



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL APPEAL NO. 18 OF 2019**

**POA LINK SERVICES LTD.....1<sup>ST</sup> APPELLANT**

**PATRICK ATARO OTWANI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**GERTRUDE NAMALWA WANJALA.....RESPONDENT**

**(Being an appeal from the Judgement and Decree of Hon. C. Menya SRM**

**in Kimilili PMCC No. 72/2018 delivered on 28/12/2018)**

**JUDGEMENT**

The respondent herein (plaintiff in the lower court) in her plaint filed on 5th June, 2018 sought general damages, special damages of Kshs 11,600/=, costs of the suit, interest and any further other relief court may deem fit to grant;

Briefly, the facts are that on the 25<sup>th</sup> of August, 2017 at 6.30 pm, the respondent was passenger in Motor vehicle Registration Number KCE 982B Toyota Fielder along Kitale-Kamukuywa Road at Shandumba Area when the appellants, their servants or drivers so negligently drove, managed and/or controlled motor vehicle registration number KCL 484W causing it to collide with motor vehicle registration number KCE 982B Toyota Fielder in which the respondent was a passenger and consequently sustained various injuries and obligated to receive care.

During the trial; the respondent called a total of 4 witnesses *to wit* **PW 1** Dr Joseph Sokobe wrote the medical report, **PW2** caroline wesakanya a nurse at Mt Elgon Hospital where the respondent was seen at, **PW3** was the respondent and **PW4** who stated that she was admitted for 2 days, discharged and admitted again. Beverly Chelangat, a Clinical officer from Kimilili Sub County Hospital produced the P3 form. the appellants never called any witness but adopted the defence in Civil case No. 71/18.

The trial court found that the respondent sustained a blunt injury to the chest with bruises, bruises and blunt injury to the lower abdomen, blunt injury to the right shoulder, a deep cut wound on the right leg and loss of consciousness. The doctor concluded that she sustained soft tissue injuries and had fully recovered.

The trial court delivered its judgment on 28<sup>th</sup> December, 2018 and entered liability at 100% against the appellant and awarded general damages of Kshs 350,000, and special damages of Kshs 11, 600/=.

Dissatisfied with this award, the appellant filed the instant appeal setting out the following grounds;

- 1. THAT the learned Trial Magistrate erred both in law and fact in pronouncing judgment against the appellants on liability when there was no legal basis or otherwise basis of doing so in light of there being insufficient evidence adduced before her.**
- 2. THAT the learned Trial Magistrate erred both in fact and law by pronouncing judgment against the appellants whereas the respondent had not proved appellants liability on a balance of probability.**
- 3. THAT the learned Trial Magistrate erred in law and in fact by failing to take into account all material and relevant facts as to the causation of the accident and as a result thereof reached a wrong decision by holding the appellant 100% liable for the accident.**
- 4. THAT the learned Trial Magistrate erred in law and in fact by holding that the respondent had proved negligence as**

against the appellants on balance of probability.

5. THAT the learned Trial Magistrate erred in law and in fact by awarding special damages not supported by any prove.
6. THAT the learned Magistrate misdirected himself failing to apply or applying wrong principles on the assessment of quantum on damages awardable to the respondent thus awarding damages which were manifestly excessive in the circumstances and not commensurate with the injuries sustained by the respondent.
7. THAT the learned Trial Magistrate erred both in law and fact by finding the appellants 100%liable for the accident in light of the evidence adduced.
8. THAT the learned trial magistrate erred in law and in fact by failing to consider the submissions of the Appellants.
9. THAT the learned trial magistrate erred in law and in fact by taking into account irrelevant factors and failing to take into account relevant factors thereby arriving at an erroneous judgment.

Parties agreed to dispose of the appeal by way of written submissions. The appellants filed their submissions on 15/7/2020 and the respondent on 17/6/2020..

On liability, the appellants submit that the burden of proof was on the respondent to prove negligence on the part of the appellants, that in her testimony, the respondent did not know who to blame for the accident, that the police officer who testified was not the Investigating officer, could not tell how the accident occurred and did not produce sketch maps to assist the court and that DW1 blamed the respondent for not belting up.

The appellant relies on the provisions of section 107 and 108 of the Evidence Act, the cases of *Tread Setters Tyres Limited Vs John Wekesa Wepukhulu*(2010)eKLR, *Kiema Mutuku Vs Kenya Cargo Hauliers Services Ltd, Lavington Security Services Ltd V Okeyo* (2004)eKLR and *Lilian Birir & Anor Vs Ambrose Leamon* (2016)eKLR.

The respondent contends that since the respondent produced the proceedings in Kimilili Traffic case Number 102/2018 where the 2<sup>nd</sup> appellant pleaded guilty and fined Kshs 8,000/= is sufficient to apportion liability as was by the trial court and that the clinical officers evidence showed the respondent had safety belt marks. Counsel in this regard cited the case of *Emmanuel Kirwa Too(suing through father and next friend) John Kiptoo Koskei Vs Poa Link Services Company Ltd & 2 Ors.HCC 26/2018-Eldoret*

On the issue of quantum, the appellants argue that the amount awarded to the respondent was inordinately high, that the amount of damages awarded must be within the limits set out by decided cases and within limits that the Kenya economy can afford. Counsel submits proposes an award of Kshs 100,000/= for general damages and Kshs 6,000/= for special damages.

The following authorities were cited in support of the appellant's proposed award; *Mohamed Gulab Hussein & Benson Karuiuki V Felistus Lenah Muema* (2016)eKLR, *Osman Mohamed & Anor Vs Saluro Bundit Mohamed Civil Appeal No. 30/1997, Ziphorah Wambui Wambaira & others vs Gachuru Kiogora & Others Civil Appeal No. 10 of 2004, Ndungu Dennis Vs Ann Wangari ndirangu & anor* (2018)eKLR, *Dickson Ndungu Kirembe Vs Theresia Atieno & 4 Others* (2014)eKLR, *Roberet Ngari Gateri Vs Maingo Transporters* (2015)eKLR, *David Okoka Odero Vs Kilindini Tea Warehouses Ltd* (2008) eKLR and *Juma Hajee Properties Vs Hamidu Malio & 2 Others Eld Civ. Appeal 42/18*

The respondent on the other hand submits that the appellants did not subject the respondent to a second medical examination to cross check with the injuries allegedly sustained. The respondent proposes an award of Kshs 750,000/=. On special damages, counsel argues that the same were specifically pleaded and proved.

He has relied on the case of *Easy Coach Ltd Vs Emily Nyangasi* (2017) eKLR.

This is a first appeal, the guiding principles as settled by the courts are numerous. In *Oluoch Eric Gogo -Vs- Universal Corporation Limited* [2015] eKLR, the court restated the duty of an appellate court as follows:

***“As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....***

The appellants in this appeal have faulted the trial courts finding on liability arguing that the respondent did not discharge the burden to support the apportionment. The appellant contends that the respondent herself stated that she did not know who to blame for the accident.

This situation was captured by the trial magistrate when in her judgment she stated;

***.....she however admitted that the said accident happened so fast and she could not exactly tell how it happened.***

***I had chance to hear the narration of the plaintiff in CIV 71 OF 2018 as well as the police officer who produced the police abstract. In my opinion the plaintiff in this case was a mere passenger and could not in any way be liable.***

Black's law Dictionary, 8<sup>th</sup> edition defines liability to mean; ***the quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.***

It is not in dispute that the respondent was a passenger in Motor Vehicle Registration Number KCE 982B, that the accident occurred and the 2<sup>nd</sup> appellant driving Motor Vehicle Registration Number KCL 484W was charged in Kimilili Senior Principal Magistrates Court vide Traffic Case Number 102/2018, the facts of that case being; he overtook without noticing an oncoming vehicle KCL 863F hence his motor collided with the Motor Vehicle carrying the respondent. The Police officers charged the 2<sup>nd</sup> appellant after concluding that he drove without due care and attention. He pleaded guilty and was fined Kshs 8,000/=.

The respondent has placed premium on the conviction of the 2<sup>nd</sup> appellant for the offence of driving without due care to prove negligence on the part of the 2<sup>nd</sup> Respondent. In that regard the respondent relied on the provisions of Section 47A of the Evidence Act which provides;

***A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.***

The Section was discussed in *Everlyne Shivachi Vs Thara Trading Ltd [2013]eKLR* where the court stated;

***“A final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence shall after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein whichever is the latest shall be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”***

The appellants argue that the respondent's case ought to have been dismissed or at best; liability apportioned equally.

Lord Denning in *Jones v Livox Quarries Limited (1952) 2 QB 608* held:

***“A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man he might hurt himself and in his reckonings he must take into account the possibility of others being careless.”***

Justice R. Nyakundi in *Alfred Chivatsi Chai & another v Mercy Zawadi Nyambu (2019) eKLR*, held;

***The appellants to succeed on contributory negligence the following factors ought to be proved on a balance of probabilities:***

- a) ***The probability that the harm would not have occurred if that other person took care to mitigate the loss and damage.***
- b) ***The likelihood of the harm as a result of breach of the duty of care by the tortfeasor.***
- c) ***The nature of the social activity or legal duty, is risk creating activity in which the person owed the duty of care was engaged in.***

In this case, the respondent was just a passenger while the 2<sup>nd</sup> respondent had entered onto the lane of the vehicle carrying the respondent. I don't see how the respondent could have contributed to the occurrence of the accident applying the test set out in the cases mentioned above. I therefore find no merit in the appellants' contention on this issue.

On special damages; in *Hahn V. Singh, (1985) KLR 716*, the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. held:

***Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.***

The court notes that PW1 Dr. Sokobe testified and produced the Medical Report and Cash Receipt as PEXH 1(b). The respondent on the other hand had in her plaint sought Kshs 11,600/= being costs for P3 Form, medical report, Motor vehicle Search, Official Companies Search and Medical expenses.

The nature of special damages demands that the party claiming must specifically plead and prove by way of receipts any expenditure that he or she made. Nothing less. There was no proof of expenditure on the other items falling under special damages.

I therefore decline to grant the respondent damages on specific items that she did not produce their receipts. I consequently reduce the respondent's special damages from the awarded sum of Kshs 11,600/= to Kshs 6,000/= being the cost of procuring the medical report.

On quantum, the appellant proposes a sum of Kshs 100,000/= while the respondent proposes Kshs 750,000/=. It has been held by our courts severally, and therefore agree with the appellants that the damages awarded should be within limits that the Kenyan economy can afford, that they should not be too low and in the same vein they should not be excessive and that they should be within limits set out by decided cases. See *Mohamed Gulab Hussein & Benson Karuiuki V Felistus Lenah Muema* and *Osman Mohamed & Anor Vs Saluro Bundit Mohamed*

*(supra)*.

It is not in doubt that the respondent sustained a blunt injury to the chest with bruises, bruises and blunt injury to the lower abdomen, blunt injury to the right shoulder, a deep cut wound on the right leg and loss of consciousness. This evidence is not controverted because the appellants did not subject the respondent to 2<sup>nd</sup> medical examination.

In *Francis Ndungu Wambui & 2 others v Benson Maina Gatia* (2019) eKLR, the respondent **suffered severe head injuries – transient loss of consciousness with extra-crannial haematoma, blunt trauma on the right shoulder and soft tissue injuries to the right hip point and had recovered, the court awarded Kshs 300,000/=.**

In *Francis Ochieng & Another v Alice Kajimba* (2015) eKLR, the High Court reduced an award of Kshs 500,000/= to Kshs 350,000/= for multiple soft tissue injuries.

In *H. Young Construction Company Ltd v Richard Kyule Ndolo* (2014) an award of Kshs 250,000/= general damages was made for soft tissue injuries.

I also note that the authorities cited by the appellants quote an inordinately low figure and the respondent inordinately high. It is my further finding that the trial magistrates' award of Kshs 350,000/= for general damages is a fair amount and strikes a balance between the parties' proposed amounts.

In the end, the appeal partially succeeds and I make the following orders;

1. Liability is affirmed at 100%
2. The award of special damages is reduced from **Kshs 11,600/=** to **Kshs 6,000/=**.
3. The award of general damages is affirmed at **Kshs 350,000/=**
4. No order as to costs in the appeal.

It is so ordered.

**DATED AT BUNGOMA THIS 11TH DAY OF MARCH, 2021**

**S. N RIECHI**

**JUDGE**