REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 155 OF 2011

HELLEN KEMUNTO OCHEGO.....APPELLANT

VERSUS

ABLONDA SILAS WESONGA.....RESPONDENT

(Being an appeal from the Judgment delivered on 11th March, 2011 by Hon. C. A. Otieno (Resident Magistrate) Principal Magistrate's Court at Kikuyu CMCC No.81 of 2010).

JUDGMENT

1. Vide a plaint dated 12th March, 2010, the Appellant sued the Respondent for damages arising out of a road traffic accident. The Appellant blamed the accident on the alleged negligent manner in which the Respondent drove motor vehicle Registration No. KBA 471P.

2. The claim was denied as per the statement of defence filed. In the alternative, it was pleaded that if the accident occurred, it was solely or substantially caused by the Appellant's negligence.

3. In a reply to the defence, the Appellant joined issues with the defence and reiterated the contents of the plaint.

4. At the conclusion of the case the trial magistrate found that the Appellant had failed to prove her case and dismissed it with costs.

5. The Applicant was aggrieved by the said judgment and appealed to this court on the following grounds:

1.The learned trial magistrate erred in failing to consider adequately the evidence adduced by the Plaintiff.

2. The learned trial magistrate erred in fact and in law in laying a higher burden of proof than that of a balance of probabilities as required in civil matters.

3. The learned trail magistrate erred in law in failing to find that the Plaintiff had proved the averments in the plaint.

4. The learned trial magistrate erred in failing to find that the Defendant had a higher duty of care than the Plaintiff.

5. The learned trial magistrate erred in her finding that the Plaintiff did not prove that the Defendant was to blame while evidence adduced was sufficient.

6. The learned trial magistrate erred in fact and in law in assessing damages against the evidence adduced and the authorities cited and thereby made an assessment that was so inordinately low as to be unjust.

6. The appeal was canvassed by way of written submissions which I have considered.

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make

due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

8. The Applicant's evidence was that on 3rd March, 2009 at about 7.00 p.m. she was crossing the Nairobi - Nakuru road near a bus stage. That while at the Zebra crossing the motor vehicle herein came from Nakuru direction and hit her. Her further evidence was that she had seen the motor vehicle at a distance and that there were other people crossing the road. During cross- examination, the Appellant stated that she was at the middle of the road when she was hit by the motor vehicle. The Appellant who was the sole witness denied having ran across the road and stated that the fly over was far from where she was.

9. On the other hand, the Respondent in his evidence blamed the Appellant for the accident. He denied that there was a zebra crossing at the scene and blamed the Appellant for suddenly running cross the road without checking. He further testified that the visibility was poor due to fog. The Respondent described his speed at 40-45 KPH and wondered why the Applicant did not use the flyover. The Respondent described the road as having a bus stage near the direction where the Plaintiff was headed and further stated that he did not see any other pedestrian at the scene.

10. From the evidence of the Appellant and the Respondent, it appears the scene was not visited by a police officer. There is no evidence of any such visit. Indeed the Respondent's evidence was that he took the injured Appellant to hospital. Both parties blame each other for the accident. It is difficult in the circumstances of this case to tell who was to blame or more to blame for the accident. The Appellant saw the vehicle but nevertheless started crossing the road. The Respondent's evidence being that he could not see clearly due to fog, he ought have been more cautious.

11. Whether there was a zebra crossing at the scene or not or whether the Appellant ran across the road or not boils down to the word of one party against the other.

12. The trial magistrate faulted the Appellant for not having pleaded the issue of the Zebra crossing. A case is anchored in the pleadings. In the plaint, the Appellant gave the particulars of negligence as excessive speed, driving without care and attention, failing to keen a proper look over nor observing traffic rules and failure to have regard to other road users. The Appellant's evidence has by and large covered these particulars of negligence. In my view, the pleading that the Appellant was lawfully crossing the road does not exclude the presence of a zebra crossing.

13. With the foregoing findings, I apportion liability on a 50:50 basis. The circumstances of this case makes it difficult to lay blame on any one of the parties.

14. As stated by the Court of Appeal in **Hussein Omar Farah v Lemto Agencies [2006] eKLR** held as follows:-

"In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

15. The Appellant sustained a fracture of the left patella according to the two medical reports produced. Treatment included x-rays, oral medication, immobilization with a plaster of paris and admission for two weeks for re-application of the cast. The Appellant healed but stands in risk of post traumatic osteoarthritis.

16. On quantum, the Appellant submitted for an award of Ksh.800,000/=. He relied on the case of **Savco Stores Ltd v David Mwangi Kimotho [2008] eKLR** where an award of Ksh. 800,000/= was made for the fractures of the tibia, fibula, left una and lacerations with a 12-20% permanent disability.

17. The Respondent supported the assessment of general damages by the trial magistrate at Khs.250,000/=.

18. I have also considered the case of **Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR** where an award of Ksh.200,000/= was made by the Court of Appeal in the year 2017 for a fracture of the left palella and blunt injuries with the chest, shoulders and left knee. Treatment included open reduction and fixation of metal plates after the fracture failed to unite.

19. As stated by the Court of Appeal in case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**

"....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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....."

20. The assessment of 250,000/= general damages falls within the range of similar cases. It has not been demonstrated that the trial magistrate took into account any wrong principles or omitted to take any principle into account while assessing the general damages. However, the general damages ought to be subjected to 50% contribution which comes to Ksh.125,000/=. There was no complaint in respect of the Ksh.6,600/= award of special damages. The total comes to Ksh.128,300/=.

21. In the upshot, the judgment of the lower court is set aside and substituted with a judgment in favour of the Appellant in the sum of Ksh.128,300/= interest and costs. The appeal having been partially successful, each party shall bear own costs.

Date, signed and delivered at Nairobi this 25th day of Sept, 2018

B. THURANIRA JADEN

JUDGE