REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 44 OF 2018

PERIS WANJIRU KAHIGA.....APPELLANT

VERSUS

MOSES KABATA MWANGI.....RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Hon. Ireri D. M. Resident Magistrate delivered on the 13/07/2018 in Othaya CMCC No.13 of 2017; the appellant herein instituted legal proceedings against the respondent for damages arising out of a road traffic accident that occurred on 21st June, 2015 along Nyeri - Othaya Road near Giakanja area; the appellant stated that she was travelling as a fare paying passenger in motor vehicle registration number KAU 703E when a collision occurred with motor vehicle registration number KBJ 559F; as a result of the said collision, the appellant sustained injuries and blamed the respondent for the accident; and therefore sought compensation from the respondent.

2. After a full hearing, the trial court found that the appellant had failed to discharge her burden of proof and proceeded to dismiss the suit with no order as to costs.

3. The appellant being dissatisfied with the trial court's decision filed this appeal seeking to have it set aside; and listed eleven (11) grounds of appeal summarized as follows;

i. The trial magistrate erred in dismissing the suit in its entirety;

ii. The trial court erred in totally disregarding the testimony of the plaintiff and her witnesses on negligence; failed to appreciate that there was a third motor vehicle that the defendants' driver was trying to overtake occasioning the collision; and failed to consider the plaintiffs' submissions and authorities on liability and quantum of damages making the award inordinately low;

iii. The trial court erred in relying on the evidence of **PW4** who did not witness the accident;

iv. The trial court failed to acknowledge that the defendant did not call any witnesses to discredit the plaintiff's evidence;

v. The trial court disregarded the test of balance of probabilities applied in civil cases and instead substituted it to that of beyond reasonable doubt thus occasioning a miscarriage of justice;

APPELLANTS CASE

4. According to the appellant, she was travelling in motor vehicle registration number KAU 703E on the 21st day of June 2015 when the driver of the said motor vehicle negligently drove the same causing it to encroach into the lawful lane of motor vehicle registration number KBJ 559F; and it is the appellant's contention that the accident occurred due to the respondent's driver overtaking dangerously and driving at an excessive speed.

5. At the trial of the matter, the appellant called three (3) witnesses to give evidence on liability that is herself as **PW2**, her husband, Jesse KihenjoKiambati (**PW3)** and a police officer by the name MwanamisiSheria (**PW4)**.

6. The appellant adopted her witness statement filed with the plaint; her evidence was that together with her husband and child they were seated in the driver's cabin of motor vehicle registration number KAU 703E; it is noted that there was a contradiction as to whether the appellant was sitting in the middle seat or by the window; but this is not particularly relevant in the circumstances, what should be of importance is that she was sitting in the driver's cabin; the appellant testified that the respondent's driver was driving too fast in the

circumstances and was in the process of overtaking a motor vehicle that was ahead of them when the collision occurred; she statedin her statement that the collision occurred in the middle of the road;

7. MwanamisiSheria **(PW4)** a police officer from Nyeri Traffic Unit blamed the accident on motor vehicle registration number KBJ 559F; she produced a police abstract that confirmed this; it was her evidence that the driver of motor vehicle registration number KBJ 559F left his lane and encroached on that of motor vehicle registration number KAU 703E thereby causing the accident; this was why the police blamed the driver of motor vehicle registration number KBJ 559F for the occurrence of the accident.

RESPONDENTS CASE

8. The respondent did not call any witnesses at the trial in the lower court; in response to the appeal he submitted that the trial court's finding was correct and should not be disturbed as the trial court did not misdirect itself in finding that the appellant never discharged her burden of proof.

ISSUES FOR DETERMINATION

9. The parties had been directed to canvass the appeal by filing and exchanging written submissions; upon reading the respective rival written submissions this court has framed the following issues for determination;

i. Whether the trial court erred in dismissing the appellants suit in its entirety;

ii. Whether the award on quantum of damages was inordinately low in light of the injuries sustained by the appellant;

ANALYSIS

10. This being a first appeal the duty of this court is to re-evaluate the evidence on record, analyze it and come up with its own findings and conclusion, bearing in mind that it didn't observe the demeanor of the witnesses during trial; **Hancox,** J.A. stated in the case of **MWANASONIK vs KENYA US SERVICES LTD. (Mombasa) Civil Appeal No. 35 of 1985 (unreported).**

> **"Although this Court of Appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary."**

11. The Court of Appeal also held that:

> **"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion." (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).**

Whether the trial court erred in dismissing the appellants suit in its entirety;

12. From the evidence on record and the parties' submissions in the matter, it is not disputed that a collision occurred between motor vehicles registration number KAU 703E and KBJ 559F; the bane of contention is who was to blame.

13. The appellant submitted that the trial court did not take into account the evidence of the eye witness that is **PW3** and **PW4** while making its finding; it is the appellant's submission that the evidence of **PW4** should be disregarded as the same was not corroborated.

14. The respondent has submitted that the trial court's finding was correct and should not be disturbed; it is his submission that the trial Magistrate did not misdirect himself and that the appellant never discharged her burden of proof.

15. It is clear that the evidence of **PW2** and **PW3** contradicts that of **PW4**; and the court record reflects that the respondent did not give any evidence at trial; the trial magistrate at the conclusion of the trial while making a finding on liability remarked on the same as follows,

> **"With the above unresolved contradicting evidence between PW3 and PW4, this Court is at a loss as to whether the matatu driver was to blame for the accident in that while the plaintiff blames the matatu driver, PW4 blames motor vehicle registration number KBJ 559F. At the close of the plaintiff's case, this Court could not tell who between the two witnesses was telling the truth as to who was to blame for the accident and I say so well aware that the driver of the matatu did not testify in this case and give his side of the story…."**

16. After making the foregoing remarks, the trial magistrate went on to find that the appellant had not discharged her burden of proof and therefore dismissed the suit; with respect to the trial magistrate this courts considered view is that he acted on wrong principles in arriving at this conclusion.

17. In finding that there was indeed a collision and that it was not clear which driver was to blame due to the contradictory evidence of the material witnesses, the trial court ought to have then found both drivers equally to blame.

18. In the Court of Appeal case of **Hussein Omar Farah v Lento Agencies** [2006] eKLR, the Court held as follows:-

"In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of BARCLAY – STEWARD LIMITED & ANOTHER VS. WAIYAKI [1982-88] 1 KAR 1118, this Court said:-

> **"The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."**

19. The Court stated further that:-

> **"The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki and Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame."**

20. In the case of***BAKER V MARKET HARBOROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LTD [1953] 1 WLR 1472 at 1476, Denning L.J. (as he then was) observed inter alia as follows:-***

> **"Everyday, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them…….. "**

21. And in the case of***WELCH V STANDARD BANK LTD [1970] EA 115 at 117 and SIMON V CARLO [1970] EA 285*** it was held that;

> **"It cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame……..."**

22. This court is satisfied that the trial court acted on wrong principles in dismissing the appellants suit; and finds that there are good reasons to interfere with trial court's decision on liability; this court finds that the drivers of both motor vehicles were equally to blame for the accident;

23. This ground of appeal is found to have merit and it is hereby allowed;

Whether the award on quantum of damages was inordinately low in light of the injuries sustained by the appellant;

24. This court is cognizant of the principle that for this appellate court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in various decisions; in the case of **Butt vs Khan (1977) 1KAR** Law JA statedthat:-

> **"An appellate court will not disturb an award for damages unless it is 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 arrived at a figure which was either inordinately high or low."**

25. Similarly in the case of **Kenya Breweries Ltd** [1991] eKLR it was held that,

> **"….It is now well established that this Court can only interfere with a trial judge's assessment of damages where is it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred….."**

26. Upon perusal of the Plaint this court notes that the injuries suffered by the appellant are pleaded therein as follows:-

i. Fracture of the left femur;

ii. Degloving injuries of the leg

iii. Dislocation of the left hip joint evidence by inability to walk and medial rotation of the leg;

iv. Trauma to left leg as evidence by swelling, tenderness, shortening and inability to walk;

v. Trauma to the chest as evidenced by generalized tenderness;

vi. Trauma to the left shoulder joint;

vii. Blood loss

27. These injuries were supported by the Medical Report of Dr. A. O. Wandugu – **PW1**; the Doctor testified that as a result of the said injuries, the appellant's left leg was shortened and that she had suffered permanent incapacity of 50%; the Doctor also testified that the appellant would require future medical expenses of kshs.250,000/= to remove the metal implants.

28. The respondent produced a Medical Report of Dr. Leah Wainaina; this Report confirms the injuries as pleaded by the appellant save for the hip dislocation; it also confirms that the appellant walks with a limp and will require to remove the metal implants at a cost of Kshs.60,000/=; the Report establishes that the appellant suffered permanent incapacity of 6%-7% and was produced at trial by Dr. Kahuthu(**DW1)**

29. The appellant gave evidence that after the accident she was admitted in hospital for over two months; she testified that she suffered a fracture on her left thigh and knee and a wound that was grafted and stated that she had implants that need to be removed; the appellant also indicated that even after being released from hospital she underwent physiotherapy and at the time of hearing, she testified that she had not healed from her injuries and that as a result thereof she was unable to farm or work in a salon as she used to.

30. At the conclusion of the hearing in the subordinate court, the parties filed their submissions and the trial court later rendered its judgment and dismissed the suit but indicated that had the appellant been successful, the trial court would have made an award for Kshs.1,000,000/= as general damages for pain and suffering, Kshs.100,000/= as future medical expenses; special damages would have been awarded at Kshs.334,652/= as this was the amount proved.

31. On appeal the appellant in her submissions on quantum submitted that the court do award Kshs.4,000,000/= as damages and relied on the following authorities:-**Fred Ogada Azere vs Ezekiel Kiarie Nganga (2019) eKLR** where the appellant suffered a commuted fracture of the right acetabulum, posterior dislocation of the right hip joint and other soft tissue injuries; the appellate court reversed the trial court's decision and awarded the appellant Kshs.1,350,000/= as general damages; **Peace Kemuma Nyang'era v Michael Thuo & another [2014] eKLR**where the appellant suffered a fracture of the sacrum bone (transformational fracture), fracture of the right superior pubic ramus of the public bone, fracture of the right ischium/inferior pubic ramus of the pelvic bone, Haematoma on both thighs and Lumbo-sacral haematoma. The Court awarded Kshs.2,500,000/= as damages; **Michael MainaGitonga V Serah Njuguna [2012] eKLR** therein the plaintiff suffered multiple fractures of the pelvis, dislocation of the right hip with displaced fracture of the right acetabulum, comminuted fractures of the right tibia and fibula on the proximal end with fracture of the tibia plateau, soft tissue injuries of the chest. The Court awarded Kshs.1,500,000/= as general damages.

32. With regard to future medical expenses, the appellant prayed for Kshs.150,000/=.

33. The respondent on the other hand has prayed that Kshs.500,000/= be awarded as general damages; to supportthis prayer, Counsel for the respondent relied on the following authorities:-**Paul N. Njoroge v Abdul Sabuni Sabonyo [2015] eKLR**therein the appellant sufferedmultiple comminuted fracture of the right femur causing severance of major vessels to the right leg and shortening of leg by 5 cm, displaced fracture of the left shoulder blade, Swelling and stiffened knee; the Court awarded Kshs.500,000/= as damages; **Michael Adeka Khaemba& 2 others v Rassangyllo Muli Kumuyu [2018] eKLR**where the **r**espondent had suffered a fracture of the femur and the Court awarded Kshs.200,000/=; **Thomas Ombima v Samson AnindoMwenje [2018] eKLR**therein the plaintiffsuffered comminuted fracture of middle 1/3rd of left femur, back injury, dislocation left ankle, chest injuries, soft tissue injuries to the elbow joint and left knee joint; the Court made an award of Kshs.400,000/=; **Francis MainaKahura v NahashonWanjauMuriithi [2015] eKLR** where the respondent suffered a segmental fracture of the mid-shaft right femur and a cut wound on the right knee. General damages was awarded at Kshs.500,000/=; **Elisha Akello Raga v Shajan and Holdings Limited &anor [2016] Eklr** the plaintiff suffered a **c**ut wound on the right orbital area, blunt trauma to the chest, contusion on the right hip joint leading to dislocation of the right hip, bruises on the right knee and a fracture of the femur; the Court upheld the trial Court's award of Kshs.450,000/=.

34. From the evidence on record, this court has noted that the appellant suffered the injuries as pleaded save for the dislocation of the left hip; this injury is only mentioned in the medical report of Dr. Wandugu; there is no other mention of the said injury in either the Case Summary from Central Provincial General Hospital '**PExh.3'** or from Outspan Hospital '**PExh.4'**; there is also no mention of it in the P3 produced as **'PExh.5'**.

35. As a result of her injuries the appellant was initially admitted at Central Provincial General Hospital from 21/06/2015 – 17/08/2015 and thereafter at the Outspan Hospital from 17/08/2015 - 24/09/2015; from her evidence the appellant had suffered permanent incapacity as a result of her injuries; the degree however has been placed at 6%-7% by the respondent's doctor and 50% by the appellant's; the disparity between these two figures is great leaving this Court at a loss as to what the actual degree of incapacity is; however, it is apparent that the appellant did suffer grievous harm taking into account the length of her stay in hospital.

36. The cases cited by the appellant refer to injuries far more grave than those suffered by the appellant herein; the cases cited by the respondent have the opposite effect and make reference to injuries that are not comparable to those suffered by the appellant herein.

37. Taking into account the nature of the injuries suffered by the appellant and the authorities cited herein this court is satisfied with the award as put forward by the trial court isneither inordinately high or inordinately low.

38. With regard to future medical expenses, the same was pleaded at Kshs.250,000/= by the appellant; and this was supported by the medical report of Dr. Wandugu; whereas Dr. Wainaina on the other hand put forward a sum of Kshs.60,000/=; and the trial Court made an award of Kshs.100,000/=; this court finds no reason to interfere with this intended award as the same is a mean average of the proposed figures;

39. This court reiterates the principles set out in the renowned case of **Butt vs Khan (supra)**; and finds that the trial court did not apply wrong principles of law when arriving at its decision and find no good reason to disturb the trial court'sintended award on quantum of damages; this court finds that the award is not inordinately low in light of the injuries sustained by the appellant;

40. This ground of appeal isfound lacking in merit and is disallowed;

FINDINGS AND DETERMINATION

41. For the forgoing reasons this court makes the following findings and determination;

i. The appeal is found to be partially successful;

ii. This court finds that the trial court erred in dismissing the plaintiff's suit; the trial court's decision dismissing the plaintiff/appellant's entiresuit is hereby set aside and substituted with a judgment on the following terms;

Liability – 50:50 in favour of the appellant;

General damages for pain and suffering - Kshs.1,000,000/=

Special damages – Khs.334,652/=

Future Medical Expenses – 100,000/=

iii. The appellant shall be entitled to costs in the lower court; on the costs of the Appeal the appellant shall have 50%.

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 14th day of May, 2020.

HON.A.MSHILA

JUDGE