REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 159 OF 2019

GEODFREY KARINGURI MWIRICHA.....1ST APPELLANT

J.M.IGWETA COMPANY LTD.....2ND APPELLANT

VERSUS

CHARITY MWONJIRU MBAABU.....RESPONDENT

(Being an appeal from the judgement and Decree of Hon. M.A. Odhiambo delivered on 14th November 2019)

JUDGEMENT

1. The Respondent herein was the Plaintiff in the trial court whereas the appellants were the Defendant. The Respondent instituted the suit seeking general damages for pain, suffering and loss of amenities and Special damages of Kshs. 657,754.55. She averred that on 19/7/2017 she boarded a motor vehicle Registration No. KBW 590E to travel to Maua from Meru as a fare paying passenger. That the 1st Appellant drove the motor vehicle KBU 490M so carelessly and negligently that he caused the said motor vehicle to hit Motor vehicle registration Number KBW 590E from behind and as result he suffered serious personal injuries.

2. The appellants filed their statement of defence on 12th February 2019 stating that the accident was solely caused by the driver of motor vehicle Registration Number KBW 590E. In Reply to the statement of defence the appellant reiterated that the fault was solely caused by the negligent act of the driver of motor vehicle registration Number KBU 490M.

3. The matter proceeded for hearing. The Respondent called three witnesses while the appellants called one witness. The trial court found the appellants 100% liable for the accident and apportioned general damages as hereunder;

General Damages	**Kshs. 300,000/=**
Special Damages	**Kshs. 550,336/=**
Future Medical Expenses	**Disallowed**
Costs	
Net Award	**Kshs. 850,336/=**

4. Aggrieved by the aforesaid determination the appellant filed its memorandum of appeal citing five grounds of appeal;

a. That the learned trial magistrate erred and misdirected herself by entering judgement on liability in favour of the plaintiff despite there being no sufficient evidence or any evidence to support the same;

b. That the learned trial magistrate erred in law and misdirected herself as to the extent and nature of respondent's injuries and thereby erred in law in her assessment of damages which was manifestly excessive.

c. That the learned trial magistrate erred in law by awarding damages that had been settled by the Respondent's insurance Company thereby double compensating the Respondent despite the said damages not being strictly proved by law.

d. The learned trial magistrate erred in assessing damaged and failed to apply the trite principles of awarding damages, and specifically on general and special damages and comparable awards for analogous injuries and further failed to appreciate

and find that the appellants had proved their case on a balance of probabilities and

e. The learned trial magistrate erred in her assessment of the damages that would have been awarded to the Respondent as the same was based on the wrong principles and the amount arrived at was inordinately high and a wholly erroneous estimate and likely to injure the body politik.

5. The appeal was canvassed by way of written submissions. On liability the appellants submitted that the motor vehicle the respondent was travelling in was for commercial goods and not a public service vehicle, how then was she travelling in it as a fare paying passenger? That it was incumbent upon her to call enjoin the driver of the motor vehicle to prove this fact. That if this court is inclined to apportion liability the same ought to be apportioned at the ratio of 50%:50%.On special damages they submitted that the plaintiff had admitted to her medical bills havingbeing settled by her insurer hence the Respondent had the burden of distinguishing how much was paid by her and similarly her insurer. They cited the case of **KIP Melaime ltd & 2 others v Violent WaitiriGichia [2017] eklr.** On damages it was their submission that the award made by the trial court was excessive despite the trial court citing cases where awards of Kshs. 120,000/= and Kshs. 300,000/= were made. In this regard they cited the case of **DenshireMutetiWambua vs Kenya Power & Lighting Co. Ltd (2013) eklr& Civil Appeal No. 99 of 2014; Charles OriwoOdeyo v AppolloJustsAndabwa& Another [2017] eklr.**

6. The Respondent submitted that the issue whether the she was an illegal passenger and the purpose of the motor vehicle was neither canvassed in the trial court nor listed in the grounds of appeal and cannot therefore be introduced through submissions. In this respect she referred to the Court of appeal decision in **Olive MwihakiMugenda& Another v OkiyaOmtataOkioti& 4 others [2016] eklr, Peter GichukiKingara v Independent Electroral and Boundaries Commission and 2 others & South Nyanza Sugar Co. Ltd v Jackson OmolloKibwana (2020) eklr.** It was also her submission that the element of liability is also futile because her testimony together with that of Pw2, the investigation officer was enough to prove who caused the accident without calling the driver of the motor vehicle. That the same is also futile because the appellants never sought to enjoin the owners of the motor vehicle KBW 590E as third parties to the proceedings. On special damages it was her submission that the same was specifically pleaded and proved and the appellant's only cross-examined on the element of future medical expenses. That the issue of double compensation cannot raised at this trial court stage and even if the same was to be raised the same was not tantamount to double compensation because the plaintiff contributed to premiums to her insurer. She cited the case of **Reinan Pacific Motor Trucking Company as cited by Chitembwe J in Leli Chaka Ndoro v Maree Ahmed & SM Lardhib.** Lastly on the award of general damages it was her submission that the cases cited by the trial magistrate were in the year 2009 and her case transpired in the year 2018 hence the amount was not excessive in the circumstances.

Analysis and Determination

7. This being the first appeal 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. (See, **Selle& Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123).**

8. In this case the Respondent called three witnesses in the trial court whereas the appellants called one witness. **Pw1 Charity Mwonjiru**testified that she boarded a matatu registration No. KBW 590 E heading to Maua from Meru. That when she reached Kaithe area there was a bump and the driver of the *matatu*slowed down to scale the bump. That suddenly the *matatu*was hit from behind by a lorry registration Number KBU 490M. It was her testimony that she was later on taken to Meru Hospital where an X-ray was taken and later referred to Karen Hospital where he was admitted from 25/7/2017 and discharged on 30/7/2017. At Karen Hospital he went through various surgical procedures and by that time her gluteal region was swollen. She blamed the driver of the lorry and specifically because he did not slow down as he was approaching the bump or keep a proper look out for other road users.

9. In cross-examination she stated that she routinely goes for check-up at Karen Hospital but did not produce documents to prove the same. She also told the court that there was no vehicle in front of them the lorry was behind. She confirmed that it is her insurance Company that paid her bills.

10. **Pw2 Sergent Phyllis Mwikali** confirmed that the *matatu* was hit from behind by the lorry. It was also her testimony that she had preferred charges against the 1st Appellant but he absconded court and the case is pending in court. That the part of the impact was the boot of the*matatu* an indication that it was hit at the back.

11. **Pw3 Dr. Gerald Mureithi** testified that he examined the respondent on 4th October 2018. At the time she had a swelling on the gluteal area and she developed numbness on the legs. She however did not make a finding on future medical expenses.

12. **Dw1 Joseph MutuuIgweta**confirmed to be one of the proprietors of the 2nd Appellant and stated that the 2nd Appellant is family owned. It was her testimony that the *matatu*overtook them from behind and as usual the lorry hit it. He also stated that the*matatu* was avoiding an oncoming vehicle hence it swayed on their lane. He stated that the insurance repaired the matatu. He computed a claim form and admitted that the 1st appellant was at fault. The insurance repaired the matatu.

13. **Ground a of the appeal** relates to liability. The appellants submitted that liability was not proved by the respondent as the motor vehicle was a commercial goods vehicle as opposed to a passenger service vehicle. They also seek to shift blame on the driver of the matatu. I have looked at the proceedings. The appellants did not contest whether or not the respondent was an illegal passenger. They also did not raise the issue in their grounds of appeal. The same has been raised in their submissions.

14. In **Olive MwihakiMugenda& another v OkiyaOmtataOkoiti& 4 others [2016] eKLR** the Court held;

The issue of locus standi of the 2nd appellant was not an issue raised before the trial court; it is also not an issue raised in any ground of appeal and there is no cross appeal on the locus of the 2nd appellant in this matter, it cannot therefore be validly introduced through submissions, no matter how eloquent.

15. In **South Nyanza Sugar Co Ltd v Jackson OmolloKibwana [2020] eKLR** the Court held that a defendant should not raise the issue of mitigation of loss on appeal at the first instance. By doing so, the issue becomes a non-issue. The issue must be pleaded and proved.

16. The Court of Appeal when confronted with a similar scenario in **Republic V Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto& Others ex-parte Tom Mbaluto, [2018] eKLR**stated the following when interpreting Rule 104 of the Court of Appeal Rules which is equivalent to Order 42 Rule 4 of the Rules:

> **"Rule 104 of the Court of Appeal Rules, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy v. Ruth WatiriKibe, CA No. 39 of 2015 and Openda v. Ahn [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court…. As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.**

17. The twin issues of whether the motor vehicle was a commercial vehicle as opposed to a passenger service vehicle and whether the Respondent was an illegal passenger were not raised in the trial court and/or in the memorandum of appeal. The same cannot therefore be canvassed at this stage of the proceedings as leave was not sought to raise the same.

18. On liability I have considered the evidence of the parties. The Respondents testimony and that of the investigating officer remained unshaken. The appellant witness admitted to conceding that the 1st appellant was liable to the accident in an insurance claim for recovery of the matatu. The facts of the case were that the lorry hit the matatu from behind.

19. In **Moses MuriithiNjagi v Joseph NjugunaMacharia& 2 others [2016] eKLR** the Court held;

> **"The point of impact cannot absolve the appellant from blame. The matatu driver drove from behind and hit the lorry. Even if the lorry was stationary, it was incumbent upon the matatu driver to see other vehicles on the road. The driver's decision to overtake other vehicles which had given the lorry the opportunity to turn was reckless…"**

20. As to apportioning blame to the driver of the matatu the case of **LoiceMucheyiMasoso (suing as the administrator/legal representative of the Estate of the late JospehMasoso – Deceased) v Maurice N Karanja& another [2019] eKLR** has similar facts to this case the Court absolved the driver of the matatu in that case and placed sole blame to driver of the lorry when it held as follows;

> **"From the evidence on record, it is clear that the 1st respondent had little to do with the accident that occurred on 8th September 2000 and, if he did, then he was not liable for the accident. The police abstract absolved him of any blame which was placed squarely on the 2nd respondent. The evidence of both the appellant and DW1 indicated that they were hit by the lorry as they made a stop on the command of traffic lights. The matatu was observing traffic rules by stopping at the instant traffic lights when they were suddenly hit by the lorry and thus it cannot be said that the matatu was at fault for being stationery because the 1st respondent was lawfully obeying traffic lights. In the foregoing, I would have found the 2nd respondent 100% liable for the accident that occurred on 8th September 2000 and absolve the 1st respondent from any liability whatsoever….."**

21. The driver of the lorry was clearly to blame. He hit the *matatu* from the back side. The evidence of the appellant witness was clearly an afterthought. The evidence of the Respondent was corroborated by that of the investigation officer. I therefore find the appellant liable for the accident. As for the apportionment of liability, the respondent herein was a passenger. The appellant did not seek to take out third party proceedings against the driver of the *matatu.* This burden shifted to him once he laid blame to the driver of the *matatu*. Having already determined that the appellant was liable I do find hold that the trial magistrate was correct in apportioning liability at 100% as against the appellants.

22. The next issue is special damages. During the trial the appellants only contested the future medical expenses which was rightfully dismissed by the trial court. They neither raised the issue of double compensation during the trial court proceedings nor raise the same in the memorandum of appeal. The doctrine as laid out in **Republic V Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto& Others (supra)** also applies in this respect. Even if I would have considered the same I would still have inclined to the decision In **Leli Chaka Ndoro v Maree Ahmed & S.M. Lardhib [2017] Eklr** cited by the Respondent where Chitembwe J HELD AS FOLLOWS;

> **"The arrangements between the appellant and third parties cannot benefit the respondents. If that were to happen, then any tort feasor in an accident claim will be sniffing around to find out whether the accident victim was insured. Resolution Health could have paid the bill but that payment was made as a result of the premiums paid by the appellant. The appellant could have as well kept quiet about the payment by his insurer as ordinarily the hospital receipt would have been issued in his name.**
>
> **My finding on this issue is that personal accident claims are not affected by the doctrine of subrogation. The doctrine of**

subrogation applies to indemnity insurance claims. In cases of indemnity, the insured loss is premeditated and can be computed up to the last cent. In personal accident claims, one cannot compute the extent of the suffered injuries. A lost limb cannot be replaced by an artificial one irrespective of the latter's costs. If an accident victim can recover payment out of a personal accident policy that is an added advantage which should not benefit the tortfeasor.

With regard to the issue of double payment, I am satisfied that the recovery of the special damages from the respondents would not amount to double payment. Assuming the respondents came to know about the settlement of the bills after they had paid the appellant, could the respondents claim the money from the appellant or his insurer. My answer to this is "No". This is because the respondents are not party to that arrangement between the appellant and his insurer. The respondents are simply liable to satisfy the amount of damages suffered by the appellant. This does not amount to double compensation.

23. On general damages the appellant opined that the award issued by the trial Magistrate was excessive. The assessment and award of damages is always within the discretion of the trial court and, for this reason, the appellate court will be hesitant to interfere with the award unless it can be demonstrated that the trial court proceeded on wrong principles and arrived at an erroneous award in the sense that it is either too high or too low in the circumstances of a particular case. The oft-cited decisions in this regard are **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 and Kemfro Africa Ltd T/A Meru Express Service, GathogoKanini versus A.M. Lubia& Olive Lubia (1982-1988) 1 KAR 728.** In the former case the Court of Appeal noted:

"..An appellate Court will not disturb an award of damages unless it is so 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 so arrived at a figure which was either inordinately high or low…"

See also **Swiss Contact Ltd & Peter MungutiKieti v Esther another [2019] eKLR**

24. I have considered the injuries sustained by the Respondent. The cases cited by the trial magistrate and those cited by the parties herein. In **Swiss Contact Ltd (supra)** the respondent suffered soft tissue injuries secondary to blunt injuries on the head, the back and the buttocks area the court awarded a sum of Kshs 200,000/= on account of general damages. The facts and decision in Swiss Contact Ltd (supra) is more commensurate to this case. I have also considered that the respondent suffered other injuries to the leg. I do find that the award issued by the trial Magistrate was not excessive in the circumstances.

25. Having outlined all the merits of the appeal herein I do find that the appeal lacks merit and the same is therefore dismissed with costs to the Respondent.

HON ANNE ADWERA ONG'INJO

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED BY EMAIL AND ORALLY THORUGH MICORSOFT TEAM ON THIS 1ST DAY OF OCTOBER 2020

HON ANNE ADWERA ONG'INJO

JUDGE

In the presence of:

C/A: Kinoti

Ms Mbogo Advocate for Respondent

MS Njue Advocate for Appellant/Holding brief for Njeru Advocate for Appellant.

HON ANNE ADWERA ONG'INJO

JUDGE