



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 300 OF 2016**

**MAGDALINE WANJIRU NJUGUNA.....APPELLANT**

**VERSUS**

**GEORGE KAMAU.....1<sup>ST</sup> RESPONDENT**

**BARUH PETER.....2<sup>ND</sup> RESPONDENT**

**ONDITI MAURICE.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. This is an appeal against the ruling of the Chief Magistrate Milimani in CMCC No. 2605 of 2011 delivered on the 14<sup>th</sup> May 2014.
2. The appellant filed suit against the 1<sup>st</sup> and 2<sup>nd</sup> respondents for compensation for general and special damages as a result of injuries sustained in a motor vehicle accident that occurred on the 13<sup>th</sup> July 2009. The 1<sup>st</sup> defendant later took out 3<sup>rd</sup> party notice against the 3<sup>rd</sup> respondent. The trial court dismissed the case against the defendants having established that the driver of motor vehicle KBD 722Q owned by the 3<sup>rd</sup> respondent was responsible for causing the accident and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents driver was not at fault.
3. The appellant being dissatisfied with the judgement appealed on 5 grounds that can be summarised as follows;
  - a) *That the learned magistrate erred in law and fact in holding that the appellant failed to establish her claim against the 1<sup>st</sup> and 2<sup>nd</sup> respondent.*
  - b) *That the damages awarded to the appellant was inordinately low.*

4. The parties disposed of the matter by way of written submissions.

**B. Appellant's Submissions**

5. The appellant submitted that appeal falls within the parameters in which this court can interfere with the trial court's decision. The appellant relied on the cases of **Nance v British Columbia Electric Railways Company Limited [1951] AC 601**, **Ali v Nyambu T/A Sisera Stores [1990] KLR 534** and that of **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] K.A.R. 5**.
6. The appellant submitted that the assessment of damages was improper as damages for loss of earning and future medical expenses were not awarded and that the appellant ought to have been compensated for her inability to lead a full life owing to the injuries suffered. The appellant relied on the case of **Jobling v Associated Dairies Ltd [1981] 3 WLR 172**.
7. The appellant submitted that she was away from work for 51 days as a result of the injuries sustained and given that the appellant's payslips were not available, the Regulations of Wages (General) Order would apply with the net effect that the court ought to have found that the appellant was due Kshs. 18,622.99 for loss of earnings. The appellant relied on the case of **Fairley v John Thomson Ltd [1973] 2 LLOYD'S LAW REPORTS 40** as well as that of **Ann Njoki Njena v Umoja Floor Mills & Anor [2006] eKLR**.
8. On future medical expenses, the appellant submitted that she was entitled to an award under this head and proposed the multiplier of 22 years given she was 38 years at the time of the accident with monthly expenses of Kshs. 200 leading to a total award of Kshs. 52,800. The appellant relied on the cases of **Peter Ngugi Kimani v Joseph Kariuki [2018] eKLR**, **Eric Onyango Okumu v SDV Transami (K) Ltd**

[2007] eKLR, Mwaura Muriuki v Suera Flowers Ltd & Anor [2014] eKLR and that of Mumias Sugar Co. Ltd v Francis Wanolo [2007] eKLR.

9. The appellant submitted that the evidence she adduced in court was not rebutted by any contrary evidence by the respondents as the respondents did not give any evidence in support of their case which renders their defence mere statements. The appellant relied on the case of Mary Njeri Murigi v Peter Macharia & Anor [2016] eKLR.

#### **C. 1<sup>st</sup> & 2<sup>nd</sup> Respondent's Submissions**

10. The 1<sup>st</sup> & 2<sup>nd</sup> respondent submitted that the appellant failed to discharge her duty of proving their negligence. They relied on the case of Eastern Produce (K) Limited v Christopher Atiado Osiro – High Court at Eldoret Civil Appeal No. 43 of 2001. Consequently, the 1<sup>st</sup> & 2<sup>nd</sup> respondents submitted that the learned magistrates finding on liability was correct and relied on the case of Duncan Kimanthi Karagania v Ngugi David & 3 Others [2016] eKLR.

11. The 1<sup>st</sup> & 2<sup>nd</sup> respondent further submitted that an appellate court should not interfere with the finding of a trial judge unless it is satisfied that there was a misdirection or misapprehension of the law leading the judge to arrive at a wrong decision. They relied on the case of David Brown Kipkorir Chebii v Rael Chebii [2016] eKLR.

12. On quantum, the 1<sup>st</sup> & 2<sup>nd</sup> respondent submitted that the award Kshs. 150,000 in favour of the appellant had she succeeded in her claim was too high as the appellant had sustained soft tissue injuries and that Kshs. 60,000 would suffice. On special damages, the 1<sup>st</sup> & 2<sup>nd</sup> respondent submitted that the award Kshs. 52,450 was excessive as the appellant had only proven Kshs. 43,250.

13. On costs, the 1<sup>st</sup> & 2<sup>nd</sup> respondent submitted that they be awarded costs of the appeal as recompense for vigorously defending the appeal.

#### **D. Analysis of Law and Evidence**

14. As a first appellate court, my duty, as espoused under section 78 of the Civil Procedure Act of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. I am also enjoined to analyze, evaluate, assess, weigh, interrogate and scrutinize all the evidence and arrive at my own independent conclusion, bearing in mind the fact that unlike the trial court, I had no advantage to see and hear witnesses as they testified. This principle of law was well settled in the case of Selle v Associated Motor Boat Co. Ltd (1968) EA 123.

15. This court is equally alive to and shall be guided by the decision in the case of Mbogo v Shah & Another (1968) EA 93, where the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows: -

*“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”*

16. On whether the appellant established her claim against the 1<sup>st</sup> & 2<sup>nd</sup> respondent, the testimony of PW1 was to the effect that the driver of motor vehicle KBD 722Q was responsible for the accident.

17. The appellant testified that she was asleep at the time the accident occurred and was woken up by noise. She then realized that the motor vehicle had veered off the road, hit a tree and eventually lay on its side. She further testified that she was taken to hospital after the accident. She filed a statement of evidence explaining how the accident occurred which was not at variance with her testimony.

18. Additional evidence was from the police officer PW1 who produced the police abstract. He testified that investigations revealed that it was the driver of vehicle registration no. KBD 722Q belonging to the 3<sup>rd</sup> respondent who was to blame for the accident.

19. PW1 explained that the vehicle registration number KBD 722Q emerged from Rwaka and failed to keep its lane thus hitting vehicle registration no. KWE 088 causing it to spin around and hit 2<sup>nd</sup> defendant's vehicle registration no. KAY 195E in which the appellant was travelling in.

20. I come to the conclusion that the appellant failed to adduce any evidence against the 1<sup>st</sup> and 2<sup>nd</sup> respondents to prove the particulars of negligence set out in the plaint.

21. The learned magistrate clearly stated in her judgment that it was the driver of vehicle registration no. KBD 722 who was to blame for the accident. However, the magistrate erred in failing to enter judgment against the 3<sup>rd</sup> respondent after finding him culpable.

22. The defendant issued 3<sup>rd</sup> party notice dated 31/01/2012 and was granted leave to join the 3<sup>rd</sup> party. The court also directed that liability between the appellant and the respondents including the 3<sup>rd</sup> party be tried together.

23. A copy of records attached to the application showed that the vehicle belonged to one Maurice Onditi as at the date of the accident. The 3<sup>rd</sup> party/respondents annexed to the application to enjoin him.

24. The 3<sup>rd</sup> respondent filed a defence on 11/06/13 denying the occurrence of the accident and liability thereof. He said he bought the vehicle registration no. KBD 722 from one Shem Namuseyi Shanonyi and that if any accident occurred, it must have been before he took possession of the vehicle.

25. The 3<sup>rd</sup> respondent did not adduce any evidence in support of his defence. He did not comment on the copy of records produced by the respondent showing that the vehicle registration no. KBD 722Q was registered in his name.

26. The evidence of the plaintiff in her statement was that she was travelling in the respondents' vehicle registration number KAY 195E as a fare paying passenger when it collided with the vehicle of the 3<sup>rd</sup> respondent registration KBD 722Q causing that of the defendant to veer off the road as a result of which she was injured.

27. The appellant's evidence in chief was that the plaintiff was sleeping at the time of the accident and was woken up by a loud bang. The bang must have been from the collision of the two vehicles. She realised that the respondent's vehicle had veered off the road and that she had sustained injuries.

28. The evidence of PW1 was to the effect that the vehicle registration no. KBD 722Q belonging to the 3<sup>rd</sup> respondent was to blame for the accident. She testified that the vehicle emerged from Ruaka (opposite direction) and failed to keep its lane. It hit vehicle registration number KWE 088 which hit the respondent's vehicle in which the appellant was travelling in.

29. From the evidence of the appellant and that of PW1 the police officer, I find that negligence was established on the part of the 3<sup>rd</sup> party. The magistrate erred in failing to find the 3<sup>rd</sup> party liable based on the evidence on record. There is no evidence to attribute any part of the blame on the 1<sup>st</sup> and 2<sup>nd</sup> respondent and as such, the case of apportionment does not arise herein.

30. It is my considered opinion that the appellant proved the case against the 3<sup>rd</sup> respondent on the balance of probability. I find the 3<sup>rd</sup> respondent wholly liable and enter judgment at 100% against him.

31. On quantum, the magistrate awarded general damages for pain and suffering at Kshs. 150,000/-.

32. In the case of *Ali Vs Nyambu [1990] KLR 534*, the Court of Appeal held that an appellate court can only interfere with an award of damages where the award is inordinately low or inordinately high or where some factors were not taken into consideration or that irrelevant factors were considered. The appellant relied on this case. In her argument that the magistrate failed to award damages for loss of earnings and for future medical expenses which resulted in an inordinately low award.

33. The case of *Jobling Vs Associated Daines Lts (1981) 3WLR 172*, was cited where the court held: -

***“... a person is not compensated for physical injury; he is compensated for the loss which he suffers as a result of that injury. The plaintiff will be compensated not for having serious injuries but for the inability to lead a full life.”***

34. The appellant pleaded for loss of earnings for 51 days she claimed was absent from work commencing 13<sup>th</sup> June to 3<sup>rd</sup> August 2009 at the rate of Kshs. 10,000/- based on the minimum monthly wage scale. I agree with the appellant that this evidence of absence from duty during the treatment period was not controverted. However, taking into consideration that the injuries sustained were minor, and that there was no permanent disability suffered, I will allow thirty (30) days for loss of earnings. I hereby award Kshs. 10,000/- for this item.

35. The medical, transport and other miscellaneous expenses were pleaded per se and proved by way of receipts. The magistrate acknowledged that the special damages were specifically pleaded and proved but did not make an award. I hereby award the appellant special damages of Kshs. 43,250/-.

36. Future medical expenses were not claimed in the appellant's evidence. I have perused the appellant's witness statement and her testimony and confirmed the position. The submissions before the lower court did not allude to this claim. I am of the view that this claim for future medical expenses was an afterthought that was introduced in the submissions in this appeal. I find no basis to consider the award at this late stage of the proceedings.

37. The doctor's report shows that the appellant suffered soft tissue injuries. In her submissions she prayed for Kshs. 100,000/- for pain and suffering. The court awarded the appellant general damages of Kshs. 150,000/- which was higher than her proposal. In my view, the award is adequate compensation for pain and suffering as well as for loss of amenities. I find no reason to interfere with the award of the lower court.

38. The following is the summary of the award: -

a) General damages	Kshs. 150,000/-
b) Special damages	43,250/-
c) Loss of earnings	<u>10,000/-</u>
Total	<b><u>Kshs. 203,250/-</u></b>

39. The appellant is hereby awarded the costs of this appeal as well as those of the lower court as against the 3<sup>rd</sup> respondent.

40. The 1<sup>st</sup> and 2<sup>nd</sup> respondents to meet their own costs of this appeal and the lower court case. The appeal is therefore successful and it is hereby allowed.

41. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2019.**

**F. MUCHEMI**

**JUDGE**