REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO.22 OF 2015

JANE WARUGURUMIANO.....APPELLANT

VERSUS

JOTHAM NGURI MAGONDU.....1ST RESPONDENT

MURIITHI SAMUEL.....2ND RESPONDENT

(Appeal Arising From The Judgement Of The Senior Resident Magistrate At Kerugoya By Hon. J. A. Kasam In Chief Magistrate's Civil Case No.58 Of 2015 Delivered On 25th June, 2015)

J U D G E M E NT

The appellant JANE WARUGURU MIANO filed this appeal against the judgement of the Senior Resident Magistrate Kerugoya CM's CC 58 of 2015 delivered on 25.6.2015. The appellant had filed a case against the respondents Jotham Nguri Magondu and Muriithi Samuel claiming special damages, general damages, cost and interest. The claim is based on the facts that on 26.2.2013 the appellant was travelling as a passenger in motor registration number KAW 067 N which was owned by the 1st defendant Jotham Nguri Magondu the beneficial owner and was owned by the 2nd defendant who was the registered owner. The vehicle was involved in an accident due to the negligent manner of driving by the defendant by themselves, their servants or agents. The vehicle veered off the road and rolled several times as a result of which the plaintiff sustained severe bodily injuries. The court delivered judgement and apportion liability against the defendants at 70% and the appellant to shoulder 30% liability. She was awarded general damages of Kshs.250,000/=, future medical care kshs.250,000/= special damages of Kshs.35,280/= plus costs of the suit.

The appellant was aggrieved by the judgement and filed this appeal which raises the following grounds;

- **That the learned trial Magistrate erred both in law and fact in apportioning Liability at 30%: 70% in disregard of the fact that the appellant was only a passenger.**
- **That the trial Magistrate erred in both law and facts in failing to make a finding that the appellant boarded motor vehicle registration number KAW 067 N with the consent of the respondents and was such an authorized passenger.**
- **The learned trial Magistrate erred in both law and facts when she awarded sum of Kshs.250,000/= as damages for injuries suffered which amount is manifestly low in the circumstances and connotes an erroneous estimate of damages suffered.**
- **That the learned Magistrate erred in law and in fact in failing to consider even adequately adopt and appreciate the written submissions of the plaintiff on record and the authorities annexed therein in support of the plaintiff's case.**
- **The learned trial Magistrate failed to follow the rules of precedents in awarding general damages.**
- **The trial Magistrate considered irrelevant matters and against the weight of evidence on record in arriving at the said decision on favour of the respondents against the appellant.**

She prays that the appeal be allowed and she be awarded costs.

The respondent submits that the appellant has failed to prove the wrong principles on which the Magistrate relied and acted on. He prays that the appeal be dismissed.

I have considered the appeal. There two issues which arise. The first one is quantum of damages and liability. This being a 1st appeal this court must bear in mind that its primary role as the 1st appellate court is to review the evidence before the trial Magistrate and reach an independent decision whether or not to uphold the judgement and to bear in mind that it did not hear or see the witnesses testify. I refer to ***Kenya Ports Authority Vs. Kuson (Kenya) Limited (2009) 2 E.A 212.***

The evidence before the trial court was that the 1st respondent gave the appellant a lift together with her friend. She paid Kshs.20/=. Upon reaching Gakuo area, a P.S.V abruptly stopped. The 1st respondent swerved to avoid hitting it where upon the vehicle rolled and landed in a ditch. The appellant sustained injuries.

The 1st respondent blamed the P.S.V though he did not note its registration. The 1st respondent blamed the appellant for failing to fasten the seat belt. The 1st respondent admitted during cross examination that the appellant was a passenger in his motor vehicle. The 1st respondent did not raise the issue that the appellant did not fasten the seat belt at paragraph 8 of the defence and blames the appellant of negligence.

From the evidence adduced the vehicle was not in collision with any other motor vehicle. The respondent stated that the matatu which was ahead of him stopped without warning. The plaintiff on her part stated that the driver was trying to overtake a number of vehicles when a vehicle which was trying to overtake obstructed him. The respondent has not disputed the negligence apportioned to him. The appellant in her evidence in court did not state that she had fastened the seat belt. She admitted that the vehicle was not a matatu.

What comes out clearly is that the accident occurred. The respondent was driving the said motor vehicle. According to the plaintiff, the respondent was overtaking. The respondent blames a vehicle which stopped abruptly. The respondent was negligent. He stated that he swerved to the right which was his off side. The particulars of negligence pleaded were proved. The appellant was a passenger. She had no control of the motor vehicle. She could not have done anything to prevent the accident. The respondent has not denied that she was an authorized passenger in the vehicle. As a passenger she could not have contributed to the cause of the accident in any way. Based on the evidence before the trial Magistrate, I am of the view that the respondent was entirely to blame for the accident.

The respondent blamed the driver of a Nissan matatu. The respondent never applied to join the matatu driver as 3rd party as required ***under Order 15 rule 2 civil procedure Rules.*** The respondent is bound by his pleading. The respondent could have avoided the accident if he had kept his distance. The accident was self involving, the respondent lost control and the vehicle rolled. The appellant had nothing to do with the cause of the accident. The trial Magistrate found the respondent liable but did not state why she apportioned blame on the appellant. I find that the appellant was not to blame for the accident in any way. For the court to find the appellant to blame, the court must state the act of omission which she committed. The respondent blamed the appellant for failing to fasten the seat belt. The respondent in his evidence did not adduce evidence that the appellant had failed to fasten the seat belt. The respondent had the burden to prove that the appellant was at fault which means negligence, breach of statutory duty or other act of omission which gave rise to liability tort or which would give rise to the defence of contributory negligence. It is a failure of an injured party to act prudently. In a persuasive decision in ***Wilter Chemutai Torongei Vs. W.E. Tilley Muthaiga & Another (2017) eKLR*** the court held;

> **The only time a passenger maybe held to be liable in my view, is when for instance it is shown that he did not fasten his seat belt or was trying to jump out of the vehicle when it has not stopped. That way, some contributory negligence could be attached to him.**
>
> **In this case, no evidence was tendered to suggest any contributory negligence by the deceased. The circumstances are such that the deceased having been a passenger could not have caused or contributed to the occurrence of the accident in any way.**

In ***Mary Olando Vs. Lucas Ngode Mugunda (2015) eKLR***

> **At paragraph 8 however it is averred that the plaintiff contributed to the accident for failing to wear an available seat belt. At the hearing only the plaintiff and a doctor gave evidence and although the defendant`s advocate cross-examined her she was not questioned on the use of the seat belt and no evidence was adduced that she did not wear a seat belt. Her evidence remained uncontroverted and I agree with her advocate that the trial magistrate finding on liability was not based on any evidence. The appeal is therefore allowed, the finding/ apportionment of contributory negligence against the plaintiff is set aside and substituted with a finding that the Defendant is wholly liable for the accident**

This is the same situation here. The trial Magistrate did not base her finding of the appellants contributory negligence on any evidence.

The respondent relied on the case of ***Gitobu Imanyara & 2 others Vs. Attorney General (206) eKLR.***

Where it was stated:

> **"Whereas an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial Judge should stand this jurisdiction is to be exercised with caution if there is evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight bearing of circumstance admitted of proved or had plainly gone wrong, the appellate court will not have to do so"**

The trial court had no basis to find liability on the appellant. I must therefore interfere with her finding. I am of the view that based on the evidence on how the accident occur, it is the respondent who was wholly to blame for the accident and is 100% liable for the accident.

The second issued for determination is general damages. The appellant pleaded that she suffered a headache, had huge haemotoma, had neck pain, left scapular fracture with tenderness, dislocation of right shoulder joint, fracture of 8th rib with tenderness, lumbar spine, pain and bruises of lower limbs. General damages for pain and suffering was awarded at Kshs.250,000/=. The appellant s stating that the damages were too low. It is now settled in law that the appellate court will not interfere with an award of damages unless it is shown that the court applied irrelevant factors, failed to take into account some relevant factors or acted on some wrong principle of law. The court will also consider whether the award is too low or inordinately high as to be wholly erroneous. This was stated in the court appeal in the case of ***Kemfro Africa Ltd t/a Meru Express service Gathogo Karuri Vs. A.M. Lubia & Another (1982 – 1988)*****KLR** where it was held:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that wither that the Judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

The award of damages is a matter of the exercise of the court discretion. In the case of ***Gitobu Imanyara (Supra)*** the Court stated

"Further formerly established that this court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the 1st instance they would have given a large sum".

The appellant has failed to prove the wrong principle on which the Magistrate relied and acted upon. The appellant is saying that the court should take into account the lapse of time, inflationary trends and the nature of injuries the court to enhance the award of general damages to two million (2,000,000/=) shillings. He relies on various authorities which he had cited in his submissions before the trial court. These are;

1. JOSEPH KIRUBINGANGA VS. KENNETH OKETCH eKLR 2009

"Where Lady Justice Martha Koome (as she then was) awarded the plaintiff Kenya shillings One million one hundred thousand (Kshs.1,100,000/=) for head – scratches/bruises of face, fracture of the scapula and fracture of left femur"

2. NAKURUHCC NO.202 OF 2009 – MICHAEL MAINAGITONGA VS. SERAHNJUGUNA ALIAS SERAHWANJIKUMUNGAI: 2012 eKLR.

"where plaintiff referred in Edward Mzamili case where the plaintiff suffered head injuries, leading to concussions, cut wound and bruises of the scalp, fracture of the left scapula, compound fracture and dislocation of the left elbow, chest injuries with multiple fractures of 5th, 6th and 7th ribs and fracture of left femur, upper 1/3 shafe, where Kshs.2,000,000/= was awarded.

In the case, Justice W. Ouko awarded Kshs.1,500,000/= for pain and suffering".

3. MACHAKOSHCC NO.190 OF 2008 MEHARI TRANSPORTERS LTD VS. DAMUSMUASYAMAINGI 2013 eKLR.

"Justice B.Thuranira Jaden awarded Kshs.1,600,000/= for blunt chest trauma with fractures of the right 4th , 6th and 7th ribs and haemothorax blunt abodominal trauma with laceration of the liver, fracture right scapula bone and friction, burns and laceration wounds right upper limb"

4. NAIROBI HCC NO.248 OF 2001 – KENNEDY OSEUR VS. MUSA LOCHO& ANOTHER AND COPY POINT LIMITED 2009 eKLR

"Where Justice J. M. Khamoni awarded Kshs.2,000,000/= for head injury leading to concussions, cut wound and bruises at the scalp, fracture of the left scapula, compound fracture, dislocation of the left elbow, chest injuries with multiple fractures of the 5th, 6th and 7th ribs and fracture of the left femur upper 1/3 shaft".

5. HCC NO.188 OF 2009 – HELLENATIENOODOUR VS. S.S. MEHTA & SON LTD AND MUTHITUNANUA 2015 eKLR

"Where Justice R. E. Ougo awarded the plaintiff Kshs.1,500,000/= for fracture of the right libia and Fibula multiple fractures of the ribs on the right side of the chest (3rd, 4th, 5th, 6th, 7th, and 8th rib) chest injury and hemothrax, blunt abdominal trauma, fracture of the right scapula and surgical scars on the right knees, interiorly, and right ankle joint medially".

The injuries in the cited cases show far more serious injuries which the plaintiffs sustained. Such authorities where they were cited should be taken as mere guides, the discretion of the trial Magistrate to determine the award of damages remains unfettered and the award in each case is based on its own circumstances and facts.

Upon perusal of the judgment, the trial Magistrate addressed her mind to the injuries and held that the document injuries as per the plaint were not challenged in court and the appellant was still on physiotherapy and rehabilitation after the accident because of severe physical and psychological therapy. The trial Magistrate stated that she considered the authorities cited and that they involved a fair injuries as those suffered by the plaintiff.

She took into account all factors, namely the nature and seriousness of the injuries, comparable awards and inflation. These are relevant matters. She cannot be faulted merely because another court would have awarded a bigger award. The award cannot be stated to be too low.

In conclusion:

On the issue of liability. I hold that the respondent was to blame for the accident. There was no contributory negligence proved against the appellant. I will therefore interfere with the finding on liability by the trial Magistrate.

I set aside the judgment on liability and substitute if with 100% liability against the respondent.

I find no reason to interfere on the award of general damages. The appeal on this ground has no merits and is dismissed.

I award costs to the appellant.

Dated and delivered at Kerugoya this 19th day of April, 2018

L. W. GITARI

JUDGE

Judgment read out in open Court .

Mr. Mwai for Mr. Muriithi for Respondent.

M/s Waweru for Mr. Mwaura for Appellant.

C/A:- Gichia