



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CIVIL APPEAL NO. 68 OF 2018**

**CHARLES OCHIENG' ANYANGO.....APPELLANT**

**VERSUS**

**FREDRICK MWITI MWENDA.....RESPONDENT**

**JUDGMENT**

1. The appellant challenges the trial courts findings on both liability and quantum of damages in its judgment delivered on the 19/11/2018, on grounds that:

**1) The learned Magistrate erred in law and fact by finding the Appellant 100% liable in negligence in disregard of evidence that the Respondent contributed to the occurrence of the accident.**

**2) That the Learned Magistrate erred in law in awarding excessive and inordinately high damages in the sum of Kshs 1,000,000/= for pain and suffering.**

2. The claim arose from a road traffic accident along the Kenol-Sagana road on the 3/7/2017 involving Motor Vehicles Registration No. KCE 918 U in which the Respondent was a fare paying passenger and KBM 812 W, property of the Appellant during which the Respondent sustained injuries.

3. The Respondent called three witnesses while the Appellant called no evidence, despite filing a statement of defence denying liability, and in the alternative alleging contributory negligence on the part of the Respondent who was a passenger, and the driver of the vehicle, who he did not enjoin as a co-defendant in the suit. At the close of the case, the Respondent filed written submissions. The Appellant failed to tender any submissions.

4. The duty of the first appellate court has been stated in numerous decisions.

In **Selle –v- Associated Motor Boat Co Ltd (1968) EA**, the duty was stated as;

**“----- the principles are well settled; that this court must reconcile the evidence, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has neither seen or heard the witnesses-----“**

5. The Court of Appeal in **Okeno –v- Republic (1972) EA 32** held that;

**“An Appellate court on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –v- R 1957) EA, 336, and the Appellate Court’s own decision on the evidence. It must weigh conflicting evidence and draw its own conclusion -----“**

6. On the matter of quantum of damages, the principles to be applied where ably stated in **Butt –vs- Khan (1981) IKLR at 356 by the Court of Appeal thus:**

**“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 is either inordinately high or low.”**

**The Evidence**

7. The Respondent testified as PW-3- highlighting his statement recorded on the 18/5/2017. He testified that he was a lawful passenger in

the Appellants vehicle Registration No. KCE 918 U and while at Kakuzi area, the driver collided with an on coming vehicle as he tried to overtake. He testified that the vehicle was on high speed on the straight road, and that the oncoming vehicle tried to swerve to avoid the accident; that the vehicle rolled several times from which he sustained serious injuries at the Pelvic bone area which had not healed fully at the time.

8. **PW-2-** was Doctor Geffrey Njoki Njiru who produced the medical report detailing the nature of injuries sustained by the Respondent (P Ext -2-). It was her evidence that due to the fractures, the Respondent may develop Osteo-arturitis.

The Police Officer No. 71591 PC Shadrack Ngatia testified as PW-1-. He produced the Police Abstract (PEXI) though not the Investigating Officer. It stated that the driver of the vehicle was blamed though the case was pending under Investigation, and that the driver had died in the accident.

9. The defence did not call any evidence.

At the close of the case, the Respondent filed submissions but the Appellant failed to, despite having been accorded an opportunity to.

In his submissions, the Respondent proposed general damages for pain and suffering at Shs 1,500,000/- while urging for full liability against the Appellant.

#### Issues for Determination

- i) **Whether contributory negligence was established against the Respondent by the Appellant, and if so, to what extent.**
- ii) **Whether the court ought to interfere and disturb the trial courts assessment of general damages downwards.**

#### **10. Liability:**

The Respondent's evidence was unchallenged and uncontroverted. The Respondent was a passenger, having no control of the accident vehicle. It is trite that no contributory negligence in the manner of driving and or control of a vehicle ought to be attached to a passenger, unless it is shown by evidence, in what manner the passenger contributed to the accident – **Rosemary Wanjiku Kungu –v- Francis Mutua Mburi & Another (2014) eKLR, West Kenya Sugar Co. Ltd –v- Lilian Auma Saya (2020) eKLR.**

11. The Appellant did not tender any evidence that could have pointed and established any contributory negligence on the Respondent. It is not enough to state in a defence, evidence must be tendered to corroborate the averments in the defence.

In its absence, a party is precluded from alleging contributory negligence on the point of a passenger – **Caroline Endorelia Mugayilwa –v- Lucas Mbae Muthara (2016) eKLR; P.N.M. & Another –v- Telkom Kenya Ltd & 2 Others (2015) eKLR.**

12. Further the vehicle alleged to have contributed to the accident was not enjoined into the pleadings by the Appellant. That failure was fatal to the Appellant's case as a court cannot pass Judgment against a party who is not a party in a case. The Appellant can only blame itself its failure and predicament.

13. In this Appeal, the Appellant did not tender any submission on the matter of contributory negligence.

14. By the above, the only irresistible conclusion which the trial court arrived at, is that the Appellant was wholly to blame for the occurrence of the accident. The Respondent is thus absorbed from blame. The court upholds the trial court's finding that the Appellant was wholly liable for the occurrence of the accident.

#### **15. Quantum of damages**

The Respondent sustained serious injuries to the pelvic region, as stated in the medical report produced by Dr. Godfrey Njoki Njiru of P.C.E.A Kikuyu Hospital dated 11/1/2017 being **Open Book fracture pelvic bones involving the pubic ramis and iliac bones** with complications of Osteo – arthritis to the left hip joint and soft tissue injury. Upon authorities cited by the Respondent, the trial court awarded KShs 1,000,000/- damages for pain and suffering. As stated above, the Appellant did not file submissions.

16. For this court to disturb the award by the trial court, it must be shown by the Appellant that the trial court proceeded on wrong principles or that Judge misapprehended the evidence in some material respect, and thus arrived at a figure that was inordinately high – **Butt –v- Khan –(supra).** The court has taken into account that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained, which damages should be commensurate with the injuries and comparable with previous similar awards, and such other factors like inflation – **Boniface Waiti & Another –vs- Michael Kariuki Kamau (2007) eKLR.**

17. The Appellant cites the case **Civicon Ltd –vs- Richard Njomo Omwandia & 2 Others (2019) eKLR** to urge for review downwards of the award. I have considered injuries sustained by the Respondents in the said case.

The 1<sup>st</sup> Respondent sustained Pelvic fracture, had healed, but slight limp, walking with a cane, ankle and hip moved well without limitation. Award of KShs 450,000/- in April 2019. The court reduced the award to KShs 450,000/-.

18. The Respondent, urging for upholding of the trial court's award cited three cases – **Florence Hare Mkaha –v- Pwani Tawakal Mini Coach & Another (2012)eKLR (Mulwa J) and Jericho Furniture's Ltd T/A George Wood Funeral Society –vs- Norah Chepugetich Bett (2015) eKLR**, where damages of Kshs 1,000,000/- were awarded.

19. The injuries sustained in the **Jericho Furniture case** (supra) above are fracture of the pelvic, deep deploring wound on gluted region over the left buttock and soft tissue injuries with permanent disability of 100%.

In the **Florence Hare Mkaha (Mwongo J) case(supra)** the injuries were fracture of the left iliac crest of the superior ramus on left pubic, and fracture left acetabulum and fracture of left knee – lateral condyle of the femur.

20. Considering the Respondents injuries against injuries sustained in the above cases, it is evident that the injuries by the Respondent are less severe, to attract comparable awards.

21. An award of damages is at the discretion of the trial court, but that discretion ought to be exercised judiciously, with reason. **J.W. (Minor suing through L.W) –vs- Medical Superintendent Malindi District Hospital & 2 Others (2018) eKLR**. Though not faulting the trial courts exercise of its discretion, I find the award of Kshs 1,000,000/- to have been inordinately high, as to represent a reasonable assessment of damages.

22. Consequently, and taking guidance from the cited authorities above, **I set aside the award of Kshs 1,000,000/- and substitute it with a more reasonable and comparable award, consummerate with the injuries sustained by the Respondent of Kshs 750,000/-.**

23. Accordingly the appeal succeeds partly, as follows:-

- **Liability – 100% against the Appellant, upheld.**
- **Damages – Reduced from Kshs 1,000,000/- to Kshs 750,000/=.**
- **The award of general damages shall attract interest at courts rates from the date of the trial court's Judgment the 19/11/2018.**
- **Each party shall bear own costs.**

**Dated, Delivered and Signed at Kerugoya this 4<sup>th</sup> day of February, 2021.**

**J. N. MULWA**

**JUDGE**