



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 30 OF 2019**

**(CORAM: F.M. GIKONYO J.)**

**(An appeal from the Judgment of Hon W. Juma (C.M) delivered on 13.11.2019 in Narok CMCC No. 90 of 2017)**

**WANAINA MWAURA ANTONY.....APPELLANT**

**VERSUS**

**IBERE HENRY MURURU.....1<sup>ST</sup> RESPONDENT**

**JOHN RONOR.....2<sup>ND</sup> RESPONDENT**

**KIPKOECH TONUI JOHN.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Impugned judgment**

1. This appeal challenges the judgment of the chief Magistrate’s Court at Narok in Civil Suit No. 90 of 2017 delivered on the 13<sup>th</sup> November 2019 in which the trial court: -

***a) Apportioned liability; 1<sup>st</sup> and 2<sup>nd</sup> defendants to bear 65% liability jointly and severally; and the 3<sup>rd</sup> Defendant 35% for injuries sustained by the Plaintiff.***

***b) Awarded General damages in the sum of Kshs 3,000,000.00, and special damages of Kshs 1,777,383.00; a grand total of Kshs 4,777,383.00.***

***c) Ordered the defendants to pay costs of the suit with interest at court rates from the date of the judgment.***

2. Being aggrieved by the said judgment, the appellant filed this appeal vide a memorandum of appeal dated 27<sup>th</sup> November 2019 in which he cited twenty-one (21) grounds of appeal but all of which relate to two issues; (i) liability and (ii) quantum of damages.

**1<sup>st</sup> Respondent’s Case**

3. The 1<sup>st</sup> respondent’s case was that on the 12<sup>th</sup> November 2015 while he was travelling as a fare paying passenger in motor vehicle registration No KBW 177P, Motor vehicles KBW 295W and KBU 177P were negligently driven as to cause an accident along Narok- Mulot road causing him severe bodily injuries. He averred that due to the accident he sustained great loss and prayed for general damages for pain and suffering, loss of earning capacity, Kshs 500,000.00 for future medical expenses, special damages of Kshs 3,113,779.00 and costs and interest. He stated that he sustained the following injuries as a result of the accident – intertrochanteric fracture of the right femur, gross distortion of the bone structures of the upper end of the femur of the trochanteric region., avascular necrosis (bone death), wastage of the right buttocks and thigh muscles, shortening of the right leg, and stiffness of right hip.

4. **PW1** –Dr. Washington Wokabi produced in evidence the medical report, receipt for the report and doctor’s court attendance receipt as **Pexh 1(a), (b) and(c)** respectively.

**PW2** -Inspector Moses Onyango produced police abstract and occurrence book as **Pexh 2(a) and (b)** respectively which confirmed the occurrence of the accident.

**PW3-** Ibere Henry Mururu produced P3 form, discharge summary/treatment notes, medical report Mayo Medical Centre, Medical receipt, car hire receipts, pay slip, motor vehicle KBW 295 W, motor vehicle KBU 177P, daily wages work sheet, motor vehicle search receipts, demand letter and statutory notices as **Pexh 3-14**; copies of a discharge summary and treatment chits from the PCEA Kikuyu Hospital that confirmed that he had sustained the said injuries. That evidence was corroborated by Dr. Wokabi, who testified that he had examined the respondent after the accident. He confirmed that the respondent had sustained the above injuries. He classified the injuries as grievous harm and assessed his incapacitation at 40%. He produced his medical report as evidence. In his submissions, the respondent advanced a sum of Kshs 5,000,000.00 for pain and suffering and the plaintiff abandoned the claim for loss of earning capacity as he had been paid until retirement, and special damages of Kshs 3,480,779.00. He relied on the following authorities – *A.A.M. Vs Justus Gisairo Ndarera*[2010] eKLR, *Geoffrey Mwaniki Mwizi Vs Ibero(K) Ltd & Anor* [2014] eKLR, *Mwara Muiruri Vs Suera Flowers Ltd& Anor* [2014] eKLR and *Nicodemus Osoro Another V Jane Gatwiri* [2019]eKLR .

5. The appellant on his part did not offer counter-evidence on quantum. In their written submissions at the trial court, the appellants argued that the suit be dismissed against him for want of proof of any negligence on his part.

#### APPELLANT'S CASE

6. The 3<sup>rd</sup> Defendant/ Appellant called two witnesses. DW 1 – Robert Mwembi Manger was a driver of canter KBU 177 P. He stated that he saw a matatu descending from the left (other lane) and at the same time there were zebras crossing the road from the right. He reduced the speed of the canter to 50km/hr upon seeing the zebras crossing. By then the matatu had already reached where the zebras were and hit one of the zebras from the left side and lost control veering off into his lane. He stated that he tried to avoid the accident but he was unable since there was a hole/ trench off the road. DW2- Jackson Gitau corroborated DW1. The appellant maintained that the 1<sup>st</sup> Respondent had not proved his case against the Appellant and therefore they should not be apportioned liability.

7. Directions were given that the appeal be disposed of by way of written submissions. The appellant and the 1<sup>st</sup> respondent filed their respective written submissions, which I have read through and noted the arguments advanced.

8. In their submissions in support of the appeal, the appellant urged the court to re- evaluate the evidence and find that there was compelling and overwhelming evidence to demonstrate that the appellant's driver (DW1) was not negligent in any way that he took reasonable steps to avert the accident and therefore not liable for the accident and/ or injuries sustained by the 1<sup>st</sup> Respondent. He urged the court to dismiss the case against the appellant with costs. The 1<sup>st</sup> respondent supported the judgment of the trial magistrate stating that the same was commensurate with the injuries sustained.

#### ANALYSIS AND DETERMINATION

[9] In law, first appellate court is under an obligation to re-evaluate the evidence and come to own conclusions, except, it must give allowance of the fact that it neither saw nor heard the witnesses; matters of demeanor are best observed by the trial court. See : **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In the exercise of re-evaluation of evidence, the court is not beholden or compelled to adopt any particular style. Nonetheless, it must avoid mere rehashing of evidence or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern is to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Thus, a good style would be one that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, making of the final impression of the evidence and facts of the case and the applicable law will find little or no difficulty at all. I shall so proceed.

#### **Issues**

10. Two issues emerge in this appeal. (1) Who is to blame for the accident? And; (2) What amount of damages is fair compensation for injuries sustained?

#### **A. Liability**

11. According to **PW2, Inspector Moses Onyango, Motor vehicle KBW 295W (hereafter the Matatu) hit a zebra thereby losing control and hitting the other vehicle KBU 177P (hereafter the Canter). He stated that the police blamed the driver of the Matatu for the accident because the area where the accident occurred is prone to animals and drivers ought to be cautious when driving in the area. He was also categorical that the Matatu was coming from Narok towards Bomet whilst the Canter was from Bomet towards Narok.**

12. **But, the plaintiff Ibeere Henry Mururu who testified as PW3 gave a completely different version thereof.** It was his testimony that the two vehicles were moving towards the same direction with the Matatu being ahead and followed by the Canter. He stated that both vehicles were being driven at high speed and blamed the two for his woes.

13. There is already tension between the evidence by the plaintiff and his key witness on liability. What therefore is the established framework for relieving such tensions? The established judicial method, which rests on the singular dependability of the *fact-base*, and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the *account from the other side*; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result.

14. According to DW1, the driver of the Canter, he was approaching from the opposite direction of the Matatu when he suddenly saw zebras crossing the road. He also saw the Matatu hit one zebra and lost control. It started moving in a zigzag manner. During these happenings, he put his hazards on and moved to of the road to the left to avoid being hit. But, he could only move as much as there was a ditch on his side of

the road. The Matatu eventually came onto his side of the road and hit the Canter. He stated that there are normally animals in that area and drivers should expect such eventuality. He blamed the driver of the Matatu for the accident.

15. The evidence by DW1 was corroborated by DW2 in material respects. DW2 was traveling in the Canter and saw what happened. He stated that the Matatu was oncoming. It hit one zebra, lost control, crossed through the other side of the road where it hit the Canter outside the road. The Matatu came to their side of the road. He confirmed that the driver of the Canter went off road to the safest extent possible as there was a ditch on that side of the road. He also blamed the driver of the Matatu for the accident.

16. The evidence of PW2 also corroborates the evidence by the defence witnesses. The OB report also supports the testimony by PW2. When I put the evidence of DW1, DW2 and PW2 on the threshold, it is quite consistent that the Matatu was on coming, it hit a zebra, lost control, crossed over the other side of the road and hit the Canter outside the road. There is absolutely nothing to support the account provided by the plaintiff on how the accident happened. I do note also that it was not controverted that the driver of the Canter moved outside the road to the extent possible due to the ditch that was beside the road. I, therefore, agree with the appellant's submission that, in holding **DW1** ought to have taken evasive measure that ought to have been taken by the driver of the Matatu, was clearly an error. The set of facts emerging from the evidence herein suggest that the driver of the Matatu was to blame 100% for the accident. It was at night and so the driver ought to have exercised caution, proper look out and drive at reasonable speed that will permit him to avoid such accidents. He also so badly lost control after hitting the zebra which is indicative of high speed in the conditions of the time. I do not see anything which may bring blame upon the driver of the Canter. Therefore, the trial magistrate erred in holding the driver of the Canter liable to the tune of 35%. I set aside apportionment of liability by the trial court. And, in lieu thereof, I enter judgment on liability against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents at 100%. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are vicariously liable for the accident. Judgment against them is therefore jointly and severally. Of course, there is no evidence of contributory negligence by the 1<sup>st</sup> respondent who was a passenger in the Matatu and so he bears no liability.

### **Quantum**

17. According to the Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR** : -

*'An appellate court will not disturb an award for general 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...'*

18. This test has been echoed in a plethora of decisions which I do not wish to multiply except to cite some few; **Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003**; **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**; **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. AM. Lubia and Olive Lubia (1982 -88) 1 KAR 727**; and **Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012**.

19. In the instant suit, the trial magistrate awarded Kshs 3,000,000.00 as damages for pain and suffering; the appellant regards the award as inordinately high. The 1<sup>st</sup> respondent agrees with the trial magistrate that the award is fair compensation.

20. I will apply the test. The Court of Appeal observed in **Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR** that –

*“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”*

21. Emphasis is that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

22. The 1<sup>st</sup> respondent herein sustained the following injuries - intertrochanteric fracture of the right femur, gross distortion of the bone structures of the upper end of the femur of the trochanteric region., avascular necrosis (bone death), wastage of the right buttocks and thigh muscles, shortening of the right leg, and stiffness of right hip. The doctor assessed incapacitation at 40 % in **A.A.M Vs Justus Gisairo Ndare[2010] eKLR** the injuries included fracture to the femur with permanent disability assessed at 40% the court awarded kshs 2,500,000.00 in 2010. The other comparable authorities cited by the 1<sup>st</sup> Respondent in his submission in the trial court range between 2,000,000 and 2,500,000/=. As stated in the case of **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR**, the court in making an award for general damages must always consider the prevailing inflation rates.

23. From the authorities cited by the 1<sup>st</sup> respondent, it is clear that the trial magistrate made a commensurate and fair award in view of the injuries sustained by the 1st respondent. An award of Kshs 3,000,000.00 is fair compensation for pain and suffering.

### **Conclusions and orders**

24. The appeal succeeds on liability. I absolve the appellant from liability given the circumstances of the accident. Accordingly, the apportionment of liability entered by the trial court is set aside. In lieu thereof, I find and hold the 2<sup>nd</sup> and 3<sup>rd</sup> respondent vicariously liable, jointly and severally for the accident herein. The awards of damages, special damages, cost and interest remain as was made by the trial magistrate. Each party to bear own costs of the appeal.

It is so ordered.

**Dated, signed and delivered at Narok through Microsoft Teams Online Application this 16<sup>th</sup> day of March 2021**

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**F. GIKONYO**

**JUDGE**

**In the Presence of:**

1. Munyi holding brief for Karanja for the applicant
2. Botany for the Respondent
3. Mr. Kasaso – Court Assistant

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**F. GIKONYO**

**JUDGE**