. The judgement on liability is adjusted to 60%:40% in respondent’s favour.***

***ii. General damages are adjusted downward to Ksh 400,000/=.***

***iii. Parties bear their costs.***

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**