REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 17 OF 2018

(Being an appeal from the judgment and decree of the Principal Magistrate's Court at Nkubu by the Honorable Magistrate J. M. Irura (SRM) delivered on 17th May, 2017 in Nkubu PMCC No. 44 of 2013)

(CORAM: F. GIKONYO J.)

NICODEMUS OSORO.....…..... 1ST APPELLANT

G4S KENYA LIMITED.....…. 2ND APPELLANT

-Versus-

JANE GATWIRI ..... RESPONDENT

JUDGMENT

1. On 17th May, 2017 the trial court entered judgment in Nkubu PMCC No. 44 of 2013 in favour of the Respondent as follows:

> **1. Liability was apportioned in the ratio of 20:80 as against the 1st and 2nd defendants and 3rd and 4th defendants respectively.**
>
> **2. The plaintiff was awarded Kshs. 2,000,000/- in general damages and Kshs. 198,464/- as special damages and costs of the suit and interest.**

2. The Appellants being aggrieved by the award filed this appeal and preferred five grounds in the memorandum of appeal. The said grounds may be collapsed into two issues, to wit, that the trial magistrate erred in fact and law in:

> **1. The apportionment of liability; and**
>
> **2. Assessment of damages.**

SUBMISSIONS

3. The appeal was canvassed by way of written submissions. The Appellants submitted that in light of the injuries pleaded and proved an amount of Kshs. 1,000,000/- would suffice as adequate compensation for the Respondent's injuries. They argued that the plaint and evidence on record show varying injuries. Thus, only those injuries pleaded and proved by the Respondent ought to have been considered by the learned trial magistrate in assessment of quantum of damages.

4. Concerning apportionment of liability, the Appellants asserted that from the evidence of the two drivers each party blamed the other. And the court observed that both drivers had a part to play. Therefore, the court should find that the defendants are equally liable.

5. On the other hand, the Respondent submitted that the learned magistrate reviewed the evidence and observed that the 1st Appellant was overtaking at a corner on a bridge making it impossible for the Nissan driver to escape the collision. The 1st Appellant was the cause of the accident but she supports the apportionment made by the trial magistrate.

6. On the issue of quantum, the Respondent stated that she filed a cross-appeal because the learned magistrate did not take into account the very important findings of the examining doctor, to wit; (1) the injuries in the lower limbs was with permanent incapacity and that she cannot do her daily activities; (2) she has metal plates insitu; (3) facial injuries were serious rendering her unconscious and loss of some of her teeth. She prays general damages to be increased to Kshs. 4,000,000/-.

ANALYSIS AND DETERMINATION

7. This being a first appeal, the court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. (***See: Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123***).

8. **PW1 Dr. Koome Guantai** a medical officer based at Meru Level 5 Hospital presented the medical report for the respondent that was authored by Dr. Catherine Mwende Mutuku as well as the P3 form.

9. **PW2 Jane Gatwiri** told the court that on 25th November 2011 she was a passenger on board a *matatu* registration KBJ 411P going to Meru. When they arrived at Kaguru farm they encountered two vehicles headed towards Nairobi, one was a G4S vehicle and the other a probox. The G4S vehicle was attempting to overtake the probox but it miscalculated and hit their *matatu* on the side of the driver. She was seated at the seat directly behind the driver. She lost consciousness and found herself at Consolata Mission Hospital.

10. She sustained injuries on the face, lost two pre-molars, had fractures on the legs at both thighs on the right leg she had compound fractures on the thigh bone. She was operated on both legs and metal plates inserted but are yet to be removed after 3 years. When she got discharged she contracted a nurse who used to dress her. She continued to attend clinics for 7 months for which those months she was bed ridden. She still attends physiotherapy clinics every month and cannot work.

11. At the close of the Respondent's case, the Appellants called one witness. **DW1 Nicodemus Osoro Ombese** stated that he works as a G4S driver and on the material day he was driving motor vehicle registration KBN 316F from Meru to Nairobi. At around 6.30 PM at Kaguru farm a probox motor vehicle ahead of him which indicated that it was stopping and went off the road, and he decided to overtake it. But the probox suddenly emerged into the road without indication. He then saw an oncoming Nissan *matatu* and applied emergency brakes but the *matatu* did not break and a collision ensued. He was charged with a traffic offence vide Tr. No. 316/12 in Meru Chief Magistrates Court and the case is ongoing.

12. Then the 1st and 2nd defendants called two witnesses. **DW2 Stanley Kiogora Mbui**, an employee of the owner of motor vehicle registration No. KBJ 411P, the 2nd defendant. He recalled that on the material day he was driving the said motor vehicle from Nairobi to Meru. At around 6.30PM he arrived at Mwichiune near Kaguru farm. He met G4S vehicle overtaking a Toyota probox at a spot which is on a corner and on the bridge. He flashed his headlights to warn the driver of the G4S motor vehicle but the vehicle hit his vehicle. He lost consciousness and regained it in hospital.

13. **The DW3 No. 44320 CIP Pius Wanyama** based at Meru traffic base produced the OB and police abstract. He stated that according to the report the driver of motor vehicle KBJ 411P was trying to avoid a head on collusion when it collided with an oncoming KBN 316F which was overtaking. The driver of the latter vehicle was blamed and charged for careless driving.

14. This court has carefully considered the record of appeal and submissions presented. The issues to be determined by this court are:

1. **Who is to blame for the accident herein? and**

2. **Whether the court should disturb the award of damages made to the Respondent on the basis of the injuries sustained**.

Liability

15. Where two or more vehicles are involved in an accident, liability thereof will depend on the circumstances of the accident as depicted by the evidence adduced. In some situations, one of the drivers may be solely to blame for the accident. In other situations, some of the drivers and not others, may be to blame for the accident but to the degree that the court shall decide on the basis of the evidence adduced. Yet, in another situation, all the drivers may be blamed equally for the accident on the basis of the evidence adduced. Of worth to note is that, in apportioning liability between such drivers, the court is not expected to apply any mathematical precision. Rather, it is a matter of court's good and informed judgment on the basis of the evidence.

16. Applying this test what does the evidence portend? Evidence given by the driver of the *matatu*, **DW2**, is that they were headed to Meru. **DW1** who was driving the G4S vehicle was headed towards Nairobi. As **DW1** was attempting to overtake a probox and miscalculated, thus, hitting the *matatu*. **DW2** told the court that the accident happened at a corner and on a bridge. However, according to **DW1** attempted to blame the probox which was ahead him as well as matatu which was oncoming. His evidence was that the probox indicated that it was stopping and went off the road and he decided to overtake it. Unexpectedly, he said tha the probox emerged into the road without an indication which resulted in the collusion with the matatu.

17. The appellants submitted that each of the drivers' blame each other for the accident of which the point of impact was on a yellow line which indicates that neither party tried to take reasonable measures to avert the accident.

18. In this case, the evidence is not in any way blurred although DW1 attempted to introduce confusion on liability. This is a collision. DW1 was overtaking at a corner and on a bridge; he ought to have known that you don't overtake at such places for they are blind spots and the road is ordinarily narrow. DW1 ought to have been extra careful at corners and bridges. Again, if a vehicle indicates that it intends to get off the road, the driver behind should slow down considerably to allow such vehicle to get off the road. In some circumstances, the driver behind may be forced to stop to allow the vehicle to get off the road. But, DW1 decided to overtake the probox and at a corner. This was sheer negligence on his part. **DW3** produced the police abstract and investigation places the blame squarely on DW1. As a result. In the upshot, DW1 was largely to blame for the accident. Therefore, I find the apportionment of liability herein to be premised on the evidence and I affirm it. I reject the grounds of appeal on the point.

Quantum of damages

19. Circumstances in which an appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of **Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000-** the Court of Appeal- as follows:

> **"…in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."**

20. I am also aware that decided cases guide the court in assessing damages. Similarly, I am alive to the fact that astronomical awards may hurt lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of **H. West and Son Ltd v. Shepherd [1964] AC.326** where it was stated that:

> ***"…but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional….."***

21. With the above guide, I will cite some comparable cases. In the plaint, the plaintiff pleaded that she sustained two fractures on the right leg above the knee, a fracture on the left leg, a fracture on the left hand and cut on the face. According to the medical report by Dr. Caroline Mutuku the Respondent had:-

> **1. Multiple bruises with loss of two premolar teeth on the left side lower jaw.**
>
> **2. Bilateral fractures. On the right side she had segmental fracture involving right femur (distal and proximal). On the left side she had a fracture midshaft femur and fractured left lateral malleolus with multiple bruises on the anterior aspect of the leg.**

22. The Appellants submitted that the evidence on record presented varies with the injuries purported to have been sustained. They argued that only the injuries pleaded and proved by the Respondent ought to have been considered in the assessment of quantum by the trial magistrate. The Respondent in her plaint stated that she sustained a fracture on the left hand but this was not proved. It ought not to be taken into account in assessing damages merely because it was pleaded. The loss of two premolar teeth was not pleaded. But was it proved? I should state that, in my experience as a judge, I have noted that some parties file compensation claims before a proper medical report on the injuries is done. As a result, variance between the injuries pleaded and the injuries actually suffered will emerge. The practice is awful and only exerts unnecessary toil by court and parties. It should be avoided. That notwithstanding, I think that injuries proved to have been sustained in the accident are the ones the court should consider in awarding damages. Of course, the medical experts will lead the way here. Therefore, in view of the constitutional command on substantive justice, it would be most unjust to deny compensation solely because the injury proved to have been sustained in the trial was not pleaded. Such rule on strict pleading may become a source of injustice. An issue may be determined by the court if it emerges from evidence of the parties.

23. Having said that, the injuries the plaintiff sustained resulted in her being admitted in hospital from 25th November 2011 to 30th January 2012 a period of 65 days. The medical report stated that she was surgically operated on both legs and fractures reduced by screws. At the time of examination she was on fair general condition, complained of severe pain and wouldn't walk without assistance. She dragged her right leg as she moved. Her conclusion is that the respondent sustained severe injuries to the lower limbs with permanent incapacity. The Respondent cannot do her daily activities; she is on orthopaedic follow up as well as physiotherapy and long term pain control.

24. In the case of **Alex Wachira Njagua –Vs- Gathuthi Tea Factory & Another [2010] eKLR** the court awarded Kshs 3 Million for blunt injuries of the head with confusion, fracture of the left tibia, fracture of the right fibula, cut wound on the forehead, bruised elbow and bruised knee.

25. In the case of **Charles Wanyoike Githuka –Vs- Joseph Mwangi Thuo & 2 Others [2008] eKLR** the award was Kshs 2 Million. The Plaintiff in that case suffered fracture mid-shaft of the right femur, segmental fractures of the left femur, compound fracture of the right lower leg (fibia and fibula bones), fracture of the right tibia plateau (knee joint), and fracture of the right ankle joint.

26. In the case of **Gabriel Mwashuma v Mohammed Sajjad & another [2015] eKLR** the award was Kshs. Kshs. 3M. The plaintiff in that case suffered segmental left femur fracture, compound fracture left patella and femoral condyle, comminuted left distal tibia/fibua(pilon) fracture, fracture right fibula and soft tissue injuries right knee.

27. In light of the injuries suffered by the Respondent and the cases I have cited, an award of Kshs. 2,000,000 in general damages is fair compensation. Accordingly, I do not think the award by the trial court was inordinately high or low as to be wholly erroneous estimate of damages. There is no reason of disturbing it.

28. In the end result, I find the appeal and the cross-appeal not to have merit and is dismissed. Each party to bear own costs.

Dated, signed and delivered in open court this 13th day of February, 2019.

...……..

F. GIKONYO

JUDGE

In presence of

Rimita for Respondent

Muthoga for appellant – absent

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F. GIKONYO

JUDGE