REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 3 OF 2016

GODFREY WAMALWA WAMBA................................1ST APPELLANT

KYOGA HAULIERS LIMITED..................................2ND APPELLANT

VERSUS

KYALO WAMBUA..RESPONDENT

(Being an appeal from the Judgment of the Honourable Senior Principal Magistrate E. G. Nderitu in Voi Civil Case No SPMCC No66 of 2015- Voi delivered on 15th February 2016)

BETWEEN

KYALO WAMBUA...PLAINTIFF

VERSUS

GODFREY WAMALWA WAMBA...............................1ST DEFENDANT

KYOGA HAULIERS LIMITED................................2ND DEFENDANT

JUDGMENT

1. In his Plaint that was dated 22nd April 2015 and filed on 29th April 2015, the Respondent sought the following reliefs:-

a. General damages

b. Special damages Kshs 153,000/=

c. Cost (sic) **of the suit**

d. Interest

e. Loss of future earnings

f. Any other relief deemed fit to grant by this honourable court (sic)

2. The Appellants jointly filed a Defence dated 22nd May 2015 on 26th May 2015 wherein they denied all the Respondent's allegations contained in his Plaint. They blamed the driver of the Motor Vehicle he was travelling in for having caused the accident herein. He filed his Reply to the Defence dated 6th June 2015 on 18th June 2015.

3. In her judgment delivered on 15th February 2016, Hon E. G. Nderitu, Senior Principal Magistrate at Voi Law Courts awarded the Respondent herein a sum of Kshs 853,000/= made up as follows:-

General damages	**Kshs 700,000/=**
Future medical expenses	**Kshs 150,000/=**
Special damages	**Kshs3,000/-**

Plus costs and interest thereon from the date of judgment.

4. The said Learned Trial Magistratefound that the 1st Appellant herein to have been wholly liable for the accident and the 2ndAppellant to have been vicariously liable for his negligence.

5. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellants filed their Memorandum of Appeal dated 15th March 2016 on the same day. They relied on seven (7) Grounds of Appeal.

6. On 9th March 2017, the Appellants filed their Record of Appeal of even date. Their Written submissions dated 4th December 2017 were filed on 5th December 2017. The Respondent filed his Written Submissions dated 18th November 2017 on 7th December 2017.

LEGAL ANALYSIS

7. This being a first appeal, this court is under a duty to re-evaluateand assess the evidenceand make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

8. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123**and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

9. Having the aforesaid holding in mind and having looked at the Appellant's grounds of appeal and the parties respective Written Submissions, it was clear to the court that the issues for consideration and determination were ideally the following:-

a. Whether or not the Learned Trial Magistrate erred in apportioning liability wholly as against the Appellants;

b. Whether or not the quantum that was awarded by the Learned Trial Magistrate was so manifestly excessive and/ or inordinately high in the circumstances requiring interference by this court.

10. The said issues were therefore dealt with under the distinct heads shown hereinbelow

1. LIABILITY

11. The Appellants submitted that the Respondent had failed to prove his case on a balance of probabilities. It was their contention that that No 81020 PC Julius Oketch(hereinafter referred to as " PW 2") failed to produce a sketch map to demonstrate skip marks, speed of Motor Vehicle Registration KBA 689G (hereinafter referred to as the "1st subject Motor Vehicle) in which he was travelling as a conductor and Motor Vehicle Registration Number UAH 574/UAD 1190 (hereinafter referred to as "the 2nd subject Motor Vehicle) that was being driven by the 1st Appellant herein and registered owner of the 2nd subject Motor Vehicle.

12. They stated that the evidence of where the two Motor Vehicles landed after the accident was speculative. They asserted that from the Respondent's evidence and that of PW 2, the point of impact was never proven and consequently, the drivers of both Motor Vehicles were equally liable.

13. They further averred that the Respondent herein was a turn boy/conductor and could not therefore tell what evasive maneuvers the driver of the 1st subject Motor Vehicle took to avoid the collision with the 2nd subject Motor Vehicle. They therefore argued that the Learned Trial Magistrate erred when she found them to have been wholly liable for the accident herein.

14. In this regard, they referred this court to the case of **Jimnah Munene Macharia vs John Kamau Erera NBI.C.A.C.A.NO.218/1998** (unreported) where the Court of Appeal cited with approval the case of **Barclays Steward Limited & Another vs Waiyaki (1982-88) KAR,** it was held as follows:-

> **"The base narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr Cottle was driving on his correct side where the range power crushed it.…Collision is a fact. It is however not reasonable possible to decide on the evidence of Wainyaki** (sic)**and Gitau who is to blame for the accident. In this state of affairs the question arises whether both drives should be held liable."**

15. In the same case, the Court of Appeal had cited with approval the case of **Baker vs Harburough Industrial Co-operative Society Limited (1953) 1 WLR 1472**where Lord Denning observed as follows:-

> **"Everyday, proof of collision is held to be sufficient to call on the Defendant to answer. Never do they both escape liability. One or the other is held to blame and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitantly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw distinction between them."**

16. On his part, the Respondent averred that he was a passenger in the 1st subject Motor Vehicle and because he had no control whatsoever in the manner in which the said vehicle was being driven, no liability could be attached to him. He was emphatic that his evidence and that of PW 2 was under oath and had not been uncontroverted by the Appellants.

17. He pointed out that PW 2 tendered evidence that showed that the 1st Appellant caused the accident for venturing into the wrong lane while attempting to overtake thereby causing the 2nd subject Motor Vehicle to collide with the 1st subject Motor Vehicle. The 1st Appellant was charged with the offence of causing death by dangerous driving but as at the time of the trial, the case had not yet been determined.

18. The circumstances of the case herein were that on 28th August 2012, the Respondent was travelling as a bus conductor in the 1st subject Motor Vehicle along Nairobi-Mombasa Highway at Man-Eaters when it

collided with the 2nd subject Motor Vehicle that encroached into the path of the 1st subject Motor Vehicle as it was trying to overtake another vehicle.

19. PW 2 testified on behalf of PC Wangui who was initially the Investigating Officer but she had since been transferred to Nyanza. He contended that the 1st Appellant was responsible for the accident. He did not adduce in evidence sketch plans to show how he arrived at the said conclusion. This court could therefore not confirm on which side of the road the impact occurred, a point that the Appellants correctly pointed out.

20. Appreciably, although they did not Cross-examine PW 2, the burden of proof lay on the Respondent to prove that the Appellants caused the said accident. He made an assertion that was not proven by facts and hence, there was nothing for the Appellants to have controverted.

21. This court therefore agreed with the Appellants that in the absence of proof of where the impact of the accident between the 1st and 2nd subject Motor Vehicles was, the Learned Trial Magistrate erred when she found and held that liability would attach wholly against them merely because they did not call a witness to counter the Respondent's assertions. It was not sufficient for him and PW 2 to have asserted that the Appellants were to blame for the accident without adducing documentary evidence such as photographs or sketch plans to prove the same.

22. This court fully associated itself with the holding of Warsame J (as he then was) in the case of **Jotham Mugalo vs. Telkom (K) Ltd Kisumu HCCC No. 166 of 2001**(unreported), when he stated as follows:-

> **"…The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence."**

23. In this regard, this court also fully associated itself with the cases of **Barclays Steward Limited & Another vs. Waiyaki** (Supra) and **Baker Vs. Harburough Industrial Co-operative Society Limited**(Supra) that was relied upon by the Appellants and thus came to the conclusion that apportionment of liability at 50%-50% as against the Appellants and the Respondent herein was fair and reasonable in the circumstances of the case herein.

24. The Respondent failed to enjoin the driver and registered owner of the 1st subject Motor Vehicle to his detriment. He must therefore forfeit 50% part of his claim.

II QUANTUM

25. The Appellants contended that general damages must be reasonable and within the limits of decided cases of similar nature. They were categorical that the award of Kshs 700,000/= general damages that the Learned Trial Magistrate awarded the Respondent was manifestly excessive.

26. Although they, admitted that the injuries he sustained were serious, they did not annex a decided case or propose a figure they deemed to have been reasonable in the circumstances to assist this court at arriving at a reasonable figure. They merely pointed out that the Learned Trial Magistrate was guided by the case of **Jackson Murerwa vs Jai-Ambe Enterprises [2011] eKLR** that it had relied upon.

27. On his part, the Respondent referred this court to the principles set out in the case of **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) L KAR 727**at page 703 on when an appellate court can to interfere with the finding of a trial court. In the said case it was held that:-

> **"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 court only if it satisfied that the trial court applied the wring principles (as by taking into account some irrelevant factor or leaving out of account some relevant) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an erroneous estimate."**

28. The appellate court also arrived at a similar holding in the case of **Butt vs Khan (1977) I KAR**.

29. He relied on the case of **Stephen Mutisya Muumbi vs Peter Mutuku Katuli [2008] eKLR**where the plaintiff therein was awarded a sum of Kshs 600,000/= general damages for a fracture of the tibia/fibula. He pointed out that the case was decided over nine (9) years ago.

30. He also relied on the case of **Lucy Ntibuka vs Bernard Mutwiri & Others [2007] eKLR** where the court awarded the Plaintiff therein Kshs 500,000/= general damages for multiple soft tissue injuries. He also pointed out that the case was decided over ten (10) years ago.

31. The court noted that the Respondent suffered the following injuries:-

> **a. Compound fracture of the right distal tibia/ fibula**
>
> **b. Cut wound on the scalp**
>
> **c. Cut wound on the chest**
>
> **d. Cut on the lower lip**.

32. He was admitted in hospital for three (3) weeks where he underwent surgery and plus K wire inserted to repair the fibula. A back slab application to align the fracture was also done. He was put in a cast for three (3) weeks. The K wire and the cast were removed on 26th July 2013, more than seven (7) months later.

33. Dr Mohamed Hanif (hereinafter referred to as "PW 1") adduced in evidence a Medical Report dated 19th October 2015 that showed that there was obvious deformity of the lower third of the Respondent's limb which was wasted and shortened by about two (2) centimetres. He noted that he had continued to attend clinics even as at the time of the medical examination when he still complained of pain in the lower limb and difficulties in walking, which he did with support. He recommended corrective orthopedic surgery to correct the non- union of the tibia which he estimated would cost Kshs 500,000/=.

34. The Appellants and the Respondent consented to admit the Medical Report of Dr Udayan R Sheth that was dated 23rd October 2015. He made similar observations regarding the deformity of the right leg due to malposition fracture right tibia, shortening of the leg by two (2) centimetres and need for corrective surgery. He, however, put the cost of the operation at Kshs 40,000/=.

35. It is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law.

36. The principles for an appellate court interfering with an award of a trial court were set out in the case of **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No 2) (1982-88) L KAR 727**at page 703 that**:-**

> **"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.**

37. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

38. In the case of **Cecilia W Mwangi & Another vs Ruth Mwangi[1977] e KLR** where the court cited with approval the case of **Tayab vs Kinanu (1982-88) 1KAR 90** where the court therein stated that:-

> **"I state this so as to remove the misapprehension so often repeated that the Plaintiff is entitled to be fully compensated for all the loss and detriment she had suffered. That is not the law she is only entitled to what is in the circumstances a fair compensation, fair both to her and to the Defendants. The Defendants are not wrong doers. They are simply the people who foot the bill.**

39. Further in the case of **Daniel Kosgei Ngelechi vs Catholic Trustee Registered Diocese of Eldoret & Another [2013] eKLR**, the court therein cited with approval the case of **Kigaragari vs Aya (1982-88) 1 KAR 768** where it had been stated as follows:-

> **"Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee …..."**

40. In assessing general damages, courts must have presence of mind to ascertain the sum of general damages that other courts and especially appellate courts would ordinarily award in respect of a particular injury. A plaintiff's compensation ought to be comparable to awards by other courts. In view of the aforesaid, a court must therefore be guided by precedents.

41. In assessing general damages, courts must have presence of mind to ascertain the sum of general damages that other courts and especially appellate courts would ordinarily award in respect of a particular injury. A plaintiff's compensation ought to be comparable to awards by other courts. In view of the aforesaid, a court must therefore be guided by precedents.

42. In the case of **Kigaraari vs Aya(1982-88) 1 KAR 768**, it was stated as follows:-

> **"Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."**

43. In the case of **Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR** , on appeal, Wakiaga J allowed a sum of Kshs 700,000/= general damages where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she will need money to remove k-nails and screwsor.

44. *In the case of***Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR***,the Court of Appeal referred to the cases of* ***Antony Mwangi vs Martin Muiruri [2008] eKLR,*** *where the plaintiff therein sustained a fracture of the femur and was awarded Ksh.400,000/= as general damages and the case of* **Joseph Suri Nyateng vs H.P. Mashru [1999] eKLR** *where the plaintiff therein sustained a fracture of the femur and a dislocation of the shoulder and was awarded Ksh.450,000/=.*

45. In the caseof**Joseph Musee Mua vs Julius Mbogo Mugi & 3 others [2013] eKLR**, the plaintiff therein suffered a fracture of left tibia and fibula, two (2) broken upper jaw teeth, chest and shoulder injuries. His nerves were also affected. He had shortening of the left leg and as a result, he suffered 5 %

disability. The Court awarded Kshs1,300,000/= general damages.

46. Having had due regard to the aforesaid cases, the evidence of PW 1, the Respondent and the Medical report of Dr Udayan R Sheth, it appeared to this court that the award of Kshs 700,000/= was not unreasonable in the circumstances of the case herein. Indeed, the Appellants also conceded in their Written Submissions that the injuries the Respondent sustained were serious.

47. Notably, the Learned Trial Magistrate did not make any reference to the Medical Report by Dr Udayan R Sheth. She, however, noted that the Respondent had claimed for Kshs 150,000/= for future medical expenses in his Plaint. In view of the disparity in the cost of the corrective surgery in the two (2) Medical Reports, this court found that the Learned Trial Magistrate acted correctly when she adopted the sum Kshs 150,000/= because it was between Kshs 500,000/= that had proposed by PW 2 and Kshs 40,000/= that had been suggested by Dr Udayan Sheth. This court was therefore not persuaded to interfere with the Learned Trial Magistrate's decision on future medical expenses.

48. Accordingly, having considered the Appeal herein, the Written Submissions in support of the respective parties' cases and the case law, the court was not persuaded that this was a suitable case for it to exercise its discretion to interfere with the lower court's finding for the reason that the Appellants did not demonstrate that the quantum that was awarded by the Learned Trial Magistrate was so manifestly excessive so as to warrant this court to interfere with the same.

49. To the contrary, this court found and held that the Learned Trial Magistrate applied the correct principles in assessing the general damages and future medical expenses. The Appellants did not dispute the special damages and the same were proved during the trial thus interference by this court was not warranted.

DISPOSITION

50. For the reasons foregoing, the upshot of this court's judgment was that the Appellant's Appeal that was dated9th March 2017 and filed the same day was partly merited on the issue of apportionment of liability.

51. In the circumstances foregoing, this court hereby sets aside and/or vacates the Judgment of Kshs 853,000/= that had been entered in favour of the Respondent against the Appellants and in its place hereby enters judgment in his favour against the Appellants for Kshs 426,500/=made up as follows:-

General damages	**Kshs 700,000/=**
Future medical expenses	**Kshs 150,000/=**
Special damages	**Kshs 3,000/=**
	Kshs 853,000/=
Less 50% liability	**Kshs 426,5000/=**
	Kshs 426,5000/=

Plus costs and interest thereon from the date of judgment.

52. In view of the fact that this Appeal was partly successful, each party shall bear its own costs of this Appeal.

53. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20th** day of **February** 2018

J. KAMAU

JUDGE