REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL NO. 96 OF 2016

WILSON MUCHIRI.....1ST APPELLANT

SIMON DENIS.....2ND APPELLANT

WAITHUKI SYMON.....3RD APPELLANT

-VERSUS-

ANNAH WAMATHA MUITA

Alias **ANNE WAMAITHA.....RESPONDENT**

(Being an appeal from the judgment and decree of Honourable Kagendo – Chief Magistrate) delivered on 31st August 2016 in Molo CMCC NO.119 "B" of 2015 between Ann Wamaitha Muita alias Anne Wamaitha –vs- Wilson Muchiri & 2 Others)

JUDGMENT

1. On the 24th December 2014 the Respondent was knocked down by a motor vehicle Reg. No. KBU 181W the property of the 2nd and 3rd Appellants being driven by the 1st Appellant. She sustained injuries.

She sued the Appellants alleging negligence by the driver.

2. In her Amended plaint dated 6th May 2015 the Respondent pleaded for compensation for pain and suffering, loss of earning capacity and future medical expenses together with special damages in the sum of Kshs.653,167.

Upon hearing of the case the trial magistrate found the Appellants wholly to blame for the accident and therefore liable in damages, which he assessed at Kshs.2,000,000/= for pain and suffering, loss of earning capacity at Kshs.1,248,000/= and special damages at Kshs.653,167/=.

3. The Appellants being dissatisfied with the whole judgment preferred this appeal.

Twelve grounds of appeal are preferred but are summarized into two thus liability and *quantum* of damages.

4. In their joint Amended statement of defence dated 3rd December 2015 the appellants denied the Respondents allegations including ownership of the accident vehicle, occurrence of the accident and jurisdiction of the trial court.

5. I have considered the pleadings, evidence and submissions filed by the parties.

Three issues arise for determination.

1. *Jurisdiction of the trial court*

2. *Whether the trial magistrate erred in law and fact in finding the appellants wholly to blame for the accident.*

3. *Whether the trial Magistrate's award in damages was inordinately excessive*.

6. The principles upon which an appellate court ought to consider on appeal were stated in the cases **Butt -vs- Khan (1987) KLR, Mwanasokoni –vs- Kenya Bus Services Ltd (1982-88) and Selle –vs- Associated Motor Boat Co. (1968) EA 123** among others. An

appellate court has a duty to re-consider and re-evaluate the evidence adduced before the trial court and come up with its own findings and conclusions, and to find out whether the findings of the court are based on the evidence on record or on no evidence taking into account that the court neither saw or heard the witnesses testify.

7. **Jurisdiction**

The matter of jurisdiction ought to be raised at the earliest opportunity. The Appellants denied jurisdiction of the court in their statement of defence. Jurisdiction is everything and once a court realizes that it lacks jurisdiction it ought to down its tools – **Owners of the Motor Vessel "Lillian" –vs- Caltex Oil (Kenya) LTD (1989) KLR.** It ought to be raised at the earliest opportunity. The Appellants did not pursue the matter of jurisdiction nor did the court pronounce itself on the same.

8. Details of the accident are stated at the police abstract (PExt 8) that the accident occurred at the Total market along Nakuru-Eldoret road. The driver was charged at the Traffic court at Molo for the offence of careless driving contrary to **Section 49 (1) of the Traffic Act**. There is no doubt therefore that the trial court at Molo Chief Magistrates court had the requisite jurisdiction to hear and determine the suit.

9. **Liability**

It is trite that whenever a road traffic accident occurs involving two vehicles one or both must be held liable. Some act or omission by a driver must materially contribute to the accident or a probable cause that may have also contributed to the accident. It is thus for the plaintiff to call sufficient evidence to prove the particulars of negligence as pleaded to succeed in proving the case on a balance of probability, the required standard of proof - See

Section 107 and 108 of the Evidence Act

10. In **Embu Public Road Services Ltd –vs- Riimi (1968)EA** the court held that

> ***"…where the circumstances of the accident give rise to the interference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the accident …"***

11. The Respondent's evidence was brief that

> ***"…The vehicle was from Nakuru heading to Eldoret direction. I blame the driver. I was off the road. He left the road and came and crushed me. The vehicle was speeding. I lost consciousness. I was on the left side facing Eldoret. My leg got injured."***

12. It is only upon cross examination that the respondent

> ***"The accident occurred at 5.00p.m. -It was dark--- I was seated down facing Eldoret direction."***

13. To controvert the above evidence **DW1 driver** of the accident vehicle testified that he was driving towards Eldoret on the left side of the road at about 5.30 a.m. and that it was dark. It was his testimony that he saw a trailer coming towards him causing him to swerve to the left side where there was a lady running from the left side to the right and was hit by his vehicle's side mirror mud guard of the front tyre. He testified that he was not driving fast nor drunk and blamed the plaintiff for jumping onto the road. On cross examination the driver admitted having knocked the respondent down.

14. In his judgment the trial magistrate captured the evidence on record, considered it and made findings that upon his own admission, the driver of the accident vehicle knocked down the Respondent by not keeping a proper look out and that the Respondent was hit while seated down off the road and therefore found him wholly to blame for the accident.

15. I am satisfied that the trial court considered both the evidence as well as the parties submissions in his analysis and final determination contrary to the Appellants evidence.

I have considered submissions filed by the Appellant and authorities cited, **Kenyatta University –vs- Isaac Karumba Nyuthe (2014) e KLR** and **Kimani Muhoro –vs- Another (2015) e KLR**. The courts emphasized the necessity of an eye witness and independent evidence on how an accident occurs**.**

16. The trial magistrate clearly stated that according to the medical report produced in court, the injuries sustained were consistent with being run over the foot crushing it while seated down. Having not seen the parties testify I am very cautious to interfere with the discretion of the trial court.

17. In their defence, the Appellants denied all allegations. The driver (DW1) admitted having been the driver of the accident vehicle and admitted occurrence of the same. However, contributory negligence was pleaded against the Respondent.

I have considered the driver's evidence. It has obvious contradictions and inconsistencies.

18. I am not persuaded that an accident cannot be proved without an eye witness nor the investigating officer's report. Circumstances of each case must be considered individually. In this case, the driver's evidence speaks of nothing but clear inferences that the Respondent was

not to blame nor contributed to the accident but a 3rd party trailer that was not enjoined in the court proceedings, whose duty was the appellants if they blamed the 3rd party trailer.

See **Lilian Birir & Another –vs- Ambrose Leamon** (**2016**) **e KLR.**

19. I am therefore satisfied that the evidence on record points to full liability against the Appellant's driver. The Appellants have failed to show the court in what way the trial magistrate erred in law or fact in finding the Appellants wholly liable. It is not enough to state. There must be proof. That ground of appeal is devoid of merit. It is dismissed. The trial magistrate's findings are therefore upheld. The appellants are wholly to blame jointly and severally.

20. ***Quantum*** **of damages**

A trial court will only interfere with the discretion of the court in assessment of damages if it is inordinately too high or too low as to be an erroneous estimate of the damage or it is shown that the judge proceeded on wrong principles of the law or misapprehended the evidence in material aspects – **Butler –vs- Butler (1984) e KLR.**

21. The injuries sustained by the Respondent are stated in the Medical report of Dr. Joseph Chege Wambore dated 4th April 2015 having treated the Respondent at Kijabe hospital where she was admitted. They are:

- Crush injury of the whole right lower limb
- Loss of consciousness abeit temporary
- Transfused several blood units
- Bones and flesh and all structures of right limb were crushed and damaged beyond repair- bones in small numerous fragments.
- Amputation of the limb leaving about 8 inches from the groin
- Recommended surgical intervention to treat the resulting wounds
- Diverting route of stools by creating colostomy –
- Plenty of skin grafting resulting to other wounds at doner sites especially the left thigh

Opinion

- Small stamp close to groin could not be fitted with prosthesis
- Leg forever lost
- Dependency on other people
- Abdominal operation may pose immediate or late intestinal complications due to the colostomy, yet to be closed.

22. The respondent urged for General damages at Kshs.4,000,000/= while the Appellants proposed Kshs.600,000/= before the trial court. Both parties cited old cases for the period 1995 and 1998.

The trial court awarded Kshs.2 Million damages for pain and suffering and Kshs.1,248,000/= loss of earning capacity, citing cases **David Kigotho Kibe -vs- John Wambugu Ndungu & Another Nakuru HCC No.15 of 2006 (2008) e KLR.**

23. The appellant faults the trial magistrate stating that the awards were not supported by any reason but on expression of opinion.

The Respondent submits that the cases **Ahamed Mohamud Adams Jimmy Tomino & 2 Others (2006) e KLR and James Joseph Rugendo –vs- KPLC (2011) e KLR** cited by the Respondent before the trial court are relevant, the injuries therein being comparable to the Respondents and where sums of Kshs.1,900,000/= and Kshs.3,000,000/= were awarded in 2006 and 2011 respectively.

24. In **James Joseph Rughendo case** (supra), the injuries were more serious and included amputation of the right leg below the knee as well as amputation of left big toe and second toe, 3rd degree burns on both legs and damage to radical ulnar and median nerves. An award of damages need not be a misery but realistic, reasonable and satisfactory but not extravagant - **C.A No.152/2014 Silvester Musyoka Josephat -vs- Hadija Sawe Chilangaty, (2018) e KLR**. The proposal by the Appellant is but a mockery of justice for the serious injuries sustained by Respondent.

25. I have considered recent authorities.

In **C.A No. 163/2015 Malliana Francis Mundui & Another -vs- and Geoffrey Mwaniki Mwinzi –vs- Ibero (K) Ltd & Another (2014) e KLR,** awards of Ksh.3Million and 2 Million respectively were awarded for comparable injuries.

I do not find the trial magistrates award of Kshs.2,000,000/= for pain and suffering to be inordinately high as to invite this court's interference.

26. **Damages for loss of earning capacity**

The Respondent was 49 years old and a seller of vegetables. Indeed at time of accident she was selling potatoes. She did not prove her

income by any conventional method save to state in her evidence that she could no longer walk, nor could she continue with selling potatoes as she could not go to the farm to purchase. There is no doubt that the Respondent lost her capacity to earn a living – for herself and her children. She could have done her potato business upto old age, even after 60 years.

27. In **Mumias Sugar Co. Ltd –vs- Francis Wanalo KSM C.A NO. 91 OF 2003 (2007) e KLR,** the Court of Appeal observed that "A claim for loss of earning capacity can be made when someone is either employed or not, justification being for compensation for the risk that the disability exposes him to losing the job or diminished chances of getting an alternative job if a party is not employed. The award is also available to compensate him for the risk that he may not get employment in future."

28. The court stated that damages for loss of earning capacity could also be claimed as part of general damages for pain, suffering and loss of amenities or as a separate head of damages and further that there is no formula for assessment but the court ought to be guided by correct principles. In the case **James Joseph Rughendo** (supra) the court awarded damages for loss of earning capacity together with damages for pain, suffering and loss of amenities at Kshs.3 Million.

29. The Respondent did not state what her income was. She however testified that she had a shed and a licence for selling potatoes but due to the accident she could not continue with the business. She was 49 years old and due to the amputation of the leg near the hip, she could not use a prosthesis and had to use two crutches which made it difficult for her to fetch vegetables at the farms. Her earnings and earning capacity were diminished.

The trial court adopted an income of Kshs.15,000/= per month and a multiplier of 13 years.

30. It is trite that there are many ways of proving an income in the absence of documentary evidence.

However, I find the application of Kshs.15,000/= by the trial magistrate to have been excessive and without proper basis.

I am minded that the Respondent had an incapacitation of 80%.

The Government wages guidelines for the period would have been useful and a basis for assessment of income but the trial court failed to take this into account.

The appellant has proposed an income of Kshs. 4,573/=. I do not think that sum is reasonable. The wages guidelines were not provided to the court. I am persuaded that Kshs.7,000/= per month would be a more reasonable an realistic estimate of the respondents income in the absence of any proof.

31. In this regard, the **Court of Appeal in Jacob Ayiga Maruja and Another -vs- Simon Obayo C.A 167/2000 (2005) e KLR** expressed the above opinion and proceeded to assess the loss of earning capacity for the rest of the plaintiff's life.

Using the minimum wages guidelines for the period 2016, a reasonable sum would have been in the region of Kshs.6,000 - 8,000/= per month.

As a result, and to be fair to both parties, I shall set aside the award by the trial court and substitute it with an income of Kshs.7,000/= per month against a multiplier of 13 years thus

7,000 X 12 X 13 = Kshs.1,092,000/=.

32. **Special Damages** must not only be specifically pleaded but also strictly proved.

A sum of Kshs.653,167/= is pleaded in the Amended plaint. In her particulars of special damages, Kshs.606,167/= is stated as medical expenses – PExt 14. I have looked at the exhibit. Most of the receipts are invoices (Pages 104 - 11 R/A). The paid up receipts amount to Kshs.450,287/= (pages 112 – 126 R/A).

33. Added to the above are motor vehicle search fees of Kshs.500/= and Kshs.6,000/= being medical report fees making a total proven special damages of Kshs.456,787/=.

The trial courts award of Kshs.653,167/= is set aside as having not been strictly proved and substituted with a sum of Kshs.**456,787/=**.

34. For the foregoing, the appeal succeeds in part.

The trial courts awards are substituted as hereunder:

1. **Liability** -100% against the Appellants jointly and severally.

2. Damages for

(a) Pain and suffering - Kshs.2,000,000/=

(upheld)

(b) Loss of earning

Capacity - Kshs.1,092,000/=

(c) Special damages - Kshs. 450,787/=

Total Kshs.3,542,787/=

35. The above sums shall accrue interest at court rates from the date of judgement of **subordinate courts date of** the trial court.

Each party shall bear own costs of the appeal.

Dated, signed and delivered this 7th Day of March 2019.

J.N. MULWA

JUDGE

[LO1]