



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 205 OF 2017**

**1. DOUGHLAS MWACHANYA**

**2. GULZA AHMED MOTORS LTD.....APPELLANTS**

**VERSUS**

**VICTORIA MUTIO MULINGE.....RESPONDENT**

**J U D G M E N T**

1. In this appeal the challenge is only on the quantum of damages awarded and assessed which the appellant terms as excessive and not having been due for award having not been pleaded and proved.

2. The Memorandum of Appeal sets out three grounds of appeal which I must admit and commend as apt and succinct rather than being windy and circuitous.

3. This being a fast appeal, the court proceeded by way of a rehearing and is duty-bound to re-appraise the entire evidence with a view to coming to own conclusions while keeping reminded that the task of assessment and award of damages is a discretionary jurisdiction<sup>[1]</sup> and known to be very difficult<sup>[2]</sup>. In re-examining the entire record as a way of rehearsing, the court is not bound to agree with the decision of the trial court even if the parties have not addressed it on a point<sup>[3]</sup>. In that regard the first aspect of this decision that is not explicitly taken by the appellant but falls under the question of whether or not the entire evidence and submissions were adequately and properly considered goes to the finding on liability.

4. In apportioning liability at 80:20% in favour of the Respondent the trial court pronounced itself in the following words:-

**“Though the defendants did not call any witness to controvert the evidence by plaintiff it was clear that the she contributed (plaintiff) to her misfortune especially that it was evident she was staggering and drunk. I find there was no reason for police officer would have given false information as to her drunkenness thought not the investigating officer. I find therefore she was 20% to blame (plaintiff) and against defendant 80% as no witness called to ascertain as to whether the driver of the motor vehicle swerved, braked or did anything to avoid the accident”.**

5. It is clear that the court blamed the Respondent for having been drunk and staggering on the road and thereby contributing to the accident. The only reference to the fact of drunkenness came from the police officer, PW 3, called, as it were, to produce the police abstract under Section 147 of the Evidence Act. To this court that officer's duty was to produce the document and had not been called as a witness. In his evidence in re-examination, the witness confirmed having not been an Investigating Officer and relied on the report in the police records. That part of evidence was essentially and wholly hearsay. It was not admissible and could not have been the basis of a finding on liability against the Respondent. The only person who witnessed the drunken status of the respondent was the driver and the appellant here. He had the chance to attend court and tell the court what he saw but opted not to. To the extent that the courts finding on liability was grounded upon inadmissible hearsay evidence the same cannot stand and is set aside.

6. On the grounds set out, having read the judgment of the trial court in line with the evidence led, I have found that there was error in the determination reached on appointment of liability and I leave it at that point.

**Award of damages for**

**loss of earning capacity**

7. In the plaint at trial the pleadings and prayers made no advertence to loss or diminution of earning capacity. In fact, nothing was said of the

respondent's earnings or engagement. Loss of earning capacity must, like all claims, be pleaded and proved. This is because the adversary party must be made aware of the claim against it as a way of fostering a fair hearing of the dispute. It is for this reason that a party is bound to say all in its pleadings and lead evidence to prove such allegations. In this matter there having been no pleading nor evidence on loss of earning capacity there was no basis, in fact no right and jurisdiction, for the court to award a remedy not sought by the respondent. When the court finds that the respondent was a watchman at a salary, I wonder where that was picked from. That ground succeeds and is thus upheld with the effect that the award of Kshs.1,920,000/= is therefore set aside in entirety.

### **Damages for pains & suffering**

8. As said before, the duty and task to assess damages falls to the discretionary power of the trial court and it is a serious thing for an appellate court to interfere in discretionary decisions. In this matter the trial court did take into account the injuries suffered and in pursuit of attaining the principle of law that comparable injuries ought to attract comparable damages, considered the decisions cited by the parties to the court. In arriving at the sum of Kshs.1,300,000/= the court noted that decision relied upon by the Appellant was upon injuries what were less severe. The fact that time had lapsed since the decisions were made and the incidence of inflation were all taken into account.

9. This court can only interfere with a decision or assessment of damages if it is demonstrated that the trial court took into consideration an irrelevant factor; failed to take into account a relevant factor or that the award is wholly erroneous and untenable. In this matter, I find no demonstrated error in assessment of the sum awarded. I find that there is no justification or reasons to interfere therewith.

10. In the end, this appeal succeeds to the extent that the finding on liability is set aside and in its place substituted on finding that the appellant was wholly to blame. On damages awarded, the damages under the head loss of earning capacity is set aside in whole while the award of damages for pains and suffering is upheld.

11. The appellant having succeeded only partly, I do award to the appellant ½ of the costs of this appeal.

**Dated and delivered at Mombasa this 15th day of January 2020.**

**P.J.O. OTIENO**

**JUDGE**

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[1] Gitobu Imanyara vs AG [2016] eKLR

[2] Sophinaf Company Ltd vs James G. Ndolo [2006] eKLR

[3] Mwangi vs Wambugu [1984] KLR 453