REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 116 OF 2020

PHOEBE NJOKA

MBUGUA IMMACULATE.....APPELLANTS

VERSUS

SABINA MUMBE MAKATO.....RESPONDENT

(Being an appeal form the Judgment of Hon. M. Nabibya, Resident

Magistrate delivered on the 24th July 2020 in Mombasa SRMCC No.1082 of 2015)

JUDGMENT

1. This appeal arises from the judgment of **Hon. M.L Nabibya (PM**) dated **24th July 2020** delivered in **Mombasa CMCC No. 1082 of 2015**.

2. The impugned Judgment was delivered in a suit in which the Respondent sued the appellant seeking general and special damages as a result of personal injuries sustained on **22nd February, 2015** in a road traffic accident whose occurrence the Respondent blamed on the appellant and or his agent's negligence in managing or controlling **Motor Vehicle Registration Number KBL 900Q**.

3. In his statement of defence dated **20th August, 2015**, the appellant denied any liability as alleged and put the Respondent to strict proof thereof. In the alternative, he pleaded that if indeed the accident occurred, it was caused or substantially contributed to by the Respondent.

4. At the hearing of the suit, the Respondent testified and called for (4) witnesses, whereas the Respondents closed their case without calling any witnesses. Upon close of the hearing, the parties filed and exchanged written submissions.

5. The learned trial Magistrate rendered his Judgment on 20th August 2020, wherein he found the Appellants 100% liable for the accident. He proceeded to award the Respondent general damages in the sum of Kshs.500,000.00 and Kshs.33,633.00 as special damages.

6. The Appellants were aggrieved by the entire judgment of the trial court hence this appeal. In their memorandum of appeal dated **24th August, 2020,** the Appellants challenged the trial court's decision on both liability and quantum. They advanced six grounds of appeal in which they principally complained that the learned trial Magistrate erred in law and fact by: *assessing damages that were manifestly excessive; failing to apply principles applicable in assessment of damages; failing to take into account relevant factors in evaluating the evidence on quantum and liability; failing to accept the Appellants evidence on the balance of probability; holding them wholly liable for the accident; and finally, awarding general damages that were high*.

7. By consent of the parties, the appeal was prosecuted by way of written submissions which both parties duly filed.

8. The Written Submissions on behalf of the Appellants were filed on **13th February, 2020** and therein, the Appellants have clearly set out that it is only quantum and not liability that is being challenged. The Appellant have cited the case of **JMN (Minor suing through next friend and father WWN V Petroleum & industrial Service Ltd [2014] eKLR,** where the court awarded Kshs.180,000.00 as general damages yet the plaintiff had suffered serious injuries as compared to the Respondent herein.

9. Further reliance has been placed on the case of **Edwin Masese Msando –vs- Teresa Gesare Masese [2019]eKLR,** where the court

revised damages awarded from Kshs.500,000 to Kshs.200,000.00.

10. The Appellants' counsel has also relied on the case of **Shreeji Enterprice (K) Limited –vs-John Kyeene Wambua & Another [2015]eKLR** to show that the damages awarded by the trial magistrate were excessive. The Appellants have proposed an award of Kshs.250,000.00

11. In the submissions filed on behalf of the Respondent, it has been argued that there is no arguable appeal raised and invites the Court to dismiss the same. The Respondent's counsel urged the court to consider the treatment notes, medical report and the Respondent's evidence which was not challenged by the Appellant.

12. It has been submitted that **Joshua Muthiani Mutiso**, PW2 testified that that the Respondent was unconscious after the accident and even after regaining consciousness she was disoriented and in a state of confusion.

13. Also, **Dr. S.K Ndegwa**, PW5 produced his report dated **17th April 2015**, where he expressed his opinion and assessed that the Respondent had suffered permanent disability at 5% due to chronic pains, multiple scars and the slight mental confusion which he noted can recur even after it is resolved.

14. The Respondent has cited the case of **Butler –vs- Butler CA of 1993** which laid down the principles upon which an appeal court can interfere with the award of damages.

15. Further, it is the Respondent's position that the Appellants have not demonstrated that the trial Magistrate did not take into account matters he ought to have taken into account when he awarded damages.

16. The Respondent goes on to submit that the Appellants neither tendered any evidence in support of their case nor did they call any witnesses during trial to dispute the Respondent's case.

17. Finally, the Respondent has reminded the court that in the Appellants' submissions they did not address the issue of liability which is tantamount to abandoning **grounds 3** and **5** of the **appeal.**

18. I have carefully considered the Grounds of Appeal, the parties' rival written submissions and the evidence on record together with the law and authorities cited in determining the appeal. I have also carefully studied the Judgment of the learned trial magistrate. Having done so, I find that the key issue for determination is whether the learned trial magistrate erred in his finding on both liability and quantum.

19. Before delving into determining the above two issues, I wish to briefly address the Appellants complaint that the learned trial magistrate failed to appreciate his written submissions. In my considered view, the above complaint has no basis whatsoever. My reading of the lower court's record does not show or suggest that the learned trial Magistrate failed to consider or to appreciate the submissions filed by any of the parties including the Appellant. This is what the trial Magistrate stated in her Judgment delivered on **24th July, 2020** at **Paragraphs 14 to 17**:-

> ***"Parties submitted with the Plaintiff stating she was able to prove ownership of the accident motor vehicle by provisions of a police abstract….***
>
> ***On their part, Defendants submitted that the court adopts 80:20 ratios between the parties for failure by Plaintiff to indicate that she was a pedestrian at the time of accident***
>
> ***I have therefore carefully evaluated the entire evidence and considered the submissions by the parties. I find the Plaintiffs' suit remain unchallenged since the defence failed to offer any rebuttal evidence…"***

20. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. The duty of a first appellate court is well settled. It entails revisiting, re-evaluating and considering afresh the evidence presented before the trial court for the appellate court to make its own independent conclusions while bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses testify and give due allowance for that disadvantage. In the case of **Peters –vs- Sunday Post Limited, [1958] EA 424, Sir Kenneth O'Connor P.** said:-

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."***

21. Now, turning onto the issue of liability, although the Appellants did not address this issue in their submissions, I will proceed to address it nonetheless. In the case of **Treadsetter Tyres Ltd –vs- John Wekesa Wepukhulu [2010]eKLR,** Ibrahim J allowed an Appeal and quoted **Charles Worth & Percy On Negligence, 9Th Edition at P. 387** on the question of proof, and burden thereof where it is stated:-

> ***"In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence maybe reasonably inferior and (2) whether, assuming it may be reasonably inferred,***

negligence is infact inferred."

22. The Respondent was clear in her evidence that she was at the stage awaiting to board a matatu when a vehicle which was being driven by the appellant or his authorized agent hit her from behind. This evidence was not controverted by any evidence to the contrary.

23. In her pleadings, the Respondent also relied on the doctrine of *res-ipsa loquitor*. It is common knowledge that vehicles are driven on the main road and not off the road. The fact that the subject vehicle hit the Respondent while at the bus stage is sufficient evidence to corroborate PW2's evidence that the vehicle was being driven at a high speed and that consequently, its driver lost control causing the vehicle to veer off the road where it hit the Respondent. This is the only reasonable conclusion one can make from the material presented before the trial court considering that the Appellants did not claim and did not produce any evidence to rebut the said evidence.

24. It is noteworthy that proof in civil cases is based on a balance of probabilities and not beyond reasonable doubt as in criminal cases. In the present case, I am persuaded, and agree with the trial court's finding that the Respondent established, on a balance of probabilities that the accident in which she was injured was caused by the Appellants' negligence. Since the Appellants did not adduce any evidence to rebut this claim, I concur with the learned trial magistrate's finding on liability against the Appellants at 100%.

25. On quantum, the appellant challenged the award of Kshs.500,00.00 arrived at by the learned trial magistrate for general damages as being excessive and is of the opinion that Kshs.250,000.00 would be fair compensation for the Respondent.

26. The legal position on this is that the award of a trial court ought only to be interfered with on appeal under the following circumstances as articulated in the renowned case of **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] –vs- Lubia & Another (No.2) [1985] eKLR;**

"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 whether that 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 damage."

27. In this case, the nature and extent of the Respondent's injuries is not disputed. It is clear from **Dr. S.K. Ndegwa's** medical report that the Respondent sustained head injuries involving a concussion, right scalp haematoma and contused bruises on the forehead; friction burns on the left upper arm and elbow; friction on the left hip and chest and several lacerations on the left knee and upper left leg. The discharge summary from Coast General Hospital also shows that the injuries were serious enough to justify admission in hospital for treatment for about 3 days.

28. After considering the proposals on quantum made by each party and the authorities cited in support of the different propositions, the learned trial magistrate in his discretion awarded the Respondent KShs.500,000.00. It is important to note that the learned trial Magistrate did not cite any authorities that guided his award. However, on re-evaluating the evidence on record before the trial court, I find that the learned trial magistrate made reference to the relevant evidence on record in awarding general damages.

29. I have read through the cited authorities relied upon by the Appellant and note that the injuries suffered by the victims therein were more severe in nature than in the current case. I am therefore not persuaded by the authorities cited by the appellant. It must be noted that one's injuries will never be fully comparable to other person's injuries. What a court is expected to consider is that as far as possible comparable" to the other person's injuries, and the after effects.

30. The Court of Appeal in the case of **Odinga Jacktone Ouma –vs- Moureen Achieng Odera [2016] eKLR** stated that

"Comparable injuries should attract comparable awards".

31. According to Dr. S.K Ndegwa's report, the Respondent healing is expected with 5% permanent disability due to chronic pains and multiple scars and slight mental confusion which can recur even after it resolves initially.

32. Further, in the case of **Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR**, the court stated as follows: -

"It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance …"

33. Taking all the relevant factors into account, I am not convinced that the award of KShs.500,000.00 was manifestly excessive or inordinately high as to give rise to an inference that it was based on a wrong estimate of the damage suffered. I cannot also say that in arriving at his decision, the learned trial magistrate considered irrelevant factors or applied any wrong legal principle. Since the award of special damages has not been contested on appeal, I will not make any findings that will interfere with it.

34. From the foregoing discussion, I find the appeal without merit and dismiss the same with costs to the Respondent.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Wairagu counsel for Appellant

M/S Ngugi counsel for Respondent

Court Assistant - Gitonga