REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.196 OF 2018

TRAKANA MOMBASA LIMITED.....1ST APPELLANT

DEDA JAJI NZUYA.....2ND APPELLANT

-VERSUS-

GEORGE AMWAYI ISAYA.....RESPONDENT

(Being an Appeal from the Judgment/Decree of Hon. Wahome, Chief Magistrate, Molo delivered on 11th December 2018 in Molo CMCC No.127 of 2018

JUDGMENT

BACKGROUND

1. This appeal arises from suit filed in the lower court by the respondent seeking the following prayers: -

    a. General damages for loss of earnings and earning capacity

    b. Future medical expenses and operations

    c. Special damages

    d. Costs of the suit

    e. Interest on (a) and (c) above

2. The plaintiff availed five witnesses. After hearing, by judgment delivered on 11th December 2018, the trial magistrate apportioned liability at 10:90 in favour of the plaintiff. He assessed as follows: -

    a. General damages ……..... kshs 400,000.

    b. pain and suffering ……..kshs 8,000,000 less 10%7,200,000

    c. loss of earnings…….....kshs 3,600,000

    d. Future medical expenses……kshs 2,800,000

    e. Special damages……...kshs 138,360

3. The defendants/appellants being aggrieved by the said determination filed appeal against both liability and damages awarded on the following grounds: -

    i. That the learned trial magistrate erred in law and fact in finding the Appellant 90% liable when there was evidence to support such finding on liability for the subject accident thereby imposing upon the appellant liability beyond the scope or magnitude envisaged or tenable in law.

ii. That the learned magistrate erred in law and in fact inholding the Appellant liable on the basis, not of evidence adduced by the parties, but rather on the basis of surmise and assumptions supported by the proceedings of the court and therefore the holding on liability is untenable.

iii. That the learned magistrate erred in law and in fact by disregarding the normal course of human event in finding without any evidential basis that the Appellant's motor vehicle would just leave the road, knock the respondent and go back to the road without any demonstrated cause.

iv. That the learned magistrate erred in law and in fact in seeming to import and apply the strict liability on the driver of the subject motor vehicle, the 2nd appellant when there was no pleading of that cause of action and imposing what appears strict liability and unnecessary burden on the appellants.

v. That the learned magistrate erred in law and in fact in making awards on damages for pain and suffering and other awards that are manifestly high, exaggerated, uneconomical, punitive, ruinous, unsubstantiated and in violation of principles of making an award of damages in cases of the nature of the instant suit.

vi. That the learned magistrate erred in law and fact by making award of damages for loss of earning capacity on the presumption that the respondent had lost total capacity to earn when there was no such pleading and or conclusive and reliable medical evidence in that respect.

vii. That the learned magistrate erred in law and fact in making duplicate award under Law Reform Act and Fatal Accident Act without taking the awards against each other.

viii. That the learned trial magistrate erred in making unsubstantiated special damages which were never pleaded and or proved as required in the circumstances and in law.

4. Parties agreed to proceed by way of written submissions.

APPELLANT'S SUBMISSIONS

5. On finding on liability, the appellant submitted that it is the duty of a person who expects a court to believe in existence of a particular fact to lead evidence either orally or documented to prove the same as provided by **Section 109 of the Evidence Act CAP 80, Laws of Kenya.**

6. The appellant submitted that the principle has to be met irrespective as to whether the defendant has to call a witness to rebut the same; that the plaintiff ought to have assisted the court in reaching a verdict in their favour by clearly proving facts on a standard of probability. Appellant submitted that in tort system, negligence is said to consist of duty of care, secondly, a breach of that duty and thirdly, damages to the plaintiff caused by breach of that duty. And further the third element is divided into two elements, that damage must have been caused by defendant's conduct and secondly the defendant's conduct must have been the proximate cause of plaintiff's damage.

7. Appellant submitted that it was upon the plaintiff to convince the court that the accident could be avoided; that he failed to prove that the accident was as a result of 90% negligence of the driver of the subject motor vehicle.

8. Appellant submitted that the plaintiff testified that he was in company of two other when they were hit from behind by a vehicle killing the two others. Appellant submitted that it is not certain to assume that the plaintiff saw the recklessness of vehicle driver. Further that the vehicle landed in the middle of the road; that the court in its finding assumed that the court left the road and hit the plaintiff who said they were walking off the road and returned to the road.

9. Appellant submitted that the court erred in placing strict liability on the 2nd defendant; that it is evident that the plaintiff was knocked while on the road and the same was not a designated foot path. Appellant cited the case of **David Mwangi Kariuki & another v Stephen Mwangi & another [2017] eKLR** which reiterated court of appeal case of **Patrick Mutie Kamau & another v Judy Wambui Ndurumo** where the court stated as follows: -

> **"That pedestrians too owe a duty of care to other road users, and they ought to move with due care and follow the Highway Code. They should too take care of their own safety and not to run across the road when it is not safe to do so. If they do so, it is at their own peril and cannot blame an oncoming vehicle which is unable to avoid the accident due to short distance."**

10. The appellant further submitted that on cross examination, PW5, the investigating officer testified that the plaintiff was walking on the left side of the road but plaintiff ought to have been walking on the right side as required by traffic rules so as to notice an oncoming vehicle to enable him take action to avert an accident.

11. Further that it incumbent upon the plaintiff to prove that the driver was negligent as the mere occurrence of an accident does not follow that a particular person has driven dangerously without due care and attention and cited the case of **Simpson Vs Peat [1952]1ALL ER 443.**

12. Appellant submitted that the court's first task is to ascertain the duty of care and based on evidence adduced, ascertain if the breach of duty of care was solely and/or contributory by the defendant; that there must be causal link between someone's negligence and his injury.

13. Appellant further cited the case of **Statpack Industries Vs James Mbithi Munyao [2005] eKLR** . Where **Visram J.** stated as follows:-

"Coming now to the more important issue of "causation" it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

14. Appellant submitted that the plaintiff failed to establish that the appellant had duty of care towards him and that this particular accident was caused by the 2nd defendant/Appellant and the defendant should not have been found 90% liable without any evidence tendered by the plaintiff and cited the case of **Doughlas Odhiambo Apel & Another Vs Telkom Kenya LTD**

15. The appellant further submitted that the **Law Reform Act Cap 26 Section 4 (1)** provide as follows:

"Where any person suffers damage as a result of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just".

16. In respect to damages, the appellant submitted that an award of kshs.7,200,000 for pain and suffering is inordinately high and submitted that it is within the appellant's knowledge that the High Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate.

17. Appellant cited the case of **Nyambura Kigaragari vs Agripina Mary Aya** where **Justice Nyarangi** stated as follows:

"I would express firmly the opinion that awards in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily on the court. The largest application should be given to that approach. As large amounts are awarded they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increase costs for insurance cover (in the case of accidence cases) or increased fees."

18. Also in the case of **Joseph Musee Mua v Mbogo Mugi & 3 others** the court held as follows: -

"Courts have held that damages for injuries suffered must be within consistent limits. The damages should represent a fair compensation but should not be excessive…"

19. And in in **West (H) & Son Ltd v Shephered[1964]AC.326,345** as cited in **Odinga Jackton v Moureen Achieng Odera[2016]e KLR** observed that:

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

20. The appellant submitted that the trial magistrate erred in awarding kshs.10,440,000 in general damages as the award is inordinately high in the circumstances. Appellant cited several authorities on award of damages.

RESPONDENT'S SUBMISSIONS

21. The respondent filed written submissions dated 21st February 2020 on 24th February 2020. Respondent opposed the appeal and submitted that on liability, the appellant did not call any witness hence the respondent's evidence was uncontroverted and cited the case of **Trust Bank Limited v Paramount Bank Limited & 2 others, Nairobi Milimani HCCC No.1243 of 2001** where the court held as follows: -

"It is trite law that where a party fails to call evidence in support of its case, that part's pleadings remain mere statements of fact since in so doing, the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence by the plaintiff against them is uncontroverted and therefore unchallenged."

22. The appellant submitted that the respondent proved his case on a balance of probability and the trial court reached its decision based on merit; and did not err in holding the appellant 90% liable for the accident having not adduced evidence to rebut respondent's evidence the court should have held the appellant 100% liable; that there was no evidence to hold the respondent 50% liable as proposed by the appellant.

23. On submission that the court imposed strict liability on the appellant, the respondent submitted that at page 32 of the record of appeal is an amended plaint and at paragraph 5, the relationship between 1st and 2nd defendants has been described where 2nd defendant is described as the driver of the 1st defendant and no evidence was adduced to controvert that; and in paragraph 7 of the amended plaint, the plaintiff prayed that the defendant/1st appellant be held vicariously liable for the act/omission of the 2nd appellant and still no evidence was adduced to rebut the same by the appellant.

24. On quantum, the respondent stated the injuries sustained by the plaintiff/respondent as per **Doctor Kiamba's** evidence and cited authorities in support of awards granted under different headings stating that the awards are not inordinately high and that the trial magistrate reached the decision based on evidence adduced.

ANALYSIS AND DETERMINATION

25. This being the first appellate court, this court is obligated to re-evaluate evidence adduced before the trial court and arrive at an independent determination. This I do knowing that unlike the trail court, I never got the opportunity to take evidence first hand and observe the demeanour of witnesses. For these I will give due allowance.

26. This position was held in **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the court stated as follows:-

> **"…An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect…"**

27. I consider the following as issues for determination:

i. Whether the plaintiff prove duty of care on part of the defendant and whether the defendant was in breach of the duty of care.

ii. Whether damages awarded are inordinately high as to represent erroneous estimate

Whether the plaintiff prove duty of care on part of the defendant and Whether the defendant was in breach of the duty of care.

28. The lower record of appeal show that evidence was taken in Molo Cmcc No.125 of 2018 which gave rise to HCCA No.198 of 2018. In respect to liability, the appellant herein testified as PW4; he stated that on 1st January 2018, he was walking with two people being deceased persons in this appeal number 197 and 198 both of 2018. He testified that the three of them were hit from behind by a lorry injuring him and killing the two deceased persons. He said they were walking on the left side of the road. On cross examination, he blamed the driver of the vehicle for not hooting to alert them to escape.

29. PW5 a traffic police officer confirmed that the accident occurred on 1st January 2018 at 1.30 pm involving motor vehicle registration number KBV 561C/ZE2758 heading to Nakuru and that 3 pedestrians who were heading to Nakuru walking on the left side were hit. He confirmed that the pedestrian was the respondent herein and deceased persons in HCCA NO.197 and 198 of 2018. He confirmed that the respondent herein was seriously injured and the other 2 died.

30. There is no doubt that the driver/2nd defendant herein while driving on the road, owed a duty of care to pedestrians walking or other road users and is expected to hoot to alert the pedestrians of the oncoming vehicle or swerve.to avoid collision. The pedestrians at the same time had a duty to walk off the road to avoid collision with a vehicle or any other road user while walking on the road, close to the road or crossing the road.

31. PW4 said they were walking off the road and the vehicle did not hoot. PW5 a police officer said the place of impact was on the left side of the road. He said the driver of the vehicle escaped and has never returned to record statement. He never clarified whether the pedestrians were walking on the tarmac or off the tarmac. He only said they were walking on the left side of the road.

32. The fact that the 3 pedestrians were knocked from behind while walking places higher responsibility on the driver who should have been in a position to see them; if he was driving carefully, he should have been able to control the vehicle to avoid the accident or reduce impact of the accident. The allegation that he did not hoot to alert the pedestrians also to do their part by moving away from the vehicle was not controverted. I agree with the trial magistrate that a larger blame lie on the part of the driver; however, on the other hand, I find contribution of 10% on the lower side. I am inclined to apportion liability of 20% on part of the appellant herein and the appellant who died in the other 2 files 197 and 198 both of 2018.

Whether damages awarded are inordinately high as to represent erroneous estimate.

33. In respect to damages, **Dr Wellington Kiamba** who examined the respondent testified that the respondent had severe injuries. On examining the plaintiff on 8th March 2018, he found the following injuries

a) Fracture of the pelvis wings on the right side,

b) Fracture of the left tibia,

c) Injury to the urethra and bladder,

d) soft tissue injuries on the chest,

e) abrasion on the scalp, elbows and hands.

34. He said as a result of injury to urethra and bladder a catheter was put; that he could not urinate normally and could not walk; he said the x-ray confirmed the injuries. He said he had developed narrowing of urethra and the urethra was put on the lower part. He assessed the cost of removing the plate at kshs.100,000. He said the respondent required physiotherapy.

35. The doctor testified that he examined the respondent again on 10th August 2018 and found that he had not recovered and he still had the catheter. His knees were stiff and urination was very painful; that the right knee joint could not move, right knee and ankle joint were swollen and painful. He added that the left lower leg had a very prominent scar behind the knee. He classified the degree of injury as grievous harm. He added that the respondent had developed a very severe closing of the urethra as per the radiological report, he opined that he had developed complications in the knee joint and the use of the right knee is almost lost. That the function of left lower leg was reduced to the extent that he could not walk even with crutches.

36. The doctor testified that the respondent would spend kshs.400,000 to correct the urethra and he will never resume duty as security officer. On cross examination, he said the respondent cannot work as his knees cannot move and due to urethra and bladder injuries.

37. I note from the judgment that under pain and suffering, the trial court compared plaintiff's injuries with injuries in **Nakuru HCCC No.78 of 2016 Brenda Nyaboke Michira Vs German International Co-operative GIZ** where the plaintiff was awarded kshs.8,000,000. The same authority was cited by the respondent in submissions filed in this appeal. I have perused the authority and compared the injuries suffered. I note that in the said case the injuries were more severe compared to the respondent's. Permanent disability was assessed at 100% while in this case permanent disability was assessed at 70%. The plaintiff's condition in the cited case is a complete paraplegia, with complete paralysis on her lower limbs with loss of movement; the patient was to depend on a nurse and physiotherapy for the rest of her life, including medication. The plaintiff also required electric chair costing kshs.300,000 which would require change every 10 years.

38. In the instant I note that the doctor stated that movement of joints cannot be executed and has restricted movement on the right knee ankle. There is no mention of restriction of movement on the other knee joint or ankle joint.

39. The award in the cited authority under pain and suffering was kshs.8,000,000. Having noted that the injuries were more serious in that case, the award of the same amount in this case was inordinately high and will reduce the award under the head of pain and suffering to kshs.7,000,000.

40. I do not see reason to interfere with awards under the other headings.

41. From the foregoing appeal on liability and award under pain and suffering succeed.

42. **FINAL ORDERS**

1. **Liability apportioned at 20:80 in favour of the plaintiff.**
2. **Damages reduced by 1,000,000 under the head of pain and suffering.**
3. **Award in other headings to remain.**
4. **Total award to be subjected to 20% contribution.**
5. **Each party to bear own costs.**

Judgment dated, signed and delivered via zoom at Nakuru

This 7th day of May, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Mr. Kisila Counsel for Appellants

Oganda holding brief for Gekonga Counsel for Respondent