REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 19 OF 2016

DONALD MWARANGI…….…….....1ST APPELLANT

ALI SWALEH AHMED & ASAD SHERIFF MUDHIR

T/A EMARAT AGENCIES…….....…….2ND APPELLANT

AND

MEJUMAA NURU MWAKIO.....RESPONDENT

THE HON. ATTORNEY GENERAL….....THIRD PARTY

(Being an Appeal from the entire Judgment of Honourable E.M. Kadima, Senior Resident Magistrate Voi (sic) **on 13th July 2016)**

IN

REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT

AT VOI

CIVIL SUIT NO 60 OF 2014

MEJUMAA NURU MWAKIO…….……..…..…….PLAINTIFF

VERSUS

DAVID MWARANGI…..…..……...……..1ST DEFENDANT

ALI SWALEH AHMED & ASAD SHERIFF MUDHIR

T/A EMARAT AGENCIES……...……...…….2ND DEFENDANT

THE HON. ATTORNEY GENERAL…….....……....3RD PARTY

JUDGMENT

INTRODUCTION

1. On 13th July 2016, the Learned Trial Magistrate, Hon E.M. Kadima, Resident Magistrate rendered his decision in which he found the Defendant **(sic)**to have been wholly liable for the traffic accident that occurred on 4th December 2014. He awarded the 1st Appellant herein general damages in the sum of Kshs 500,000/=, Special damages in the sum of Kshs 3,800/= plus costs and interest from the date of the judgment.

2. The Appellants did not file their Appeal within the stipulated period of thirty (30) days from the date of the decision of the Learned Trial Magistrate. They filed Notice of Motion application dated and filed on 18th August 2016 seeking leave to file an appeal out of time and a stay of execution pending the hearing and determination of their appeal. The said application was allowed by consent of the parties on 20th February 2017. They subsequently filedtheir Memorandum of Appeal. They relied on nine (9) grounds of Appeal.

LEGAL ANALYSIS

3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidenceand make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

4. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123**and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

5. Having looked at the Appellant's grounds of appeal and in particular to its Written Submissions, it was clear that the issues that were really before this court were:-

> **a. Whether or not the Learned Trial Magistrate erred in fact and law in the manner he apportioned liability in his decision;**
>
> **b. Whether or not the Learned Trial Magistrate awarded a figure that was unreasonable and inordinately high to warrant the interference of this court.**

6. The said issues were therefore addressed under the following distinct and separate heads.

I. LIABILITY

7. Grounds of Appeal Nos (3), (4) and(6) of the Memorandum of Appeal were dealt with together as the same were related.

8. The Appellants submitted that the Learned Trial Magistrate erred in law and fact when he stated in his decision that they would bear liability on a hundred (100%) per cent basis and again in the same decision,proceeded to apportion liability at ninety (90%) per cent against them and ten (10%) per cent against the Respondent herein.It was their view that this finding was ambiguous, unclear, incoherent and incomprehensible and thus urged this court to re-evaluate and re-examine the evidence that had been adduced in the Trial Court and arrive at its own independent decision.

9. On her part, the Respondent argued that interlocutory judgment does contemplate apportionment of liability against a third party. She submitted that Order 1 Rule 17 and Rule 19 of the Civil Procedure Rules, 2010 only envisages a defendant being entitled to judgment against a third party once there is a

decree against such a defendant.

10. She pointed out that third party directions between the Defendants and the Third Partywere not taken as the latter did not enter appearance or file a defence and consequently, liability could not be apportioned against the Third Party. Sheplaced reliance on the case of **Samson Kairu Chacha vs Isaac Kiiru King'ori [2016] eKLR** where it was held as follows:-

> **"We agree with the learned judge's view that the guard would only have been held responsible for the loss had directions on the liability as between the appellant and the said guard been taken on the third party proceedings."**

11. It was also her contention that the Third Party was not a party to the proceedings herein as the Appellants did not include him in the pleadings in this court or serve him with their pleadings herein and consequently, this court could not make adverse orders against the said Third Party.

12. She urged this court to re-evaluate the evidence that was adduced in the Trial Court and find that the Appellants were to blame for the accident herein because the Appellants' driver failed to do anything to avoid the accident by taking evasive action. She added that the fact that the Third Party's driver was convicted for the offence of careless driving did not absolve the Appellants' driver from culpability.

13. In this regard, she placed reliance on the cases of **Philip Kiptoo Chemwolo & Mumias Sugar Co Ltd vs Augustine Kubende [1982-88] 1 KAR** and **Ann Mukami Muchiri vs David Kariuki Mundia [2008] eKLR**in which it was held that an acquittal of traffic charges did not exonerate a party from being found liable to have contributed to the causation of an accident.

14. She also referred this court to the cases of **Butt vs Khan (1982-88) 1 KAR**, **M.M.Kisoso vs express (K) Limited [1999] eKLR**, **Hamisi Gunga Baya vs Salt Manufacturers Ltd & Another [1995] eKLR** and several other cases where the common thread was that a driver of a motor vehicle is required to exercise caution while driving failing which he will be found to be liable.

15. It was also her averment that since she was a passenger, she could not have been said to have contributed to the causation of the accident herein.

16. A perusal of the proceedings showed that on 4th September 2012 at about 2030 hours at Taita Village along Mombasa- Nairobi Road, the driver of Motor Vehicle Registration Number GKB 732B (hereinafter referred to as the "Third Party Motor Vehicle") carelessly drove, managed and/or controlled the said vehicle causing it to violently collide with Motor Vehicle Registration Number KAX 676T (hereinafter referred to as the "Appellants' Motor Vehicle") in which the Respondentwas lawfully travellingin. As a result, she suffered severe injuries.Several other passengers who were travelling in the Appellants' Motor Vehicle sustained serious injuries while two (2) passengers sustained fatal injuries.

17. In his evidence, PC 58476 Samuel Koech Kim (hereinafter referred to as "PW 1") confirmed that the driver of the Third Party Motor Vehicle was overtaking other vehicles and refused to give way to other vehicles as a result of which the said Motor Vehicle collided with the Appellants' Motor Vehicle.His testimony was that the collision occurred on the lane of the Appellants' Motor Vehicle and that the driver of the Third Party Motor Vehicle was convicted and placed on probation.

18. PW 1 confirmed that the driver of the Appellants' Motor Vehicle was never charged with any offence but averred that the accident could not have occurred had he pulled off the road to avoid the Third Party Motor Vehicle.

19. On her part, the Respondentblamed the driver of the Third Party Motor Vehicle for having crossed to the lane of the Motor Vehicle she was travelling in and occasioning the collision of the two (2) Motor Vehicles. She did also, however, state that the driver of the Appellants' Motor Vehicle drove at an excessive speed between Mariakani and Voi and she had complained about the same. She was emphatic that the driver of the Appellants' Motor Vehicle was travelling at 160kph.

20. No 68855 CPL David Yator (hereinafter referred to as "DW 1") stated that after investigations were concluded, it emerged that the driver of the Third Party Motor Vehicle was to blame and he was in fact charged with the offence of causing death by dangerous driving.

21. Notably, in his judgment, the Learned Trial Magistrate stated that the conduct of the driver of the police lorry, which this court assumed to have been the driver of the Third Party Motor Vehicle painted a picture of someone who was irresponsible by the sheer fact that he was convicted and sentenced for causing death of one of the passengers which decision was never appealed nor contested and hence liability lay attached against him on a hundred (100%) per cent.

22. His conclusion that the Defendant was hundred (100%) liable was ambiguous as it was not clear to which of the Defendants, who were two (2), the hundred (100%) per cent liability attached. In the same vein, in the same decision, the Learned Trial Magistrate apportioned liability at ten (10%) per cent against the Plaintiff and ninety (90%) per cent against the Defendants. It is this ambiguity that led the Appellants herein to lodge the Appeal herein as it was not clear from his decision of the extent of liability against the parties herein.

23. On 5th August 2015, the Learned Trial Magistrate allowed the Appellant's Notice of Motion application dated 2nd March 2015 and filed on 3rd March 2015 seeking to enjoin the Third Partyas a Third Party in the proceedings before him. However, the Third Partydid not file any pleadings in the matter therein. As a result, interlocutory judgment was entered against him on 27th January 2016 whereupon the trial proceeded in his absence.

24. Order 1 Rule 19 of the Civil Procedure Rules, 2010 provides as follows:-

> **"Where a third party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled, after causing the satisfaction of the decree against himself to be entered upon the record, to judgment against the third party to the extent claimed in the third-party notice; the court may upon the application of the defendant pass such judgment against the third party before such defendant has satisfied the decree passed against him:**
>
> **Provided that it shall be lawful for the court to set aside or vary any judgment passed under this rule upon such terms as may seem just."**

25. It was therefore correct as the Respondentargued that Order 1 Rule 19 does not envisage interlocutory judgment being entered against the Third Party. The same was irregular and inconsequential as Order 10 of the Civil Procedure Rules only envisages entry of interlocutory judgment where a defendant and not a third party fails to appear after being served with summons to enter appearance have been served.

26. It was abundantly clear that the accident herein was caused by the negligence of the driver of the Third Party Motor Vehicle.The fact that the driver of the Appellants' Motor Vehicle failed to completely evade the collision led this court to find that he also contributed to the causation of the accident to a certain extent.

27. Indeed, according to PW 1, the collision was a head. This was an indication that the driver of the Appellants' Motor Vehicle failed to swerve to avoid an imminent head on collisionand hence liability attached to him albeit to a lower degree as the accident occurred on the side he was driving. This court was unable to attach a higher degree liability as the Respondent's assertions that he was speeding between Mariakani and Voi and driving at 160kph was a mere assertion and had not been proven.

28. Having considered the circumstances under which the accident herein occurred, it was the considered view that the Learned Trial Magistrate misdirected himself when he apportioned liability at ten (10%) per cent contribution against the Respondentfor the reason that she was a lawful fare paying passenger in the Appellants' Motor Vehicle and no evidence was adduced before the Trial Court to suggest that she acted in a negligent or careless manner that contributed to the causation of the accident herein.

29. In this regard, this court found that apportionment at ninety (90%) per cent against the Third Party and ten (10%) per cent against the Appellants herein was reasonable apportionment of liability in the circumstances of the case. The manner in which the Third Party will become liable to the Appellants and how the Respondent will proceed against the Appellant herein is well set out in the Civil Procedure Rules and this court need not enter into discourse of the same. In any event, this was not an issue that had been placed before this court for determination.

II. QUANTUM

30. The Appellants contended that Dr Kagona Gitau (hereinafter referred to as 'PW 3") could not confirm who completed the P3 Form and that he had not personally examine the Respondent. They were emphatic that the dislocation of the left knee was not proven.

31. They referred this court to the case of **Denshire Muteti Wambua vs Kenya Power & Lighting Co Ltd [2013] eKLR** in which it was held that in assessing general damages, comparable injuries should as much as possible compensated by comparable awards.

32. They also placed reliance on the case of **H. Young Construction Company Ltd vs Richard Kyule Ndolo [2014] eKLR**where Thuranira J reduced general damages for degloving injury to the calf with loss of skin over the calf muscles and blunt injury to the left ankle joint from Kshs 350,000/= to Kshs 250,000/= general damages.

33. They also referred to the case of **Spin Knit Limited vs Johnstone Otara [2006] eKLR** where the court therein awarded general damages in the sum of Kshs 300,000/= where the plaintiff had sustained a degloving injury to the right hand.

34. On her part, the Respondentreferred this court to the cases of **Al Samah Enterprises Ltd & Abubakar Omar vs DM (Minor suing through mother and next friend) CGK [2016] eKLR** and **Easy Coach Limited vs Emily Nyangasi [2017] eKLR**where the courts awarded between 400,000/= and Kshs 700,000/= respectively for degloving injuries.

35. Notably, no medical report was adduced in evidence. Appreciably, a medical report is not conclusive evidence of the injuries a person sustains. The Respondent relied on the P3 Form. Indeed, a P3 Form will suffice in proving such injuries. According to the said P3 Form, she suffered degloving injury to the scalp, deep cut on the left shoulder, blunt injury to the left knee and dislocation of the left knee joint. The Learned Trial Magistrate awarded her Kshs 500,000/= general damages.

36. It is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of **Margaret T. Nyaga vs Victoria Wambua Kioko** (Supra)

37. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

38. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

39. In the case of **Kigaraari vs Aya(1982-88) 1 KAR 768**, it was stated as follows:-

> **"Damages must be within the limits set out by decided cases and also within the limits the**

Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."

40. There is no doubt that the injuries the Respondent suffered were serious. Having had due regard to the aforesaid cases, it did therefore appear to this court that the award of Kshs 500,000/= as general damages was not unreasonable in the circumstances of the case herein. The assessed amount was comparable to the award that would be assessed due to the prevailing inflationary trends.

41. In the case of **Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR** , on appeal, Wakiaga J allowed a sum of Kshs 700,000/= general damages where a plaintiff had sustained femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she will need money to remove k-nails and screwsor.

*42. In the case of***Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR,***the Court of Appeal referred to the cases of* ***Antony Mwangi vs Martin Muiruri (2008) eKLR,*** *where the plaintiff therein sustained a fracture of the femur and was awarded Ksh.400,000/= as general damages and the case of* ***Joseph Suri Nyateng vs H.P. Mashru (1999) eKLR*** *where the plaintiff therein sustained a fracture of the femur and a dislocation of the shoulder and was awarded Ksh.450,000/=.*

43. Accordingly, having considered the Appeal herein, the Written Submissions in support of the respective parties' cases and the case law, the court was not persuaded that this was a suitable case for it to exercise its discretion to interfere with the lower court's finding for the reason that the Appellants was not able to demonstrate that the quantum that was awarded was so manifestly excessive so as to warrant this court to interfere with the same.

DISPOSITION

44. For the reasons foregoing, the upshot of this court's judgment is that the Appellant's Appeal that was lodged on 8th November 2016 was not merited and the same is hereby dismissed with costs to the Respondent.

45. Judgment be and is hereby entered in favour of the Respondent against the Appellants and the Third Party herein for Kshs 503,800/= made up as follows:-

General damages	Kshs 500,000/=
Special damages	Kshs 3,800/=
	Kshs 503,800/=

Plus costs and interest thereon at court rates.

46. As the conclusion of the Learned Trial Magistrate relating to the apportionment of liability was ambiguous, the same is hereby set aside and in its place, this court hereby orders and directs that the Third Partyherein shall bear ninety (90%) per cent liability while the Appellants herein will jointly bear ten (10%) per cent liability of the Respondent's claim.

47. It is so ordered.

DATED and **DELIVERED** at **VOI** this **19th** day of **October** 2017

J. KAMAU

JUDGE