



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

HIGH COURT CIVIL APPEAL NO. 13 OF 2016

NAIROBI UNITED SERVICES.....1ST APPELLANT

PETER WARIUNGU.....2ND APPELLANT

VERSUS

NK (of unsound mind suing through

JMJ as Next Friend).....RESPONDENT

(Being an appeal from the judgment of Hon E Kimilu SRM delivered on 1st March, 2016 in Naivasha CMCC No 263 of 2016)

JUDGMENT

Background

1. This is an appeal emanating from a road traffic accident that occurred on 6th June 2008 in which the plaintiff was knocked down by matatu registration No KBA 208W belonging to the 2nd defendant/appellant. The accident resulted in severe injuries to the plaintiff who, being of unsound mind, sued the defendant through her next friend and son.

2. After a hearing in which the plaintiff was unable to testify due to her mental condition, the trial court found the driver 100% liable, and awarded damages as follows:

General damages	Kshs	500,000.00
Special damages	Kshs	<u>105,329.00</u>
Total	Kshs	605,329.00

3. This appeal is against both liability and damages, whereby the grounds are summarized as follows:

- That the finding of 100% liability was against the weight of evidence and was not to the standard of balance of probabilities
- That the plaintiff failed to prove particulars of negligence and thus the award of damages was erroneous
- That the damages awarded were excessive

4. This court's role on a first appeal is to subject the whole of the evidence to a fresh and exhaustive scrutiny as provided under section 78(2) of the CPA and make its own conclusions about it, bearing in mind that this court did not have the opportunity of seeing and hearing the witnesses first hand. This duty was elaborated in *Selle & another -vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*.

Liability

5. The hearing commenced on 7/7/2015 with PW1, JM, the plaintiff's son testifying that on 6/6/2008 he was told that his mentally unsound mother had been knocked down by a vehicle. He was given the registration number. He rushed to the scene, found the accident vehicle

registration number KBA 208W at the scene, and found his mother on the ground. He then rushed her to Naivasha District hospital where she was admitted for sixty days before being transferred to Kikuyu PCEA Hospital. He produced medical records and discharge summaries and receipts as Exhibits 1 to 6.

6. He testified that his mother was 90 years old at the time of the accident. The doctor assessed her disability at 30%. Before the accident, he said, his mother used to walk on her own with a stick; that she would cross the road from her house to the hotel where he had paid for her for the previous six months. As her last born son he had to take care of her as she could not live upcountry.

7. PW1 said his mother is the one who explained to the doctor what had happened; that she had come to court six times, that he had been unaware of her mental illness; that she had crossed the same road numerous times in the six months she had lived in the town; and that the road was clear at the time of the accident.

8. PW2 PC Alice Mathenge of Naivasha Traffic Base testified on 12/1/2016. She produced the Police Abstract for the accident report as PExb 7. She also produced the Occurrence Book for the date of the accident and noted, however, that the pages for the period 2/6/2008 to 8/6/2008 had been plucked off. She said the records were old since the accident occurred in 2008 and the pages may have been plucked due to usage. The abstract did not show anyone was charged.

9. Dr Obed Omyyoma testified as PW3. He examined the plaintiff on 20/8/2009, one year and two months after the accident relying on treatment notes of the hospitals she had attended, and on his examination including x-rays of chest and upper limbs. In his medical report, he stated her injuries to be:

- a. Fracture right Olecranon process of the radius –ulnar bone with complete displacement
- b. Multiple fractured ribs of the right side of the chest
- c. Multiple bruises on the forehead

He assessed her permanent disability at 30%, and injury was grievous harm. He produced medical reports and affirmed that he personally took the patient's history. He noted that she was psychotic

10. The defence case was made out by the driver of the accident vehicle, Peter Waruinge. He said he had been a driver for 38 years. On the material day he was driving to Nairobi from the bus stage. In his written statement he said:

“ While driving along Kenyatta Avenue in Naivasha town I was involved in an accident with a pedestrian who is mentally disturbed.....

That a female pedestrian who was accompanied by another lady were walking on the left side of the road in the opposite direction of my travel.

While about 3 metres away one of the lady entered the road wanting to cross to the right. She then stopped on her tracks when she noticed that I was close by. I confirm that when I saw that she wanted to cross I braked and when I noticed that she had abandoned her attempt to cross I started to accelerate only for her to change her mind and enter or dash across to the right. The lady was hit by the front side and she fell down... the front right headlight lens broke....”

11. In his oral testimony he said:

“I saw two ladies standing off the road. They wanted to cross the road and I applied brakes to allow them to cross. They stopped and when I again wanted to move, the old lady ran to the road. I know the old lady since I see her in town and along the roads. She looks like a psychiatric patient. She was accompanied and we took her to Naivasha District hospital”

12. In cross examination, he said he was driving at 30kph and was in a position to brake and in case of an accident, impact would be minimal. He confirmed he knocked down the respondent, and according to his observation, she was like “a mental disorder person.” The record shows that he said he spotted the pedestrian at about 300metres and it was a close range, although in his written statement he said it was 3 metres. He said took her to hospital and blamed her for the accident. In re-examination, he said the road was busy and it was difficult to go at high speed

13. The crux of the appellants' argument on liability is that in the absence of eyewitness evidence from plaintiff, there was no proof of the plaintiff's case on balance, that the plaintiff did not demonstrate negligence, and that the burden could not shift to the defence to prove otherwise. They rely on the case of **Eastern Produce (K) Limited v Christopher Atiado Osiro [2006] eKLR** where Gacheche J stated:

“It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid down in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd. (1991) 2KAR 258, where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence”.

I have in mind the description of negligence as is to be found in Salmond and Heuston on The Law of Torts 19th Edn. where it is described as “conduct, not a state of mind – conduct which involves an unreasonably great risk of causing damage.....negligence is the omission to do something much a reasonable man, guided upon those considerations which

ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do.” (underlining is mine) The position is laid more clearly as “In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.” (Lord Wrigur in *Lochgelly Iron and Coal Co. v. M’Mullan* [1934] A. C. 1,25)”

14. In the lower court, the appellants relied on **M'mbula Charles Mwalimu v Coast Broadway Company Limited** [2012] eKLR where it cited Ringera J (as he then was) in the case of **Grace Kanini Muthini v Kenya Bus Service Ltd and Another HCC 4708 of 1989** as follows:

“On liability, the Plaintiff did not adduce any evidence beyond stating that the accident was reported to Police. She produced in evidence a Police Abstract of the accident. This document indicated that on 15th August, 1988 at 2.20p.m. an accident occurred on 1st Avenue, Eastleigh and General Waruinge junction involving motor vehicle KVZ 919 owned by the first defendant and driven by the second defendant and one Muthini Ndunda, the deceased. The said Muthini Ndunda is described therein as a pedestrian and the injuries are said to have been fatal. This document does not improve the case of the plaintiff. All that is recorded therein is the fact of an accident involving the deceased and the 1st defendant's motor vehicle which was being driven by the 2nd defendant.....”

15. As I see it, in a civil matter such as this, what the court looks at is the totality of the evidence adduced as at the close of the trial; what story does the cumulative evidence on record tell? In this case the plaintiff's evidence shows that the victim was hit by the plaintiff's vehicle and there was a police abstract of the fact; the doctor confirmed the nature and extent of the injuries; the doctor stated that he personally interviewed the victim who told him her history of the accident. The only eyewitness evidence available – which is that of the defence – shows details of how the accident occurred. All witnesses are sworn to tell the truth, irrespective of which party calls them, and their evidence aids the court in coming to a determination of the matters in issue.

16. The respondent relies on the Court of Appeal's finding in the case of **Embu Public Road Services Ltd. v Riimi (1968) EA 22** that where the circumstances of the accident give rise to an inference of liability, then the defendant has to show that there was a probable cause of the accident. In the **Embu Public Road Service** case it was held that:

“...where an accident occurs and no explanation is given by the defendant which could exonerate him from liability, then the court would be at liberty to apply the doctrine of res ipsa loquitur and hold the defendant liable in negligence.”

17. Similarly, way back in 1988 in **Nandwa v Kenya Kazi Ltd (1988) KLR, 488** the Court of Appeal had cited with approval the case of **Henderson v Henry E Jenkins & Sons [1970] AC 282 at 301** where Lord Pearson at letter D stated:

“In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift.

But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants...”

18. In this case, the sole defence eyewitness confirmed that he knocked down the victim. He saw her and another person try to cross the road. He stopped. He had known the lady from seeing her on the roads before. In his observation, she had appeared like a psychiatric patient. When he drove off again, she suddenly crossed the road. Nevertheless, he said she was about three hundred metres away.

19. There is no doubt in my mind that the driver was extremely negligent. He saw the two pedestrians trying to cross. He stopped. They stopped. Then he drove off again yet he suspected the victim was a psychiatric patient. Armed with that knowledge, the proper thing to do in such circumstances would have been to stop and assist the psychiatric patient he had been seeing on the roads to cross. When he drove off again, he was taking a calculated risk. He miscalculated and knocked the victim. She suffered injuries which are not disputed. I am satisfied that, on balance the total thrust of the evidence points to the driver's fault.

20. Accordingly, there is no basis to interfere with the trial court's finding on liability and I affirm it.

Quantum of damages

21. On general damages the trial court relied on **David Kiplangat Sang v Richard Kipkoech Langat & Another [2006] eKLR** where the injuries were fractures of the left leg, hip joint and his knee. The court there awarded Kshs 550,000/-. The trial court awarded the lesser amount of Kshs 500,000/-.

22. The appellants challenged the award of general damages and proposed instead that the amount should not have exceeded Kshs 300,000/-. In support, they cited **Gladys Lyaka Mwombe v Francis Namatsi & Others [2019] eKLR**. There, the injuries were a cut wound on the head with bleeding, loss of consciousness, tenderness on the anterior chest, cut wound on right leg below the knee without fracture, and a fracture of the left tibiofibular.

23. As earlier noted the injuries sustained in this case were: Fracture right Olecranon process of the radius –ulnar bone with complete displacement; Multiple fractured ribs of the right side of the chest and Multiple bruises on the forehead. She also suffered 30% permanent disability. Thus the victim’s injuries are clearly more serious than those in **Gladys Lyaka’s** case.

Disposition

24. In light of the foregoing, nothing has been placed before me on quantum that would persuade me to interfere with the trial court’s determination on damages, and I so determine. The appeal is therefore dismissed in its entirety with costs to the respondent.

25. The trial court’s judgment is therefore upheld.

Administrative directions

26. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

27. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

28. Orders accordingly

Dated and Delivered via videoconference at Nairobi this 16th Day of July, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Ms Moragwa for the Appellant
2. Ms Keberenge for the Respondent
3. Court Clerk - Quinter Ogutu