REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 133 OF 2014

BEN MWITA MATINDE.....APPELLANT

-VERSUS-

SALINA KOSGEY.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. T.M. Olando, Resident Magistrate, delivered on 22 October 2014 in Eldoret CMCC No. 417 of 2012)

JUDGMENT

[1] The appellant, **Ben Mwita Matinde**, sued the respondent, **Salina Kosgey** in **Eldoret Chief Magistrate's Civil Case No. 417 of 2012** for general damages, costs and interest, contending that on or about the **1st January 2012** he was knocked down and injured by the respondent's **Motor Vehicle Registration No. KBA 972C.** It was the assertion of the appellant that, at the material time, the respondent was the owner and/or driver of the subject motor vehicle and that it was on account of her negligence, or the negligence of her driver/servant for which she was vicariously liable, that the accident happened.

[2] In her Defence dated **2 August 2012**, the respondent conceded that an accident occurred on **1 January 2012** involving her **Motor Vehicle Registration No. KBA 972C** and the appellant as alleged, but denied that the same was as a result of negligence on her part or on the part of her driver as alleged. To the contrary, the respondent blamed the appellant for the occurrence, in trying to cross the road at a junction and when it was unsafe so to do. She also averred that the appellant was negligent for failing to notice the presence of her motor vehicle and for failing to adhere to the Highway Code. She therefore denied that the appellant was entitled to any damages in tort and prayed for the dismissal of his suit.

[3] Upon hearing the parties and their witnesses, the trial court fixed liability at 50:50 and proceeded to assess the general damages due to the appellant in the sum of **Kshs. 250,000/=.** Being aggrieved by that decision, the appellant filed the instant appeal, raising the following three grounds:

> **[a]** That the learned trial magistrate erred in law and in fact in awarding the sum of **Kshs. 250,000/=** as general damages.
>
> **[b]** That the learned trial magistrate erred in law and in fact in making a finding on liability at 50:50%.
>
> **[c]** That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions.

[4] Consequently, the appellant prayed that the order on liability and quantum be set aside, and that the award of general damages be enhanced. He also prayed for the costs of the appeal as well as any other or further relief that the Court may deem fit and just to grant. The respondent was initially represented herein by the firm of **M/s Lilan Mwetich and Co. Advocates.** The said firm however sought leave to cease acting for the respondent in this matter, vide their application dated **30 March 2017**. That application was allowed on **17 July 2017** and leave granted as prayed. Thus, the record shows that the respondent has been acting in person since.

[5] The appeal was canvassed by way of written submissions, pursuant to the directions issued herein on **26 February 2019**. It is noteworthy that, though served, the respondent opted not to attend court or file written submissions. The effect thereof is that the appeal is uncontested. Counsel for the appellant, **Mr. Mwinamo,** relied on his written submissions dated **8 March 2019** wherein he faulted the trial court for apportioning liability at 50:50. He urged the Court to find, on the basis of the evidence of the appellant and his two witnesses, that the accident occurred because the driver of the subject motor vehicle veered off the Kaptagat-Eldoret road and knocked down the appellant. He took the view that **DW1** was not a reliable witness, granted that she was not at the scene at the time. Counsel urged the court to find that hers was mere hearsay evidence with little probative value.

[6] Counsel also urged the Court to take into account that **DW2** was arrested and charged with a traffic offence in connection with the accident. His posturing was that this, in itself, was proof that **DW2** was negligent. Counsel cited **Section 47** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** to shore up this argument. He also considered significant the fact that the accident occurred on a bend and therefore that **DW2** was only unable to see the appellant in good time because he was over speeding. According to counsel, this explains why the motor vehicle veered off the road and knocked the appellant.

[7] In terms of quantum, counsel urged the Court to take into account the injuries suffered by the appellant, namely:

[a] Right upper arm was swollen and tender

[b] Fracture of the right humerus distal third

[c] Right ankle was swollen and tender

[d] Fracture of the right tibia near the ankle joint

[8] For the injuries aforestated, counsel for the appellant proposed an award in general damages in the sum of **Kshs. 1,000,000/=.** He relied on **Nairobi HCCC No. 3648 of 1989: Francis N. Mutuli vs. John Kitheka Kwara & Another** and **Mombasa HCCC No. 119 of 1991: Mohamed Shee Kikoi vs. Dominic Mwaura**. In the first case, the plaintiff was awarded **Kshs. 600,000/=** general damages for fracture of tibia/fibula, fracture of the left and right femur and fracture of the ribs; while in the latter case, **Kshs. 650,000/=** was awarded for fracture of the tibia fibula, dislocation of the left hip and amputation of the left toe.

[9] This being a first appeal, it is the duty of this Court to re-evaluate the evidence adduced before the lower court and come to its own conclusions and findings in respect thereof. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was enunciated thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this 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..."**

[10] Accordingly, I have perused and considered the record of the lower court and re-evaluated the evidence that was presented therein. The appellant testified on **19 October 2012** as **PW1**. He told the lower court that, on the **1 January 2012** at about 8 p.m., he was standing on the right side of the road near **Kaptagat Police Station** when **Motor Vehicle Registration No. KBA 072C** came along, veered off the road and knocked him. He got to learn that the motor vehicle belonged to the respondent. He testified that he sustained a fracture and dislocation of the right leg; and was taken to hospital by the respondent's son who also paid all his hospital bills. He thereafter saw **Dr. Aluda** for examination and the compilation of a medical report. **PW1** also confirmed that the accident was reported to the police and that he was issued with a Police Abstract and a P3 Form which was filled by **Dr. Aluda**. The appellant denied, in cross-examination that he was standing in the middle of the road, or that he was crossing the road at the material time.

[11] Dr. Aluda, a medical practitioner based in **Eldoret Town**, testified as **PW2**. He confirmed that he had occasion to examine the appellant, **Ben Mwita Matinde**, on **18 May 2012**; and that the appellant gave a history of having been injured in a road traffic accident on **1 January 2012. PW2** further confirmed that the appellant sustained the following injuries, which had healed as at the time of examination:

[a] Right upper arm was swollen and tender

[b] A fracture of the right humerus

[c] The right ankle was swollen and tender

[d] Fracture of the right tibia

[12] PW2 produced the medical report he prepared in respect of the appellant as the **Plaintiff's Exhibit 3a** along with his receipt for **Kshs. 2,000/=** which the appellant paid for his services (marked **the Plaintiff's Exhibit 3b).** He likewise produced the duly filled and signed P3 Form for the appellant as **the Plaintiff's Exhibit 2** and confirmed that, in his opinion, the appellant's injuries amounted to Grievous Harm.

[13] The last witness for the plaintiff was **PC Henry Kipsang (PW3)** of **Kaptagat Police Station.** He confirmed that the accident in question was reported to their station and that it involved a pedestrian, **Ben Mwita** (the appellant), and the driver of **Motor Vehicle Registration No. KBA 072C**. He also confirmed that the appellant was issued with a Police Abstract, which he produced as **the Plaintiff's Exhibit 4** before the lower court.

[14] The respondent testified on **6 August 2014** as **DW1**. She confirmed that she was the owner of **Motor Vehicle Registration No. KBA 072C** as at **1 January 2012**; and that it was involved in an accident while being driven by her driver, **William Serem**. She testified that she never visited the scene; and that it was her driver who reported the accident to her. She also confirmed that one of the motor vehicle's side mirrors was damaged as a result of the accident. **DW1** also confirmed that she met the treatment expenses for the victim of the accident to the tune of **Kshs. 82,000/=** and that he had suffered a fracture on the hand.

[15] The respondent's driver, **William Serem** testified as **DW2**. He too confirmed that **Motor Vehicle Registration No. KBA 072C**

belonged to **Selina Kosgei,** the respondent herein; and that he was driving it on **1 January 2012** at about 9.00 p.m. along the Eldoret-Ravine road when he accidentally hit the appellant with the left side mirror. He added that the appellant was known to him prior to the accident. **DW2** blamed the appellant for the accident, contending that he was then driving at a speed of about 60 kph; and that he had just got onto the main Eldoret-Ravine Road from **Flax Centre** when the accident occurred. **DW2** also stated that the accident occurred at a bushy corner of the road, but denied that his view was impeded in any way.

[16] From the foregoing, there is no dispute that an accident occurred at about 8.00 p.m. on the **1 January 2012** at Kaptagat junction, along the Eldoret-Ravine Road involving the appellant and the respondent's motor vehicle, **Registration No. KBA 072C, Toyota RAV 4**. The parties were also in agreement that the appellant was injured in the said accident; and that it was **DW2** who took him to hospital and paid his hospital bills on behalf of the respondent. Thus, the nature and extent of the appellant's injuries were never in issue before the lower court. The main issue therefore was who, between the appellant and **DW2,** was to blame for the accident.

[17] The evidence presented before the lower court shows that while it was the contention of the appellant that **DW2** swerved off the road and hit him off the road on the right side, **DW2** blamed the appellant for suddenly jumping onto the main road in a bid to cross the road. The parties were in agreement that the incident occurred at about 8.00 p.m. in the night and therefore that it was undoubtedly dark. The parties left the scene immediately and therefore the police were not invited to make their observations at the scene. While it is understandable that there was the need to rush the appellant to the hospital for treatment, it is inexplicable that the appellant chose not to adduce evidence as to whether the scene was ever visited; and if so what the findings of the police were as to who was responsible for the accident, if at all.

[18] Since it was the duty of the appellant to discharge the legal burden of proof, he ought to have availed credible proof of its allegations of negligence as set out in paragraph 4 of his Plaint, for, **Section 107(1)** of the **Evidence Act, Chapter 80** of the **Laws of Kenya,** is explicit that:

> **Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

[19] It is also noteworthy that, in his submissions, counsel for the appellant relied solely on the statement by the respondent that **DW2** was charged with a traffic offence; and urged the Court to fix 100% liability on the respondent on that basis alone; yet at page 59 of the Record of Appeal, the respondent is recorded to have said that the driver was not charged with any traffic offence. Indeed, the Police Abstract relied on by the appellant indicates that the matter of the accident was pending under investigations at **Kaptagat Police Station**. Moreover, the mere fact that the respondent offered to meet the appellant's hospital expenses cannot sufficient proof that her driver was negligent.

[20] It is now well settled that even where the driver is convicted of the traffic offence of careless driving, it does not, by itself, impute 100% liability on the part of that driver. Hence in **Robinson vs. Oluoch [1971] EA 376,** it was held that:

> **"Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent, but that is a very different matter from saying that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."**

[21] Hence, given that the contention by **DW2** that the appellant suddenly got onto the road was not discounted by the appellant, the learned trial magistrate cannot be faulted for apportioning liability at 50:50 between the parties. Indeed, in **Barclays Steward Limited & Another vs. Waiyaki [1982-88] 1 KAR 1118** it was held thus:

> **"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...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.**

[22] The Court of Appeal also had occasion to consider a similar situation in **Michael Hubert Kloss & Another vs. David Seroney & 5 Others** [2009] eKLR where it quoted with approval the following passage from the judgment of **Lord Reid** in **Stapley v Gypsum Mines Ltd (2)** [1953] A.C. 663 at p. 681:

> **"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it…The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."**

[23] The Court of Appeal proceeded to upset the High Court's apportionment of liability at 80:20 in favour of 50:50 on the basis that both drivers were blameworthy. Here is its viewpoint on the matter:

"…there were specific acts of negligence pleaded by both parties in their pleading and the onus was on them to prove those allegations on a balance of probabilities…The case largely turns on assessment on recorded evidence since the issue of credibility of two crucial witnesses did not arise. As stated earlier, Kloss and Sabine were not before the superior court and therefore their demeanour could not be assessed. There was evidence that both drivers were driving at speeds of 80-90 Kmph shortly before the collision. Neither side suggests that the speed was excessive in the circumstances. There is evidence that Kloss applied emergency brakes and was stationary at impact while David, on his own admission, made no effort to slow down or brake. There is evidence that the road was straight, clear and dry although it was narrow and unmarked. There was evidence that both sides of the road were similarly clear and there was reason therefore for either of the drivers to swerve away from each other before it was too late, if they were exercising due care and attention. In failing to do so, both drivers must share the blame equally. We find no valid basis for apportioning higher liability against Kloss in the circumstances of this case. To his credit, he applied brakes to slow down on sensing danger, though he took no evasive action when it was open for him to do so, if his evidence is to be believed that he saw the offending vehicle at a considerable distance on his side of the road. The nearest other vehicle on that road was more than 200m away. We would accordingly interfere with the apportionment of liability and set aside the apportionment of 80% and 20% against Kloss and David respectively and substitute therefor 50% and 50% respectively for both drivers.

[24] As was observed by **Sir Kenneth O'Connor** in **Peters vs. Sunday Post Limited [1958] EA 424**:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

[25] I therefore find no basis to interfere with the lower court's finding on liability, and would therefore confirm the same at 50:50 against the parties. On quantum, it is useful to bear in mind the caution expressed in **H. West & Son Ltd vs. Shephard [1964] AC 326**, that:

"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

[26] The Court of Appeal restated this principle thus in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."

[27] Accordingly, in **Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd** [2013] eKLR, where the High Court had awarded the Plaintiff **Kshs. 100,000/=** as General Damages for multiple fractures involving the right femur, left femur and dislocation of left elbow joint associated with a fracture of the radial head, the Court of Appeal took the view that there was sound basis for interfering with the award and held that:

"…the learned trial judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that "comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases"…The award of damages by the learned judge was, in our view, so inordinately low that it is a wholly erroneous estimate of the damage."

[28] The Court of Appeal proceeded to consider comparable awards for similar injuries before coming to the conclusion that:

"In our assessment of damages in this case, regard being had to the nature, severity and extent of the injuries suffered by the appellant which, as indicated above, were multiple, the authorities show that awards vacillate between Shs. 1 million and 2 Million shillings…After due consideration of the authorities cited by both counsel, and having regard to the multiple injuries sustained by the appellant it is our considered view that an award of Kshs. 1.5 million is in tune with the trend in awards of damages in similar injury cases. We realize of course that monetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness. In the instant case, the award of 1.5 million shillings commends itself to us as reasonable."

[29] With the foregoing principles in mind, I have taken into account the injuries suffered by the appellant, namely:

[a] Right upper arm was swollen and tender

[b] Fracture of the right humerus distal third

[c] Right ankle was swollen and tender

[d] Fracture of the right tibia near the ankle joint

[30] I have also not lost sight of the written submissions made by learned counsel for the appellant in support of its proposed award of **Kshs. 1,000,000/=.** He relied on the following authorities:

[a] In **Nairobi HCCC No. 3648 of 1989: Francis Ngena Mutuli vs. John Kitheka Kwara & Another** in which the plaintiff sustained a fracture of the left and right femur, a fracture of the left tibia/fibula and a fracture of the ribs. He also suffered head concussion. He was hospitalized for 4 months and thereafter placed on complete bed rest for one year. He was discharged on crutches which he would use for the life. His injuries healed with a resultant shortening of the right leg. He was awarded **Kshs. 600,000** on **22 October 1993** as general damages for pain suffering and loss of amenities.

[b] In **Mombasa HCCC No. 119 of 1991: Mohamed Shee Kikoi vs. Dominic Mwaura,** a case decided on **30 November 1993**, the plaintiff sustained a compound fracture of the right tibia/fibula as well as a fracture and dislocation of the left hip. He also suffered a crush injury to the left foot which resulted in the amputation of the 4th toe. He was hospitalized for four weeks before being discharged on crutches. He healed with a limping gain. He was awarded **Kshs. 650,000/=**.

[31] It is therefore plain that the award made by the lower court was far too low for the grievous injuries suffered by the appellant. On the strength of **the Denshire Muteti case** (supra), I would agree that an award of **Kshs. 1,000,000/=** as general damages would be fair, taking into account all the circumstances of this case, including the fact that the respondent took care of the appellant's treatment expenses. Indeed, it is instructive that the appellant did not pitch a claim for special damages.

[32] In the result, I find merit in the appeal on quantum. The judgment and decree of the lower court are accordingly set aside and substituted with judgment in the appellant's favour in the sum of **Kshs. 1,000,000/= less 50% contribution,** together with interest and costs. Interest is payable at court rates from the date of the decision of the lower court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF JUNE 2020

OLGA SEWE

JUDGE