



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 323 OF 2012

**(AN APPEAL AGAINST THE JUDGMENT OF HON. BENJAMIN NDEDA, PRINCIPAL
MAGISTRATE AT THIKA CMCC NO. 1041 OF 2010 ON 9TH NOVEMBER, 2011)**

LAWRENCE MUKUBU. 1ST APPELLANTS

BENEDICTINE FATHERS OF NAIROBI. 2ND APPELLANTS

VERSUS

LOISE WAMAITHA KIMANI..... RESPONDENT

J U D G M E N T

By a plaint filed in the Chief Magistrate's Court at Thika on the 12th October, 2004, the Respondent herein **LOISE WAMAITHA KIMANI** lodged a claim against the Appellants **Lawrence Mukubu** and **Benedictine Fathers of Nairobi** for general and special damages, interests and costs for personal injuries sustained in a motor vehicle accident.

The Respondent pleaded that on the 30th May, 2010, she was lawfully walking as a pedestrian along Thika-Nairobi Road at Survey, when Motor Vehicle Registration Number KAQ 677Z Toyota Saloon owned by the 2nd Appellant was so negligently, recklessly and/or carelessly driven without due care and regard or attention by the 1st Appellant that it lost control, veered off the road and knocked down the Respondent thereby seriously injuring her.

The particulars of negligence on the part of the 1st Appellant were pleaded in paragraph 6 of the Plaint while the particulars of injuries and the special damages were pleaded in paragraphs 8 and 9 of the Plaint.

The Appellants filed their joint defence on the 19th October, 2010 wherein they denied the occurrence of the accident but in the alternative and without prejudice averred that if the accident occurred they denied the particulars of negligence and attributed negligence to the Respondent in paragraph 6 of the defence. The Appellants went further and denied all the other particulars in the Plaint including the jurisdiction of the court.

The Respondent filed a reply to defence on the 27th October, 2010 denying the particulars of negligence attributed to her and put the Appellants to strict proof thereof.

On the 23rd May, 2011, the lower court matter proceeded and on the said date, the Respondent gave evidence as PW 2, while Doctor Jane Gikonyo gave evidence as PW 1.

The Defence called one witness who is the 1st Appellant in the Appeal herein.

Parties, thereafter, filed written submissions on both quantum of damages and liability. The trial magistrate awarded general damages in the sum of Ksh.850,000 and apportioned liability at 80% - 20% in favour of the Respondent.

The Appellants being dissatisfied with the judgment have filed the Appeal herein. The Appeal was filed on the 25th June, 2012 which Appeal is both on quantum and liability.

The Appellants have preferred 6 (six) grounds of Appeal as listed hereunder: -

1. That the Trial magistrate erred in law and in fact in awarding general damages that were inordinately high in the light of the injuries sustained and the evidence tendered by both parties.
2. That the trial magistrate erred in law and in fact in failing to appreciate and consider the evidence adduced by the Defendant.
3. That the learned magistrate erred in law and in fact by failing to consider the Defendant's submissions and authorities attached thereto wherein the Plaintiff (Respondent) sustained comparable injuries.
4. That the learned magistrate erred in law and in fact in awarding an amount in general damages that was manifestly excessive given to nature of injuries.
5. That the learned magistrate erred in law and in fact in apportioning liability at 80:20 in favour of the Plaintiff and in failing to consider all the circumstances of the accident including the presence of a foot bridge at the scene and that the Plaintiff was negligent.
6. That the learned magistrate's award was an erroneous estimate of the damages due in the particular case.

These grounds of Appeal were canvassed by the counsel for the Appellants vide written submissions filed in court on 14th August, 2015 and opposed on behalf of the Respondent by way of submissions filed in court on 13th August, 2015.

The summary of the evidence in the lower court was that the Respondent who testified as PW 2 was on 30th May, 2010, crossing the Thika-Nairobi Highway and while at the middle of the road waiting to cross to the other side of the road, she saw a vehicle at high speed. The vehicle was being driven from Thika towards Nairobi. The driver tried to turn to return towards Thika direction on that island divide.

The driver of the said vehicle knocked her down and she sustained injuries on the left leg, right arm, forehead and back. She was rushed to Guru Nanak Hospital where she was treated. She produced a police abstract, discharge summary, P3 form, a certificate of official search which confirmed the vehicle to have been registered in the name of the second Appellant.

She complains of weakness of her right hand which she cannot use for writing and has to use the left one. Her leg has a wound and it is still painful. She told the court that she was not careless but blames the first Appellant for the accident.

PW 1 Doctor Jane Gikonyo examined the Respondent who gave a history of being involved in a road accident, on the 30th May, 2010. According to her, the Respondent sustained fracture on the right distal humerus bone, fracture left proximal humerus Femur, bruises on the right forehead and the back.

The fracture was done open reduction and internal fixation with plates. The Respondent complained of pain in the right humerus and left knee with stiffness. She had a surgery scar and restricted movement on the right and left knee joint. There was tenderness on examination of both knees.

In her opinion, the injuries would take one year to heal from the date of the medical report. She required the removal of the plate at a cost of Ksh.140,000/- she was likely to suffer permanent incapacity, the degree of which she did not assess.

On the part of the Defence, the 1st Appellant testified as DW 2. He told the court that on 30th May, 2010 he was driving along Thika-Nairobi Highway at Survey of Kenya on the extreme right on the tarmac. He was driving at a speed of 40 KPH when he saw the Respondent cross and she had already crossed to the extreme right.

A matatu came from behind and overtook him from the extreme right but it was partly on the pavement. Suddenly, the Respondent jumped on his side and landed on his car, the matatu sped off. According to his evidence, he did not knock down the Respondent but it was her who knocked his vehicle. He assisted in taking the Respondent to the hospital. In his evidence the flyover is not 1.5 kilometres away as testified by the Respondent, it is much nearer.

Since the appeal is both on quantum and liability, I wish to address the issue of liability first. I have carefully gone through the submission filed in court by both counsels for the Appellants and the Respondent. I have also gone through the evidence that was adduced in the lower court by all the parties.

In their submissions, the Appellants prays that the Respondent be held fully liable for the accident or in the alternative, this court apportions greater liability to her. The account given by the Respondent on how the accident occurred is doubtful. This is because as rightly submitted by counsel for the Appellants, Thika-Nairobi Road is a super highway and it is separated by high kerbs that make it impossible for a motor vehicle to attempt to cross over to the opposite lane. The version given by the first Appellant is more probable on a balance of probability. The court also considers that the first Appellant was driving a lethal machine and he ought to have been more careful in the way he drove and/or controlled the motor vehicle.

On quantum of damages, I have looked at the authorities annexed to the submissions by the respective parties. The Appellants submitted that an award of Ksh.800,000/- was inordinately high taking into account the injuries sustained by the Respondent. They submitted that an award of Ksh.380,000/- is reasonable compensation.

The Appellants have relied on the cases of **Simon Mutisya Kavii Vs Simon Kigutu Mwangi (2013) KLR** where a court awarded a sum of Ksh.200,000/- for fracture to the tibia and fibula.

They have also relied on the case of **Fast Choice Company Ltd Vs Hellen Nungari Ngure (2011) eKLR** where the Court of Appeal awarded Ksh.180,000/- for fracture of humerus.

On her part, the Respondent urges the court not to disturb the judgment by the lower court. She prays that the Appeal be dismissed with costs. She relies on the authority of **Kilifi Plantations Limited Vs Awour Odawa (2004) eKLR**.

I have carefully considered the submissions and the case law cited by the parties herein. I am alive to the fact that this being the first Appeal the court is under duty to re-evaluate the evidence and come up with an independent conclusion. This court has a discretion to interfere with damages if the same are inordinately high or low as was stated in the case of **Butt Vs Khan** where the Judge stated: -

“An Appellant court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and arrived at a figure which was either inordinately high or low.”

In assessment of damages, it must be borne in mind that each case depends on its own facts, awards should not be excessive and comparable awards and inflation should be taken into account.

Having taken into account the comparable authorities that have been cited, I do find that the award made by the trial court was excessive in the circumstances of the case. In the Doctor's opinion in the medical report dated 10th September, 2010, the injuries were in the process of recovery and the Respondent would take about two (2) years to recover. This was more than five years ago. In my judgment, I will reduce the

award and allow an award of Ksh.600,000/- as general damages. The appeal is therefore allowed in that regard and the Respondent will have judgment against the Appellants for Ksh.600,000/-.

The apportionment of liability at 80:20 in favour of the Plaintiff is reasonable and this court will not interfere with it.

The Appellants are awarded the costs of the appeal but the Respondent will get the costs in the lower court.

It is so ordered.

Dated and delivered at Nairobi this 19th day of November, 2015.

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L. NJUGUNA

JUDGE

In the presence of

..... for the Appellants.

..... for the Respondent.