REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.1 OF 2019

RICHARD KIBET KEBENEI.....1ST APPELLANT

BENARD OBATI OWINO.....2ND APPELLANT

CHERUIYOT BII.....3RD APPELLANT

VERSUS

VERONICA MUHONJA MUGAILWA.....RESPONDENT

(Being an appeal from original conviction and sentence in Civil case No.229 of 2017 of the Principal Magistrate's Court at Oyugis by Hon. J.P. Nandi, PM)

JUDGMENT

1. In the amended plaint dated 3rd July 2018, the appellants, **Richard Kibet Kibenei, Benard Obat Owino** and **Cheruiyot Bii,** were sued by the respondent; **Veronica Muhonja Mugailwa** for both general and special damages as well as loss of earning capacity all arising from a road traffic accident which occurred on the 18th December, 2015 along the Oyugis-Kisumu road involving the appellant's Motor vehicle **Reg. No. KBV 719K** Mitsubishi Lorry and Motor vehicle **Reg. NO.GKA 021Y** Land Rover, in which the respondent was lawfully travelling as a passenger.

2. It was pleaded that the appellant's motor vehicle was at the material time driven by the third appellant in a manner which was so negligent and reckless such that it lost control and rammed onto the government vehicle thereby causing serious bodily injuries to the respondent/plaintiff who therefore instituted suit against the said driver and the legal or/and beneficial owners of the vehicle **(i.e the first and second appellants)** praying for loss and damages suffered by her.

3. The appellants in their amended statement of defence dated 9th June 2018, denied all allegations made against them by the respondent and contended that if the alleged accident occurred, that it was caused by the respondent's negligence and/or recklessness in or while boarding the Government vehicle or by the negligence and/or recklessness and/or incompetence of the vehicle's driver in the manner of driving.

The appellants therefore prayed for the dismissal of the petitioner/respondent's case with costs.

4. At the hearing of the case, the only testimony received was that of the petitioner/respondent **(PW1),** the defendants/appellants did not lead any oral evidence in support of their defence.

After the hearing, the trial court, upon due consideration of all the evidence placed before it concluded that the appellants were liable for the accident at 80%. Consequently, the respondent was awarded damages in the amount of kshs.6,846,174/58cts, giving a net amount of kshs.5,476,936/65cts together with costs and interests.

5. Being dissatisfied with the award and judgment of the trial court, the appellant, preferred the present appeal on the basis of the four(4) grounds set out in the memorandum of appeal dated 17th January 2019.

The appeal was canvassed by way of written submissions. In that regard the appellants' submissions were filed herein on 23rd October, 2020 by **Messrs Mose Mose & Milimo Advocates** and those of the respondent were filed on 29th September, 2020, by **Messrs Omwenga & Co. Advocates.**

6. Having given due consideration to the appeal and opposition thereto by the respondent as well as the rival submissions, it fell upon this court to reconsider the evidence and draw its own conclusions bearing in mind the trial court had the opportunity of seeing and hearing the witnesses (see, **Sella Vs Associated Motor Boat Co. Ltd (1968)EA(23)**

7. In that regard, the plaintiff/respondent's evidence was that on the material date while in the company of her work mates, all staff of the Judiciary of Kenya, they were travelling aboard a Motor Vehicle Reg. No. GKA 021Y Land Rover belonging to the Judiciary heading towards the direction of Oyugis along the Kisumu-Oyugis road and on reaching the area known as Kadongo-Kanyaparo the vehicle was involved in an accident with the appellant's vehicle Reg. No. KBY 719K Mitsubishi Lorry while moving on the opposite side of the road.

8. It was the respondent's contention that the driver of the appellant's vehicle was to blame for the accident in the manner of driving the vehicle recklessly and at a speed which was excessive in the circumstances such that he lost control of the vehicle and caused it to collide with the Government vehicle. As a result the respondent and others suffered serious injuries. This evidence was uncorroborated as the appellants did not lead any evidence to counter and rebut the respondent's allegations of their culpability in the accident. Indeed, the evidence showed that the appellants were fully liable. For the accident without any contribution from the driver of the Government vehicle.

9. However, on the question of liability, the parties entered a consent to the effect that judgment on liability be entered in the ratio of 80:20% in favour of the respondent/plaintiff against the appellants/defendants.

This appeal is therefore essentially on quantum of damages. In that regard, the appellants in their grounds One, two and three of the grounds of appeal contend that the trial court erred in law and principal by applying erroneous principal in computation of quantum on damages payable to the respondent thereby arriving at an erroneous and grossly excessive estimate of the payable general damages.

10. That the award of general damages made in favour of the respondent was manifestly and inordinately excessive in the circumstances and that the trial court acted in error when it failed to properly evaluate the evidence on record thereby reaching an erroneous decision. The appellants therefore urge this court to set aside and quash the impugnate judgment of the trial court and order that the respondent's suit against them be dismissed and in the alternative the award of general damages made to the respondent be reviewed and/or varied. They also pray that the costs of this appeal be borne by the respondent.

11. Basically, the appellant's complaint is directed at the general damages awarded by the trial court to the respondent. There is no complaint or substanding complaint on the special damages. The appellants' view was that the awards made for pain and suffering, loss of earning capacity and for future medical expenses were manifestly and inordinately excessive and/or did not arise in the circumstances of the case and ought to be down scaled and/or be disregarded or set aside altogether.

12. With regard to an appeal of the present nature i.e on the question of damages, the court of Appeal in the case of **Kemfro Africa Ltd and Another Vs A.H. Lubia & another (1982 – 88)1KAR,777** stated that:

> *"The principles to be considered by an appellate court in deciding whether it is justified in devising the quantum of damages awarded by a trial judge were held by the court of Appeal for Eastern Africa to be that, it 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 low or so inordinately high that it must be a wholly erroneous situation of the damage".*

13. Taking into account the foregoing principles, the issue herein with regard to the general damages for pain and suffering would be whether the award of ksh.5,000,000/- less 20% contribution i.e ksh.4,200,000/- under the head was inordinately high as suggested by the appellant. In making that award, the trial court relied on the medical report by **Dr. J.C. Sokobe**, dated 30th April 2018, which showed that the respondent suffered multiple severe soft and bony tissue injuries which healed with complications resulting in permanent disability of 70% and for which she was in various hospitals as an in and out patient.

14. Going by that high degree of injury and its residual efforts and guided by the decisions in **Duncan Kimathi Karagania Vs Ngugi David & Others (2016) eKLR** and **Brian K. Mokua Vs Chrispine Kome (2015)eKLR,** the trial court assessed general damages for pain, suffering and loss of amenities at kshs.5,000,000/- and in so doing cited the decision in **Sosphine Company Ltd Vs Daniel Ngonga Kenyi(2006)eklr**, where the court of Appeal observed that:-

> *"The assessment of damages for personal injuries is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such facts as the previous awards for similar injuries and the principles developed by the courts, ultimately, what is reasonable award is an exercise of discretion by the trial judge and will depend on the particular facts of each case".*

15. The trial court also cited the decision in **Tayas Vs Kinanu (1983)KLR 114,** where the court of Appeal stated that:

> *":But money cannot be renew a pupsical frame that has been battered and shattered. All the judges and courts can do is to award some which must be regarded as giving reasonable compensation".*

In awarding the impugned general damages, the trial court was very much alive to the law and principle applicable in the computation of damages. Not that the decisions cited by the appellants were disregarded by the trial court but that they were found unsuitable and incompatible with the injuries suffered by the respondent herein.

16. On the contrary, the authorities cited by the respondent were more or less comparable with the injuries she suffered as a result of the accident.

Consequently, this court sees no reason to depart from the assessment made by the trial court for the respondent's pain, suffering and loss of amenities endured after the accident.

It is instructive to note that the 70% permanent disability suffered by the respondent did not mean that she could not continue with her job, only that her performance would be lower and strainful. After all, "**disability is not inability**".

17. With regard to the award of kshs.300,000/- for future medical expense, it was justified and lawfully due to the respondent from the appellants on the basis of the expert opinion of DR Sokobe. The amount was not picked from the air as it was the expected expense in the former or continuance treatment of the respondent which could stretch for a long period of time and even past her official retirement age.

18. With regard to the award of kshs.1,200,000/- for loss of earning capacity, the trial court placed absolute reliance on the holding of the court of Appeal in **Mumias Sugar Co. Ltd Vs Francis Wando(2007) eKLR,** to wit:-

> "*The award for loss of earning capacity can be made both when the plaintiff is employed at the time of trial and even when he is not so employed. The justification for award when the plaintiff is employed is to compensate the plaintiff for the loss that the eligibility has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labor market while the justification for the award where the plaintiff is not employed at the date of trial is to compensate the plaintiff for the risk that he will not get employed or suitable employment in future*".

19. The trial court noted that the respondent suffered permanent disability of 70% and thus exposed her to the risk of losing her job and chances of securing another job as a secretary were diminished. However, in the opinion of this court, that finding was based, with due respect to the trial court, on conjecture and was never supported by any evidence. There was no evidence that the respondent was to lose her job due to the disability acquired by her after the accident. She did not avail any notice from her employer of the intention of or retiring her from her employment on medical grounds. She confirmed that she continued with her employment at the Judiciary even after completion of the initial treatment of the injuries sustained in the accident.

20. In her evidence, the respondent did actually allude to the fact that she earned an extra income from rearing or breeding chicken or that she carried out poultry business as a side occupation, if you like, a side "hustle". However, she did not provide cogent direct or indirect evidence to prove the fact. It's a matter of common knowledge that quite a number of people in formal employment engage in chicken breeding as a hobby or for subsistence purposes.

Even without necessary documentary evidence the respondent could have at least called one or two of her customers to testify and corroborate her assertion that she engaged in poultry business for profit and as an extra source of income.

21. Clearly, the respondent was not entitled to the award of kshs.1,200,000/- for loss of earning capacity less 20% contribution i.e 1,000,000/- and in as much as it was made by the trial court it was erroneous and is hereby set aside.

Otherwise, for special damages, there was sufficient documentary evidence to prove the claim amount of kshs.1,646,174/- under the head.

22. In the end result, other than the alterations and invalidation of the award for loss of earning capacity, this appeal is dismissed to a larger extent with costs to the respondent.

Ordered accordingly.

Delivered and signed this 5th day of November, 2020.

J.R. KARANJAH

JUDGE OF THE HIGH COURT