



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL APPEAL NO. 159 OF 2011**

**PENINAH NDUNGE MUSINGILA.....APPELLANT**  
**-VERSUS-**

**THE TRUSTEES OF THE CATHOLIC DIOCESE OF MACHAKOS....1<sup>ST</sup> RESPONDENT**  
**MUTUA PATRICK.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal against the Judgment delivered by Hon. S. Mungai- Senior Principal Magistrate delivered at Machakos in CMCC No. 1194 of 2009 on 27.9.2011)**

**BETWEEN**

**PENINAH NDUNGE MUSINGILA.....PLAINTIFF**  
**-VERSUS-**

**THE TRUSTEES OF THE CATHOLIC DIOCESE OF MACHAKOS..... 1<sup>ST</sup> DEFENDANT**  
**MUTUA PATRICK.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The suit in the trial court arose out of a road traffic accident in which the appellant was a pedestrian along Machakos- Nairobi Road on 21.10.2008 when motor vehicle KBB 291D registered in names of the 2<sup>nd</sup> respondent and beneficially owned by the 1<sup>st</sup> respondent occasioned an accident in which the Appellant was injured and that the Appellant pleaded negligence and *res ipsa loquitor*. The appellant sought special damages and future medical expenses of Kshs 100,000/- as well as general damages for pain, suffering and loss of amenities in respect of injuries as particularized in Paragraph 6 of the plaint as amended on 12.8.2010.
2. The respondents in their joint defence denied negligence on their part and the particulars of loss and injuries. The respondents pleaded that the accident was as a result of the contributory negligence and or sole negligence of the appellant as particularized in paragraph 7 of their joint defence.
3. The appeal is on quantum and liability. The parties agreed to canvass the same via written submissions. It is only the appellant's submissions that are on record.
4. Learned counsel for the appellant submitted on four issues that were considered errors; that is on finding liability on the part of the appellant; shifting blame on the appellant; disregarding the appellant's evidence and not relying on the appellant's evidence on damages. It was submitted that there was evidence to the effect that the victim contributed to the accident and therefore it meant that both parties were to blame and not only one party. Reliance was placed on the case of **Teresia Sebastian Massawe (Suing as the Legal Administratrix of the estate of the late Silvia Sebastian Massawe v Solidarity Islamic (Kenya Office & another [2018] eKLR)**. Counsel submitted that the court ought to have found the Appellant 30% contributorily negligent.
5. Learned counsel submitted that the appellant testified that she sustained multiple facial lacerations, blunt injury right arm, closed fracture of the right humerus, blunt pelvic injury and lacerations of both knee regions and the amount proposed of Kshs 250,000/- was inordinately low as the appellant had proposed Kshs 600,000/-as general damages for pain and suffering. Counsel submitted that the trial court erred in failing to award the amount pleaded for future medical expenses.
6. The role of the Appellate court is now a matter of judicial notice that 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 so as to 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**.
7. In the case of **Lukenya Ranching and Farming Coop. Society Ltd -Vs- Kavoloto (1979) EA** the learned Judge recapped the grounds that the Appellate court will interfere with exercise of discretion by the trial court when assessing damages laid down by the court of appeal in **Kangu -Vs- Manyoka (1961 EA 705, 709, 713 and in Lukenya Ranching and Farming Coop. Society Ltd -Vs- Kavoloto (1979) EA** that if the trial court;
  - a) Took into account an irrelevant fact or,

b) *Left out of account a relevant fact or,*

c) *The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.*

8. The Appellant avers that the trial court ought to have found the respondent 70% contributorily negligent; that the Learned Magistrate's award was *extremely low* and that the finding of liability was erroneous.

9. The evidence on record is as follows; Pw1, the appellant testified that on the material day she was walking to the market along Nairobi Machakos Road when she was knocked by a vehicle KBB 291D near the Red Cross office. She testified that she was off the road on the right side and the vehicle that came from Nairobi was ascending so it left its lane and came to the side where she was and after she was knocked she lost consciousness and found herself at Machakos general Hospital where she was admitted for two weeks. She testified that her face and knee were cut, her right hand fractured and her hip joint injured. It was her testimony that she reported the matter to Machakos police station and was issued with a P3 form as well as given an abstract. She tendered in court the P3 form, the abstract, the treatment note, requests for x-ray, discharge summary and the medical report by Dr Kimuyu. She produced receipts for the treatment amounting to Kshs 5,631/- and told the court that she blamed the driver of the motor vehicle for leaving his lane. On cross examination, she testified that there was a bump near red-cross and she was hit before the vehicle reached the bump. She told the court that she was on the right side of the road and she was not crossing the road. She told the court that she had not made full recovery.

10. **Pw2. Dr. Kimuyu Judith** testified that she examined the appellant on 5.6.2009 who had a history of a road traffic accident on 21.10.2008 having been hit while walking off the road by a motor vehicle. She testified that she categorized the injury as maim and produced the P3 form that she filled. She told the court that she prepared a medical report on 2.6.2009 that contained the same details as the P3 form and in the report she opined that the appellant required a fractured arm surgery to correct the arm at a cost of Kshs 100,000/- in a private hospital. On cross examination, she testified that the appellant had medical notes confirming her history therefore her opinion was correct.

11. **Pw3. Cpl Eustace Macharia** testified that as per the police file 230/2008 the appellant was injured in an accident that occurred at 8.00 am on the material day along Machakos- Nairobi road. He testified that the matter was investigated and it was recommended that the file be closed because the victim contributed to the accident. It was his testimony that as per the police file, the appellant was hit while in the middle of the road and it appeared that the vehicle was at high speed. On cross examination, he testified that the file indicated that the motorist tried to swerve to the right to avoid knocking the pedestrian and she continued crossing the road and that the pedestrian could have prevented the accident by letting the motor vehicle pass first. He testified on reexamination, that the records do not show any brake marks on the road.

12. The appellant's case was closed after Pw3 testified and the 2<sup>nd</sup> respondent presented his testimony.

13. **DW1 was Father Patrick Mutua.** He testified that on 21.10.2008 he was driving the suit vehicle from Nairobi heading to Machakos and was keeping to his lane and driving at 60-70 kph. He testified that a woman was crossing the road and he braked and tried to swerve but the woman was in the middle of the road and he knocked her with the head lamp. He testified that the appellant fell on the right side of the road and his vehicle was damaged. He testified that he blamed the appellant for running across the road and that she should have waited for him to pass. He testified that there was no Zebra crossing at the scene. On cross examination, he testified that he saw the lady crossing and he hooted and braked but the lady persisted in crossing the road and as such he veered off the road to evade knocking her. The respondent closed their case.

14. The trial court found that the appellant contradicted her statement by first saying that she was knocked while off the road and later that the vehicle veered off the road to the opposite side of the road and knocked her. He found that Pw3 presented evidence and as such it was undisputed that she was knocked while in the middle of the road. He found that the appellant decided to carelessly cross the road suddenly when it was unsafe to do so and authored the accident hence failed to prove her claim against the respondent. He found that an award of Kshs 250,000/- would be reasonable for general damages and Kshs 2,200/- as special damages that were proved. He dismissed the suit and this decision prompted the instant appeal.

15. Upon analyzing the evidence adduced by both parties the issues for determination are:-

**1) Whether negligence has been proven against the respondents and if so what is the extent of liability,**

**2) Whether the case for disturbing the award herein has been made,**

**3) If yes, how much is the Respondent entitled to.**

16. Having considered the grounds of appeal, this court would therefore need to be satisfied that there was indeed negligence on the part of the Respondent so as to allow the same.

17. Negligence as a tort is the breach of legal duty to take care which results in damage undesired by the defendant to the plaintiff. Thus its ingredients are (a) A legal duty on the part of A towards B to exercise care in such conduct of as falls within the scope of the duty, (b) Breach of that duty (c) and consequential damage to B See **Winfield on Tort Eighth Edition Page 42. In Blyth v Birmingham Water Works 1856 11 EX P. Page 784** Negligence was defined as the omission to do something which a reasonable man guided upon the consideration which ordinarily regulates the conduct of human affairs would or do something which a prudent and reasonable man would not do. The

concept of duty, breach and damage as introduced in **Donoghue v Stevenson (1932) AC 562** is the neighbour principle according to which a duty is placed upon a person to take reasonable care to acts or omissions which he can reasonably foresee as likely to injure his neighbour and neighbour in this context means persons so closely and directly affected by the acts of another that the other ought reasonably to have them in contemplation as being so affected when doing or making the acts or omissions complained of see **Donoghue v Stevenson (Supra)**. 18. In the instant case, it is evident that the accident occurred during the day, on a main road. There is evidence of the point of impact being on the middle of the road and this court is able to envisage who exactly was on the wrong. There are certain things that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer See **Hoe v Ministry of Health (1954) AC Pages 66, 87- 88 Morris LJ**.

19. In this regard, the doctrine of *res ipsa loquitur* as pleaded by the appellant applies and therefore it entitles the appellant to rely as evidence of negligence upon the mere happening of the accident. He need not allege or prove any specific act or omission of the respondent. If the result which he does prove, of some unspecified act or omission makes it more probable than not that the damages was caused by the negligence of the defendant see **Clerks and Lindsell on Torts 12<sup>th</sup> Edition P 441**.

20. A pedestrian and a driver are expected to exercise a duty of care on the road. See **Teresia Sebastian Massawe (Suing as the Legal Administratrix of the estate of the late Silvia Sebastian Massawe v Solidarity Islamic (Kenya Office & another [2018] eKLR)**. I find that the evidence of the appellant points towards deliberate untruth on her part and I have considered the evidence of Pw3 and Dw1. A pedestrian does not just get hit on the middle of the road unless she opted to be jaywalking and disregard that there were other road users. The appellant has not given any explanation that the accident was caused by any reason other than negligence on her part. She shifted goal posts to make it appear that she was walking on the road reserve and the respondent opted to veer off the road and hit her; her version is far from the truth. The respondent on the other hand has had his testimony corroborated by the evidence of the investigating officer who was an independent witness and who has convinced me that, on a balance of probabilities the accident was not caused by negligence on his part. Consequently, unable to disturb the finding of the trial court.

21. The appellant has assailed the trial court for relying on the respondent's evidence. However I find that the appellant's grounds lack merit as the respondent's evidence appears truthful.

22. On the issue of quantum, the general principle upon which this court, as an appellate court, will interfere with an award of damages is if it is inordinately high or low as to represent an entirely erroneous estimate. It was stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** as follows;

“ An appellate court will not disturb an award of damages unless it is so inordinately must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either *inordinately high or low ...*”

23. The case of **Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** listed some principles to guide the court in awarding general damages, *viz*;

*a. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.*

*b. The award should be commensurate to the injuries suffered*

*c. Awards in decided cases are mere guides and each case should be treated on its facts and merit*

*d. Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration*

*e. Awards should not be inordinately high or too low*

24. Cases involving fracture and dislocation of jaws, that are more serious than the instant one attract amounts of Kshs 500,000 to 800,000/-. In **Isaac Waweru Mundia V Kiilu Kakie Ndeti T/A Wikwatyo Services [2012] eKLR** the plaintiff was awarded Kshs. 750,000/- for:

- a. Fracture of the base of the skull
- b. Comminuted complex mandibular fracture (right condylar neck fracture) with malocclusion and loss of left lower incisor tooth
- c. Right eye vertical dystopia and diplopia on left gaze with marked ptosis of the upper eyelids
- d. Resultant facial asymmetry caused by the above injuries
- e. Wounds and abrasions on the lip, chin, and both lower limbs
- f. Loss of blood, physical and psychological pain.

25. The above injuries being more severe than the instant ones and taking into account inflation, an award of Kshs 300,000/- would have been sufficient as general damages had the appellant proved her case.

26. The appellant assailed the trial court for failing to award the amounts needed for future medical expenses. I agree with the trial court and add that though the same was specifically pleaded the same was not proven. I am guided by the finding In **Picket -v- British Rail Engineering [1980] A.C. 136, 168**, where Lord Scarman said: *“But, when a judge is assessing damages for pecuniary loss, the principle of full compensation can properly be applied. Indeed, anything else would be inconsistent with the general rule. Though arithmetic precision is not always possible and though in estimating future pecuniary loss a judge must make certain assumptions based upon evidence) and certain judgment, he is seeking to estimate a financial compensation for financial loss. It makes sense in this context to speak of full compensation as being the object of the law.”* In this regard, the court finds no reason to disturb the findings of the trial court under that head.

27. In sum the appeal fails and is dismissed with costs. The finding of the trial court is upheld.

It is so ordered.

Dated and delivered at **Machakos** this 7<sup>th</sup> day of **May, 2020**.

**D. K. Kemei**

**Judge**