REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.180 OF 2013

JOSEPH NYAWIMA NYATIENO.....APPELLANT/RESPONDENT

VERSUS

JASPER NZAU NZOMO.....1ST RESPONDENT/APPLICANT

G. MAINA.....2ND RESPONDENT/APPLICANT

ELLAH NJUGUNA.....3RD RESPONDENT/APPLICANT

(Appeal from the Judgment of Honourable d. Ole Keiwua (Mrs) Principal Magistrate's

Court at Nairobi delivered on 22nd March 2013 in CMCC No. 5469 of 2011

JUDGMENT

The Appellant has filed this Appeal challenging the judgment delivered on the 22nd March, 2013 on both the quantum of damages awarded by the trial magistrate and on liability. The appellant who was the plaintiff in the lower court case number 5469/2011 filed the plaint dated the 11th day of October 2011 against the Respondents in which he claimed general damages for pain and suffering, special damages in the sum of Kshs.2,500/- plus costs of the suit.

The cause of action arose from a traffic road accident that occurred on the 26th August, 2010 when the Appellant was pushing his hired hand cart along Mombasa road, in Nairobi, when the first Respondent acting as the servant of the 2nd and 3rd Respondents so negligently drove managed and/or controlled motor vehicle registration number KAX 589Z that it collided with the hand cart from the rear as a result of which, the Appellant sustained serious injuries and suffered loss and damage. The particulars of negligence of the first Respondent are set out in paragraph 4 of the plaint and so are the particulars of injuries and those of special damages.

The Respondents filed a joint statement of defence on the 19th day of January 2012 in which, they denied the Appellant's claim. They denied that the accident occurred as well as the particulars of negligence attributed to the first Respondent. The particulars of injuries and those of special damages were also denied. In the alternative and without prejudice, the Respondents averred that the accident if any, was as a result of the Appellant's own negligence and the negligence of unidentified pedal cyclist. The particulars of negligence on the part of the Appellant and those of unidentified pedal cyclist are set out in paragraph 4 of the defence.

During the hearing, the Appellant testified as PW1. It was his evidence that in the year 2010, he used to carry luggages at Industrial area using a handcart. He used to pay the owner of the same Kshs.50 per day and he could make a profit of Kshs.500/- per day on his part. That, on the 26th August, 2010 he was pulling the handcart along Mombasa road from Embakasi heading to Industrial area, when motor vehicle KAX 589Z hit him from behind. He was hit while outside the road and the weather was clear.

As a result of the accident he sustained injuries and was taken to Kenyatta National Hospital where he was admitted from 26th August 2010 to 21st October, 2010 during which time, he was operated on, on both legs and K-nails were fixed in both legs. He stated that he was not to blame for the accident and that he did not see a bicycle on the road at the material time. He reported the accident at Embakasi Police Station and was issued with a police abstract which he produced as an exhibit together with the treatment records, a P3 form and a copy of records from the Registrar of Motor vehicles.

In cross-examination, he stated that it was not dark and that the handcart that he was pulling had reflectors.

Dr. Washington Wokabi gave evidence as PW2. It was his evidence that he prepared a medical report for the Appellant and in so doing, he relied on the P3 form and treatment card from Kenyatta National Hospital. According to him, the Appellant sustained serious injuries, was incapacitated for 24 months and he suffered permanent incapacity of 30%. He produced a receipt of Kshs.5,000 for court attendance. It was his evidence that the Appellant will require Kshs.100,000 to remove the K-nail.

Dr. David Wairoto gave evidence as DW1. He is a general practitioner and he examined the Appellant on the 28th December, 2012. He confirmed that the Appellant suffered fractures to both right and left femurs but according to him he put the cost of removing the K-nail at Kshs.50,000/- in a Government hospital.

PC Peter Yegon testified as DW2. He stated that he investigated the accident and confirmed that the accident involved the Appellant and motor vehicle KAX 589Z. When he visited the scene, he found the driver of the aforesaid motor vehicle at the scene and the driver told him that a pedal cyclist appeared at the road and while he tried to avoid hitting him, he hit the Appellant. He did not find the handcart at the scene. He stated that the driver was not charged for the accident. It was his evidence that after inspection, the motor vehicle was found not to have pre-accident defects. He produced the inspection report and the 2nd medical report as exhibits in the case.

On cross-examination, it was his evidence that the 1st Respondent admitted hitting the Appellant. That though he did not see the statement of the first Respondent, he told him that the accident occurred when he was avoiding hitting a pedal cyclist.

In a judgment delivered on the 18th day of March, 2013, the trial court found the first Respondent 80% liable for the accident and the owner of motor vehicle KAX 589Z vicariously liable. He also allowed Kshs.2,500 as special damages, Kshs.100,000 as future medical expenses and Kshs.700,000 as general damages. He did not award any sum under the head of loss of earning or earning capacity.

The Appellant being dissatisfied with that judgment, preferred the Appeal herein on three grounds:-

1. *That the learned magistrate erred by apportioning liability at the ratio of 20:80%*

2. *The learned magistrate erred by making an award of damages for pain and suffering which was too low.*

3. *The learned magistrate erred by failing to make an award for loss of earnings or loss of earning capacity.*

The appeal was disposed off by way of written submissions which this court has duly considered. Though the Appellant has listed three grounds of Appeal, the same can be collapsed into two; being that on liability and quantum of damages. On liability, the Appellant has faulted the finding of the learned magistrate of apportioning liability at 20:80%. In his submissions, the Appellant has relied on the evidence on record and has cited the case of **Ndirangu Gathoga Civil Case No. 3418/1987** where the learned Judge held;

> ***"pleadings are not evidence. In the absence of any explanation from the defendant as to how the motor vehicle he was driving came to strike the plaintiff's handcart from the rear, I am impelled to find liability in full against the defendant. The case appears to be an appropriate one for the invocation of the doctrine of*** *res ipsa Loquitor.* ***I apply it.***

The Appellant submitted that in this case, the first Respondent did not explain how he came to hit the handcart from the rear. It was a case of *res ipsa Loquitor* – no explanation of presumed negligence.

On the part of the Respondents, it was submitted that, on cross-examination, the Appellant admitted that he was inside the road and that he did not see any bicycle at that time. It was further submitted that police constable Peter Yegon testified that the first Respondent swerved to the left hand side of the road to avoid hitting a pedal cyclist and thereby hit the Appellant. The Respondent averred that there was no eye witness to corroborate the Appellant's version of the occurrence of the accident. The Respondents further contended that although the first Respondent owed the Appellant a duty of care, the duty was not absolute since the Appellant, being a handcart pusher on a busy highway, also owed himself a duty of care to be on the lookout for other motorists, pedestrians and keep himself out of harm.

The Respondents relied on the case of **Kenya Power and Lighting Company Limited Vs. Nathan Karanja Gachoka (2010) eKLR** where the court held that:

> *"…… a plaintiff, must proof its case on a balance of probability whether the evidence is challenged or not. The court apportioned liability at 50%:50% between the deceased and the defendants.*

Further, the Respondents relied on the case of **Grace Kanini Muthini Vs. K.B.S & Another Nyeri High Court Misc. Application No. 270/2000** in which the case of Kenya Power supra was quoted as follows;-

> *"……I can only decide the case on a balance of probability if there is evidence to enable me say that it is more probable than not that the second defendant wholly or partly contributed to the accident. And the court finding no such evidence, the plaintiff suit was dismissed".*

And the case of **Ignatius Makau Mutisya Vs. Reuben Musyoki Muli (2015) eKLR** in which the Court of Appeal while quoting **Denning J. in Muller Vs. Minister of Person (1947) e All E.R. 372** stated thus;

> **"That degree is well settled. It must carry, a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not" the burden is discharged, but, if**

the probabilities are equal, it is not. Thus, proof on a balance or prepondencce of probabilities means a win, however, narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.

The Respondents also relied on the provisions of Section 107, 108 and 109 of the evidence Act.

Reliance was also made on the case of **David Brown Kipkorir Chebii Vs. Rawl Chebii (2016) eKLR while quoting Sir. Newbold P**. in **Mbogo & Another Vs. Shah (1968) E.A,** where the court held thus;

"……..a court of appeal should not interfere with the exercise of the discretion of a single Judge unless its satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice……"

From the evidence on record, the Appellant stated that the first Respondent hit him from behind as he was pulling a handcart. He was outside the road on the left side. He said he did not see a bicycle on the road. He further stated that his handcart had reflectors, which fact, was not disputed by the Respondents.

On his part, DW2, PC Peter Yegon told the court that he did not visit the scene of the accident which means that he relied on what he was told by P.C. Kariuki and P.C. Kanyoro, the officers who visited the scene. Therefore, the evidence he gave in court on what the first Respondent told the police to the effect that a pedal cyclist appeared at the road and he tried to swerve to avoid hitting him and thus hit the Appellant, was all hearsay which the court cannot be able to verify. He, however, told the court that the first Respondent along with the pedal cyclist were to blame for the accident.

Further, DW2 on cross-examination stated that the first Respondent admitted having hit the Appellant as he tried to avoid a pedal cyclist and that the handcart was ahead of the first Respondent. He stated that the first Respondent swerved to the left and that he is the one who wrote his statement. The statement by the first Respondent was filed in court on 19th January 2012 and though he did not testify, the court has perused the same, as it is obliged to do, as it forms part of the record. In that statement, he states that beside him, there was a lorry and while avoiding to hit it, he accidentally hit the handcart pusher on his left side causing him injury on both legs.

In view of that statement and the evidence of DW2, it is clear that the first Respondent hit the Appellant's handcart from behind as a result of which, the Appellant sustained injuries. It is also not true that the first Respondent swerved to avoid a pedal cyclist as alleged by DW2 because in his own statement, he stated that he swerved to avoid hitting a lorry. The evidence of the Appellant is more believable than that of DW2 as he was not at the scene and only relied on what he was told by other people who were not called as witnesses. I therefore find that there is no evidence on record, on the basis of which the learned magistrate apportioned liability at 20%:80% between the Appellant and first Respondent. In my view, the Appellant proved his case on a balance of probability and the first Respondent was fully to blame for the accident.

On general damages, the Appellant alleges that the award of Kshs.700,000 made by the learned magistrate was low whereas the Respondents submitted that it was reasonable. It is trite law that the Appellate court will only interfere with exercise of discretion of the lower court where it has failed to take into account a relevant factor, or has taken into account an irrelevant factor or where the amount awarded is inordinately so low or so high that it must be a wholly erroneous estimate. See the case of **Kemfro Africa Limited t/a Meru Express Services (1926) & Another Vs. Lubia & Another (No.2) 1985 eKLR.**

The general principle for assessing damages is set out in the case of **Denshire Muteti Wambua Vs. Kenya Power and lighting Company Limited (2013) eKLR** which is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the current level of awards in similar cases. The same principles were echoed by Onyancha J. in the case of **Millicent Atieno Ochuonyo Vs. KatOla Richard (2015) eKLR.**

According to Dr. Wokabi who testified as PW2, the Appellant sustained fractures of the right and left femurs. He underwent surgery and the fractures were fixed with K-nails. Todate, he complains of weakness of the legs, he cannot walk or stand for long hours; he cannot walk without external support and he cannot kneel or squat.

Examination revealed that he was limping profoundly. Both thigh muscles are very wasted due to disuse and full range of movements of both knees are restricted. He is not fully rehabilitated and will require approximately 18-24 months from the date he was seen i.e. 18th March 2011 for him to walk well and resume some form of gainful employment. As at the time he was seen, he had factual disability of approximately 30%. The K-nail will require to be removed at a cost of Kshs.100,000.

The Appellant was subjected to a 2nd medical examination. He was examined by Dr. Wairoto who prepared a medical report dated 28th December 2010. In his report he confirmed that the Appellant sustained fractures of both left and right femurs.

In his opinion, he will require Kshs.50,000 as future medical expenses to remove the K-nail, and that physical disability resulting from the injury was nil.

The Appellant has urged the court to enhance the award of general damages from Kshs.700,000 to 1,200,000 arguing that the trial court did not appreciate the seriousness of the injuries by the Appellant. That the court did not take into account that cases cited involved fractures to one leg only and that the court failed to factor in, inflation. He relied on the cases of **Jackline Kamunyi Kamau – Vs.Simon Kiiru Njoki** where an award of Kshs.1,200,000 was upheld on Appeal, **Joseph Musee Muia Vs. Julius Kabogo Mugo & 3 others (2013) eKLR)** where

a sum of Kshs.1,300,000 was awarded and that of **Dorcas Wangithi Nderi Vs. Samuel Kibiru & others 2015 eKLR** where Kshs.2,000,000 was awarded.

On their part, the Respondents submitted that in the case of **Jackline Kamunyi Kamau Vs. Simon Kiiru Njoki** (supra) the Court of Appeal noted that the trial court failed to take into account the submissions and authorities filed by the parties but upheld the sum of Kshs.1,200,000 all together and that in the case of **Joseph Musee Mua Vs. Julius Mbogo Mugi & 3 others (2013) eKLR** and **Dorcas Nderi Vs. Samuel Kibiru & others (2015) eKLR** the injuries were more serious than those suffered by the Appellant herein.

The court has considered this aspect of general damages and the authorities cited. It's true that the injuries sustained by the plaintiffs in the cases cited by the Appellant are more serious than those of the Appellant. On the other hand, the court notes that the award made by the learned magistrate was a bit on the lower side. It's my considered view that a sum of Kshs.900,000 is reasonable as compensation for the injuries.

On future medical costs, I find no reason to interfere with the award of Kshs.100,000 made by the learned magistrate. The same is retained.

On loss of earning capacity or loss of earnings, it is trite that loss of earnings is a special damage and must be specifically pleaded and proven. The respondent has argued that the learned magistrate was right in failing to award damages under this head as the same was not proved. It was submitted that the Appellant did not tender any evidence to show that as a result of the accident, his business has ceased and that he was totally unable to conduct any other business to earn a living. They relied on the case of **Mumias Sugar Company Limited Vs. Francis Wanalo (2007) eKLR** to the effect that loss of earnings is a special damage claim and it must be specifically pleaded and proved.

On the part of the Appellant, it was submitted that loss of earning of Kshs.500/- per day ought to have been awarded as the Appellant told the court that he was a handcart pusher earning Kshs.500/-. That this direct oral evidence was not challenged at all even in cross-examination. Counsel for the Appellant relied on the case of **Wambua Vs. Patel (1986) KLR** where Apaloo J, as he then was, accepted a cattle traders oral evidence of earnings from his "memory bank" which decision was approved in **Kimatu Mbuvi Vs. Augustine Munyao Kioko (2006) eKLR** by the Court of Appeal which added its own voice in **Jacob Ayiga Maruja & Another Vs. Simeon Obayo (Civil Appeal No. 167 of 2002** that

> **"we do not subscribed to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, it is good. But we reject any contention that only documentary evidence can prove these things"**

In the case herein, the Appellant said he was a handcart pusher and he was indeed injured while pulling the handcart. The fact that no documentary evidence was adduced to prove earnings, should not dis-entitle him damages for loss of earnings. I fully concur with the decision of the Court of Appeal in the case of Jacob Ayiga (supra). I take judicial notice of the fact that the handcart pushers in Kenya earn a living through that engagement and I find that the learned magistrate erred in failing to award the Appellant damages under the head of loss of earnings. The accident herein occurred on the 6th August 2010. According to doctor Wokabi the Appellant would take 18-24 months for him to work and resume some form of gainful employment. Taking into account the future operation and the healing process the court awards damages for loss of earnings as follows;-

Kshs.500x6 (days)x4 (weeks)x12(months)x3 years making a total of Kshs.432,000/-

In the end, the Appeal succeeds and judgment of the lower court is altered as follows;

a) Liability – 100% against the

Respondents.

b) General damages – Kshs.900,000/-

c) Future medical expenses – Kshs.100,000/-

d) Damages for loss of earnings – Kshs.432,000/-

e) Special damages – Kshs. 2,500/-

TOTAL – **Kshs.1,434,500/-**

No award is made on loss of earning capacity as it has not been shown that the Appellant will not be in a position to earn a living the rest of his life.

The Appellant shall get the costs of the Appeal.

Dated, Signed and Delivered at Nairobi this 29th day of November, 2018

.....

L. NJUGUNA

JUDGE

In the presence of:-

..... For the Appellant

..... For the Respondents