REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 360 OF 2013

MBUGUA ELIZABETH.....1ST APPELLANT

CHARLES NJOROGE NG'ANG'A.....2ND APPELLANT

VERSUS

COLLETA IMBOSA MUKANZI.....RESPONDENT

(Being an appeal from the Judgment delivered on 7th June, 2013 by Hon. Mr. P. W. Wasike (RM) Milimani Commercial Courts in CMCC No.1123 of 2011)

JUDGMENT

1. The Respondent who was the Plaintiff in the lower court had sued the 1st Defendant, Mbugua Elizabeth and the 2nd Defendant Charles Njoroge Nganga for damages suffered when the Respondent was involved in road traffic accident. Upon hearing the matter, the Hon. Magistrate found the two Defendants jointly and severally liable for the accident and awarded the Respondent Ksh.469,400.28/=. The 1st Defendant was aggrieved by the decision of the lower court and appealed to this court. Although the memorandum of appeal reflects two Appellants, it is noted that only the 1st Defendant appealed herein. The 2nd Defendant did not file any appearance or file a defence and is erroneously reflected herein as a 2nd Appellant. Consequently, I will therefore only refer to one Appellant, Mbugua Elizabeth.

2. The grounds of appeal are as follows:

> **"i. The learned trial magistrate erred in law and fact in failing to consider the evidence adduced on liability.**
>
> **ii. The learned trial magistrate erred in law and in fact for wrongly entering judgment for the Defendants jointly and severally without apportioning liability as it ought to be.**
>
> **iii. The learned trial magistrate erred in law and fact in failing to note that the Defendants did not own a vehicle jointly, were not a driver and owner of motor vehicle but both were owners of different vehicles which collided and the plaintiff/respondent herein was injured. Hence there was need to apportion liability.**
>
> **iv. The learned trial magistrate erred in law in awarding judgment of Ksh.250,000/= on general damages for injuries that do not deserve such a high award.**

v. The learned trial magistrate erred in law and fact to failing to consider sufficiently or at all the Appellant's evidence and submissions as to facts and the law placed before him.

vi. The learned trial magistrate erred in law and fact in awarding the plaintiff a sum that was manifestly excessive in the circumstances."

3. The appeal was canvassed by way of written submission which I have duly considered.

4. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings – See **Selle v Associated Boat Co. Ltd (1968) EA 123**.

5. The Respondent has argued that the appeal as filed is not properly before the court since the 1st Appellant failed to include a certified copy of the judgment and Decree that is appealed from in the Record of Appeal herein. The applicable law is Order 42 rule 2 of the Civil Procedure Rules. The section provides:-

"Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed."

6. There is no certified copy of the decree in the Record of Appeal compiled by the Appellant. However, failure to include the certified copy of the decree in the Record of Appeal compiled by the Appellant is not fatal to the appeal. It is a breach of procedure that does not go into the substance of the appeal. This oversight on the part of the Appellant can be cured by Article 159 of the Constitution 2010 which enjoins the court in administration of Justice without undue regard to technicalities of procedure. It is therefore in the interest of justice that the Appeal is determined on merits.

7. Moving on to the substance of the appeal, on the issue of liability, the Appellant is aggrieved by the failure by the magistrate to apportion liability. It is evident that the accident involved two motor vehicles that were owned by two different persons. There was no relationship of any kind between the owners or the respective drivers of the two motor vehicles. They were total strangers.

8. The Appellant has complained that the trial magistrate erred when he entered judgment jointly and severally between the two motor vehicles. The concept of joint and several envisages a collective and individual liability of the parties held to be jointly and severally liable in the same judgment. In the case of **Hellen Njenga v Wachira Murage & another [2015] eKLR**, the court held that:

"Even in the cited cases of Republic v Permanent Secretary In charge of Internal Security *Exparte* Joshua Mutua Paul [2013] eKLR the court in setting out the meaning and effect of a "joint and several" judgment on liability citing Dubai Electronics v Total (K) Ltd & 2 Others HCCC NRB CC 870/98 stated:

"i. Clearly, therefore, where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability, each tortfeasor is only liable to settle the sum due to the time of his liability. Where, however, the liability is joint and/or several, the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasor according to their individual liability."

ii. Either way, he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them".

The court in the above decision was in essence recalling what Hon. Ringera, J stated in the **Kenya Airways Ltd v Mwaniki Gichohi**, thus,

"The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree; However, double compensation is not allowed and accordingly, whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendants."

9. I therefore agree with the Appellant that the two tortfeasors should not have been held jointly and severally liable since they owned different motor vehicles. None of them was an agent or servant of the other. They had no relationship whatsoever.

10. In this particular case, the Honourable Magistrate upon analyzing the evidence before him, stated that the 2nd Defendant was the one on the wrong since he drove into the junction when the traffic lights had turned red on his side causing him to ram into the right side of the 1st defendant's motor vehicle. The trial magistrate also found there was no evidence that the 1st defendant tried to avert the accident by ensuring it was safe to move or tried to avoid the accident.

11. According to the proceedings in the lower court, the Respondent was the only witness who adduced evidence. On liability, it was her evidence that she was a passenger in motor vehicle KBA 724T, the 1st Defendant's motor vehicle, where she was seated behind the driver. She testified that the motor vehicle while being driven on Jogoo road stopped at the traffic lights until the lights turned green giving them a go ahead. When the motor vehicle proceeded on, motor vehicle KZG 968 came from the side and rammed into motor vehicle KBA 724T.

12. The evidence by the Respondent as adduced in the trial court is sound. The traffic lights are meant to maintain order on our roads. The traffic rules ought to be obeyed by all motorists. It is apparent from the evidence of the Respondent that the Appellant stopped at the traffic lights since the same had turned greed on their side. The Respondent's evidence was uncontroverted by any other evidence. The Respondent was a passenger and did not in any way contribute to the accident. Motors vehicle KZG 968 on the other hand in disobedience of the traffic lights drove on when he was required to stop. As a result it rammed onto motor vehicle KBA 724T causing injuries to the Respondent. Although the Respondent's evidence blames the 2nd Defendant's motor vehicle for failure to stop at the lights, there is no evidence from the Appellant's side to show the manner in which their motor vehicle was being driven at the material time. Could the Appellant's driver for example have noticed the other motor vehicle in time to avoid the accident? Consequently, I apportion liability between the two motor vehicles at 20% against the 1st Defendant (Appellant) and 80% against 2nd Defendant, Charles Njoroge Ng'ang'a.

13. On the second issue of quantum, the court's assessment of general damages was based on two medical reports of Dr. Theophilas Wangata and Dr. Njenga. It is not in contention that the Respondent suffered a fracture of the glenoid bone at the right shoulder, Dislocation of the right acromio –clavincular joint and soft tissue injuries as particularized in the plaint. Moreover, the lower court file contains the two reports whose contents generally reflect similar injuries. The report by Dr. Njenga who was the Appellant's doctor thus essentially agrees with the report by Dr. Theophilas Wangata who was the Respondent's doctor.

14. The trial magistrate assessed the general damages at Ksh.250,000/= which the Appellant claims is on the higher side. Looking at the submissions as filed in the lower court, the Respondent sought to be paid Ksh. 700,000/= as general damages. She relied on the case of **James Kimondu v Anne Wahome & another, HCCC No. 472 of 1992 Mombasa**, Where the plaintiff sustained fracture and dislocation of the left clavicle and was hospitalized for 11 days and was off work for 3 months and was awarded general damages for pain and suffering of Kshs.250,000/= in 1994. She is also relied on another case of **Otieno Musa v Bwana Mkuu Mohamed, HCCC No. 958 of 1991 Mombasa**, where the plaintiff suffered the dislocation of the left acromio-claivicular joint and the right clavicle and the fractures were manipulated by way of plates and screws and he was awarded Ksh.340,000/= in 1993.

15. The Appellant on the other hand submitted that Ksh.150,000/= would be adequate compensation.

They relied on the case of **Benard Oundo Odero v Josphat Arap Bett, HCCC 2314 of 1988**, where the plaintiff who sustained a fracture of the left clavicle, lacerations on the scalp lacerations over the knee and posterior of the shoulder was awarded Ksh.150,000/=. They also relied on the case of **Peter Kithiki Kitunguu v Josephat Paul Otieno, HCCC 2273 of 1990,** where the plaintiff who sustained compound comminuted fractures of the lefty radius and ulna was awarded Ksh.150,000/= on general damages.

16. The authorities submitted by the parties are old cases that were decided in the year 1990,1991 and 1992 or thereabout. It is therefore noteworthy that the passage of time and inflation must be taken into account.

17. As stated by the Court of Appeal in the case of **Kemfro Africa Limited T/a Meru Express Services & Another v 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.**
>
> **The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

18. This court can only interfere with the award made by a subordinate court, if it is satisfied that the court below proceeded on wrong principles or that the learned magistrate misapprehended the evidence as a result of which he arrived at a figure that was inordinately low or inordinately high. In the instance case, looking at the injuries suffered by the Respondent and the authorities submitted by both parties, the award of general damages made to the Respondent of Ksh.250,000/= was fair in the circumstances and the same is upheld.

19. There is no contention as far as the award of special damages of Ksh.291,400.28/= is concerned.

20. The upshot is that the appeal succeeds to the extent of apportionment of liability as stated above. Consequently, the lower court judgment is set aside and substituted with a judgment in favour of the Plaintiff (Respondent) for the sum of Ksh.541,400.28/= against the 1st Defendant (Appellant) on 20% liability basis and agent the 2nd Defendant on 80% liability basis. The costs in the lower court to be apportioned accordingly. The appeal having been partially successful, each party to meet own costs of the appeal.

Dated, signed and delivered at Nairobi this 11th day of April, 2017

B. THURANIRA JADEN

JUDGE