REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 197 OF 2011

ROAT TAINERS MOMBASA LIMITED.....1ST APPELLANT

MOHAMMED B. KAULI.....2ND APPELLANT

-VERSUS-

PETER OCHIENG ONGUYO.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. A. Onginjo, SPM, delivered on 4 November 2011 in Eldoret CMCC No. 45 of 2010)

JUDGMENT

[1] This appeal arose from the Judgment and Decree of the Senior Principal Magistrate's Court **(Hon. A. Onginjo)** in **Eldoret Chief Magistrates Case No. 45 of 2010: Peter Ochieng Onguyo vs. Road Tainers Mombasa Limited & Mohammed B. Kauli**. That suit had been filed by the Respondent against the Appellants herein vide the Plaint dated **13 January 2010** in respect of injuries allegedly suffered by the Respondent in a road traffic accident that occurred on the **29 September 2009** near **Moi University Annex Area** on the Eldoret-Nakuru Road.

[2] The contention of the Respondent was that he was lawfully riding a bicycle along the said road when the 1st Defendant's motor vehicle **Registration Number KBH 928P** pulling **Trailer No. ZC 8332**, which was being driven by the 2nd Appellant, was so negligently, carelessly and recklessly riven that the same lost control, veered off the road and knocked him down; and that in consequence thereof, he sustained severe personal injuries, whose particulars were set out at paragraph 9 of the Plaint. The particulars of negligence alleged on the part of the 2nd Defendant were likewise supplied at paragraph 7 of the Plaint; and it was on the basis thereof that the Respondent sought an award in General and Special Damages for his pain, suffering and loss of amenities, as well as costs of the suit and interest.

[3] The Appellants denied the Respondent's allegations vide their Defence dated **8 February 2010.** They denied the allegations of negligence, injury and special damage, and put the Respondent to strict proof thereof. In the alternative, it was averred that if an accident ever occurred, then the same was caused solely or substantially contributed to by the Plaintiff. The particulars of the Respondent's negligence were set out in paragraph 4 of the Defence. Thus, the Appellants denied that they owed the Respondent any duty of care in the circumstances. They accordingly prayed for the dismissal of the Respondent's suit with costs.

[4] Having given consideration to the evidence presented before her by the parties, and the written submissions made by Learned Counsel, the Learned Trial Magistrate came to the conclusion that the Appellants were fully liable for the Appellant's injuries. In terms of quantum of damages, the lower court awarded the Respondent **Kshs. 1,350,000/=** as General Damages for his pain and suffering, along with Special Damages in the sum of **Kshs. 3,000/=,** interest and costs.

[5] Being dissatisfied with the Judgment of the lower court, the Appellants filed this appeal on **30 November 2011** on the following grounds:

> **[a]** That the Learned Senior Principal Magistrate erred in law and fact in awarding damages to the Respondent who had not proved on a balance of probability that he was involved in the alleged accident;
>
> **[b]** That the Learned Senior Principal Magistrate erred in law and fact in awarding **Kshs. 1,353,000/=** as General Damages, which award is manifestly excessive bearing in mind the nature of injuries allegedly sustained by the Respondent;
>
> **[c]** That the Learned Senior Principal Magistrate erred in law and fact in assessing the said General Damages without having regard to the submissions made on behalf of the Appellants;

[d] That the Learned Senior Principal Magistrate erred in law and fact in awarding both Special and General Damages on the strength of inadmissible documentary evidence;

[e] That the Learned Senior Principal Magistrate erred in law and facts in failing to apply the right principles of law in awarding General Damages;

[f] That the Learned Senior Principal Magistrate erred in law and fact in failing to appreciate that the Respondent had fully healed at the time of testifying without any major side effects, medical impairment and/or permanent incapacity;

[g] That the Learned Senior Principal Magistrate erred in law and fact in giving an inordinately high, manifestly excessive and unconscionable award in respect of General Damages;

[h] That the Learned Senior Principal Magistrate erred in law and fact in arriving at the said decision contrary to the evidence adduced in court and therefore arriving at an erroneous decision.

[6] Thus, the Appellants prayed that the appeal be allowed with costs and the lower court Judgment be set aside; and that it be substituted with an award of this Court, after the application of the proper principles of the law and critical and proper evaluation of the evidence before the Court.

[7] The appeal was canvassed by way of written submissions pursuant to the directions issued herein on **13 November 2018**. Accordingly, the Appellants' Counsel, **Mr. Wanyonyi,** filed written submissions on **15 November 2018**, while **Mr. Ndinya Omollo** for the Respondent filed his written submissions on **18 December 2018**. Counsel for the Appellants took the posturing that the lower court erred in its findings on liability, by relying on the conviction against the 2nd Appellant in the Traffic Case. According to him, a conviction in a criminal case is not conclusive proof that the person convicted was solely to blame for the accident; and particularly so in the case before the lower court wherein the Appellants had pleaded negligence against the Respondent. He relied on **Kisumu Civil Appeal No. 49 of 2000: Dilpal vs. Herma Muvite & Another** and **Nairobi High Court Civil Case No. 121 of 2012: Asif Sadiq vs. Mumbi Holdings Limited & Another.**

[8] On quantum, Counsel for the Appellants urged the Court to find that the injuries set out in paragraph 9 of the Plaint are majorly soft tissue injuries in nature, save for the fracture of the left radius, distal phalanx of the left middle finger and fracture of the lateral and right medial malleolus. Counsel further submitted that, on **30 November 2010** when the Respondent testified, he had fully healed with no permanent incapacity. Thus, it was the assertion of **Mr. Wanyonyi** that, in those circumstances, and award of **Kshs. 1,350,000/=** was on the higher side. His proposal was that an amount of **Kshs. 500,000/=** would have sufficed as General Damages. He relied on **Voi High Court Civil Appeal No. 2 of 2015: Rose Makumbu Masanju vs. Night Flora alias Nightie Flora & Another** to support his proposal.

[9] On behalf of the Respondent, **Mr. Omollo** reiterated the assertion that the Respondent proved his case before the lower court beyond reasonable doubt; that he gave a vivid account of how the accident happened; and that his evidence was corroborated by the evidence of two doctors, namely: **Dr. Paul Rono (PW2)** and **Dr. Samuel Aluda (PW3).** He further drew the Court's attention to the fact that, at page 27 of the Record of Appeal, the 2nd Appellant as **DW1** confirmed that he was indeed involved in a road traffic accident with a cyclist and that the victim was the Plaintiff (the Respondent herein). Accordingly, Counsel urged the Court to find from the evidence on record, and by virtue of the doctrine of *res ipsa loquitor*, that the Respondent proved on a balance of probability that he was involved in a road traffic accident on the material day and that the Appellants were entirely to blame for the accident.

[10] On quantum, it was the submission of the Respondent that it was within the discretion of the trial court to award the sum that was awarded by it; and that this Court, as an appellate court, can only interfere with the award if it is demonstrated that the lower court acted on wrong principles or made an award that is so excessive or so inordinately low as to amount to an error in principle. He posited that the award was within the confines of the law granted the injuries pleaded in paragraph 9 of the Plaint. He relied on **H. West and Sons Ltd vs. Shepherd [1964] AC 326; Kim PGO choo vs. Camoen & Slignton Area Health Authority** and **Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd, Civil Appeal No. 60 of 2004** in urging the Court to uphold the decision of the lower court by dismissing this appeal with costs.

[11] I am mindful that this is a first appeal, and as such, it is the duty of this Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded, while bearing in mind that this court did not have the benefit of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was aptly expressed thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[12] To that end, I have perused and considered the record of the lower court and re-evaluated the evidence that was presented therein. The Respondent testified as **PW1** before the lower court on **30 November 2010.** His evidence was that on **26 September 2009**, he was riding his bicycle from **Burnt Forest** towards **Eldoret Town**, carrying firewood; and that on reaching **Moi University Annex** on the Nakuru-Eldoret Road, he was knocked by motor vehicle **Registration No. KBH 928P/Trailer ZC 8332** that was from the direction of **Eldoret Town.** According to his account, the said motor vehicle had lost control and moved from its lane to the lane he was using; and that as a result of the accident, he lost consciousness and came to while at **Moi Teaching and Referral Hospital**, where he was admitted from **26 September to 11 November 2009**, having sustained fractures on the left leg, left arm and middle left finger. He added that he underwent surgery to have plates inserted on the fractured left leg and left arm.

[13] In support of his evidence, the Respondent produced the treatment notes and other documents issued to him at **Moi Teaching and Referral Hospital.** He also produced the Police Abstract confirming the occurrence and furnishing the particulars of the motor vehicle

involved, its driver and owner. The Police Abstract further showed that the driver was charged with the offence of careless driving in **Traffic Case No. 2726 of 2009**; and that he pleaded guilty to that charge and was fined **Kshs. 5,000/=** in default to serve 3 months imprisonment. Thus, the Respondent blamed the driver of the offending motor vehicle for the accident, his injuries, pain and suffering. He vehemently denied that he was in any way to blame for the accident.

[14] Dr. Paul Kipkorir Rono (PW2) of Moi **Teaching and Referral Hospital** testified on **18 January 2011**. He confirmed that the Respondent, **Peter Ochieng**, was involved in a road traffic accident and was admitted for treatment at their facility between **26 September 2009** and **11 November 2009**. He confirmed that the Respondent sustained fractures of the left femur, right radius and left middle finger; and that surgical intervention was made to fix the broken bones. He further stated that the patient was thereafter attended to as an outpatient at their Orthopaedic Clinic. **PW2** produced the Discharge Summary as the **Plaintiff's Exhibit 1** before the lower court.

[15] In his evidence before the lower court, **Dr. Aluda (PW3),** a private medical practitioner in Eldoret Town, stated that he had occasion to examine **Peter Ochieng**, the Respondent herein, following his discharge from **Moi Teaching and Referral Hospital**. He noted that the injuries were still in the healing process and therefore that he was not able to assess the degree of disability.

[16] On behalf of the Appellants, the 2nd Appellant, **Mohammed Badi Kauli,** testified on **27 June 2011** as **DW1**. He confirmed that he was working for the 1st Appellant as a driver; and that on **26 September 2009**, he was driving the subject motor vehicle, **Registration No. KBH 928P** from **Malaba** to **Mombasa** when, on reaching **Moi University Law School,** he was involved in a road traffic accident. His version was that he found a stalled motor vehicle on the left lane and had to overtake it by using the right lane; and that while thus overtaking, a cyclist came from off the road and entered the road, thereby ramming onto the last axle of the trailer. He added that there were bumps at the scene and that as a result he was driving at a low speed 20 kph. He further stated that the cyclist, who he came to know as **Peter Ochieng**, the Respondent herein, was carrying a high stack of firewood and did not give attention to other road users.

[17] DW1 conceded that he was charged with the offence of careless driving and arraigned before court in connection with the accident. He produced a Police Abstract as **Defence Exhibit No. 1** and confirmed that the motor vehicle in issue belonged to the 1st Appellant at the time; and that the accident occurred on the right-side lane facing Nakuru. **DW1** further conceded in cross-examination that he pleaded guilty to the charge of careless driving and was fined **Kshs. 5,000/=.**

[18] The Defence also called **Joel Kingorosh (DW2),** a Senior Clerical Officer attached to the Criminal/Traffic Registry at Eldoret Chief Magistrate's Court. **DW2** produced the case file for **Traffic Case No. 2726 of 2009: Republic vs. Mohammed Batt Kauli** and confirmed that the accused therein was charged with the offence of careless driving contrary to **Section 49(1)** of the **Traffic Act** on **9 December 2009** in respect of an accident that occurred on **26 September 2009** at 7.50 p.m. along Nakuru-Eldoret Road near **Moi University Annex.**

[19] Having given due consideration to the evidence adduced before the lower court in the light of the Grounds of Appeal and the submissions made herein by Learned Counsel, it is my view that the two main issues that presented themselves for determination were on liability and quantum. Accordingly, my re-evaluation of the evidence will adopt those two approaches.

[20] On **liability,** there is no denying that the accident in question did occur or that the 2nd Appellant was, as a result, charged and arraigned before the Traffic Court at Eldoret Law Courts with the offence of careless driving contrary to **Section 49(1)** of the **Traffic Act**. There is further no dispute that the 2nd Appellant pleaded guilty to the charge and was fined **Kshs. 5,000/=.** He however contended that the accident was contributed to by the Respondent, for joining the main road without a proper look out. It was on this basis that Counsel for the Appellants faulted the lower court for the finding that:

> **"From evidence on record for the plaintiff and defence it is apparent that the issue of liability was resolved in Eldoret C.M.TR.C No. 2726 OF 2009 when the 2nd Defendant herein pleaded guilty for the offence of careless driving and was fined Ksh 5000/= in default 2 months in jail. The 2nd Defendant cant be heard to retract from this record as he has not and cant appeal against a voluntary plea of guilty…"**

[21] Counsel for the Appellants, submitted, and rightly so in my view, that a conviction in a criminal case is not conclusive proof that the person convicted was solely to blame for the accident; and particularly so in the case before the lower court wherein the Appellants had pleaded negligence against the Respondent. In **Robinson vs. Oluoch [1971] EA 376,** it was held that:

> **"Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent, but that is a very different matter from saying that a conviction for an offence involving negligent driving is conclusive evidence that he convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."**

[22] Thus, although **Section 47A** of the **Evidence Act, Chapter 80 of the Laws of Kenya,** recognizes that a final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence is conclusive evidence that the person convicted was guilty of that offence, it was incumbent on the lower court to proceed further than the fact of the 2nd Appellant's conviction and analyze the evidence availed before it in the light of the pleadings filed; which pleadings included particulars of negligence on the part of the Respondent. Hence, I fully agree with the approach taken by **Hon. Odunga, J.** in **Asif Sadiq vs. Mumbi Holdings Ltd & Another [2012] eKLR** in respect of **Section 47A** aforementioned that:

> **"…once a conviction becomes conclusive by virtue of the aforesaid provision, the issue is whether or not the convict …**

cannot be subject of a subsequent inquiry. It does not necessarily mean that that person is 100% liable in negligence. The decision to charge one and not the other person is usually at the discretion of the police and the mere fact that one of the two drivers is charged does not necessarily mean that the other driver is not liable at all. Whereas the person convicted of a criminal offence cannot, where the circumstances under Section 47A aforesaid prevail, question that conviction, the issue of contributory negligence is always open to the party despite the conviction…"

[23] It is therefore pertinent for the Court to determine whether, upon the evidence adduced before the lower court, the Respondent could be held at fault for the accident. The allegations of the Appellants against him were set out thus in the Defence:

[a] Riding carelessly, negligently and without due regard to other road users particularly motor vehicle **Registration Number KBH 928P** and its trailer **No. ZC 833C;**

[b] Riding the bicycle on the said road while carrying excessive cargo and thereby losing control of the bicycle;

[c] Joining the road without checking whether the road was clear;

[d] Failing to brake, swerve and or in any other manner avoid the accident;

[e] Riding the said bicycle in the later evening without the benefit of light.

[24] Whereas the 2nd Appellant alleged that the Respondent joined the road from a feeder road carrying a high stack of firewood and rammed onto the last axle of the trailer, the Respondent gave clear and credible evidence that he was riding his bicycle towards Eldoret Town from the direction of **Burnt Forest** carrying 25 pieces of firewood when the 2nd Appellant veered off his correct lane onto his path. The 2nd Appellant admitted that he was overtaking a stationery motor vehicle at the time; and between him and the Respondent, he had a heavier duty to ensure a proper look-out before attempting to overtake. It also emerged from the evidence of **DW2** that there was another cyclist involved; and the burden of proof was on the Appellants to rule out any fault on the part of that other cyclist if the court were to attribute any contributory negligence to the Respondent. **Section 107(1)** of the ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya*** *is explicit* that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

[25] Also pertinent are the provisions of **Sections 109** and **112** of the **Evidence *Act.*** *Those two provisions state thus:*

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

...

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

[26] It was upon the Appellants to prove the allegations of negligence made by them in their Defence, which burden, on my re-evaluation of the evidence adduced before the lower court, was not discharged. I therefore find no basis for faulting the conclusion of the trial court that the two Appellants were fully liable to the Respondent for his injuries, pain and suffering.

[27] On quantum, it is trite that assessment of damages is a matter of discretion; and that, usually, an appellate court will not disturb an award unless sufficient cause be shown. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**, the Court of Appeal restated this principle as follows:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court 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 high that it must be a wholly erroneous estimate of the damages."

[28] In the Plaint, the particulars of the Respondent's injuries were furnished at paragraph 9 as follows:

[a] Swelling and tenderness of the left forearm;

[b] A fracture of the left radius;

[c] A fracture of the distal phalanx of the left middle finger;

[d] Swelling and tenderness of the left thigh bone;

[e] A fracture of the left femur;

[f] Swelling and tenderness of the right leg;

[g] A fracture of the right lateral and right medial malleolus;

[h] Lacerations and two deep cut wounds on the right leg of about 12 cm and 6 cm each.

[29] Evidence was adduced by the Respondent before the lower court in proof of the injuries and to confirm that he was unconscious when he was admitted at **Moi Teaching and Referral Hospital** for treatment; and that he remained thus confined from **26 September to 11 November 2009**, was uncontroverted. His evidence was corroborated by the evidence of **PW2** and **PW3** as well as the medical documents produced before the lower court. Those documents included the Respondent's treatment notes, the Discharge Summary Form dated **11 November 2009 (Plaintiff's Exhibit No. 1)** and the P3 Form **(Plaintiff's Exhibit No. 2).** There was also a Medical Report prepared and produced by **Dr. Aluda's** dated **16 December 2009 (Plaintiff's Exhibit 4a)** confirming the Respondent's aforementioned injuries.

[30] There is no doubt therefore that the Respondent's injuries were serious; indeed, in the P3 Form (Plaintiff's Exhibit 2) the degree of injury was classified as Grievous Harm. The Learned Trial Magistrate made reference to **Obadiah Mungai Kimani vs. Ebrahim Kibenge T/A Sanku Agencies** in which **Kshs. 850,000/=** was awarded on **18 October 2000** for similar injuries; and **Nairobi HCCC No. 861 of 1991: Mukesh vs. Parmar and Another vs. Kenya Transporter and Another**, wherein **Kshs. 800,000/=** was awarded on **23 April 1991** for fractures of the femur and radius. She accordingly awarded **Kshs. 1,350,000/=** having factored in the fact that the Respondent's injuries were more severe, the age of the aforementioned awards and the inflationary trends.

[31] In attacking the award, and proposing a sum of **Kshs. 500,000/=** Counsel for the Appellants relied on **Rose Makumbo Masanju vs. Night Flora alias Nightie Flora & Another** in which **Kshs. 500,000/=** was awarded as General Damages for a fracture of the left wrist, comminuted fracture of the frontal bone with concussion and loss of consciousness for three hours along with facial soft tissue injuries. It is however manifest that the Respondent herein suffered far more serious injuries than the Plaintiff in the **Rose Makumbo Masanju** case aforementioned.

[32] Thus, having given careful consideration to the Respondent's injuries, the submissions made herein as well as the authorities cited by Learned Counsel, it must, first and foremost, be acknowledged, as was done in **H. West and Son Ltd v. Shepherd (1964) AC 326 that:**

> ***"…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…"***

[33] In Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] eKLR the High Court had awarded the Plaintiff **Kshs. 100,000/=** as General Damages for multiple fractures involving the right femur, left femur and dislocation of left elbow joint associated with a fracture of the radial head. The Court of Appeal was of the view that there was sound basis for interfering with the award and held that:

> **"…the learned trial judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that "comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases"…The award of damages by the learned judge was, in our view, so inordinately low that it is a wholly erroneous estimate of the damage."**

[34] The Court of Appeal proceeded to consider comparable awards for similar injuries before coming to the conclusion that:

> **"In our assessment of damages in this case, regard being had to the nature, severity and extent of the injuries suffered by the appellant which, as indicated above, were multiple, the authorities show that awards vacillate between Shs. 1 million and 2 Million shillings…After due consideration of the authorities cited by both counsel, and having regard to the multiple injuries sustained by the appellant it is our considered view that an award of Kshs. 1.5 million is in tune with the trend in awards of damages in similar injury cases. We realize of course that monetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness. In the instant case, the award of 1.5 million shillings commends itself to us as reasonable."**

[35] In the light of the aforestated pronouncement, I am satisfied that the award by the lower court was well within limits and cannot therefore be faulted as being too high or too low as to amount to an erroneous assessment. There is similarly no demonstration that the trial court proceeded on wrong principles or that she misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high; or that, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one. There is further proof that indeed the Special Damage component of **Kshs. 3,000/=** was indeed paid to **Dr. Aluda** for his services and a receipt produced before the lower court as **Plaintiff's Exhibit 4b.**

[36] In the result, I find no merit in the appeal. I would accordingly dismiss it with costs and confirm the decision of the lower court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF JUNE 2019

OLGA SEWE

JUDGE