



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**CIVIL APPEAL NO. 57 OF 2016**

**JOHN MWANGI KIIRU.....APPELLANT**

**VERSUS**

**SALOME NJERI MWANGI.....RESPONDENT**

*(Being an appeal from the judgment made on 10<sup>th</sup> August, 2016 in Engineer PMCC No 32 of 2015 – Hon G.N. Opakasi, Resident Magistrate)*

**JUDGMENT**

**Background**

1. This is an appeal on both liability and quantum of damages. The appellant seeks that the court should re-assess liability of the appellant, and reduce the quantum of damages if the respondent's liability is found to be enhanced.

2. In the lower court, the respondent was awarded general damages of Kshs 450,000/= flowing from an accident in which the undisputed injuries suffered by the plaintiff/respondent were as follows:

- a. Massive swollen foot
- b. Two (2) Fractures of the metatarsal bones
- c. Soft tissue injuries, and
- d. Pain and swelling

Special damages of Kshs 2,500/= did not attract the appellant's attention and are deemed unchallenged.

3. The appellant's grounds of appeal are:

**That the learned trial Magistrate erred in both law and fact –**

**1. In finding that the appellant was liable for the injuries of the respondent**

**2. By failing to properly scrutinize and evaluate the evidence tendered by the appellant and correctly relate the same to the case law cited in court and thereby failed to arrive at a fair and reasonable assessment on the issue of liability and compensation**

**3. By making an award on liability which was not supported by relevant facts, evidence and authorities that the award on liability was against the weight of the evidence before the court and was without any consideration to the submissions of both parties.**

**4. In deciding the case against the appellant. In doing so, the trial magistrate erroneously held the appellant liable without any proof or evidence of negligence on part of the respondent**

5. In failing to appreciate sufficiently or all the judicial nature of the case that was before him finding the appellant liable merely because the occurrence of the accident and not because of any proved fault or negligence on the part of the appellant.

6. In awarding Kshs. 450,000/= as general damages as the same is excessively high and also in failing to find that the nature of the injuries sustained by the respondent did not warrant such an award.

7. By making an award on general damages that was inordinately high as to represent an entirely erroneous assessment.

8. In failing to properly take into account the proper legal principles regarding quantum while considering the judgment awards in cases of similar nature thus arriving at an excessive award.

4. This court's role as a first appellate court is to re-assess and reconsider the evidence and arrive at its own conclusions taking into account the it did not have the benefit of hearing the witnesses and seeing their demeanour. This is the crux of the court's appellate jurisdiction conferred by **section 78** of the **Civil Procedure Act**. The court will, however, not interfere with the exercise of the inferior court's discretion on an award of damages unless it is satisfied that the decision is clearly wrong because that court misdirected itself in some material respect or the award is so inordinately high or low as to represent an entirely erroneous estimate. (**Mbogo & Another v Shah [1968] EA 1993; Butt v Khan (1977) 1 KAR**).

### Liability

5. On liability, the appellant has two complaints. The first is that that the learned trial Magistrate failed to scrutinize evidence on record. He asserts that the Magistrate in her judgment found that plaintiff was walking on left side of the road and that vehicle lost control veered to the left side of the road and knocked her was a sign of negligence. This was despite the inconsistent evidence of the plaintiff that she was on the right side of the road and was hit from behind.

6. Secondly, the appellant impugns the trial Magistrate's finding that the Appellant's vehicle hit the respondent despite there being no evidence. In his submissions the respondent prays that in the alternative, the court should evaluate the liability equally between the parties at 50% : 50%.

7. The evidence of the plaintiff recorded in her witness statement and in her cross-examination, was that on 26<sup>th</sup> July, 2014, she was walking on the right side of the road towards Engineer town. Suddenly a motor vehicle Registration Number KAX 279L emanating from Ndunyu Njeru came from behind her and hit her left leg. She fell into a ditch, and the driver stopped and told her sorry, then he took off and disappeared. In her oral presentation of evidence-in-chief, however, the plaintiff said that she was walking on the left side of the road. This is also what the trial court found. The plaintiff immediately reported the incident to the Engineer police station, and was advised her to go to hospital. She went to Engineer Hospital where she was treated. She produced Exhibit 1 – copy of records; Exb 2 receipt, Exb 3 hospital notes, Exb 4 a P3 form, and Exb 5 Dr Wokabi's Report

8. The respondent's response holds fast that ***“the true position is that the Respondent indicated that she was walking on the left side of the road”*** as recorded in her oral evidence in chief. The respondent's oral evidence in chief thus contradicts her written witness statement, and her evidence on cross examination, a contradiction not addressed by the trial court

9. I have tried to understand the scenario drawn by the evidence raised. If the plaintiff was walking towards Engineer town on the left side of the road, vehicles approaching her from Ndunyu Njeru direction would be driving on the left side of the road and would approach her from behind. Her right leg would be closest to the tarmac and exposed to being hit. If she was walking on the right side of the road headed towards Engineer, the vehicles nearest her would be driving from the direction of Engineer towards her and facing her frontally. Her left leg would be closest to the tarmac. She could not be hit from behind on that side of the road except by a vehicle travelling from Ndunyu Njeru direction that had veered off from the left side of the road. Either way, there is a credible possibility of being hit from behind, by a vehicle travelling from Ndunyu Njeru, as there is no indication that the road was a dual carriageway, or that it had an island in between lanes.

10. Whilst addressing the issue of discrepancies in evidence, the Court of Appeal of Kenya adopted the reasoning of the Court of Appeal of Tanzania in **Dickson Elia Nsamba Shapwata & Another v The Republic, Cr. App. No. 92 of 2007**. The Court of Appeal of Kenya in **Philip Nzaka Watu v Republic [2016] eKLR** stated as follows :

***“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”***

11. The point is that when faced with discrepancies in evidence, the court should examine the discordant evidence within the complete context of evidence availed. Other evidence adduced was that by PW2, Corporal Ezekiel Ngode, who produced a Police Abstract showing the registration number of the vehicle that hit the plaintiff. It belonged to the appellant. He confirmed that the plaintiff reported the accident immediately after she was hit and the police visited the scene immediately thereafter.

12. He testified that they found two eyewitnesses who volunteered to record statements to the police, and they also gave the police the number of the accident vehicle. He said that at the scene it was observed that the plaintiff's vehicle lost control and went on the left side of the road where the victim was walking, and hit the victim.

13. In cross examination, PW2 admitted that he was not the in the investigating officer. However, he stated that there is an investigation file in respect of the accident case, and that one PC Odhiambo was in charge of the accident investigation. Further, that there was a criminal trial in progress against the defendant for the accident. In re-examination he confirmed that all police officers have investigative skills.

14. The Police Abstract clearly records an accident in which the plaintiff's vehicle KAX 279X was involved in an accident with the plaintiff. It also indicates that the Occurrence Book number as No 6 of 26/7/2014. In addition the search records on the vehicle also show that the vehicle belongs to the defendant. There was no evidence adduced by the defendant to challenge this evidence in relation to the vehicle.

15. In this regard, the Court of Appeal held in **Wellington Nganga Muthiora v Akamba Public Road Services and Another CA Kisumu 2010 ECLR** that:

*“...where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it is challenged by evidence or in cross examination the plaintiff would need to produce certificate from the registrar of motor vehicles or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary.”*

16. In the case of **Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eCLR**, the court of Appeal relied on the case of **Joel Muga Opinja v East Africa Sea Food Ltd [2013] eCLR** and restated this position as follows:

*“We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied”*

17. The defendant's evidence was that he was in Thika on the day of the accident. He quibbled about whether the vehicle involved in the accident was a pick up or double cabin pick up. He admitted that he has been charged with careless driving in a traffic case. However, he was not able to corroborate his alibi.

18. Looking at the evidence as a whole, I am satisfied that the evidence of PW2 corroborates the evidence of the plaintiff and that it is overwhelming that the vehicle that hit the plaintiff was the appellant's vehicle. In light of the principles in the **Philip Nzaka Watu case**, I am also satisfied that the contradictory evidence of PW1 is a minor discrepancy.

19. In civil matters, a case is proved on a balance of probabilities. As such, I agree with the trial magistrate that the accident occurred involving the appellant's vehicle. I have no reason to interfere with the trial Magistrate's finding of liability as against the defendant.

## **Damages**

20. The injuries suffered by the plaintiff are not contested. The appellant complains that the award of damages of Kshs 450,000/= given by the trial magistrate is inordinately high given the nature of the plaintiff's injuries. In his submissions, he argues that instead of relying on more recent cases, the trial Magistrate relied on the old case of **Rivatex v Philip Mochache Nyabayo [1999] eCLR**. There the award was for the amount of Kshs 240, 000/= where the plaintiff sustained a fracture of metatarsal bone. This was the closest authority to the present case. However, the magistrate noted that this authority was decided 17 years prior to her judgment, thus considered the rate of inflation in her award.

21. In his submissions, Counsel urged reliance on the following cases which were not adduced at trial, viz : **Richard Kieti Kathuu v Musee Mutemi [2018]eCLR** where the court awarded Kshs 150,000/= for blunt trauma to left elbow joint, bruised left elbow, a cut wound and fracture to metatarsul bone of left limb; and **Silphanus Kumbe Murondo v Lamek Mbaka Motegi & Another [2013] eCLR**, where the court awarded 220,000/= where the most serious injury suffered by the plaintiff was fracture of the 5<sup>th</sup> metacarpul bone of the right hand.

22. On her part the respondent is in agreement with the award given by the trial magistrate even though she had relied on the case of **Hussein Abdi Hashi v Hassan Noor [2004] eCLR** where plaintiff was awarded Kshs. 800,000/= for lateral malleus fractures of metatarsals (2<sup>nd</sup> to 5<sup>th</sup>) with a large laceration anterior to the ankle. Those injuries were more serious than those suffered by the plaintiff herein.

23. During here examination in chief, the plaintiff stated that she had not completely healed and that she still experiences pain. The medical report by Dr. Wokabi stated that the injuries were healing, and the pain would decrease and probably disappear within 6-8 months from date of the report; that during that period she would have difficulties in walking and standing for long. He classified the degree of injury as “harm”.

24. I note that the trial magistrate did in fact analyse the authorities relied on by both parties and reasoned that the amount requested by the Plaintiff of Kshs 600,000/= was too high while that proposed by defendant was too low at Kshs 150,000/=. From the analysis of the judgment, the authorities did not provide for injuries that were similar to this case.

25. I have also carefully perused the case of **Richard Kieti Kathuu** and **Silphanus Kumbe Murondo** cases now availed by the appellant. The former case relates to a single fracture of the metatarsal bone, a cut wound, blunt trauma to left elbow joint, bruised left elbow and fracture to metatarsal. The **Silphanus** case concerned a single fracture of the 5th metacapsul of the hand. The plaintiff suffered fractures on two metatarsals whose healing could take longer because they carry the body's weight.

## **Disposition**

26. All in all, I see no reason to interfere with the award by the trial court and hereby affirm the same.

27. Accordingly, the appeal fails and is dismissed with costs. The judgment of the lower court is hereby confirmed.

28. Orders accordingly.

**Dated and Delivered at Naivasha this 17<sup>th</sup> Day of July, 2019**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Obino holding brief for Ms Muli for the Appellant
2. Ngunjiri holding brief for Macharia for the Respondent
3. Court Clerk - Quinter Ogutu