Mwangi & 3 others v Munyi & 5 others (Civil Appeal E206 & E208 of 2022 (Consolidated)) [2023] KEHC 18934 (KLR) (Civ) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18934 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E206 & E208 OF 2022 (CONSOLIDATED)

CW MEOLI, J

JUNE 15, 2023

BETWEEN

BRIAN MUTHEE MWANGI ..... 1ST APPELLANT

EMMA MONICA NJERI ..... 2ND APPELLANT

AND

MARY WAMBUI MUNYI ..... 1ST RESPONDENT

MATASYOH CYNTHIA ..... 2ND RESPONDENT

SAMUEL MAINA ..... 3RD RESPONDENT

BARI JOHN ..... 4TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E208 OF 2022

BETWEEN

BARI JOHN ..... 1ST APPELLANT

SAMUEL MAINA ..... 2ND APPELLANT

AND

MARY WAMBUI MUNYI ..... 1ST RESPONDENT

BRIAN MUTHEE MWANGI ..... 2ND RESPONDENT

MATASYOH CYNTHIA ..... 3RD RESPONDENT

EMMA MONICA NJERI ..... 4TH RESPONDENT

(Being an appeal from the judgment of D.W. Mburu (Mr.) SPM. delivered on 18th March 2022 in Nairobi Milimani CMCC No. 716 of 2016)

JUDGMENT

1. This appeal emanates from the judgment delivered on 18.03.2022 in Nairobi Milimani CMCC No. 716 of 2016. The suit had been commenced by Mary Wambui Munyi, the plaintiff in the lower court (hereafter the 1st Respondent in both HCCA No. E206 & E208 of 2022) by way of a plaint filed on 12.02.2016 and further amended on 12.03.2019, against the Defendants in the lower court, Brian Muthee Mwangi (the 1st Appellant in HCCA No. E206 of 2022), Natasyoh Cynthia, (2nd Respondent in HCCA No. E206 of 2022 & 3rd Respondent in HCCA No. E208 of 2022), Samuel Maina (2nd Appellant in HCCA No. E208 of 2022), Bari John (1st Appellant in HCCA No. E208 of 2022) and Emma Monica Njeri (2nd Appellant in HCCA No. E206 of 2022).

2. For ease of reference and for reasons which soon become apparent, the court will hereafter refer to Brain Muthee Mwangi as the 1st Appellant, Emma Monica Njeri as the 2nd Appellant, Bari John as the 3rd Appellant, Samuel Maina as the 4th Appellant, Mary Wambui Munyi as the 1st Respondent and Matasyoh Cynthia as the 2nd Respondent.

3. The 1st Respondent's claim arose from a road traffic accident involving two (2) motor vehicles that occurred on 07.11.2015. It was averred that at all material times the 1st Appellant, 2nd Respondent and 2nd Appellant were the authorized driver, registered owner, owner in possession & control respectively, of motor vehicle registration number KBM 426M whereas the 4th Appellant and 3rd Appellant were the driver and registered owner of motor vehicle registration number KAP 442K, respectively.

4. It was averred that on the foregoing date, the 1st Respondent was lawfully travelling in motor vehicle registration number KAP 442K along Limuru Road, near 6th Parklands Avenue as a fare-paying passenger when the 1st & 4th Appellant with the authority and in the course of their employment to the 2nd Respondent, 2nd Appellant and 3rd Appellant respectively, so negligently drove, managed and or controlled motor vehicles registration number KBM 426M and KAP 442K, that they caused and or permitted the said motor vehicles to collide. It was further averred that as a result, the 1st Respondent sustained severe bodily injury, loss, and damage.

5. The 1st & 2nd Appellant filed a joint amended statement of defence denying the key averments in the plaint and pleaded negligence against the driver of motor vehicle registration number KAP 442K. The 2nd Respondent on her part filed a statement of defence denying the key averments in the plaint while admitting ownership of motor vehicle registration number KBM 426M until 03.11.2010 when she sold the vehicle to the 2nd Appellant. And that possession, ownership together with the requisite transfer documents were passed to the 2nd Appellant. The 3rd and 4th Appellant on their part filed a statement of defence denying the key averments in the plaint and pleaded negligence against the 1st Respondent, driver, owner and or agent of motor vehicle registration number KBM 426M.

6. The suit proceeded to full hearing during which all the respective parties adduced evidence save for the 1st and 2nd Appellant. In its judgment, the trial court found in favour of the 1st Respondent and apportioned liability in the ratio of 50:50 as between the 1st & 2nd Appellant on one part and 3rd & 4th Appellant on the other part. Judgment was thus entered in favour of the 1st Respondent in the sum of Kshs. 2,363,325/- made up as follows:

a. General damages Kshs. 1,100,000/-;

b. Loss of earning capacity Kshs. 500,000/-;

c. Future medical expenses Kshs. 594,000/-;

d. Special Damages: Kshs. 169,325/-;

Total Kshs. 2,363,325/-

7. Aggrieved with the judgment of the trial court, the 1st and 2nd Appellant preferred an appeal dated 31.03.2022 being Nairobi Milimani HCCA No. E206 of 2022, on the following grounds: -

> "1. That the learned magistrate erred in law and in fact in awarding general damages at Kshs. 1,100,000/- which award was excessive and unwarranted in light of the evidence adduced and was not commensurate to the injuries sustained.
>
> 2. That the learned magistrate erred in law and in fact in awarding general damages for loss of earning capacity at Kshs. 500,000/= which award was excessive and unwarranted in light of the evidence adduced and was not commensurate to the injuries sustained.
>
> 3. That the learned magistrate erred in law and in fact in awarding the claim of special damages at Kshs. 169,325/= which claim was not proved and was excessive and unwarranted in light of the evidence adduced.
>
> 4. That the learned magistrate erred in law and in fact in awarding future medical expenses at Kshs 594,000/= which award was excessive, unwarranted and in light of evidence adduced.
>
> 5. That the learned magistrate erred in law in not taking into account entirely the written submissions of the Appellant.
>
> 6. That the learned magistrate's finding and decision were against the weight of the evidence adduced." (sic)

8. Equally aggrieved with the judgment of the trial court, the 3rd and 4th Appellant preferred an appeal dated 04.03.2022 and amended on 13.04.2022 being Nairobi Milimani HCCA No. E208 of 2022, based on the following grounds: -

> "1. That the learned trial magistrate erred in law and fact by disregarding established legal precedent and thereby erroneously arriving at a wrong conclusion on quantum.
>
> 2. That the learned trial magistrate erred in law and fact by holding the 4th and 5th Defendant/Appellant (herein the 3rd and 4th Appellant) 50% liable on liability in total disregard of the circumstances leading to the cause of the accident.
>
> 3. The trial magistrate erred in fact and in law in failing to consider the Appellant's submissions on quantum.
>
> 4. That the learned trial magistrate erred in law and in fact in not making an award which was within limits of already decided cases of similar nature.

5. That the learned magistrate erred in law and fact in awarding judgment as follows; General damages Kshs. 1,100,000/-, Loss of earnings Kshs. 500,000/-,Future expenses Kshs. 594,000/- and Special damages Kshs. 169,325/- without showing how he arrived at those figure and in total disregard of the submission of the Appellants on the issue of quantum and liability.

6. The learned trial magistrate erred in fact and in law in finding that the Appellants was to pay 50% of general damages of Kshs. 2,363,325/= which is very high award for the injuries suffered.

7. The learned magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the Appellants evidence adduced before the court and by instead relying on the authorities cited by the Respondent which were unrelated to the actual claim by the Respondent." (sic)

9. On 30.11.2022 the appeals were consolidated, and directions issued. Nairobi Milimani HCCA No. E206 of 2022 was appointed as the lead file hence the order of parties as earlier outlined in this judgment.

10. Written submissions were filed in respect of the appeals. The 1st and 2nd Appellant's appeal was centered around the question of quantum of damages. In support of grounds 1 and 5 in the memorandum of appeal, counsel anchored his submissions on the decision in Kemfro Africa Limited t/a Meru Express Services & Another v Lubia & Another (No.2) [1985] eKLR to argue that the trial court erred in fact and law by failing to follow the principles and rules of precedent in awarding general damages.

11. Further citing the decisions in Christine Agnes Omanyo v Matilda Akumu Khaduli [2014] eKLR and Kenya Power & Lighting Co. Ltd v Benson Aseka Anyanzwa [2017] eKLR counsel contended that trial court failed to take into consideration the 2nd medical report by Dr. Wambugu and the 1st & 2nd Appellants' submissions hence this court is mandated to subject the evidence which was produced before the trial court to fresh scrutiny and find that the award made therein was excessive.

12. Addressing the court on ground 2, counsel relied on the decision in Cecilia W. Mwangi & Another v Ruth W. Mwangi [1997] eKLR to submit that the 1st Respondent did not produce any documents proving her earnings and that a claim for loss of earning capacity being a special damage claim in nature required strict proof. That from the medical reports on record the 1st Respondent could still work and was not 100% incapacitated. Therefore, the trial court erred in awarding damages under the head which ought to be set aside.

13. Concerning ground 3 of the memorandum of appeal of the 1st and 2nd Appellant, it was contended that the trial court erred in awarding special damages at Kshs. 169,325/- a sum not specifically proved, and which sum was excessive considering the evidence adduced. Hence the award was liable for being set aside. Arguing ground 4, counsel asserted that the medical report by Dr. Wambugu estimated further medical expenses at Kshs. 75,000/- at Kenyatta National Hospital (KNH) while the 1st Respondent's medical report estimated the same expense at Kshs. 450,000/-. That the trial court erred in awarding Kshs. 594,000/- which award was excessive and unwarranted. The court was urged to set aside the award and substitute it with a sum not exceeding Kshs. 75,000/-. In conclusion counsel urged the court to allow the 1st and 2nd Appellant's appeal as prayed.

14. Although the 3rd and 4th Appellants' appeal challenged the findings on the issues of liability and quantum, their submissions before this court only addressed the question of liability. Counsel first

restated the evidence before the trial court, then citing the provisions of Section 107,108 & 109 of the *Evidence Act*, the decisions in Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR and East Produce (K) Limited v Christopher Astiado Osiro Civil Appeal No. 43 of 2001 contended that, to succeed on a claim founded on negligence, a claimant must prove all four elements of negligence.

15. Citing a raft of decisions among them being Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001, Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, Farida Kimotho v Ernest Maina [2002] eKLR and Muthuku v Kenya Cargo Services Ltd (1991) KLR 464 counsel submitted that the 1st and 2nd Appellants did not adduce any evidence whereas the evidence tendered at the trial exonerated the 3rd and 4th Appellants of any wrong, as the sole cause of the accident was the negligent act of the driver of motor vehicle KBM 426M.

16. It was counsel's further submission that the 1st Respondent, and the driver of motor vehicle KAP 442K did not contribute to the occurrence of the accident in any way and this court ought to set aside the trial court's finding on liability and substitute it with a finding that the 1st and 2nd Appellants were wholly liable for the said accident. In conclusion, counsel cited the provisions of Section 27 of the *Civil Procedure Act* in urging the court to allow the 3rd and 4th Appellants' appeal with costs.

17. The 1st Respondent naturally defended the trial court's findings. Counsel opted to contemporaneously submit on all grounds in the consolidated appeals. He opened his address by asserting that the trial court purely exercised its unfettered judicial discretion based on the evidence placed before it. And that a trial court's exercise of judicial discretion is not to be interfered with unless it is shown that it was exercised on wrong principles.

18. Counsel called to aid the English case of Ratnam v Cumarasamy & Another [1964] ALL ELR 933, the decisions in Samken Limited & Anor v Mercedes Sanchez Rau Tussel & Anor. CA No. 21 of 1999 (UR), Peter Mburu Echaria v Priscilla Njeri Echaria [2001] eKLR, Mbogo v Shah (1968) EA 93 and Butt v Khan [1982-88] 1 KAR in support of his argument that the Appellants have failed to demonstrate the application of wrong principles or misapprehension of evidence or error on the part of the trial court and therefore the appeals herein ought to be dismissed with costs.

19. The 2ndRespondent did not participate in the instant appellate proceedings.

20. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. As earlier noted, and upon review of the memorandum of appeal and submissions, the 1st and 2nd Appellant's appeal is centered on the issue of damages whereas the 3rd and 4th Appellant's appeal challenges the trial court's finding on liability. This court proposes to concurrently address both appeals, beginning with the appeal challenging liability and thereafter the challenge to damages.

21. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though

it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

22. As rightly argued by the 1st Respondent, an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. Pertinent to the determination of issues before this court are the pleadings, which form the basis of the parties' respective cases before the trial court.

23. . In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in the foregoing regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

24. The trial court after restating the evidence tendered before it addressed itself as follows concerning liability in its judgment; -

> "11. Respective counsel for the parties filed written submissions on both liability and quantum which I have carefully considered.
>
> 12. The Plaintiff in his evidence blames both the drivers for causing the accident and reiterates the particulars of negligence set out in the plaint.
>
> 13. The 1st and 5th Defendant in turn blamed the 3rd and 4th Defendant for the accident while the 3rd and 4th Defendant blame the 1st and 5th Defendants. In short, the Defendants tried to shift blame to their co-Defendants. However, neither the 1st and 5th Defendant nor the 3rd and 4th Defendant filed any notice of claim against the co-Defendants.
>
> 14 .....
>
> 15 .....
>
> 16 .....
>
> 17. From the totality of evidence on record, it is clear that the Plaintiff who was a mere passenger did not contribute to the occurrence of the accident.

The Plaintiff cannot therefore shoulder any blame for the occurrence of the accident. There is also uncontroverted evidence that the driver of KBM 426M, the 1st Defendant herein, was driving at a fast speed and encroached the path of KAP 442K. The 1st Defendant did not give evidence hence my finding that the evidence given against him has not been controverted.....He did not rebut the evidence of both the Plaintiff and the 4th Defendant.

18. The upshot of the foregoing is that I find and hold the 1st and 4th Defendants equally contributed to the occurrence of the accident.....Consequently, I do hereby apportion liability in the ratio of 50%:50% as between the 1st and 5th Defendants on the one part and the 3rd and 4th Defendant on the other part." (sic)

25. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
>
> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists." The above provision provides for the legal burden of proof.
>
> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
>
> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
>
> "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

26. Hence, the duty of proving the averments contained in the plaint lay squarely on the 1st Respondent. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason

of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

27. In Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR the Court of Appeal stated that "determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681 as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...
>
> The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

28. During the trial court, the 1st Respondent testified as PW2. The gist of her evidence was that on the date in question she was a passenger aboard a 'matatu' motor vehicle registration number KAP 442K, travelling from Ndenderu and that the vehicle collided with motor vehicle registration number KBM 426M along 6th Parklands Avenue Limuru Road. She testified that her vehicle was being driven on the left side when the other vehicle KBM 426M that was driving towards Limuru left its lane, lost control, and encroached onto their lane resulting in a head-on collision. She blamed the driver of motor vehicle KBM 426M for veering off his lane. In cross-examination by respective counsels, she affirmed that motor vehicle KBM 426M hit the motor vehicle KAP 442K which was on its rightful lane and that the driver of the latter vehicle was not at fault.

29. PC Isaiah Muthini No. 66763 testifying as PW3 stated that the accident involved two (2) motor vehicles. He produced as exhibits the Police Abstract (P. Exh.6) and extracts of the Occurrence Book (OB) (P. Exh.9(a-c)) stating that according to police records, the motor vehicle KBM 426M was found to blame for the accident. Under cross-examination he confirmed that he was not involved in the investigations relating to the accident and his testimony before the court was based on the entries in Occurrence Book (OB) and explained that motor vehicle KBM 426M was blamed for failing to keep to its correct lane.

30. On the part of the 3rd and 4th Appellant PC Isaac Mukenya No. 73427 testified as DW3. Equally, it was his evidence that the accident involved two (2) motor vehicles. He produced as exhibits the Police Abstract in respect of the 1st Respondent as D.Exh.4 and an extract of the Occurrence Book (OB) as D.Exh.5. Similarly, he confirmed that motor vehicle KBM 426M was blamed for the accident and that the investigating officer was already transferred. Under cross-examination he confirmed that he was not involved with the investigations relating to the accident and that motor vehicle KBM 426M was blamed for failing to keep its correct lane.

31. The 4th Appellant testified as DW4. He adopted his witness statement as his evidence-in-chief and stated that on the date in question he was driving motor vehicle KAP 442K towards Nairobi along Limuru Road when an oncoming motor vehicle KBM 426M encroached onto his rightful lane causing a collusion of the two (2) vehicles. That although he attempted to swerve to avoid the other vehicle, he was inhibited by guard rails by the side of the road. He blamed the driver of motor vehicle KBM 426M for causing the accident. Under cross examination he asserted having about 10 years' experience as a driver and that his vehicle was hit on the driver's side.

32. From the foregoing, it is evident that PW3 and DW3 did not witness the material accident. Their evidence was entirely with respect to the police records related to the accident. The contents of the Occurrence Book (OB) in respect of a road traffic accident often comprise entries made after the fact and therefore inadmissible with regard to proof of the actual manner an accident occurred.

33. In analyzing the evidence on liability, the trial court observed that the respective Appellants failed to file any notice of claim against each other. Nonetheless, the court correctly observed that the Plaintiff being a mere passenger could not be found to have contributed toward the occurrence of the accident. The Court further rightly observed that there was uncontroverted evidence that the driver of motor vehicle KBM 426M encroached onto the path of motor vehicle KAP 442K and that the 1st Appellant did not rebut the evidence offered by the PW2 and DW4.

34. Both PW2 and DW4 were eyewitnesses to the accident, and their testimonies were similar regarding the way the accident occurred and the 1st Appellant's role in the accident. Both witnesses wholly blamed the 1st Appellant who was the driver of motor vehicle KBM 426M for causing the accident, having encroached on the rightful path of motor vehicle KAP 442K. DW4's evidence was that he attempted to swerve to avoid the accident, but a guard rail obstructed him.

35. He further indicated that the impact on his vehicle was to the right on the driver's side. The sum of the evidence by PW2 and DW4 is therefore that the 1st Appellant was the negligent party, who encroached onto motor vehicle KAP 442K's lawful path. As correctly observed by the trial court, this version of events was not rebutted by the 1st Appellant who was the driver of motor vehicle KBM 426M.

36. Thus, the uncontroverted evidence at the trial, and which the court apparently accepted, points to the 1st Appellant as culpable, through his proven negligence, for the accident, and vicariously the 2nd Appellant. Therefore, it perplexes this court that despite having properly analyzed the circumstances of the accident, the trial court proceeded to hold the 1st & 2nd Appellants and 3rd & 4th Appellants equally liable. The 3rd & 4th Appellant had pleaded particulars of negligence against the driver of motor vehicle KBM 426M and buttressed the said particulars through the evidence of DW4.

37. On their part however, the 1st and 2nd Appellant failed to call any evidence in support of the particulars of negligence pleaded against the 3rd and 4th Appellant. Moreover, the evidence of the 1st Respondent unequivocally acquitted the 3rd and 4th Appellants when she categorically stated that "the driver of KAP 442K was not at fault" (sic).

38. Further, applying the principle of causation and proximate cause, the 1st and 2nd Appellant failed to prove that the 3rd and 4th Appellants' negligence caused or materially contributed to the injuries sustained by the 1st Respondent while the converse was sufficiently demonstrated. The Court of Appeal in Timsales Limited v Stanley Njihia Macharia [2016] eKLR while discussing the principles of 'causation' cited with approval the decision by Musinga J (as he then was) in South Nyanza Sugar

Co. Ltd v Wilson Ongumo Nyakwemba [2008] eKLR quoting Statpack Industries Limited v James Mbithi Munyao HCCA No. 152 of 2003 (UR) where it was held that:-

> " It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence."

39. In view of the above, this court is of the view that the trial court misdirected itself when it made a finding that the 1st & 2nd Appellant and 3rd & 4th Appellant were equally liable in negligence for causing the accident. The trial court's finding on liability and apportionment cannot stand and is set aside, this court substituting therefor a finding that the 1st and 2nd Appellants were jointly and severally wholly liable for the accident.

40. Regarding quantum, it was held in Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5 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 was either inordinately high or low".

41. In Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia [1987] KLR 30, it was held that:

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 that , short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages." see also Butt v Khan [1981]KLR 349 and Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto [1979] EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; [2004]eKLR."

42. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that "an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance".

43. The 1st and 2nd Appellants specifically premised their appeal on damages and robustly submitted on the same before this court. But as earlier noted, the 3rd & 4th Appellant despite challenging the trial court's award on damages in their memorandum of appeal failed and or opted not to render any submissions on the matter. The 1st Respondent particularized her injuries in the plaint as follows;-

> " 7. By reason of the matters aforesaid the Plaintiff sustained severe bodily injuries, endured and continues to endure pain and has suffered loss and damages.
>
> Particulars of injuries suffered by the Plaintiff
>
> a) Head injury (cerebral concussion)
>
> b) Deep laceration over the forehead.

c) Fracture of the left forearm (radius and ulna bones).

d) Soft tissue injury to the right chest wall.

e) Soft tissue injury to the lower back.

.....

7A. Prior to the accident subject matter herein the Plaintiff was energetic, prosperous and hardworking as a business lady earning 23,000/- per month but due to the injuries sustained in the said accident the Plaintiff can no longer engage in that profession or any other gainful occupation and the Plaintiff claims loss of earnings and loss of earning.

7B. That the fracture of the left forearm that the Plaintiff suffered in the accident subject matter was stabilized with metal plates and screws that require to be surgically removed at an estimated costs of Kshs. 450,000/= inclusive of surgery, hospitalization as well as anesthetic costs and the Plaintiff claims the said amount as the cost of future medical care.

7C. As a direct consequence of the accident subject matter the Plaintiff fractured her left forearm needs to undergo physiotherapy to bring about improvement at an estimated costs of Kshs. 4,000/= per session for three sessions per week for at least three months. The Plaintiff claims the said expenditure of Kshs. 144,000/= as costs of future medical care.

7D. As a direct consequence of the accident subject matter, the Plaintiff has engaged the services of a domestic helper to assist her in domestic chores at a monthly salary of Kshs. 8,000/= which she claims as damages"..... (sic)

44. In its judgment, the trial court after restating and examining the respective parties' evidence on this score stated as follows: -

" Quantum of Damages

26. I have carefully considered the injuries that the Plaintiff in this case sustained. Having considered the submission by each counsel as well as relevant case law and inflation, I find that the sum of Kshs. 1,100,000/= would be appropriate recompense for the Plaintiff.

.....

General damages for loss of amenities/earning capacity

30. In our case Dr. Bhanji confirmed that the Plaintiff is unable to engage in any gainful activity owing to the injuries. The Plaintiff was aged 55 years at the time of the accident. Having carefully considered the arguments advanced by respective counsel for the parties, I do hereby make a lump sum award of Kshs. 500,000/= under the said head.

Costs of future medical expenses

31. Under the head, I would award the Plaintiff the sum of Kshs. 549,000/= as recommended by Dr. Bhanji in his medical report.

Special damages

32. The Plaintiff pleaded and proved special damages in sum of Kshs. 169,325/= which I hereby allow.

33. There shall therefore be judgment for the Plaintiff against the Defendant as follows;

a) .....

b) General damages Kshs. 1,100,000/=

c) Loss of earning capacity Kshs. 500,000/=

d) Future medical expenses Kshs. 594,000/=

e) Special damages Kshs. 169,325/=

Total Kshs. 2,363,325/=

34. The Plaintiff shall also have the costs of the suit plus interest at court rates" (sic)

45. At trial, Dr. Bhanji testified as PW1 and the medical reports he prepared in respect of the 1st Respondent dated 20.01.2016 and 04.04.2018 were tendered into evidence as P.Exh.1(a) and P.Exh.2(a) respectively. As earlier noted, the 1st Respondent testified as PW2, and produced a P3 form dated 25.01.2016 as PExh.5. The earliest medical report, P.Exh1a, was prepared roughly two (2) months after the accident. It essentially listed the 1st Respondent's injuries as set out in the plaint. These injuries were disputed, and the 1st Respondent subjected to a second medical examination at the behest of the Appellants.

46. However, only the 3rd and 4th Appellant's second medical report by Dr. L. Wainaina dated 03.05.2018 was produced by Dr. R. Ichamwenge on behalf of Dr. L Wainaina as DW5, for the 3rd and 4th Appellants' case. However, a perusal of the proceedings reveals that the said medical report was inadvertently not marked by the trial court as an exhibit.

47. PW1's medical reports were detailed and exhaustive as pertains the 1st Respondent's injuries and attendant sequela. Both Dr. L. Wainaina's medical report dated 03.05.2018 and PW1's medical report dated 04.04.2018, appear to have been prepared close to three (3) years after the occurrence of the accident, with the latter being the most recent on the 1st Respondent's injuries. That said both PW1's medical evidence was not put to any serious challenge by way of cross-examination at the trial. Undoubtedly, the most significant injury suffered by the 1st Respondent was the..... "Fracture of the left forearm (radius and ulna bones)" which must have caused her a great deal of pain and extended periods of morbidity. Further, from P.Exh.2a and Dr. L. Wainaina's medical report, the 1st Respondent's injuries predisposed her to attendant sequela necessitating future treatment costs estimated in P.Exh.2a at Kshs. 450,000/- and Dr. L. Wainaina's medical report estimated it at Kshs. 40,000/-.

48. As observed by the English Court in Lim Poh Choo v Health Authority [1978]1 ALL ER 332 and echoed by Potter JA in Tayab v Kinany [1983] KLR 14, quoting dicta by Lord Morris Borth-y-Gest in West (H) v Sheperd [1964] AC 326, at page 345:

> "But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional."
>
> See also Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR and Kigaraari v Aya (1982-88) 1 KAR 768.

49. As important as consistency in awards for similar injuries might be, the court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and the court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. The trial court restated in detail the evidence and submissions before it in respect of the 1st Respondent's injuries. That said, according to the medical reports presented before court, the 1st Respondent's injuries, though relatively severe, did not result in any form of quantifiable permanent incapacitation save for residual pain that may occur as a result of the anticipated future surgery.

50. The case of Kakuzi Limited v Stephen Njoroge Mungai & Another Kiambu HC Civil Appeal No. 68 of 2017 cited by the 1st Respondent at the trial, appeared to relate to slightly more severe injuries, although the injuries of the plaintiff therein also included a fracture of the left radius/ ulna and degloving injuries. These injuries were severe, and the plaintiff therein was awarded Kshs. 1,400,000/- in general damages. On the part of the 1st and 2nd Appellant, they complained in this appeal that the trial court did not consider Dr. Wambugu's report, which was evidently not produced and marked in the trial court. That said, the decision of Christine Agnes Omanyo (supra) cited by them before the trial court and this court, though dated, does portray comparable injuries to those sustained by the 1st Respondent although the proposed award of Kshs. 200,000/- seems to be low given inflationary adjustments.

51. The 3rd and 4th Appellants, though challenging the trial court's award in damages on appeal, failed to submit on the same before this court. However, the decision relied on in urging an award Kshs. 450,000/- before the trial court, Geoffrey Kamuki & Another v RKN (minor suing through ZKN) [2020] eKLR depicted slightly less severe. The trial court on its part sought guidance from the decisions in P.W v Peter Muriithi Ngari [2017] eKLR, Solomon Muriithi Manyara v SMK (minor suing through AKK) [2021] eKLR and Joseph Mwangi Thuita v Joyce Mwole [2018] eKLR.

52. The court has taken the liberty of perusing the said decisions and notes that the injuries sustained by the claimant's therein were severe in comparison to those sustained by the 1st Respondent herein. Consequently, it appears from my own review of the material presented before the trial court and comparisons with authorities cited on this appeal, the award for general damages appears high and an erroneous estimate in the circumstances of this case and the court does feel that it is justified in interfering with the same. This court is persuaded that an award of Kes. 900,000/- suffices as general damages.

53. Moving on, the award of loss earnings/earning capacity was challenged by the 1st and 2nd Appellant on the grounds that the 1st Respondent failed to specifically prove the same. The decision in Cecilia W. Mwangi (supra) was called to aid both before the trial court and this court. The trial court on its part awarded a lump sum of Kshs. 500,000/- while making reference to PW1's medical reports and taking guidance from the decision in SBI International Holding (AG) Kenya v William Ambuga Ongeri [2018] eKLR. The 1st Respondent gave evidence in support of the averment in her plaint that she "was .... a business lady earning 23,000/- per month but due to the injuries sustained in the said accident the Plaintiff can no longer engage in that profession or any other gainful occupation and the Plaintiff claims loss of earnings and loss of earning".

54. The distinction between lost earnings and diminished earning capacity is settled. The Court of Appeal in S J v Francesco Di Nello & Another [2015] eKLR while making the distinction stated that: -

> " Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real or actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in Fairley v John Thomson Ltd [1973] 2 Llyod's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:
>
> "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

55. The court proceeded to state that: -

> " The correct position as in the Fairley case (supra) was restated by this court in the case of Cecilia Mwangi & Another v Ruth W. Mwangi CA No. 251 of 1996 as hereunder:
>
> "Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved."
>
> In the authority of Butler v Butler [1984] KLR 225, the issue of awarding damages for loss of earning capacity was carefully considered and Chesoni Ag. JA (as he then was) said:
>
> "Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading ... Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable."

56. It is the court's view that the 1st Respondent despite pleading her earnings of Kshs. 23,000/- per month, failed to specifically prove the same. However, upon a cursory look at P. Exh.2(a), it is evident that the injuries sustained by the 1st Respondent caused her attendant sequela. Thus diminishing her income earning prospects, from the age of 56 when she was injured. The 1st Respondent relied on the cases of Butler (supra), Mumias Sugar Co. Ltd v Francis Wanalo [2007] eKLR and Meru HC Civil Suit No. 15 of 2004 Dorothy Kanyua Mbaka v The Office of the President & Another in urging an award of Kshs. 780,000/-.

57. Based on the dicta in Francesco Di Nello (supra) loss of earning capacity can be awarded separately or under the head of general damages if the court finds that the claimant's earning capacity had diminished owing to injuries sustained. What must be specifically pleaded is a claim for lost income. Thus, the 1st and 2nd Appellant's submissions that the claim for lost earning capacity ought to have been pleaded specifically has no merit. The Court of Appeal in Mumias Sugar (supra) restated the findings in Butler (supra). In that case, a plaintiff who was not in employment before suffering injuries, that rendered her incapable of ever finding a suitable job, was awarded damages for loss of earning capacity. The court stated therein that:-

> "The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in the labour market, while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in the future.....The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity nevertheless the Judge has to apply the correct principles and take the relevant factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."

58. An award for lost earning capacity may be assessed by way of multiplier method or a global award. In this case, it cannot be disputed that the 1st Respondent's injuries adversely affected her prospects of employment. However, as noted, she did not tender evidence proving her earnings of Kshs. 23,000/-. It is therefore difficult to apply a multiplier model here. The 1st Respondent despite her advanced age would still have earned a living as a businesswoman. Therefore, this court finds no misdirection on principle has been demonstrated in that regard against the trial court.

59. Turning now to the award on future medical expenses, P.Exh.2a and Dr. L. Wainaina's medical report assessed the 1st Respondent's future treatment costs at Kshs. 450,000/- and 40,000/- respectively in respect of removal of the metal implant. In addition, the former included Kshs. 4,000/- and 500/- per session per week in respect of physiotherapy for three (3) months. Again the 1st and 2nd Appellant referred to Dr. Wambugu's report which was not produced. On this head, the trial Court summarily awarded Kshs. 549,000/- without much analysis.

60. PW1 acknowledges in his report that the figure proposed would obtain if the surgery and physiotherapy are conducted in a private hospital/institution whereas Dr. L. Wainaina's report asserts that figure as proposed therein were to obtain if the surgery and physiotherapy are conducted in a mission/government hospital. This court has considered the proposed sum as per the respective reports on record. Given the variance in opinion in the respective reports, justice in the matter would lie in awarding the sum of Kes. 450,000/- as future medical expenses.

61. With respect to the award of special damages, the 1st and 2nd Appellant contended that the trial court erred in awarding special damages at Kshs. 169,325/- whereas the claim was not specifically proved, was excessive and was unwarranted. The same position had been adopted before the lower court. The trial court again summarily awarded Kshs. 169,325/- without any reasonable explanation and deduction as to how it arrived at the same.

62. The law on special damages is settled. The court in Hahn v Singh [1985] KLR 716 emphasized that special damages must not only be specifically claimed but also strictly proved. The court has taken the liberty of reviewing the receipts tendered in support of the claim for special damages. These are

P. Exh.1(b), P. Exh.2(b), P. Exh.3, P. Exh.4(b) and P. Exh.7(c) whose total is Kshs. 137,765/- and not Kshs. 169,325/- as awarded by the court. The latter award cannot stand, therefore.

63. In the result, the court hereby sets aside the judgment of the lower court and substitutes therefor judgment for the 1st Respondent against the 1st and 2nd Appellant jointly and severally as follows.

    a. General damages for pain and suffering- Kes. 900,000/-

    b. Damages for lost earning capacity- Kes. 500,000/-

    c. Future medical expenses- Kes.450,000/-

    d. Special damages -Kes. 137,765/-

    Total – Kes. 1,987,765/-.

64. The 1st Respondent is also awarded costs against the 1st and 2nd Appellants in this appeal and in the lower court with interest. The 1st Respondent's suit in the lower court against the 3rd and 4th Appellants is hereby dismissed with costs to be borne by the 1st and 2nd Appellants.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the 1st and 2nd Appellants: Mr. Nyamweya

For the 3rd and 4th Appellants: Mr. Ng'ang'a h/b for Mr. Kabita

For the 1st Respondent: Mr. Mwangi

For the 2nd Respondent: N/A

C/A: Carol