



REPUBLIC OF KENYA



KENYA LAW
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**Kemunto v Owino & 3 others (Civil Appeal 156 of 2021)
[2024] KEHC 3500 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 156 OF 2021
PN GICHOHI, J
APRIL 11, 2024**

BETWEEN

JULIET KEMUNTO ALIAS HELLEN MOKEIRA MOSOGI APPELLANT

AND

CHRISPINUS OWINO 1ST RESPONDENT

WANGWE NASIAKA ISABELLAH 2ND RESPONDENT

WYCLIFFE ONDIEKI ONSONGO 3RD RESPONDENT

KELVIN ONCHANGOI 4TH RESPONDENT

*(Being an Appeal from the Judgement of Hon. Nathan Shiundu (CM)
dated 27th day of October 2021 in Kisii CMCC NO. 469 of 2018)*

JUDGMENT

1. The Appellant herein and through the firm of Ochoki & Company Advocates, filed her Complaint dated 30/07/2018 in Kisii CMCC NO. 469 of 2018; Juliet Kemunto alias Hellen Mokeira Mosogi & vs. Chrispinus Owino & Wangwe Nasiaka Isabella. To the proceedings, the 3rd and 4th Respondents were enjoined as 1st and 2nd third party respectively.
2. In the said Complaint, the 1st and 2nd Respondents were sued as the driver and registered owner respectively of motor vehicle registration number KBG 162V.
3. The Appellant pleaded that on 20/05/2018, she was a pillion passenger on motorcycle registration number KMEG 511V along the Kisii-Kisumu Road at Mosochi area, when the 1st Respondent drove the said vehicle so negligently that it abruptly turned to enter Cardinal Otunga High School and, in the process, knocked down the said motorcycle and as a result, the Appellant sustained severe injuries



- and suffered loss and damage. She therefore prayed for special damages in the sum of Kshs. 7,050 /= general damages, costs and interest.
4. In their statement of Defence dated 10/09 2018 and filed through the firm of Nyamori & Co. Advocates, the 1st and 2nd Respondents totally denied the claim and urged that the Appellant's claim be dismissed with costs.
 5. Upon being joined to the proceedings, and through the firm of Omariba & Co. Advocates, the 3rd and 4th Respondents filed on 02/08/2019 a joint defence dated 01/08/2019 and denied that the 1st and 2nd Respondents were entitled to indemnity and/or contribution against them (Third parties). They therefore urged the court to dismiss the Third Party Notice against them dismissed with costs.
 6. In its judgment dated 27/10/2021, the trial court held :-
 - a. The 3rd Parties liable are 80% liable for the accident.
 - b. The Plaintiff is 20% liable for the accident.
 - c. The suit against the defendants is dismissed with no orders as to costs.
 - d. General damages of Kshs. 400,000.00.
 - e. Special damages of Kshs. 26,570.00.
Total – Kshs. 426,570.00.
 - f. The plaintiff is also awarded costs of the suit and interest.
 - g. The said amount will be subjected to apportioned liability.
 7. Aggrieved by the trial court's findings on liability and quantum, the Appellant filed a Memorandum of Appeal dated 26/11/2021 and on six (6) grounds and which can be condensed into three (3) grounds, that is:-
 1. The Learned trial Magistrate failed to adequately evaluate the evidence on record hence arrived at a wrong decision.
 2. The Learned trial Magistrate erred in law and fact by holding her 20% liable in absence of concrete evidence.
 3. The Learned trial Magistrate erred in law and fact in failing to appreciate the principle governing the award of damages and completely ignoring the Appellant's submissions, thus occasioned a miscarriage of justice.
 8. In the circumstances, the Appellant prayed that the entire judgment of the trial court be reviewed and/or set aside and the same be replaced with an assessment by this court.
 9. The appeal was heard on the basis of the parties' rival written submissions. The Appellant's submissions are dated 06/09/2022 and filed on 09/09/2022. On liability, the Appellant submitted that the apportionment of liability was erroneous on account of her evidence as corroborated by that of PW3.
 10. On award of general damages which the Appellant submitted as inordinately low, she cited the case of *Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs. A. M. M. Lubia & Another [1998] eKLR* to support her that this Court re-assess the general damages and enhance the same.



11. In her view, the trial court failed to consider her submissions which were more relevant in this suit and, in the circumstances, applied the wrong principles of law in the entire judgment. For those reasons, she urged this court to allow the appeal with costs.
12. The 1st and 2nd Respondents joint written submissions are dated 27/09/2022 filed on the same date. They relied on the evidence of PW3 coupled with the case of Rosemary Kaari Murithi vs. Benson Njeru Muthitu & 3 others [2020]eKLR relied on by the trial court and submitted that the Appellant was partly to blame for causing the accident.
13. On quantum, they submitted the trial court's findings were well guided by recent case law with comparable injuries and awards. They therefore urged this court not to interfere with the trial court's findings on liability and quantum. They prayed that the appeal be dismissed with costs.
14. The 3rd and 4th Respondents did not participate in this appeal.

Analysis

15. This being a first appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced in the trial court in order to arrive at its own independent conclusion taking into account that it did not have the advantage of seeing and hearing the witnesses as they testified. [Selle vs. Associated Motor Boat Company Ltd [1968] EA 123.]
16. In here evidence before the trial court, the Appellant (PW1) adopted her recorded and filed statement which was basically what is carpeted in the plaint. In cross examination, she told the court that on the motorcycle, was herself, another pillion passenger and the rider. The rider had a reflective jacket and a helmet. She did not have any of the two items.
17. She further told the court that that there was another vehicle ahead of them when the 1st and 2nd Respondents' motor vehicle abruptly and without indication came to their lane and knocked them down. She did not know if the rider was charged.
18. PW3 PC Paul Mulatya produced the Police Abstract in respect of this accident involving motor vehicle registration number KBG 162V coming from Kisii heading to Mosochi along the Kisii-Kisumu Road and motorcycle registration number KMEG 511V which was coming from the opposite direction. That the driver of the motor vehicle suddenly turned and got into a school thereby knocking the motor cycle.
19. In cross examination, he told the court that he investigated the case and established that the driver of the motor vehicle did not give way before turning. That the owner of the motor cycle was charged in Traffic Case No. 689 of 2018 with the offence of permitting an unlicensed person to ride the motor cycle. The rider was not charged and the matter was pending under investigations.
20. PW2 Jackson Murauni a clinical officer at Kisii Teaching and referral Hospital examined the Appellant and filled the P3 form testified that he found that chest and right shoulder were tender, had fractures of the left forearm and the knee joints were painful. He assessed the degree of injury as and grievous harm but as the time he testified, he sated that most likely , the injuries had healed.
21. Dr. Morebu Peter Momanyi (PW4) Kisii Teaching and referral Hospital examined the Appellant and prepared the medical report which he produced as an exhibit.
22. The 1st and 2nd Respondents' witness was the 1st Respondent (DW1), a principal at Cardinal Otunga High School. He testified that on that day and at that time, he was driving motor vehicle registration number KBG 162V while coming from Kisii heading to the school. As he was about to turn to enter



the school, he noticed a stationery matatu on the right side of the road. The driver of the matatu gave him way to turn but the motorcycle rider was overtaking on the wrong lane. In the process, the rider who had two pillion passengers hit the vehicle on the windscreen and bumper and ran away. The owner of the motor cycle was charged.

23. In cross examination, he told the court that the matatu had stopped before the gate. He blamed the rider for the accident saying that he had already turned and was entering the school when the accident occurred, He never expected the motor cycle to hit him.
24. The 3rd and 4th Respondents closed their case without calling any witnesses.

Determination

25. The undisputed facts are that this accident did occur on the material date and involved this motor vehicle driven by the 1st Respondent and the motorcycle on which the Appellant and another were pillion passengers, and that the rider escaped after the accident.
26. On one hand, the Appellant blamed the 1st Respondent for turning abruptly while the 1st Respondent blamed the rider of the motorcycle for overtaking without being mindful of other road users.
27. At the trial court, the Third Parties had submitted that 1st Respondent (driver of motor vehicle registration number KBG 162V) was to blame for the accident for knocking the motor cycle KMEG511V. They had therefore urged the trial court to hold the driver 100% liable.
28. In its judgment, the trial court held:-

“ The Plaintiff testified and blamed the Defendant for the accident. The Plaintiff also called the police officer who blamed the Defendants for the accident. According to the to the Plaintiff’s witnesses, the Defendants were to blame because he turned without indicating.

The Defendant on the other hand blamed the Plaintiff and the third parties for the accident. Their evidence was that she was an excess passenger on the motor cycle and therefore she should take the blame for the accident. The Defendant also insisted that the rider was overtaking on the wrong side of the road and produced as evidence a charge sheet and proceedings of a traffic case that the 3rd parties were convicted.

I have perused the evidence on record, and I am of the considered view that this is a case where the 3rd Parties are to blame for the accident. The Plaintiff has proved here case on a balance of probability. The evidence by the Defendant also, on a balance of probability, that the Plaintiff was an excess passenger and therefore liability must also be apportioned to her.”

29. What is clear is that though the owner of the motor cycle was charged with the offence of permitting an unlicensed person to ride the motor cycle, there is no evidence that either of the two pillion passengers were charged for committing any offence. However, the trial magistrate relied on the case of Rosemary Kaari Murithi (supra) where the Court held that “a person who voluntarily gets on a boda boda when he/she finds that there are more than one should equally be held accountable and hence culpable.”
30. In this case there was no evidence as to how the Appellant could have contributed to the accident despite the fact that there were two pillion passengers which meant that the motor cycle carried excess.
31. The primary duty of care was on the rider and the driver as they were the ones in control not the pillion passengers. According to the 1st Respondent’s statement, he had reached the junction of Cardinal Otunga High School. A matatu allegedly stopped to offload passengers and the driver signalled the 1st



- Respondent to proceed and turn left to the school. The rider was however overtaking the said matatu and therefore hit the 1st Respondent's vehicle.
32. In those circumstances, and from the analysis herein, the trial court fell into error when it dismissed the case against the Defendants (Respondents) and apportioned liability between the Appellant and the Third Parties.
 33. Liability ought to have been apportioned between driver of the motor vehicle and cyclist not between the cyclist and the pillion passenger as done by the trial court.
 34. This Court therefore finds that the 20% liability on the pillion passenger (Appellant) ought to have gone to the Defendants (1st and 2nd Respondents). The holding that Third Parties were 80% liable was fair and just.
 35. On general damages, the report by Dr. Morebu Peter Momanyi showed that the Appellant had sustained blunt trauma to the right shoulder, chest contusion, blunt trauma to the knee, fracture of the left ulna and fracture of the left radius. He opined that the injuries were healing but a permanent disability was anticipated.
 36. it is settled law that an award of general damages is discretionary and an appellate court can only interfere with such discretion, if the trial court took into account irrelevant factors or left out relevant factors or the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate.
 37. In awarding the sum of Kshs. 400,000/= as general damages, the trial court relied on the case of Agness Wakaria Njoka v Josephat Wambugu Gakungi {2015}eKLR where the Plaintiff had sustained 2 deep cut wounds on her hand, fracture of the skull, deep compound fracture of the right forearm and loss of the left hand at the wrist which was cut off and Rose Makoromo Masanju v Night Flora alia Nightie Flora & another [2016]eKLR where the court awarded Kshs. 500,000/= for a fracture of the wrist, comminuted fracture of the frontal bone with Herosinnus , loss of consciousness , two deep cut wounds on the forehead and right eye nerve- Trigeminal Neuralgia. These injuries are not comparable to those sustained by the Appellant in this case.
 38. From the medical evidence on record, there is no doubt about the injuries sustained by the Appellant herein and that was noted by the trial court. Before the trial court, the Appellant had proposed an award of Kshs. 1,000,000.00 as general damages while relying on the case of James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015]eKLR and Joseph Njuguna Gachie v Jacinta Kavuu Kyengo [2019]eKLR.
 39. On the other hand, the Defendants (1st and 2nd Respondents) cited the case of George Kinyanjui T/A Climax Coaches & another v Hussein Mahad Kuyale [2016] eKLR and proposed an award of Kshs. 80,000/= .
 40. In James Gathirwa Ngungi (supra), the plaintiff therein had sustained compound comminuted fracture of the right tibia and of the right fibula, fracture of the left proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological /re-fracture of the right leg. He also sustained residual injuries being:- re-fracture of the right leg, many sinuses on the right leg with pus, bone exposure, chronic bone infection and dead bone, restriction in walking, difficult in walking, restriction in mobility of the fore arm, difficulties in squatting, weakness of the left upper limb, he could not carry or lift heavy objects, walk with aid of clutches, and had restriction of movement of



the left limb. High Court awarded him Kshs. 1,500,000/= as general damages for pain and suffering. These injuries are not at all comparable to the injuries sustained by the Appellant herein.

41. The injuries sustained by the Respondent in Joseph Njuguna Gachie (supra) were blunt temporal injury with swelling, facial bruises, blunt injury on the left forearm, comminuted fracture left radius and dislocated left ulna joint. He was found to be clinically stable and no disability was anticipated. A sum of Kshs. 600,000/= was awarded as general damages. Similarly, the Respondent in Kenya Power & Lighting Co. Ltd & another v Kathuo Muthangya [2018] eKLR had sustained a fracture to the left tibia and fracture to the left fibula and the Court awarded Kshs. 600,000/=. These injuries awards were more or less similar to the injuries sustained by the Appellant herein.
42. Though the award of general damages is discretionary and that the trial court clearly emphasised on the principles to be followed as a guide in assessment of general damages, this Court is satisfied the award of Kshs. 400,000 was rather low in the circumstances. The same is substituted with an award of Kshs. 600,000/=.
43. On special damages, the Appellant was obligated to specifically plead and strictly prove the same. She had pleaded a sum of Kshs. 26,570 made up of Kshs. 19,520/= as treatment expenses, Kshs. 6,500/= for medical report and Kshs. 550/= for copy of records. There is no reason to interfere with that award save that special damages should not be subjected to apportionment of liability.
44. In conclusion, the trial court's judgment is set aside and substituted with judgment that:-
 1. Liability is apportioned between the Respondents and Third Parties.
 2. The Respondents to bear 20% and the Third Parties to bear 80%.
 3. General Damages awarded at Kshs. 600,000/=.
 4. Special Damages of Kshs. 26,570 /= upheld.
 5. The award of general damages be subjected to apportionment of liability.
 6. Appellant is awarded costs of the suit and this appeal together with interest.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUAL) THIS 11TH DAY OF APRIL, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of;

Mr. Marita for the Appellant

N/A for the 1st and 2nd Respondents

N/A for 3rd and 4th Respondents/Third Parties

Yego/Aphline - Court Assistant

