



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 55 OF 2019**

WILSON MATU.....1<sup>ST</sup> APPELLANT

NICHOLAS MUIGA NDERITU.....2<sup>ND</sup> APPELLANT

VERSUS

STANLEY MURIUKI WAMUGO.....RESPONDENT

**(Being an Appeal from the Judgement of Hon. P. Mutua, Principal Magistrate delivered on 6<sup>th</sup> August 2019 in Nyeri CMCC No. 382 of 2016)**

**JUDGEMENT**

**Brief Facts**

1. In this appeal, the claim before the Nyeri Principal Magistrates arose from a road traffic accident which occurred on 9/8/2015 along Nyeri-Nanyuki Road near Kiganjo Police Training college area involving motor vehicle registration number KBW 213M and motor cycle registration number KMCA 574Z
2. The respondent who was the rider of the motor cycle sustained injuries from the accident and prayed for judgement against the appellants jointly and severally in form of general and special damages. The trial court found the appellants 100% liable for the accident and awarded general damages to the tune of Kshs. 1,800,000/- and special damages of Kshs. 1,016,278/- to the respondent.
3. Being aggrieved with the said judgement, the appellants lodged the instant appeal citing five grounds. Precisely, the appellants claimed that in awarding Kshs.1,800,000/= as general damages, the trial magistrate erred in law and in fact for the said amount was inordinately and unreasonable high. Further that magistrate ought not to have awarded special damages of Kshs.1,016,278/= because the amount was not specifically proved.
4. By consent, parties agreed to argue this appeal by way of filing written submissions.

**The Appellants' Submissions**

5. The appellants submit that the respondent herein did not prove that the appellants were negligent to warrant liability at 100% against them. According to the respondent's testimony on cross-examination, the accident occurred at 10pm on an ascending road and the appellants' vehicle lights were on. The appellants deduced that they would not be driving at a high speed since it was an ascending road. The appellants referred to the case of **Kiruga vs Kiruga & Another (1988) KLR** at page 348 as cited in **Timsales vs Simon Kinyanjui Nakuru Civil Appeal No. 103 of 2003** where the court held that an appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.
6. It was further submitted that the respondent was equally negligent as he was riding an unroadworthy motor cycle without proper lighting and he was not wearing any reflective gear. Additionally he did not call any eyewitness nor did he adduce any evidence besides stating that the accident was reported to the police. The appellants relied on the case of **Grace Kanini Muthini vs Kenya Bus Service Ltd and Another HCCC No. 4708 of 1989 cited in M'Mula Charles Mwalimu vs Coast Broadway Company Limited [2012] eKLR** where Justice Ringer pointed out that by only producing a police abstract as evidence that an accident occurred was not sufficient, the plaintiff ought to prove her case on a balance of probabilities.
7. On the issue of the award of general damages, the appellants submit that the sum of Kshs. 500,000/- would suffice. Relying on the case **Ibrahim Kalema Lewa vs Esteel Company Limited NBI HCCA No. 475 of 2012 [2016] eKLR; Eldoret Steel Mills Limited vs Elphas**

8. As regards special damages, the appellants referred to the case of **Hahn vs Singh Civil Appeal No. 42 of 1983 [1985] KLR 716** and submitted that special damages must be both pleaded and proved. Consequently, the trial court erred in awarding special damages based on an invoice and not a receipt as established in the case of **Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs Janevams Limited [2015] eKLR.**

#### **The Respondent's Submissions**

9. The respondent submits that the memorandum of appeal only touched on the issue of quantum but, the appellants in their submissions have addressed the court on both liability and quantum. The respondent thus submits that the appellants ought to have sought leave of the court by virtue of Order 42 Rule (1) and (4) to be heard on the ground of liability because such ground was not put forth in the memorandum of appeal. In that regard, the respondent urges the court to disregard the appellants' submission on the issue of liability. However if the court is inclined to address the issue of liability, the respondent submits that their evidence was uncontroverted in the lower court as the appellants did not give evidence consequences of which have been rightfully captured in the case of **Shaneebal Limited vs County Government of Machakos [2018] eKLR.**

10. Furthermore, the respondent submits that the appellants did not call any expert witness to draw the conclusion that since the road was ascending; the appellants could not speed on an ascending road. The respondent states that that is merely a statement of opinion that does not add value to the appeal.

11. It is the respondent's case that the 2<sup>nd</sup> appellant, the driver of motor vehicle registration number KBW 213M, was overtaking on a sharp corner and hit his motorcycle. The respondent witnessed this and therefore the contention by the appellants that no eyewitness was called during trial is therefore incorrect.

12. On the issue that the respondent was riding an unroadworthy motorcycle, the respondent submits that the trial court did not make such a finding and no evidence was tendered to support this allegation and therefore that ground must fail.

13. The respondent submits that the award of damages is in the court's discretion and relied on the case of **Butt vs Khan [1978] eKLR.**

14. The respondent further submits that the court observed that the authorities cited by the appellants were old and related to less severe injuries and therefore the contention by the appellants that the court did not consider their submissions or authorities has no basis. Furthermore, the trial court relied on the case of **Lucy Waruguru Gatundu vs Miriam Nyambura Mwangi [2017]eKLR** in reaching the award of Kshs. 1,800,000/-. The appellants did not demonstrate to the court how this decision was inapplicable. Instead, the appellants are inviting the appellate court to adopt a different award without demonstrating how the trial court misapprehended the evidence or proceeded on wrong principles.

15. On the issue of special damages, the appellants relied on the case of **Total (Kenya) Limited formally Caltex Oil (Kenya) Limited vs Janevams Limited [2015]eKLR** in arguing that special damages can only be proved by way of receipts and not invoices. The respondent in response submitted that in the said case the issue was whether a proforma invoice could be evidence of loss of goods or equipment which is not relevant to this appeal

#### **Issues for determination**

16. On perusal of the record of appeal, and the submissions of the parties, I hereby identify three issues for determination as follows:-

- a) Whether the trial magistrate erred in law and in fact in apportioning liability at 100% to the appellants.
- b) Whether the trial court's assessment of damages was inordinately high.
- c) Whether the amount of Kshs. 1,016,278/- as special damages was specifically proved.

#### **The Law**

17. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

**“....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 into account of particular circumstances or probabilities materially to estimate the evidence.”**

18. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

19. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348,** observed that:-

**“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”**

20. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

**Whether the trial magistrate erred in law and in fact in apportioning liability at 100% to the appellants.**

21. The respondent in his submissions argued that under order 42 Rule 4 of the Civil Procedure Rules, the first appellate court was confined to the memorandum of appeal and therefore could not rest its decision on grounds other than those set out in the memorandum of appeal.

22. **Order 42 Rule 4** provides:-

**The appellant shall not except with leave of court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of court under this rule:**

**Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on the ground.**

23. A plain reading of the above provision clearly shows that a first appellate court in rendering its decision has the necessary power to consider grounds of appeal other than those set out in the memorandum of appeal provided that parties are given sufficient opportunity to address the court on the new grounds.

24. The Court of Appeal when confronted with a similar scenario in **Republic vs Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto [2018] eKLR** stated the following when interpreting Rule 104 of the Court of Appeal Rules which is equivalent to Order 42 Rule 4 of the Rules:-

**“Rule 104 of the Court of Appeal Rules, among others prohibits an appellant from arguing, without leave of the court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the court to raise the new ground of appeal but rather belatedly and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.**

**It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy vs Ruth Watiri Kibe, CA No. 39 of 2015 and Openda vs Ahn [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this court....As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.”**

25. According to the appellants, the trial court ought not to have found them 100% liable because the respondent did not prove his case on a balance of probabilities. It is argued that the court found that since the appellants did not call any witnesses to testify on their behalf, the evidence of the respondent was thereby uncontroverted and therefore the respondent proved his case on a balance of probabilities.

26. There are many authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not call any witnesses at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere assertions.

27. In the case of **Shaneebal Limited vs County Government of Machakos [2018] eKLR, Odunga J**, relied on the cases below in reaching his judgment. In **Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

28. However in the case of **Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau [2016]eKLR** the court had this to say:-

**“The suggestion however, implicit in some of the decisions quoted above, that in all sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant's failure to testify when he had filed a defence and counterclaim. While the defendant's failure to testify has fatal consequences for the counter claim because the onus is on him to prove it on a balance**

**of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.”**

29. According to the appellants, the respondent was negligent as he was riding an unroadworthy motor cycle without proper lighting and he was not wearing any reflective gear. Thus, the 2<sup>nd</sup> appellant did not see him in time to avert the said accident. Further, the appellants contend that since the accident occurred at an ascending road, the appellants would have been driving at a high speed as alleged. The respondent on the other hand states that the 2<sup>nd</sup> appellant was overtaking on a sharp corner and hit his motorcycle.

30. From the record, the respondent in his statement which he adopted in evidence stated that the accident occurred at 10.00pm at a sharp corner. He said that he was riding his motor cycle when he met two vehicles coming from the opposite direction with their head lights on. The vehicle behind started overtaking the one in front of it at a sharp corner. This caused the respondent to swerve off the road to avoid collision. However, the accident was unavoidable in that the cyclist was hit and thrown off the road. He blamed the 2<sup>nd</sup> appellant's driver for the accident for overtaking at a sharp corner and hitting him.

31. In his judgement, the learned magistrate stated that the evidence of the respondent was uncontroverted to the effect that the appellant's vehicle was overtaking at a sharp corner and hit the motor cycle even after it had swerved to avoid collision. This was the basis of the court finding the appellant fully liable

32. The correct position is that the learned magistrate did not base his finding on the single act that the evidence was uncontroverted but analysed the evidence and found the appellant to blame fully for the accident. Further, this evidence remained uncontroverted because the appellant did not call any evidence. I find no error on the part of the learned magistrate in reaching the finding that the 2<sup>nd</sup> appellant's driver was negligent and that the 1<sup>st</sup> defendant was vicariously liable. The court did not err in holding the appellants fully liable.

33. The appellant brought in new evidence which was not before the magistrate that the respondent was riding a defective motor cycle and was not wearing a reflector jacket and that for this reason he ought to have been found to have contributed to the accident.

34. In my considered view, the matters of a defective motor cycle and failure to wear a reflector jacket were introduced on appeal. This is not a trial court and I am of the view that such new evidence ought not to be entertained. However, even if the appellant adduced such evidence in the lower court it would not have changed the finding of the court on liability.

35. I therefore find no basis of apportioning liability between the parties and further find that the respondent proved his case on liability on the balance of probability and as such uphold the finding of the learned magistrate's on liability

#### **Whether the trial court's assessment of damages was fair in the circumstances.**

36. The Court of Appeal in **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR**, cited in the case of **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs A.M. Lubia and Olive Lubia (1982-1988) 1 KAR 727 at p.730** where Kneller JA said:-

**“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing 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 damage.”**

37. The Court further makes reference to the case of **Gicheru vs Morton & Another (2005) 2 KLR 333** where the Court stated:-

**“In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the Appellant was entitled.”**

38. In the case of **Simon Taveta vs Mercy Mutitu Nyeri Civil Appeal 26 of 2013 [2014] eKLR** the Court of Appeal observed thus:-

**“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.”**

39. Thus applying the above principles as set out in the Court of Appeal which are binding on this court, the issue that arises for scrutiny herein is whether the award for general damages made by the Learned Trial Magistrate were based on the nature and extent of injuries suffered by the respondent and comparable awards made in the past and whether the same was reasonable in the circumstances.

40. On perusal of the record specifically the medical reports, it is evident that the respondent sustained a fracture of the right midshaft femur and fracture of the right proximal tibia and fibula bones.

41. The respondent relied on several authorities for guidance in the assessment of damages some of which are summarised below.

i. In the case of **Lucy Waruguru Gatundu vs Miriam Nyambura Mwangi [2017] eKLR**, the respondent suffered a right mid shaft femur fracture, a comminute compound tibia/fibula fracture, right thigh ecchymosis and tenderness, right leg 10cm cut wound, septic bone loss and tenderness of the right hip. The court awarded Kshs. 2,000,000/-.

ii. In Gabriel Mwashuma vs Mohammed Sajjad & Another [2015] eKLR the plaintiff suffered segmental left femur fracture, compound fracture of left patella and femoral condyle, comminuted left distal tibia/fibula (pilon) fracture, fracture of right fibula and soft tissue injuries right knee. The court awarded Kshs. 3,000,000/-.

iii. In Eldoret Steel Mills Limited vs Elphas Victor Espila [2013] eKLR the plaintiff sustained a sub-trochanteric fracture of the right femur, fracture of the metatarsal bones of the right foot and soft tissue injuries to the right arm, right hip, right thigh and right foot. Permanent disability was assessed at 35% and the court awarded Kshs. 300,000/-.

iv. In Mwavita Jonathan vs Silivia Onunga [2017] eKLR where the High Court set aside the trial court's award of Kshs. 1,000,000/- and substituted it with Kshs. 400,000/- for the following injuries sustained; left hip commuted intertrochanteric fracture, blunt chest injury, dislocated right knee joint, sprains at the cervical spine of the neck and the lumbar-sacral spine of the back and deep wound on the left lower leg which cause a lot of blood.

42. Looking at the cases cited by the appellants and respondent, it is evident that the respondent cited cases where injuries were more serious and awards higher than the circumstances in his case. On the other hand, the appellants cited older cases and on the lower side but in their submissions on appeal, the parties cited some almost comparable cases where the plaintiffs sustained injuries similar to the case at hand. From the judgment of the trial court, the trial magistrate elected to be guided by the case of Lucy Waruguru Gatundu vs Miriam Nyambura Mwangi [2017] eKLR in which he held that the injuries were similar and comparable to the respondent herein. However, I am of the view that the case of Lucy Waruguru was not comparable to the injuries sustained by the respondent. The injuries in that case were indeed more serious than in this appeal with permanent incapacitation was assessed at 50%.

43. Consequently, I am of the view that the award of Kshs. 1,800,000/- in general damages was on the higher side and not based on comparable decisions. I am persuaded that this is a suitable case for exercise of discretion of the court to interfere with the trial court's finding on general damages. In my view, the quantum of damages awarded was manifestly excessive to justify intervention of this court. In my view, the trial court did not take into consideration a relevant factor that the injuries herein did not lead to permanent incapacitation. It is my considered view that Kshs. 800,000/- is adequate compensation as general damages to the respondent.

**Whether the amount of Kshs. 1,016,278/- as special damages was specifically proved.**

44. The trial court held that Kshs. 164,200/- as medical expenses was proved by way of receipts. However, there is an outstanding sum of Kshs. 817,328/- which was evidenced in court by way of invoices and medical bills. The court awarded the said sum on the strength of the medical bill on the reasoning that it was evidence that the respondent was treated at the institution. The appellant argued that invoices are not receipts and therefore not evidence of receipt of payment and based on that special damages cannot be awarded.

45. The question herein is whether the medical bill ought to be evidence of special damages.

46. In Ratcliffe vs Evans [1892] QB 524 Bowen L.J said:-

**“The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”**

47. Similarly in the case of Thomas Kabaya Ngaruiya & 2 Others vs David Chepsisor [2012] eKLR:-

**“Special damages are so called because they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of acts themselves. (Ratcliffe vs Evans (1892) 2 QB 524). No case was cited to me to the effect that proof of special damage necessarily means payment. It has been understood that special damages connote out of pocket expenses. The argument goes that it must be an expense where money has been paid to constitute special damages. I think this would be taking the construction of the term special damages too far.**

**The respondent produced a document showing that he owes Moi Teaching Referral Hospital Kshs. 266,000/- . I do not find the argument that the sum of Kshs. 266,000/- must have been paid first before the respondent could sue to be amenable to common sense and principles of justice.**

**.....I do not think that payment is a condition precedent to claiming special damages. As long as they are pleaded and proof is provided they are recoverable. “**

48. The appellants did not provide any proof of forgery on part of the respondent and for that reason, the medical bill from the hospital with the accompanying invoices are in my view sufficient proof of expenses incurred in treatment of the respondent who was indeed admitted in the said hospital and underwent some operations and procedures.

49. Considering all the foregoing, I am persuaded that payment is not condition precedent to claim special damages. In this regard, I am of the considered view that special damages of Kshs.1,016,278/= was specifically pleaded and proved before the trial court and that the award was in accordance to the laid down principles.

50. I find no basis to interfere with the award of special damages and hereby uphold the award of the learned magistrate.

**Conclusion**

51. Consequently, I hereby uphold the trial court's finding on liability at 100% against the appellants.

Judgement on quantum is hereby entered in favour of the respondent against the appellants jointly and severally as follows:-

(a) General damages 800,000/=

(b) Special damages 1,016,278/=

**TOTAL 1,816,278/=**

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52. This appeal is partly successful.

53. Costs of the appeal to the respondent.

54. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 13<sup>TH</sup> DAY OF MAY, 2021.**

**F. MUCHEMI**

**JUDGE**

**Judgment delivered through video link this 13<sup>th</sup> day of May 2021**