REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 427 OF 2015

STANLEY KARANJA WAINAINA.....1ST APPELLANT

THERMOPAK LIMITED.....2ND APPELLANT

VERSUS

RIDON ANYANGU MUTUBWA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon M Chesang (Ms), Resident Magistrate (RM)

at the Chief Magistrate's Court at Milimani in CMCC No 6044 of 2013 delivered on 4th August 2015)

BETWEEN

RIDON ANYANGU MUTUBWA.....PLAINTIFF

VERSUS

STANLEY KARANJA WAINAINA.....1ST DEFENDANT

THERMOPAK LIMITED.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. In her decision of 4th August 2015, the Learned Trial Magistrate, M Chesang (Mrs) Resident Magistrate (RM), entered judgment in favour of the Respondent against the Appellants on a hundred (100%) basis for the sum of Kshs 1,379,796/= made up as follows:-

General Damages for pain and Suffering	**Kshs1, 200,000/=**
Special Damages	**Kshs 99,796/=**
Future Medical costs	**Kshs 80,000/=**
	Kshs 1, 379,796/=

Plus costs and interest at court rates on the general damages from the date of judgment and on special damages from the date of filing suit and costs.

2. Being dissatisfied with the said judgment, on 4th August 2015, the Appellants filed their Memorandum of Appeal dated 31st August 2015 and filed on 3rd September 2015. They relied on fourteen (14) Grounds of Appeal.

3. The Appellants' Written Submissions were dated 12th June 2018 and filed on 13th June 2018 while those of the Respondent were dated

11th June 2018 and filed on 25th June 2018.

4. When the matter came before the court on 6th November 2018, the parties requested it to render its decision based on its Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

7. Having considered the parties' respective Written Submissions, it was apparent to this court that the issues that had been placed before it for determination were as follows:-

> **1. Whether or not the Learned Trial Magistrate erred when she found the Appellant wholly liable for the injuries the Respondent sustained; and**
>
> **2. Whether or not the Learned Trial Magistrate awarded the Respondent that were manifestly excessive as to have warranted interference by this court**

8. The court therefore found it prudent to deal with the said issues under the separate and distinct headings shown herein below.

I. LIABILITY

9. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8), (9), (10) and (11) were dealt with under this head as they were all related.

10. The Appellants submitted that the Learned Trial Magistrate erred when she admitted copies of documents in place of original documents being tendered in evidence and when she admitted the Police Abstract Report without calling the maker thereof.

11. They relied on Section 67 of the Evidence Act Cap 80 (Laws of Kenya) that provides that documents must be proved with primary evidence except in special circumstances prescribed in Section 68 of the Evidence Act where secondary evidence thereof can be admitted.

12. They added that the admission of the documents by the Learned Trial Magistrate contravened Section 35 of the Evidence Act that provides that except in special circumstances, all documents must be produced by their makers.

13. It was their contention that the police ought to have been called as witnesses in view of the conflicting evidence that was adduced by the witnesses during trial because a decision on liability was a finding of fact.

14. They argued that where it was not clear to the court who was to blame for an accident, it would be proper to apportion liability equally between the drivers of the vehicles that had been involved in an accident. In this regard, they relied on the case of **Lakhamshi vs Attorney General [1971] EA 118, 120** to buttress their case.

15. On his part, the Respondent pointed out that the Learned Trial Magistrate did not mis-understand the evidence that was adduced when she found the Respondent to have been wholly liable for the injuries that he sustained.

16. He submitted that an appellate court ought to bear in mind what the trial court saw and heard when arriving at a certain conclusion where the testimony adduced was conflicting as was held in the case of **Watt vs Thomas (1) [1947] A.C 484.**

17. It added that apportionment of liability is a matter of discretion and where a decision can go either way, an appellate court ought not to disturb such a conclusion.

18. The Respondent's adopted his Witness Statement dated 14th August 2013 and filed on 27th September 2013 and filed on 27th September 2013 as his evidence-in-chief. He stated that on 20th March 2012, he was riding Motor Cycle Registration No KMCT 062M (hereinafter referred to as "the Subject Motor Cycle") along Enterprise Road Nairobi when the 1st Appellant who was driving Motor Vehicle Registration No KAW 161K (hereinafter referred to as "the Subject Motor Vehicle") overtook him on the left and in the process, he crashed his motor cycle on the left side and his left leg as a result of which he sustained a fracture on his left leg. He was emphatic that he was not overtaking the 1st Appellant at the material time.

19. The 1st Appellant also adopted his Witness Statement dated 15th August 2014 and filed on 19th August 2014 as his evidence-in-chief. He

stated that on the material date, he was driving the subject Motor Vehicle along Enterprise Road keeping to his correct lane when the Respondent overtook him. He said that on seeing an on-coming motor vehicle, a trailer, the Respondent tried to get back on the correct lane to avoid a head on collision with the trailer and in the process of doing so, he rammed into the right rear side of the subject Motor Vehicle. It was his testimony that police arrived at the scene and took the requisite statement but they did not charge him.

20. This court perused the proceedings and noted that the issues of the makers of the documents and/or if the original documents were to be produced in evidence were never addressed on 31st October 2014 when the matter came up for Pre-Trial Conference. The matter was merely certified as ready for hearing after both parties informed the Trial Court that they had both complied with Order 11 Rule 2 of Civil Procedure Rules, 2010.

21. There was also no indication in the Pre-Trial Questionnaire that was dated 2nd December 2013 and filed on 10th December 2013 that seemed to suggest that the question of whether makers of documents would be dispensed with or if original documents would have to be specifically tendered in evidence.

22. The parties were therefore required to prepare their respective cases and proceed as per the laid down procedures under the Evidence Act and Civil Procedures Rules unless they had consented otherwise. Consequently, parties had to comply with the provisions of Section 35 and Section 67 of the Evidence Act.

23. Section 35 of the Evidence Act stipulates as follows:-

> **1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say-**
>
> > **a. if the maker of the statement either-**
> >
> > > **i. had personal knowledge of the matters dealt with by the statement; or**
> >
> > > **ii. where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and**
>
> **b. if the maker of the statement is called as a witness in the proceedings:**
>
> **Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.**
>
> **2. In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence-**
>
> > **a. notwithstanding that the maker of the statement is available but is not called as a witness;**
> >
> > **b. notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.**

24. Section 67 of the Evidence Act provides as follows:-

> **"Documents must be proved by primary evidence except in the cases hereinafter mentioned."**

25. Having said so, this court noted from the proceedings that during the Respondent's testimony, the Appellants' counsel stated that **"The documents can be produces (**sic**) one by one and produced except the police abstract."** The Respondent's counsel then informed the Trial Court that he had shown the Appellants' counsel the original documents.

26. It was clear to this court that the Appellants could not at the appellate stage purport that the Respondent did not produce original documents. Their counsel's indication that all documents could be produced save for the Police Abstract was for all purposes and intent, a waiver to object to copies of the said documents being adduced in evidence. The Learned Trial Magistrate did not therefore err when she admitted copies of the documents that were relied upon by the Respondent.

27. Turning to the issue of the Police Abstract Report, this court noted that the Appellants counsel was quite in order to have demanded that the maker of the same be called to testify as both the Appellants and the Respondent gave different versions of what transpired on the material date.

28. Notably, the said Police Abstract Report showed that the matter was pending under investigations. There was also no indication who the police blamed for the accident. It was, however, the view of this court that even if the police had testified in court, their evidence would not really have assisted the court as the matter was pending under investigation.

29. This court took the view that the Learned Trial Magistrate erred when she concluded that there was no value in having the maker of the Police Abstract Report being called to produce the same on the ground the accident was admitted. What this court understood to have been the Appellants' argument was that whereas it was admitted that an accident had occurred, the Police Abstract Report did not attribute liability to either party.

30. This court therefore found favour with the holding of **Ephantus Mwangi vs Duncan Mwangi Wambugu [1984] eKLR** that was relied upon by both parties where Kneller JA (as he then was stated that:-

> **"A member of an Appellate court, is not bound to accept the learned judge's findings of fact if it appears either that, (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or, (b) of the impression based on the demeanour of a witness, is inconsistent with the evidence on the case generally."**

31. Bearing in mind that there was no conclusive determination in the Police Abstract Report of who was to blame for the accident herein, this court came to the conclusion that it could interfere with the determination by the Learned Trial Magistrate on the apportionment of liability as it was inconsistent with the documentary evidence that was adduced during trial.

32. It further found the case of **Kiruga vs Kiruga [1988] KLR 348** that was relied upon by the Respondent to have been distinguishable from the facts of this case. There was nothing conflicting in the Police Abstract Report. Weighed against the oral evidence that was adduced by the 1st Appellant and the Respondent herein, the documentary evidence had more weight. It had nothing to do with the demeanor of the two (2) witnesses. It was clear that neither the 1st Appellant nor the Respondent were found to blame as the matter was pending under investigations at the time of the trial.

33. Doing that the best that it could do, the court found equal apportionment of liability would have been fair and reasonable based on the conclusion of the Police Abstract Report as there was no independent witness to have persuaded this court to have arrived at a different conclusion. However, as the 1st Appellant was in charge of a bigger vehicle as compared to the Respondent, he ought to have exercised more care. In the circumstances of this case therefore, it was the view of this court that apportionment of liability seventy (70%) percent– thirty (30%) percent in favour of the Respondent was more fair and reasonable.

34. In the premises foregoing, this court found and held that Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8), (9), (10) and (11) merited and the same are hereby allowed.

II . QUANTUM

A. GENERAL DAMAGES

35. Ground of Appeal No (14) was dealt with under this head.

36. In assessing general damages, courts must have presence of mind to ascertain the sum of general damages that other courts and especially appellate courts would ordinarily award in respect of a particular injury. A plaintiff's compensation ought to be comparable to awards by other courts. In view of the aforesaid, a court must therefore be guided by precedents

37. In the case of **Kigaraari vs Aya(1982-88) 1 KAR 768**, it was stated as follows:-

> **"Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."**

38. The Appellants referred this court to the case of **Kemfro Africa Ltd vs Aziri Kamau Mudika Lubia (No 2) [1985] eKLR** where it was held that an appellate court can disturb an award if a trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award was so inordinately low or inordinately high that it must have been an erroneous estimate of the damages.

39. They termed the award of Kshs 1,200,000/= general damages to have been inordinately high and proposed a sum of Kshs 200,000/= general damages. They referred to several cases where courts had awarded general damages between Kshs 300,000/= - Kshs 400,000/= where the Plaintiffs therein had sustained compound fractures of the tibia and fibula amongst other injuries- See **Harun Muyoma Boge vs Daniel Otieno Agulo [2015] eKLR**, **Tabro Transporters Ltd vs Absalom Dova Lumbasi [2015] eKLR** amongst other cases.

40. On the other hand, the Respondent urged this court not to disturb the award for general damages and relied on the cases they had placed reliance on during trial.

41. According to the Medical Report of Mr W M Wokabi dated 15th July 2013, the Respondent herein was said to have sustained a fracture of the left tibia malleolus and fracture of left fibula malleolus. At the time of the medical examination, he had complained of pain on the left ankle joint, swelling of the left ankle and foot and inability to walk or stand for long hours.

42. The doctor observed that he was "limping profoundly" when walking. He put permanent disability at ten (10%) per cent and opined that he would require to have the metal implants to be removed and that would cost Kshs 80,000/=.

43. In assessing what would be a reasonable award of general damages for pain and suffering and loss of amenities, this court had due regard to several comparable case.

44. In the case of **Joseph Musee Muia vs Julius Mbogo & 3 Others [2013] eKLR** where Dulu J awarded the Plaintiff therein a sum of Kshs 1,300,000/= for fractures of the tibia and fibula in 2013.

45. In the case of **Veronica Mwongeli Kilonzo vs Robert Karume [2003] eKLR**, the court awarded the Plaintiff therein a sum of Kshs 500,000/= general damages for fractures of the tibia and fibula amongst other injuries in 2003.

46. In the case of **Clement Gitau vs GKK [2016] eKLR**. The Respondent therein, a minor, sustained a fracture of the tibia and bruises. In 2016, Sergon J upheld the sum of Kshs 600,000/= general damages, pain and loss of amenities that had been awarded by the lower court.

47. In the case of **Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR.** The Plaintiff therein sustained fractures of femurs bilaterally, two (2) deg loving injuries of the right knee and ankle and required an operation to remove k-nails that had been inserted. In 2014, Wakiaga J awarded her a sum of Kshs 700,000/= general damages for pain and loss of amenities.

48. In the case of **Godfrey Wamalwa Wamba & Another vs Kyalo Wambua [2018] eKLR**. The Appellant therein sustained a fracture of the lower third tibia. He had healed with non-union of the tibia that would require orthopedic surgery to be corrected. He also had wasting and shortening of the leg by about two (2) centimeters. In 2018, this very court upheld an award of the lower court in which he was awarded Kshs 700,000/= general damages for pain and suffering and loss of amenities.

49. Accordingly, having considered the parties' respective Written Submission, it was the considered opinion of this court that the award of Kshs 1,200,000/= general damages for pain and suffering and loss of amenities was manifestly excessive so as to have given an erroneous estimate of damages to be awarded and thus warranting interference of this court.

50. Having considered the injuries that the Respondent sustained, comparable cases and the inflationary trends, it was the view of this court that a sum of Kshs 700,000/= general damages for pain and suffering and loss of future amenities would be adequate to compensate the Respondent for the injuries that he sustained.

51. In the premises foregoing, this court found and held that Grounds of Appeal No (7) was merited and the same is hereby upheld.

B. SPECIAL DAMAGES

52. Ground of Appeal No (12) was dealt with under this head.

53. The Appellant submitted that the Respondent only managed to prove a sum of Kshs 2,500/= and consequently, the sum of Kshs 99,796/= that was awarded by the Learned Trial Magistrate should be set aside because no receipts were furnished in court to prove the said amount. It was its contention that the said sum of Kshs 99,796/= was paid by NHIF and awarding the same to the Respondent would amount to unjust enrichment.

54. The Respondent was emphatic that the said sum of Kshs 99,796/= was paid and that proof of special damages depends on their character and nature and receipts cannot be insisted at all times. It was his contention that the fact that he was issued with a clearance certificate meant that the monies had been paid.

55. The Respondent could not have been further from the truth. As was correctly pointed out by the Appellant, special damages must be strictly proven. Perusal of the hospital clearance showed that the sum of Kshs 99,796/= was paid through NHIF. Awarding the Respondent the said sum of Kshs 99,796/= would amount to unjust enrichment as he did not go out of pocket.

56. Without belabouring this point, Ground of Appeal No (12) was merited and the same is hereby upheld.

DISPOSITION

57. For the reasons foregoing, the upshot of this court's judgment was that the Appellant's Appeal that was dated 31st August 2015 and filed on 3rd September 2015 was merited and the same is hereby allowed.

58. In the circumstances foregoing, this court hereby sets aside and/or vacates the Judgment of Kshs 1,379,796/= that had been entered in favour of the Respondent against the Appellants and in its place hereby enters judgment in his favour against the Appellants for Kshs 491,750/= made up as follows:-

General damages	**Kshs 700,000/=**
Special damages	**Kshs 2,500/=**
	Kshs 702,500/=

Less 30% contributory negligence **Kshs 210,750/=**

Kshs 491,750/=

Plus costs and interest thereon at court rates from date of judgment till payment in full. The Appellant will have the costs of this Appeal.

59. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **12th** day of **February** 2019

J. KAMAU

JUDGE