



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL NO. 51 OF 2019**

**ELIZABETH LOKO MUTISYA.....APPELLANT**

**VERSUS**

**DAVID NDICHU.....1<sup>ST</sup> RESPONDENT**

**MIRIAM WANGUI MAINA.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement and decree of the Honorable C. K. Kisiangani RM in Machakos CMCC 359 of 2018 delivered on 20.3.2019)*

**BETWEEN**

**ELIZABETH LOKO MUTISYA.....PLAINTIFF**

**VERSUS**

**DAVID NDICHU.....1<sup>ST</sup> DEFENDANT**

**MIRIAM WANGUI MAINA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. According to a plaint filed in the subordinate court on 7<sup>th</sup> June, 2018, the appellant was a passenger aboard Motorcycle KMCY 404T when while she was travelling on 29.4.2017 along Mutituni-Mua Murram Road the vehicle KHMA 166H registered in the names of the 1<sup>st</sup> respondent and beneficially owned and or driven by the 2<sup>nd</sup> respondent, was involved in an accident that it reversed suddenly and collided with Motorcycle KMCY 404T from behind and caused her severe bodily injuries as per paragraph 6 of the plaint. The appellant pleaded negligence as particularized in Paragraph 5 of the Plaint and special damages of Kshs 54,010/-. The appellant sought special and general damages for pain and suffering and loss of amenities as well as interest and costs of the suit. The appellant pleaded res ipsa loquitor, vicarious liability and sought to rely on the Highway Code.

2. In their joint defence, the respondents denied liability; denied the accident; denied ownership of the suit vehicle and denied negligence that the appellant was a pillion passenger as well as the applicability of res ipsa loquitor. They denied the injuries and loss and future medical expenses and pleaded in the alternative that the accident was caused by the negligence of the driver of the rider of the motorcycle KMCY 404T as particularized in paragraph 4 of the defence. They pleaded in the alternative that the accident was aggravated by the negligence of the appellant as particularized in paragraph 5 of the defence and prayed that the suit be dismissed with costs.

3. The hearing commenced on 7.11.2018 with **Dr. Mutunga** of Machakos Level 5 Hospital testifying as **Pw1**. It was his testimony that he examined the appellant on 18.7.2018 who was alleged to have been involved in a road accident on 29.4.2017. He told the court that he relied on the P3 form, discharge summary and X-ray films from Kenyatta Hospital. He testified that the appellant sustained a fracture of the right hand, fracture on the pelvis bone and that she was treated at Machakos Level 5 Hospital for 10 days then taken to Kenyatta National Hospital for 2 months. He testified that the appellant was put on physiotherapy and rehabilitation to improve muscle flow due to bowel incontinence. It was his testimony that the appellant could not control her urine on examination and was unable to walk without support and she complained of pain around her pelvis. He testified that he opined that the appellant suffered severed soft and skeletal injuries, assessed the degree of injury as harm and assessed that the appellant had suffered 20% incapacity. He produced the P3 form that he signed on 25.1.2018 and which was stamped by the hospital.

4. **Pw2 Pc Robert Tomno** of Machakos Police Station. He testified that on 29.4.2017 a report was received of a road accident involving a Shovel Registration No. KHMA 166 SDMG make operated by Miriam Wangui Maina and a motorcycle KMCY 404T Skygo that was being

ridden by Vincent Makau. He testified that the motorcycle was heading from Mutituni towards Mua and at the scene, the Shovel operator started reversing and hit the motorcycle and the appellant was injured and was rushed to Machakos General Hospital then later Kenyatta National Hospital. He testified that an abstract was issued. He told the court that Pc Muriuki visited the scene but was however transferred to Masii Police station. He testified that after investigation, the operator of the shovel was found to be at fault. On cross examination, he testified that he was not the investigating officer.

5. **Pw3** was the **appellant** who testified that she was in the subject motorcycle that was behind a tractor that was going uphill. She testified that the tractor reversed and hit the subject motorcycle as a result she sustained a fracture of her right arm, pelvic bone and both legs. She told the court that she was admitted to Machakos level 5 Hospital for a week and on 9.5.2018 she was admitted for 2 months. She told the court that she did not recover, she felt pain in her left and right leg; she could not bend; her right arm was unable to work. She tendered in court the police abstract, P3 form and treatment notes. She orally prayed that the special damages be amended to read Kshs 176,150/- which request was allowed. She testified that the receipts for treatment totaled Kshs 176,150/-. On cross examination, she testified that her name was not on the receipts and that her husband was paying for the taxi. She told the court that the money did not come from her pocket. On reexamination, she testified that she could not hold urine or lift heavy things.

6. The appellant closed her case and so did the respondent who called no witnesses.

7. After hearing the matter, the learned magistrate found the respondents 100% liable and awarded General Damages of Kshs 800,000/- and special damages of Kshs 176,150/- together with costs and interests which decision has precipitated this appeal.

8. This appeal is against the finding of the trial court on quantum that the appellant found as being manifestly low. The contents of the appellant's appeal are set out in the memorandum of appeal filed on 15.4.2019. Counsel prayed that the judgement of the trial court on general damages be set aside; that the finding on quantum be substituted with a commensurate one.

9. Counsel for the appellant, submitted that the amount of Kshs 2,500,000/- ought to have been awarded as general damages. Reliance was placed on the case of **Edwin Otieno Japaso v Easy Coach Bus Co Ltd (2016) eKLR**

10. Counsel for the Respondent agreed with the findings of the trial court and placed reliance on the case of **George Njenga & Another v Daniel Wachira Mwangi (2017) eKLR, Lilian Wanja v Cyprian Mugendi Igonga & 2 Others (2016) eKLR** where amounts of Kshs 800,000/- and 500,000/- were awarded respectively.

11. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

12. Having considered the pleadings, the evidence of the trial court and the respective submissions of counsel, the singular issue for determination is whether the court can interfere with the finding of the trial court on damages.

13. Has there been a case made for disturbing the award of the trial court? The law is now well settled that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. In **Phillips v The London South Western Point Way Company (1879 -80) 5. Q.B.D. 78**, James L. J. said on page 85:-

*“The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which generally speaking is considered to be within their exclusive province, that is to say the amount of damages. We agree that Judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less. Still the verdicts of juries as to the amount of damages are subject, and must for the sake of justice, be subject to the supervision of a Court of first instance and if necessary of a Court of Appeal in this way that is to say, if in the judgment of the Court the damages are unreasonably large or unreasonably small then the Court is bound to send the matter for consideration by another jury.”*

14. In **Owen vs Sykes (1936) I.KB.192** the Court of Appeal of England felt that although if they had tried the case in the first instance they would have probably awarded a smaller sum as damages yet they would not review the finding of the trial Judge as to amount of damages as they were not satisfied that the trial Judge acted upon a wrong principle of law, or that amount awarded as damages was so high as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled. The Court of Appeal followed the case of- **Flint vs Lovell (1935) I.KB.354**

15. In this regard the particulars of injuries as per the plaint were as follows

**(a) Fracture right radio ulna**

**(b) Unstable pelvic fracture (open book pelvic fracture) with injury to nerves**

16. The evidence on record on the injuries suffered by Pw1 as per the undisputed medical reports on record indicate that the appellant suffered fracture of radio ulna and an unstable pelvic fracture in respect of a report dated 15.1.2018 and signed on 25.1.2018 from Machakos Level 5 Hospital that seems to agree with the discharge summary dated 11.7.2017 by Prof Alinga and the discharge summary dated 9.5.2017 by Dr Eliud Aluvala Seme. There is no indication of 20% permanent disability that was indicated in the undated report by Dr Mutunga in respect of an examination carried out on 18.7.2018. I note that the discharge summary from Kenyatta National Hospital advised the appellant to go to an orthopedic clinic on 4.8.2017 and I am curious whether she actually went there and is concealing the report or she did not go but opted to run to Dr Mutunga whose report is different from the other three previous reports. Therefore I do not agree that there was any

disability that the appellant suffered.

17. With regard to general damages for pain and suffering, Kshs 800,000/- was awarded and no reason was given; there was no indication of what factors were taken into consideration. I would agree with the finding in **George Njenga & Another v Daniel Wachira Mwangi (2017) eKLR** and have observed that there was indication of permanent disability that was not observed by the other doctors, and not being convinced that there was disability at 20% opine that the amount awarded was rather reasonable. In **SBI International Holdings (AG) Kenya v William Ambuga Ongeri [2018] eKLR** the court upheld an award of Kshs 800,000/- that was awarded by the trial court where permanent disability was assessed at 40% to 45%. Therefore the amount of 800,000/- is reasonable in my considered view. The aspect of disability not having been properly established by the appellant then the assessment by the lower court must be upheld as the award on general damages agrees with the cited authorities presented herein. The assessment by the trial court was neither excessive nor inordinately low as to represent an erroneous estimate of the overall damages. I have no reason to interfere with it.

18. On the issue of special damages, the same was unchallenged. However I note that the amount pleaded was Kshs 54,010/- and amended to **Kshs 176,150/-**. As the amount was not contested on appeal the same is sustained.

19. The upshot of the foregoing is that the appeal lacks merit and is dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at **Machakos** this **5<sup>th</sup>** day of **May, 2020**.

**D. K. Kemei**

**Judge**