



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL NO.67 OF 2011**

**NTULELE ESTATE TRANSPORTERS LTD..... 1ST APPELLANT**

**JOHN ASHIKA MUTSAYI ..... 2ND APPELLANT**

**AND**

**PATRICK O MUTANYI MUKOLWE ..... RESPONDENT**

*(Appeal arising from Chief Magistrate Hon. U. P. Kidula in Bungoma CM CC No.65 of 2010)*

**JUDGMENT**

1. The Respondent was a Plaintiff in the lower court. By an Amended Plaint amended on 16<sup>th</sup> December, 2010, the Appellant alleged that on 22/12/09, he was a pillion passenger along Lunza-Bukura road when the 1<sup>st</sup> Appellant's motor vehicle registration No.KAV 330V, Holland was so negligently driven by its agent or servant, the 2<sup>nd</sup> Appellant, that it knocked down the Respondent together with his motor cyclist whereby the Respondent sustained serious injuries. The Respondent blamed the Appellants for the accident. He set out what he considered to be the Appellants' particulars of negligence as well as the injuries he sustained. He prayed for damages.

2. The Appellants filed a defence denying the accident. They blamed both the Respondent and the motor cyclist for the accident and set out what they considered to be particulars of such negligence. They denied that the doctrine of *Res Ipsa Loquitur* was applicable to the case and prayed that the suit be dismissed.

3. At the trial, the Respondent testified how he was a passenger in some motor cycle on the material day along Sabatia/Bukura road when at about 7.30 p.m, he was involved in an accident. He told the court how he saw a tractor coming from ahead. The same was being driven in a zig zag manner, the motor cyclist tried to avoid it by swerving to his left but the tractor followed them there and crushed them. The motor cyclist died on the spot whilst the Respondent was admitted to St. Mary's Hospital Mumias for more than a month. He produced a Police Abstract, treatment notes, P3 Form and a Medical Report by Dr. Charles M. Andai which set out the nature of the injuries he sustained. He also produced receipts for the expenses he had incurred, photographs showing the final resting place of the tractor after the accident, documents to show that he was involved in business before the accident and that he took care of his family. He told the court that before the accident, he was only 41 years and was taking care of his young family. That as a result of the accident which led to amputation of one of his legs, he was no longer able to engage in his previous business. On cross-examination, he maintained that the accident was caused by the negligence of the Appellants and that he was no longer able to engage in his previous work. The Appellants did not call any evidence. They had the medical report of Dr. Raburu produced by consent.

4. After considering the evidence and submissions of counsel, the Lower court entered judgment in favour of the Respondent holding the Appellants 100% liable and awarded damages of Kshs.2,715,000/=.

5. It is against this judgment that the Appellants have appealed to this Court setting out a total of nine (9) grounds of appeal. These grounds can be summarised as follows:-

a) that the trial Court misapprehended the evidence before it and failed to properly evaluate the same thereby arriving at a wrong decision;

b) that the trial Court failed to consider the issue of contributory negligence on the basis of the evidence before it;

c) that the trial Court proceeded on wrong principles in assessing damages whereby it awarded a sum which is so inordinately high in the circumstances.

6. Ms. Bikeyo appeared and argued the Appeal on behalf of the Appellants. She combined all the grounds on liability both in her written submissions and oral hi-light to one. That the Respondent had not proved his Case before the trial Court. She submitted that despite the many particulars of negligence pleaded in the amended Plaintiff against the Appellants, the only evidence tendered at the trial was that the tractor was being driven in a zig zag manner which had not been pleaded. That it was imperative for the Respondent to prove all the alleged particulars of negligence for his case to succeed. She cited the Case of **Susan Mumbi Waititu -vs-Kefala Grebedhin HCCC NO.3321 of 1993 (UR)** in support of those submissions and urged that the Respondent could not escape blame for the occurrence of the accident. She also cited the Case of **Smith -vs- Baker & Sons [1989]** in support of the submission that the Respondent had voluntarily assumed the injuries complained of. She further submitted that since there was no evidence that the motorcyclist and the Plaintiff did not have any alternative action such as driving off the road, the doctrine of *volenti non fit injuria* applied. She faulted the Learned Trial Magistrate for failing to consider this aspect.

7. Mr. Alwanga argued the appeal on behalf of the Respondent. He submitted that the Respondents' evidence on how the accident occurred had not been controverted; that his testimony that the tractor was driven in a zig zag manner and that it came on the way of the motor cyclist proved negligence on the part of the Appellants. That there was evidence that the 2<sup>nd</sup> Appellant had been charged in a traffic case in respect of the accident and convicted. Counsel relied on the Cases of **Victor Musoga -vs- Linus Watto Kariuki NBI HCCC No.2797 of 1997 (UR) and David Kigotho Ribe -vs- Wambugu Ndung'u & Anor (NKR HCCC NO.15 of 2006 (UR))** in support of his submissions. As regards contributory negligence, counsel submitted that since the motor cyclist whom the Appellants sought to blame had not been joined in the suit, no blame could be attributed to him. Counsel supported the trial Court's finding that the Appellants were 100% liable.

8. I have looked at the Amended Plaintiff. The Respondent pleaded a total of 14 particulars of negligence against the Appellants. Some of these were that the motor vehicle was being driven without due regard to other road users; failing to stop, swerve, brake and/or manage to control the motor vehicle from knocking the Plaintiff; turning without any due care or regard to other road users; the 2<sup>nd</sup> Appellant failing to keep his line while on the road and the 1<sup>st</sup> Appellant employing a careless and reckless driver and/or agent.

9. At the trial the Respondent testified that he saw the tractor coming from ahead, that the motor cyclist tried to avoid the tractor by going to the left; but the tractor followed them and hit them off the road. He produced some photographs Pexh.3 (a) and (b) of the tractor. This was the only evidence tendered in support of the Respondents' case at the trial. On cross-examination, he denied that the motor cyclist was riding too fast and careless and/or was riding on the wrong side of the road.

10. I agree with Ms Bikeyo that under Section 107 of the Evidence Act, Cap.80, it is up to him who alleges a fact that must prove it. In the instant case, the Respondent had alleged in the amended Plaintiff that

the 1<sup>st</sup> Appellant's motor vehicle was being driven without due care to other road users; that the 2<sup>nd</sup> Appellant failed to control the said motor vehicle to avoid knocking the Respondent and that he failed to keep his lane on the road. At the trial, the uncontroverted and unchallenged evidence was that not only was the tractor moving in a zig zag manner, but that it followed the motor cyclist and Respondent onto their lane and crashed them while off the road. Obviously the unfortunate motor cyclist and Respondent were trying to avoid the tractor which was on their side of the road. The Respondent stated firmly that:-

***“The tractor was coming from ahead, it was going zig zag on road. We tried to avoid it. We went to our left side but it followed us there and hit us off the road.”***

11. That evidence was neither challenged nor controverted. In my view, on that testimony the evidentially burden of proof had shifted from the Respondent on how the accident occurred to the Appellants. The Appellants having called no evidence to rebut that testimony, the Respondent had proved his case to the standard required. There is nothing else that could be required of him to prove his case against the Appellants. The photographs produced by consent of the parties as PExh 3 (a) and (b) showed the final resting place of the tractor as being completely off the road to its right side. That in my view corroborates the Respondent's assertion that they were hit while on their side of the road and not otherwise. It is not ordinary that a vehicle would be driven on the right side of a road and off the road for that matter. The Respondent had proved that the Appellant's tractor was being driven in a careless manner and without regard to other road users.

12. Mr. Alwanya submitted that the 2<sup>nd</sup> Appellant was charged and convicted in the **Mumias Traffic Case No.93 of 2010.** However, whilst a charge sheet in that case was produced at the trial Court, neither the proceedings of that Case was produced nor any acceptable evidence adduced to show that a conviction had been returned against the 2<sup>nd</sup> Appellant on the charges preferred against him. In this regard, the Cases of **Victor Musoga -vs- Linus Watto and David Kigothor -vs- John Wambugu (UR)** relied on by the Respondent are not applicable as in those Cases, there were convictions returned in the Traffic Cases.

13. The Appellants submitted that the trial court should have considered that the motor cyclist was also to blame for the accident. Firstly, there was no evidence to support such a fact. When cross-examined, the Respondent was categorical that the motor cyclist was neither riding too fast nor was he riding on the wrong side of the road. No evidence was produced by the Appellants to controvert the Respondents' evidence on how the accident occurred or to prove any of the particulars of negligence pleaded in the defence either against the motor cyclist or the Respondent. Secondly, having failed to join the estate of the motor cyclist as a party in the proceedings, I do not think any blame could be attributed to a party who had not been joined in the proceedings. In the Case of **Benson Charles Ochieng & Anor -vs- Patricia Otieno HCCA No.69 of 2010 UR**, the Court held:-

***“The trial Court could not have apportioned liability between the appellants and a person who was not even a party to this suit. This Court is unable to agree with the thrust of the Appellants' argument which was to the effect that the Respondent ought to be blamed for not joining the third party into the proceedings. This cannot be because it is the Appellants who will bear the consequences of any failure to include the third party into the proceedings.”***

14. Mutatis Mutandis, in the present appeal, it is the Appellants who were to face the consequences for failure to join the motor cyclist to the suit. Having failed to join that party, that the argument as to contribution of negligence fails.

15. In this regard, I am satisfied and so hold that the trial Court was entitled to hold the Appellants' 100% liable for the accident. I am also satisfied that the trial Court did not misapprehend the evidence before it and that in its evaluation thereof, it arrived at the correct decision. Grounds 1, 2, 5, 6 and 9 of the Memorandum of Appeal on liability fails.

16. As to quantum, the jurisdiction of this Court is clear. In **Henry Hidaya Ilanga -vs- Manyena Manyoka [19671] E.A 705**, the Court of Appeal for East Africa at page 713 applied with approval the dicta of the Privy Council in **Nance -vs- British Columbia Electric Railway Company Ltd (4) [1951] A. C. 601 at p.631** wherein it was held that:-

*“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v. Lovell, [1935] 1 K.B.354), approved by the House of Lords in Davies v. Powell Duffryn associated Collieries Ltd., [1942] A. C.601.”*

17. Further, in the Case of **Butt -vs- Khan [1981] KLR 349 at 356**, the C.A of Kenya held that:-

*“An appellate court will not disturb an award of damages unless it is so 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 so arrived at a figure which either inordinately high or low.”*

18. In this appeal, Ms Bikeyo, Learned Counsel for the Appellants submitted that the Learned Trial Magistrate grossly misdirected herself in treating the evidence and submissions before her on quantum that she arrived at a wrong conclusion. That she failed to follow the principle of stare decisis she failed to follow decided cases on similar injuries. She relied on the Cases of **Lukenya Ranching & Farming Co-operative Society Ltd -vs- Kavolot (EA) 418 and Wilfrida Mueni Katee -vs- Raphael Waweru t/a Ranjos Cater Proses HCCC No.1050 of 2000** in support of her submission that an award of Kshs.600,000/= should have been adequate. That the award of Ksh.3,170,862/= was so inordinately high that in the circumstances it represented an erroneous estimate.

19. Ms Bikeyo further submitted that the award for future loss of earnings was wrongly awarded since the Respondent had pleaded that he had a driving career but testified about some business. In Ms Bikeyo's view, the Respondent was bound by his pleading that he was in a driving career. Accordingly, in her view, the sum of Kshs.600,000/= awarded as loss of future earnings should not have been awarded.

20. Mr. Alwanga submitted that the award was not excessive. That comparable awards measured reasonably with the award made by the trial Court. Counsel cited the Cases of **Kariuki Mng'onde -vs- Phillip Meru HCCC NO.54 of 2001 (UR)** wherein Kshs.1.5 million was awarded in 2005; **Isabela Nyambu -vs- Sunric suppliers Ltd NBI HCCC NO.349 of 1996 (UR)** where a sum of Kshs.1.25 M was awarded in 2005 and **Cosmas Kipkoech -vs- Madrugada & Anor NKR HCCC NO.176 “B” of 2005 (UR)** wherein Kshs. 2 million was awarded in 2010.

21. On loss of earning capacity, Mr. Alwang'a submitted that this was a form of general damages and need not be pleaded. That the Respondent had pleaded the same in the Amended Plaintiff and proved it. Counsel urged that the same should not be deducted from the award.

22. Applying the principles set out in the Cases of **Henry Hidaya Ilanga -vs- Manyena Manyoka (supra) and Butt -vs- Khan (Supra)** did the trial Court apply wrong principles in assessing the quantum of damages or is the award of Kshs.2,715,000/= too inordinately high as to amount to an error of estimate?

23. Firstly, the Appellants did not contest the sum of Kshs,205,000/= for future medical expenses and Kshs.65,000/= special damages. Those sums therefore do not fall for consideration. In any event, I have on my part seen the Medical Report of Dr. Raburu and the receipts that were produced at the trial. Those sums were properly awarded. The contest lies with Kshs.1,800,000/= general damages and Kshs.600,000/= loss of future earnings.

24. The trial Court is criticised for not being guided by the Principal of state decisis and thereby arriving at a wrong conclusion. I have seen the judgment of the trial Court. The trial court held:-

***“I have considered those submissions, the authorities cited and the medical reports produced in evidence and I find that for the serious injuries that the Plaintiff sustained and the pain and suffering he underwent during his long hospitalisation that led to amputation of the left foot below the knee and other injuries were assessed by the doctors at 60% and 50% permanent disability. I find that an award of Kshs.1.8 million is a reasonable compensation for the same.”***

25. I have looked at the submissions of the respective parties that were presented to the trial court. The respondent relied on the same Cases he has relied on before this Court including the Case of **Samwel Waiguru Njoroge -vs- Kenya Bus Service NBI HCCC NO.495 of 1998 (UR)**. The Case of **kariuki Mugendi -vs- Phillip Miriti (Supra)** for amputation of the left lower limb below the knee, the Court awarded Kshs.1.5 million in 2005. In **Samwel Wanguru -vs- KBS (supra)**, for amputation of right leg with 35% permanent disability, the Court awarded Kshs.1,200,000/= in 2000. In the Case of **Isabela Nyambura -vs- Sanric Suppliers Ltd (supra)** it was a Case of amputation of left leg with 70% incapacity. An award of kshs.1.25 million was made in 2005.

26. On the other hand, the Appellants relied on the Case of **Wilson Kuria & Another -vs- Tibi Githiora HCCC No.965 of 1988 (UR)** an award of Kshs.450,000/= was made for amputation of left leg in 1994.

27. The trial court stated that it had considered the parties' submissions and authorities. It went on to state that due to the serious nature of the injuriessuffered, apart from the amputation of the leg and the long stay in hospital, it was of the view that an award of Kshs.1.8 million was reasonable compensation. In my view, failure to set out the respective parties submissions and evaluate the authorities relied on in the judgment cannot be a basis of holding that a court has failed to consider the principles applicable or has ignored the submissions and authorities cited. What is significant is that a Court has considered the same and there is evidence to show that before arriving at its decision, the Court had in mind the guiding principles.

28. I have on my part looked at the medical reports of Dr. Andai and Dr. Raburu. Both were in agreement that apart from the crush injury to the left leg which had led to the amputation, the Respondent suffered other injuries including, cut on the forehead, face and blunt injury to the left eye. There were other injuries to the right fore arm, right knee and foot and left shoulder. The Doctors opined that the Respondent had suffered 50% and 60% permanent incapacity.

29. Considering all these, the Cases relied on by the Respondent which were more recent than the one the Appellants relied on of 1994 – more than 17 years before the subject judgment was decided, and the incidence of inflation, I am unable to fault the trial court. Accordingly, I hold that the award of Kshs.1.8 million general damages was not so inordinately high in the circumstances.

30. As regards, the award of Kshs.600,000/= for “future earnings”, I have considered the respective parties' submissions. I agree with the submissions of Ms Bikeyo that a party is bound by his pleadings and cannot depart therefrom except through proper amendment.

31. In the Case of **Sosphinaf Company Ltd & Anor -vs- Daniel Ng'ang'a Kanyi [2006] e KLR** the Court of Appeal held:-

***“The loss of earning capacity is a prospective financial loss which is awarded as part of general damages and which does not have to be specifically pleaded. (See Butler -vs- Butler [1984] KLR 225 ..... In this case, the loss of earning capacity was a direct consequence of the accident which justified an award in the form of general damages.”***

32. In the case of Mumias Sugar Company Ltd -vs- Francis Wanalo [2007] eKLR the Court of Appeal held that:-

***“The award for loss of earning capacity can be made both when the Plaintiff is employed at the time of trial and even when he is not so employed..... loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of the case. There is no formula for assessing loss of earning capacity.”***

In that Case, the Court of Appeal faulted the High court for using multiplier/multiplicand basis since the degree of incapacity was low and awarded a general figure of Kshs,500,000/= in addition to Kshs.200,000/ general damages.

33. Finally, in Jacob Ayiga Maruja & anor -vs- simeon Obayo [2005] e KLR the court of Appeal held:-

***“We think, on our part, that the pleading made on behalf of the Respondent for claim of damages for loss of earnings or loss of business was careless and unprofessional. The issue of loss of earning capacity was even raised during the submissions of counsel in the Superior Court. Loss of earnings is..... a special claim and must be pleaded specifically and strictly. .... In the absence of a specific pleading therefore, it is our judgment that there could be no award made for loss of earnings. There is nevertheless a pleading that the respondent lost his business since he closed it down after the accident. His earning capacity was in effect lost and we understand why the Learned Judge equated the issue of loss of earning capacity with the loss of business and awarded the figure for the latter.”***

The Court proceeded to give an award of Kshs.160,000/= for loss of earning capacity.

34. In the instant Case, the Appellants argued that there was no basis of awarding Kshs.600,000/= as the Plaintiff pleaded that the Respondent was a driver earning Kshs.9,000/= yet the award was based on a figure of Kshs.5,000/= based on documents tendered in evidence whereby the Respondent was trading as a businessman. In the amended Plaintiff, at para.7, the Respondent pleaded, *inter alia*:-

***“At the time of the accident, the Plaintiff was aged 41 years. He was in good health and working as a driver and businessman earning a sum of Kshs.9,000/= per month from his driving career. He would have worked up to the age of 60 years or more and as a result of the said accident the Plaintiff has suffered loss and damage.”***

35. It is clear that the Respondent pleaded two items – a driving career wherein he earned Kshs.9,000/= per month and business whose earnings he did not disclose. At the trial he said nothing about the driving career but stated that he used to make Kshs.9,000/= from his business. He produced documentary evidence which was never challenged. In the submissions, although counsel headed the claim loss of future earnings he concluded that:-

***“We submit therefore that the Plaintiff is entitled to loss of future earning capacity as prayed.”***

36. In this regard, although the trial court erred in terming that head loss of future earnings, nevertheless it must have intended it to be loss of future earning capacity. Also the evidence at the trial was the inability of the Respondent to carry out his business in future. Accordingly, I am unable to fault the trial Court in awarding Kshs.600,000/=for loss of future earning capacity which is a separate head under damages.

37. In the premises, grounds 3, 4, 7, 8 and 9 are rejected. I find the appeal therefore to be without merit and I dismiss the same with costs to the Respondent.

DATED and DELIVERED at Bungoma this 30<sup>th</sup> day of June 2014.

**A. MABEYA**

**JUDGE**