REPUBLIC OF KEYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 238 OF 2011

1. RAPHAEL MURULI OKEYO

2. HS JUTLEY INSURANCE BROKERS LIMITED…. APPELLANTS

VERSUS

MARTHA MIDECHA OTENGO…… RESPONDENT

(An appeal from the Judgment and Decree of Hon. A.K. Ndung'u (Mr). Senior Principal Magistrate in Milimani CMCC No. 6825 of 2008 dated 17th May, 2011)

JUDGMENT

This is an appeal arising from the judgment of the lower court where the respondent was the plaintiff while the appellants were the defendants. The respondent was injured in a road traffic accident and blamed the 1st appellant being the driver of the motor-vehicle that hit her for causing that accident.

Following the hearing conducted in the lower court, the 1st Appellant was found to be 100% liable for the injuries sustained by the plaintiff and the 2nd Appellant vicariously liable. The respondent was awarded Kshs. 1,400,000/= general damages and Kshs. 159,172/= special damages plus costs and interest.

The appellants being aggrieved by the said judgment filed this appeal. In the memorandum of appeal, the appellants contended that the trial magistrate erred in law and in fact in finding the defendant 100% liable for the accident. It was also contended that the trial magistrate failed to find that both parties were equally to blame yet there was sufficient evidence to so find.

The learned trial magistrate was also faulted for not considering that the respondent substantially and or wholly contributed to the accident, and as a result arrived at an erroneous finding on liability. The award in general damages was said to be manifestly excessive considering the injuries sustained by the respondent. In that regard, the trial magistrate was faulted for not properly considering that what was contained in the medical report was not pleaded.

Finally, it was contended that the appellants' submissions were not considered as a result of which there was an erroneous finding on liability and quantum. Based on these grounds, there was a prayer that the appeal is allowed on liability and quantum revised.

Both learned counsel have filed submissions addressing the appeal. As the first appellate court, it is my duty to go through the entire record of the lower court and arrive at an independent conclusion. The respondent, a police officer in the police station where the accident was reported and the Doctor who examined the Respondent gave evidence in support of her case while the 1st appellant is the only witness

who gave evidence for the defence.

In the amended plaint filed on 31st October, 2008, the respondent stated that she was lawfully and carefully walking on a pedestrian path along Waiyaki way in Nairobi, when motor vehicle registration Number KAQ 074P was negligently driven that it lost control, veered off its lane and knocked her down thereby occasioning her severe injuries. This was denied by the appellants who in the defence stated that it was the respondent to blame as she suddenly crossed the road on the face of oncoming traffic when she knew or ought to have cared for her own safety. She was also faulted for failing to heed the presence of traffic reasonably expected on the road. She was also blamed for crossing or attempting to cross the road when it was unsafe and dangerous to do so.

In her evidence in the lower court the respondent told the court that she had just crossed the road along Waiyaki way at the slip road when she was hit by the motor vehicle which was coming from Church road headed to Westlands. That the 1st appellant swerved off the road while attempting to avoid another motor-vehicle. She explained that she was injured on the jaws, left shoulder and right leg. Under cross examination, she insisted she had already crossed the road when she was hit as she had already checked before crossing and realized it was safe to cross. She maintained that the driver was speeding though there were no zebra crossing lines where she crossed.

PC Bwire (PW1) from the traffic Department at Parklands police station. He stated that a report of a serious accident was received at the station involving the motor-vehicle driven by the 1st Appellant and the Respodent and injuries were reported. At the time of the testimony the matter was still under investigation. He produced the police abstract. Under cross-examination, he averred that while police officers visited the scene he was not farmiliar with what happened at the scene.

PW3, Dr. Wokabi, a Consultant Surgeon who examined the Respondent on 23rd June 2008 stated that he used the discharge summary from Avenue Hospital which history guided him. According to him injuries included a broken jaw, broken molars, fracture of the left shoulder blade, fracture of right fibula, painful right knee. The complaints she presented were difficulties chewing hard stuff, pain in the left arm and shoulder, left knee pain, two molars on the left upper side missing. That he assessed permanent disability at 15%. Upon cross-examination, he insisted that he relied on a discharge summary from Avenue Hospital to prepare the report.

The 1st appellant on the other hand said while he was driving along the slip road he saw a pedestrian on a pavement but she suddenly crossed the road, banged on the motor-vehicle on the left side mirror. He claimed that he was never charged. On being cross-examined, he insisted that he recorded a statement with the police and never left the scene. He however concurred that he veered off the road. In his judgment the learned trial magistrate noted the following -

> **"The witness says he was carrying his boss in the car. This boss was not called to testify. When a party fails to call a witness who was present at the time of the incident, the inference made is that such a witness could have given adverse evidence to the party so not calling him/her. I do hold and elect to believe the plaintiff's evidence and I find the 1st defendant and vicariously the 2nd defendant liable at 100%."**

There was obvious contradiction in the testimonies of the 1st Appellant and the Respondent. The only witness to the accident apart from the two was the 1st Appellant's boss who was not called to testify.

A pedestrian walking beside the road cannot be faulted for an accident where circumstances point to the fact that the motor vehicle veered off the road. The respondent was not questioned on the distance which she gave of two meters off the road. As proof is on a balance of probabilities, I agree with the Learned Magistrate that the truth lies with the Respondent's testimony.

In **Simon Taveta Vs Mercy Mutitu Njeru Civil Appeal No. 26 of 2013** the Court of Appeal at Nyeri relying on the case of **Kemfro Africa Limited T/A as Meru Express Service Gathogo Kanini Vs.**

A.M.M Lubia & Another (1982-88) 1. KAR 777 stated -

> **"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 judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage (see Ilango Vs. Mayoka)(1961) EA 705, 709- 713)"**

Comparable damages should as far as possible in injury claims be compensated by comparable awards. The court should also always balance the act as high awards have a negative economic impact and at the same time litigants should be adequately compensated.

The defendant in the lower court cited a case decided in 2001. It is obvious that with the passage of time inflation affects the value of money. It would have little relevance today

In the submission by the appellant, the case cited **Nakuru HCCC No. 229 of 2008 Hussein Hassan Mohammed vs Stanley Thuo Gacheru & Others [2011]eKLR** where the respondent is said to have suffered a fracture of left supra-orbital ridge, severe head injury leading to loss of consciousness for 2 days, fracture of the right ulna, fracture of both mandible with displaced tooth, blunt injury to the anterior chest wall, the court awarded of Kshs. 650,000/= as general damages. It is to be noted that this was five years ago and consideration must be had to the incidence of inflation.

The Learned trial magistrate relied on civil suit No. 1750 of 1999 to make his award. The injuries sustained by the respondent in this case cannot be said to compare with those stated in that judgment. In fact, the injuries pleaded in the plaint and those in the medical report produced by PW2 are not similar. Those in the medical report included injuries that were not pleaded. This issue was raised in the Defendants' submissions in the lower court but seems to have been overlooked in preparation of the Judgment. As parties are bound by their pleadings, the Respondent cannot rely on what she did not plead as it would seem to have been an afterthought.

Therefore, the award made by the learned trial magistrate was on the higher side. That being the case, there is reason to disturb that award which I hereby do, and reduce the figure of 1,400,000/= to Kshs. 800,000/=. The special damages remain the same that is Kshs. 159,172/=. To that extent only, this appeal is allowed.

The appellant shall be entitled to the costs of this appeal.

Dated, signed and delivered at Nairobi this 28th Day of July, 2016.

A. MBOGHOLI MSAGHA

JUDGE