



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 22 OF 2017**

**SAID SWALEH SAID.....1<sup>ST</sup> APPELLANT**

**MOMBASA MAIZE MILLERS.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**TABITHA NJERI KINUTHIA.....RESPONDENT**

(An Appeal from the Judgement of Senior Resident Magistrate Y.I. Khatambi made on 17<sup>th</sup> March, 2017 in CMCC No. 50 of 2017)

**JUDGEMENT**

1. On or about 25<sup>th</sup> April, 2014 the Respondent, Tabitha Njeri Kinuthia was a pillion passenger on motorcycle registration number KMCS 954C which was riding along Malindi-Mombasa road when it was involved in an accident with motor vehicle registration number KBD 199Q belonging to the 2<sup>nd</sup> Appellant, Mombasa Maize Millers and which was being driven by Said Swaleh Said, the 1<sup>st</sup> Appellant. The Respondent sued the appellants at Malindi Chief Magistrate's court for compensation as a result of the injuries sustained in the accident. At the conclusion of the trial, the appellants were found entirely to blame for the accident and the Respondent was awarded Kshs. 3,952,270.00 in assorted damages plus interest on the decretal amount from the date of judgement. She was also awarded the costs of the suit.
2. The appellants being aggrieved by both the findings on liability and the quantum of damages have appealed to this court.
3. The Respondent opposed the appeal and filed a cross-appeal accusing the trial court of awarding her inordinately low damages.
4. Submitting in support of the appeal, counsel for the appellants asserted that there was contradiction in the evidence of the Respondent who testified as PW1, the eye witness who testified as PW2 and a police officer who testified as PW3.
5. Counsel for the appellants pointed out that the Respondent told the court that she did not see how the accident occurred and only heard a bang and thereafter found herself on the ground. Further, that the Respondent and the motorcycle rider did not have helmets. According to counsel for the appellants, the conclusion one must reach is that the Respondent was not being taken to a bus stage as she alleged in her testimony but was being rushed to catch a bus that had already left the stage.
6. Counsel for the appellants berated PW3 Police Constable Oyoo Kwedho for being dishonest. He submitted that the witness contradicted PW1 as to the time of the accident and by stating that there was a bus stage at the petrol station where the accident occurred. According to counsel for the appellants, PW3 was biased as he never spoke to the 1<sup>st</sup> Appellant who was driving the 2<sup>nd</sup> Appellant's lorry. Further, that PW2 told the court that the 1<sup>st</sup> Appellant had been charged with a traffic offence but failed to provide the case number to the court. It was counsel's view that this testimony was meant to mislead the court.
7. Counsel for the appellants further submitted that PW3's testimony that the motorcycle was hit by the side of the lorry contradicted that of PW2 Peter Omondi Ng'andu the alleged eyewitness who talked of the motorcycle being hit from the rear by the lorry.
8. Continuing to point out the contradictions in the evidence of the Respondent's witnesses, counsel for the appellants submitted that PW4, another police officer talked of the motorcycle being hit at its exhaust area by the front right tyre of the lorry.
9. It was submitted by counsel for the appellants that the real cause of the accident was the speed of the motorbike rider as per the testimony of PW4 who testified that the motorcyclist was rushing the Respondent to a bus travelling to Nairobi that had left her behind.
10. A perusal of the court record will show that Dr. Ajoni Adede testified as PW4. The other police officer who testified in the case was the

investigating officer Police Constable Ibrahim Nzwili who testified as PW5. It is thus presumed that the police officer the appellants' counsel referred to as PW4 is actually PW5.

11. Counsel for the appellants urged this court to rely on the testimony of the 1<sup>st</sup> Appellant who testified as DW1 and find that the accident occurred as a result of the negligence of the motorcycle rider who rammed into the lorry as the 1<sup>st</sup> Appellant was entering a petrol station on the left side of the road. Counsel for the appellants urged this court to find that the motorcyclist was riding at a high speed and focused on the bus waiting for the Respondent and thereby failed to notice that the 1<sup>st</sup> Appellant had indicated that he wanted to enter the petrol station on the left side of the road.

12. It was submitted by counsel for the appellants that PW2 who is said to be an eyewitness did not actually see the accident occur but only took notice of the scene after hearing the loud bang. Counsel pointed out that no traffic charges had been preferred against the 1<sup>st</sup> Appellant and this was sufficient to demonstrate that the 1<sup>st</sup> Appellant was not to blame for the accident. He also stressed that the police report on the accident absolved the 1<sup>st</sup> Appellant of any negligence.

13. On the assorted damages awarded to the Respondent, counsel urged this court to find that the same were extremely high. Reliance was placed on the decision of Gikonyo, J in **Global Trucks Limited v Titus Osule Osoro, Bungoma Civil Appeal No. 6 of 2012** where the learned Judge reduced an award of Kshs. 300,000 to Kshs. 200,000, to persuade this court to reduce the damages awarded to the Respondent.

14. The appellants closed their submissions by urging this court to find that the cross-appeal is frivolous, vexatious and without merit. According to the appellants there is nothing in the cross-appeal to support the Respondent's claim for an increase of the damages. They thus urge this court to dismiss the cross-appeal with costs to them.

15. In opposing the appeal, counsel for the Respondent through the submissions dated 25<sup>th</sup> July, 2018 indicated that they agreed with the trial court's assessment on liability but are of the view that the damages awarded was inordinately and excessively low. Counsel further submitted that they were placing reliance on the submissions they had filed before the trial court in support of their prayer for an enhancement of the awarded damages. In addition, counsel for the Respondent pointed out that the Respondent continued incurring medical expenses and it was erroneous for the trial court to award Kshs. 172,500 for the prosthetic leg without considering the continuing medical costs. Further, that the said award had not been factored into the total award and the sum of Kshs. 172,500 should therefore be added to the total award made by the trial court.

16. Two issues arise for determination in this appeal. The first issue is whether the trial magistrate reached the correct decision in finding the appellants 100% liable for the accident. The second issue is whether the trial court applied the correct principles in arriving at the quantum of damages.

17. The issue of liability will be determined by the evidence that was adduced before the trial court.

18. The Respondent's evidence as to how the accident occurred was that on 25<sup>th</sup> April, 2014 at about 6.50 a.m. she was being taken on a motorbike to Shell petrol station in Malindi to catch a bus to Thika. The bus was fueling at the petrol station. It was then that she heard a bang and found herself on the ground. She tried to get up and that is when she realized that her left leg was detached from her body. She lost consciousness and came to in the hospital three days later.

19. Cross-examined by counsel for the appellants, the Respondent testified that they were on the left side of the road heading towards Mombasa. She also told the court that there was no vehicle ahead of them. Her evidence was that neither herself nor the motorcycle rider had a helmet. She also testified that: **"I did not see how the accident occurred. The motorcyclist had side mirrors. I did not see the motor vehicle that hit us. I did not see what happened right before the accident.... I do not think the motorcyclist was overtaking. The bus I was going to board was ahead of us at the petrol station off the road. It was at Shell petrol station. There was no bus stage there."**

20. Taken in its totality, the evidence of the Respondent does not paint a clear picture of how the accident occurred. The evidence of the other witnesses should be looked at in order to establish how the accident happened.

21. PW2 stated that on the material day at about 6.50 a.m. he was at Shell petrol station which is on the left side of the Malindi-Mombasa road. While there he noticed a friend across the road and decided to talk to him. He moved towards the edge of the road and waited for vehicles to pass so that he could cross the road. When he looked towards the direction of Malindi town he saw a canter. Before the canter could reach where he was, it hit the rear of a motorcycle which was ahead of it. The motorcycle which had a female pillion passenger fell off the road to the left. The pillion rider landed behind him. The canter drove in a zigzag manner before stopping about 13 metres away. The motorcycle rider had bruises. The passenger's leg was completely cut off. He rushed the victims to hospital and returned to the scene where he found police officers had arrived.

22. When PW2 was cross-examined, he stated that the motorcycle was in the middle of the left lane riding towards Mombasa. The witness stated that in the statement filed in court he had indicated that the canter had tried to get into the petrol station but that was not true. He insisted that the lorry was behind the motorcycle. He confirmed the Respondent's evidence that neither she nor the rider had a helmet.

23. PW3 told the court that when he visited the scene of accident he found that the lorry driver had attempted to overtake a matatu which had stopped but on returning to the left he knocked a motorcyclist who was also riding towards Mombasa. His evidence was that the point of impact which was on the left side of the road was at the entrance of a petrol station. The lorry had stopped about 20 metres ahead of the exit point of the petrol station. PW3 also testified that the driver of the lorry had been charged with causing the death of the motorcycle rider by dangerous driving.

24. Answering questions put to him during cross-examination, PW3 stated that he talked to the Respondent but he did not talk to the driver of the lorry. In the same breath PW3 stated that the driver of the lorry alleged that he was turning into the petrol station and had not seen the motorcycle behind him. He also stated that it was not possible for the motorcyclist to overtake the lorry from the left side. He never elaborated why he reached this opinion.

25. Still responding to questions put to him during cross-examination, PW3 testified that:

**“The motorcycle was heading towards Mombasa direction. It was stuck at the left rear side of the lorry. The lorry hit the motorcycle from that side. The motorcycle was not overtaking from the wrong side.”**

26. PW5's evidence was that he investigated the accident. He told the court that investigations revealed that both the motorcycle and the lorry were headed towards Mombasa. The motorcycle overtook a matatu and was followed by the lorry which was behind it. However, as the lorry was overtaking the matatu there was an oncoming vehicle. In a bid to avoid a collision with the oncoming vehicle the lorry driver swerved to the left hitting the motorcycle's exhaust area with its front left tyre. The motorcycle was trapped beneath the lorry and the rider and passenger were thrown off the motorbike. PW5 stated that the lorry driver was to blame for the accident since he overtook without judging the distance between his vehicle and the oncoming vehicle thus ramming into the motorcycle.

27. During cross-examination, PW5 was referred to the entry of the accident in the Occurrence Book and he stated that it was reported that the motorcyclist was overtaking the lorry which was ahead of him from the left side and as the lorry turned towards the petrol station there was a collision. PW5 stated that he is not the one who made the entry in the Occurrence Book. He stated that the report in the Occurrence Book was recorded by Police Constable Oyoo. The witness told the court that he went on transfer when the matter was still under investigation but he would be surprised if the lorry driver was not charged. He insisted that the motorcycle was ahead of the lorry.

28. The lorry driver (the 1<sup>st</sup> Appellant) testified on behalf of the appellants as DW1 and told the court that on the material day he was driving the 2<sup>nd</sup> Appellant's lorry from Malindi to Matsangoni where he intended to sell wheat flour and maize flour since he was the driver cum salesman. As he approached BP petrol station he indicated that he would be entering the petrol station. He wanted to check the pressure of the tyres. At the point of entering the petrol station he heard a loud bang from the left front wheel. That is when he realized he had been hit by a motorcycle which was on his left side. He stopped and upon alighting motorcyclists advanced menacingly towards him. He took a motorcycle to Malindi Police Station where he reported the accident. The 1<sup>st</sup> Appellant denied overtaking a matatu and insisted that it was the motorcyclist who was overtaking him from the left side. The 1<sup>st</sup> Appellant told the court that he was never charged with any traffic offence in relation to the accident.

29. Upon cross-examination, the 1<sup>st</sup> Appellant denied causing the accident and blamed the motorcycle rider for overtaking him from the left side. He stated that his lorry had no pre-accident defects but admitted that the inspection report showed that there was a dent on the right side. Further, that the cover report prepared by the police blamed him for causing the accident.

30. Aside from the evidence adduced by the witnesses, there was the covering report that was produced by PW2. In that report, the investigating officer blamed the driver of the lorry for the accident stating that he overtook a stationary matatu without judging the distance of an oncoming motor vehicle and without keeping distance from the motorcycle ahead of him. He thus recommended that the driver be charged for causing death by dangerous driving.

31. It is also noted that by consent of the advocates for the parties, an investigation report, prepared by Pin Eye Insurance Investigators at the behest of the insurer of the appellants' motor vehicle, was produced as an exhibit. The investigation report concluded that the accident was caused by the motorcyclist who rammed into the appellants' lorry as it was entering a petrol station.

32. Inside the police file that was produced by PW2 as an exhibit is a signal dated 25<sup>th</sup> April, 2014 from the Base Commander, Malindi to the Police Traffic Headquarters, Nairobi reporting a fatal traffic accident. According to the signal, the motorcyclist was heading towards Mombasa direction from Malindi and upon reaching BP petrol station he was hit when overtaking a lorry from the wrong side.

33. A perusal of the sketch plan shows that the point of impact was at the entry to the petrol station.

34. With the kind of evidence that had been placed before the court, the learned trial magistrate found the appellants entirely liable for the accident.

35. In the case at hand, the Respondent had set out to establish on a balance of probabilities that the 1<sup>st</sup> Appellant was the author of the accident.

36. In paragraph 5 of their statement of defence dated 31<sup>st</sup> March, 2015 the appellants had blamed the Respondent and the rider of the motorcycle for the accident. Among the particulars of negligence stated by the appellants was that the rider had carelessly overtaken the lorry on the wrong side of the road and had disregarded safety warnings.

37. Going through the evidence adduced in this matter, it becomes clear that the circumstances leading to the occurrence of the accident were highly disputed. Two scenarios were painted by the witnesses. The Respondent did not witness how the accident occurred. PW2 who said he was an eyewitness talked of the lorry ramming the motorcycle from behind. A perusal of the evidence of the other witnesses shows that PW2 may not have actually witnessed the impact. Whereas PW3 and PW5 both talked of a stationary matatu that had been overtaken by both the motorcycle and the lorry, PW2 never mentioned such a matatu. The Respondent testified that they had not overtaken a matatu. The 1<sup>st</sup> Appellant denied having overtaken a matatu immediately before the impact. How and where did PW3 and PW5 who arrived at the scene after the accident get the information of a stationary matatu? A case is only as good as the evidence adduced in its support. The scenario

painted by the police investigators is that the lorry was forced to cut back to the left by an oncoming motor vehicle thereby hitting the motorcycle. This evidence becomes doubtful when one considers that none of the three eyewitnesses (PW1, PW2 and DW1) talked of a stationary matatu. No evidence was adduced by the Respondent in support of the police claim that there was a stationary matatu.

38. The second scenario is that painted by the appellants. The 1<sup>st</sup> Appellant's testimony was that he was turning towards into the petrol station and had indicated so and had confirmed that there was no obstruction when all of a sudden he heard a bang. On checking the left side mirror he realized that he had been hit by a motorbike.

39. The evidence of the 1<sup>st</sup> Appellant was supported by the signal sent to the traffic headquarters, the entry in the Occurrence Book at Malindi Police Station and the sketch map which showed the possible point of impact as the entry to the petrol station. Indeed PW2 admitted during cross-examination that in his written statement filed in court he had stated that the lorry tried to get into the petrol station. The same witness also admitted that he had recorded in his statement that he had rushed to the scene and found the pillion passenger pleading for help. This supports the appellants' claim that PW2 did not witness the impact.

40. Looking at the evidence in its totality, it becomes apparent that the 1<sup>st</sup> Appellant was entering the petrol station when the motorcyclist tried overtaking him from the left side hence the impact. This explains why the 1<sup>st</sup> Appellant was never charged for causing death by dangerous driving. I say so because the evidence by PW3 that the 1<sup>st</sup> Appellant was charged for causing the death of the motorcyclist by dangerous driving was not supported by the production of any charge sheet or any other documentary evidence.

41. In the circumstances of this case, I find that both the 1<sup>st</sup> Appellant and the motorcyclist were equally to blame for the accident. It is most likely that the 1<sup>st</sup> Appellant did not take a keen interest on his left side mirror before turning towards the petrol station. The deceased motorcyclist was also careless as he attempted to overtake the lorry from the left side instead of overtaking it from the right side. In the circumstances the blame for the accident ought to have been shouldered equally between the 1<sup>st</sup> Appellant and the motorcycle rider. The trial magistrate therefore erred in heaping all the blame for the accident on the 1<sup>st</sup> Appellant. The appellants' appeal on the issue of liability succeeds. The appellants will only shoulder 50% liability for the accident. Even if the 1<sup>st</sup> Appellant was found to have entirely caused the accident, the Respondent and the motorcyclist ought to have carried some blame for failing to put on their helmets. It was therefore erroneous for the trial court to hold the appellants 100% liable considering that the motorcycle rider contributed to the accident.

42. As for the amount awarded as damages, I note that there is no dispute as to the injuries suffered by the Respondent. PW4 stated that when he examined the Respondent she was using crutches. There was an amputation of the left leg above the knee. He produced a medical report confirming his observation. His opinion was that the Respondent had suffered 50% permanent partial disability.

43. In awarding the Respondent general damages of Kshs. 2,300,000, the trial magistrate stated that:

**“I have considered the authorities availed by both parties and I note that the injuries sustained by the plaintiffs in the authorities availed by the plaintiff are almost similar to the injuries sustained...in the case under reference. The defendants availed authorities which are rather dated and thus cannot be used by the court as a point of reference. Taking into consideration the fact that the decision in the Simon Ano Mua case was delivered on 30<sup>th</sup> August, 2013...taking into consideration inflation and [vagaries] of life, I am of the considered view that the sum of Kshs. 2,300,000 will suffice.”**

44. I find no fault in the reasoning of the magistrate. She considered the authorities that had been placed before her in reaching her decision. Neither the appellants nor the Respondent have demonstrated that the trial magistrate acted outside the laid down principles in awarding the general damages. There is therefore no basis for finding that the award was inordinately high as alleged by the appellants and neither is there a basis for finding that the award was inordinately low as alleged by the Respondent.

45. A look at the other awards also disclose no error on the part of the trial court. There is therefore no reason for disturbing the quantum of damages.

46. In concluding her judgment the trial magistrate issued orders as follows:

**“In summary the plaintiff has proved his case on a balance of probabilities against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. I hereby enter judgement against the defendants jointly and severally and make the following award:**

- a) General damages for pain and suffering.....Kshs.2,300,000.00
  - b) Loss of earnings.....Kshs.1,624,320.00
  - c) Special damages.....Kshs. 27,950.00
- Total                   Kshs.3,955,270.00**

**The plaintiff is awarded interest at the court rates from date of judgement till payment in full plus costs for the suit.”**

47. A perusal of those orders validate the Respondent's complaint that the trial magistrate actually failed to include the Kshs. 172,500 she had awarded her for future medical expenses. I will thus allow the Respondent's cross-appeal on this issue. The sum of Kshs. 172,500 will be added to the award so that the award to the Respondent will be as follows:

a) General damages for pain and suffering...	Kshs. 2,300,00.00
b) Loss of earnings.....	Kshs.1,624,320.00
c) Future medical expenses.....	Kshs. 172,500.00
d) Special damages.....	Kshs. 27,950.00
Total.....	<u>Kshs. 4,124,770.00</u>

48. As already stated, the appellants will shoulder 50% liability meaning that the Respondent will only get Kshs.2,062,385.00 from them. The Respondent will also be entitled to interest on the sum of Kshs. 2,062,385.00 from the date of entry of the judgement by the trial court.

49. Both the appellants and the Respondent have enjoyed partial success in their respective appeal and cross-appeal. Each side will therefore meet their costs in this matter. However, the Respondent's costs in the trial court shall be met by the appellants. The costs shall be calculated based on the award made to the Respondent in this appeal.

**Dated, signed and delivered at Malindi this 27<sup>th</sup> day of September, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**