REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 34 OF 2018

MOHAMMED KASSIM.....1ST APPELLANT

KASSAM HAULIERS CO. LTD.....2ND APPELLANT

ALEX MUTAVI GEORGE.....3RD APPELLANT

VERSUS

SALIM FUMO BWANAMKUU.....RESPONDENT/CROSS-APPELLANT

(Appeal from the Judgement and Decree of the Principal Magistrate Hon. Ondieki

in Kilifi PMCC No. 244 of 2014 delivered on 25th June, 2018)

CORAM: Hon. Justice R. Nyakundi

Mr. Omondi for Respondent

Mr. Jengo for Respondent

JUDGMENT

The appellants appealed to this court against the judgement of the trial court pronounced by Hon Ondieki in SPMCC No. 244 of 2014 at Kilifi Court on 25th June, 2018. The case for the appellant on appeal is based on the following grounds:

1. ***That the Learned trial Magistrate erred in law and in fact in finding that the appellants was liable at 100%.***

2. ***That the Learned trial Magistrate erred in law and fact in holding the appellants liable for negligence yet there was no conclusive evidence that the appellants were to blame for the occurrence of the accident.***

3. ***That the Learned trial Magistrate erred in awarding the respondent the sum of Kshs.600,000/= as general damages and Kshs.90,000/= as future medical expenses.***

4. ***That the Learned trial Magistrate erred in law and in fact in making his determination on the quantum of damages payable which determination was clearly against the weight of the evidence and the nature of the injuries suffered.***

5. ***That the Learned trial Magistrate erred in law and in fact in awarding an amount of damages that is so high as to be an erroneous and an unjust estimate.***

6. ***That the Learned trial Magistrate erred in law and in fact by totally disregarding the submissions of the appellants and thereby arriving at a wrong decision.***

Whereas the respondent cross-appeal was mainly on the inordinately low assessment of quantum on general damages.

The appeal is against liability and the award of damages of Kshs.600,000 for pain and suffering suffered by the respondent in a road traffic ac ident which occurred on 3rd July, 2013 involving motor vehicles GK 212Z and KBU 787B. The scene of the accident was along Malindi-

Rocka area.

Being aggrieved with liability and quantum the appellants preferred an appeal on grounds that there was an error on the findings made on both liability and quantum. That respondent also cross-appealed against the findings by the trial magistrate that the decision of the court on damages was so low that it amounted to an injustice.

Procedural history and evidence at the trial court

On 3rd July, 2013 the respondent was lawfully driving motor vehicle GK A 212Z at Roka area along Mombasa-Malindi road. The third appellant as an agent, servant and or driver to the 1st and 2nd appellant also drove motor vehicle registration KBU 787B. Where it is averred that he drove negligently and carelessly while overtaking collided with the respondent's motor vehicle resulting in loss and damage. As a result of the accident the respondent suffered personal injuries which constituted fracture of the left femur, 3 ribs and bruises to both legs.

During the trial the respondent gave his testimony on account of the events on the occurrence of the accident and particulars of the negligence on the part of the third appellant. According to the respondent evidence the 3rd appellant drove his motor vehicle without due care and attention while negotiating a corner resulting in the collision. He also produced discharge summary from Coast and Pandya hospital which managed his medical condition. The medical report by **Dr. Adede** was also admitted in evidence as exhibit 6.

The first witness for the respondent was **Michael Kiruga**, an executive officer at Kilifi Law Courts and in-charge of records relevant to this case being **traffic Case No. 156 of 2013** in which the third appellant was charged with offence of careless driving of the subject motor vehicle on 3rd July, 2013. According to PW 1 subsequent to the trial, he was convicted and fined Kshs.15,000 in default eight months' imprisonment. The traffic record of proceedings against the third appellant was admitted in evidence as exhibit 1. The respondent who testified as PW 2 claimed that he was driving his motor vehicle GKA 212 along Mombasa-Malindi road when he came into contact with the third appellant motor vehicle registration number KBU 287B negotiating and overtaking at a corner which in relation to that act a collision occurred which he asserted was wholly on his lane. As such the respondent suffered injuries to left femur, fracture on three ribs and both legs. In the circumstances, the respondent specifically blamed the third appellant that he engaged his vehicle in a manner that was in breach of the Traffic Act the highway code on the duty of care while driving on a curved road. At the close of the respondent's case no rebuttal evidence was called by the appellant on any of the facts and evidence stated by the respondent.

It is from the above evidence and submissions by counsels that the Learned trial Magistrate made a finding on liability at 100% and an award of damages at Kshs.600,000/= for general damages, specials at Kshs.17,480/= plus costs and interest at court rates.

The appeal was disposed of by way of written submissions.

Submissions by the appellant

Mr. Omondi, for the appellants has challenged the decision through on appeal to this court. That the learned trial magistrate erred in both liability and damages. The main contention on liability was pitched on the testimony of PW2 who apparently while driving his motor vehicle as it negotiated the corner on the road in question. Mr. Omondi, blames the respondent for his failure to take evasive steps to avoid the collision. Learned counsel urged this court that there was a measure of contributory negligence ignored by the trial magistrate. It was a major part of Mr. Omondi's submissions that the trial court erred in law and fact in regard to the award of damages which he considered inordinately high. He further submitted and proceeded to challenge the claim in the cross-appeal by the respondent with regard to the award on future medicals of Kshs.90,000. Learned counsel took issue with this claim for reason that it was not pleaded save for it being mentioned in the medical report by Dr. Adede – admitted as Exhibit 6.

Learned counsel prayed that the cross-appeal be dismissed and the appellants appeal on liability be allowed to factor in contributory negligence. On quantum, learned counsel relied on the cases of **Kenya Power Lighting Co. Ltd v Zakayo Saitoti Nainyobe 2009 1 KLR, Paridi Gunglos** and **John Kuria Macharia 2014 eKLR.**

Submissions by the Respondent/Cross-Appeal

Mr. Jengo, on behalf of the respondent submitted in response to the appellants' claim challenging the appeal. He argued that the respondent oral testimony proved that the appellants motor vehicle being driven by the 3rd appellant collided with the respondent's on the material day. Learned counsel further submitted that following the accident, police carried out investigations which resulted in a traffic offence of careless driving being preferred against the 3rd appellant. Secondly, the traffic court on a plea of guilty, convicted and sentenced the 3rd appellant to Kshs.15,000 in default 8 months imprisonment.

It was learned counsel contention that the information in the police abstract, and the traffic proceedings was sufficient proof of negligence. That finding was never challenged at the trial by the appellants nor was there an appeal in regard to the findings on conviction and sentence against the third appellant.

The gist of contributory negligence though pleaded argued learned counsel was never proved at the trial. In this respect learned counsel placed reliance on the case of **Ann Wambui Nduku v Joseph Kiprono Ropko Launcher CA A345 of 2000, Shanea Bar Ltd v County Government of Machakos HCC 25 of 2016** and **CMC Aviation ltd v Crusair Ltd No. 1(1978) KLR 103.** On the contrary argued Learned counsel there is no evidence to make any findings on contributory negligence.

As regards the double barreled allegations that the respondent contributed to the accident on the one hand and that the damages awarded were not comparable with similar cases learned counsel relied on the case of **Moses Knit Wear Ltd v Gapitex Knit Wear Mills HCCC No. 834 of 2002** and **Atiya Faral v Khamisi said HCCC No. 18 of 1999**. The appellants had all the opportunity to put up their case before the trial

court on both contributory negligence and award of damages. The trial magistrate went through the evidence and documents availed at the trial to reach a decision.

In the case of damages learned counsel submitted that the consideration was on the nature of the serious injuries suffered by the respondent. In further submissions learned counsel referred to the medical treatment notes and discharge summary from Coast General and Pandya hospitals. **Dr. Adede** further medical report stated that as a result of the fracture to the femur the respondent suffered 6% permanent disability. Dr. Adede opined that he does not expect any major improvement on this limb but the metal implant would require to be removed at a cost of Kshs.90,000.

For an award of damages and guiding principles learned counsel relied on the cited authorities: **Henry Hidaya Hanga v Manyema Manyoka 1961 1 EA 705, Kigaragari v Aya (1985) eKLR, Erika Onyango v Transami (K) Ltd 2007 eKLR, Kenya Brewers Ltd v Barker Ali CA 214 of 2009 Mombasa** and **Nion Haquliurs Ltd v Michael Samoer CA 55 of 2010**. Learned counsel armed with these principles urged this court to find that there was no misdirection on the part of the trial magistrate on both liability or general damages except under the head on future medicals.

The Law, Analysis and Determination

The jurisdiction as to the scope of the 1st appellant's is now well settled as stated in the case of **R v Pandya 1957 EA 336-337**. The case advances a number of principles that the 1st appellate court is entitled to apply to arrive on its own conclusion and views as a whole and none at its own decision thereon. It has the duty to rehear the case and reconsider the materials before the trial magistrate with such other materials as it may have decided to admit. The appellate court must then make its own mind but carefully weighing and considering the evidence before it. When it comes to the question which witnesses is to be believed, rather than another and the decision terms on manner and demeanor of witness, the appellate court must be guided by the impression made by the judge/magistrate who saw the witnesses. "....."

This being the approach and duty of the 1st appellate court its only to scrutinize the evidence in question and be able to draw my own inferences.

Findings on liability legal test

In accordance with the traffic Act proof any breach of the following provisions: **Section 42, speed of motor vehicles, Section 46, causing death by dangerous driving, Section 47, reckless driving, Section 49, driving without due care and attention** may be sufficient proof to infer negligence on the part of the defendant, agent, servant or employee. The breach of the traffic code which provides various regulatory duties and obligations may be relied upon to proof acts of negligence. Section 68(3) of the Traffic Act Cap 403 of the Laws of Kenya provides as follows:

> ***"A failure on the part of any person to observe any of the provisions of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings whether civil or criminal, and including proceedings for an offence under this Act, be relied upon by any party to the proceedings as tendering to establish or to negative any liability which is in question in those proceedings."***

In the instant appeal the 3rd appellant was charged with careless driving contrary to Section 49(1) of the Traffic Act. By virtue of the indication he was found guilty, convicted and sentenced to Kshs.15,000 in default 8 months imprisonment. The respondent witness PW1 – testified and produced the traffic proceedings in support of proof on liability on the part of the said respondent. Therefore according to Section 47A of the Evidence Act that conviction and sentence is to be taken as conclusive evidence that he was guilty of careless driving. The respondent evidence also place the 3rd appellant and his vehicle at the scene of the accident.

In interpretation of the principles on contributory negligence the court in **De Frias v Rodney 1998 BDA LR 15** held as follows:

> ***"Contributory negligence required the foreseeability harm to oneself. A person is guilty of contributory negligence, if she ought reasonably to have foreseen that if she did not act as a reasonable prudence person she might be hush and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff should have failed to take reasonable care for her own safety. I do not find that the plaintiffs conduct was in any way contributory negligence. In the agony of the circumstances she made an unsuccessful attempt to avoid the conclusion."***

What the above principle attempts to explain is that the negligence calculus is a framework for a trial court faced with such situational analysis to decide what precautions the reasonable person would have taken to avoid the harm. The classic definition of negligence given by **Alderson B** in **Blyth v Birmingham Waterworks Co. [1843 – 60] ALL ER 478**

"Negligence is the omission to do something which a reasonable man, guided upon those considerations with ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

In my view negligence and contributory negligence comes in infinite forms and would therefore depend on a case to case basis. Furthermore, once the plaintiff has established a prima facie case showing the defendant is guilty of negligence the onus to discharge that burden in rebuttal rests with the defendant.

In the instant appeal both the evidence and submissions reckon that the 3rd appellant drove on a curved road with high speed. While the 3rd appellant was driving the 2nd appellant motor vehicle registration No. KBU 787B trespassed into the lane of the respondent. PW2 –

explained that where the accident occurred was at a corner and though he saw the motor vehicle coming it swerved into his lane and hit him resulting in personal injuries.

This was clearly prima facie evidence that the driving by the 3rd appellant was at a speed and being driven without due and attention to other road users.

With all these evidence insitu against the appellants there is no way learned magistrate could have made a finding on contributory negligence. It is apparent therefore that the accident occurred in the version stated by the respondent. The fact that the 3rd respondent was driving in the middle of the road as he came around the bend required of him keep a careful look to other road users.

The Law on contributory negligence to apportion proximate cause and blame worthiness applies the reasonable person standard. It is therefore presumed that a man does possess ordinary capacity to avoid injury to his neighbours unless there is clear manifestation of incapacity has been shown by way of evidence.

The position I take from re-evaluating the evidence is that when a driver approaches a bend on a major highway, more so when overtaking as the 3rd appellant did fail to exercise due care and attention. There was therefore a proper basis upon which reliance was placed on the direct evidence of (PW2). This is in line with the principles that a fact may be proved by a single witness (see – **Oluoch vs R [1985] KLR**). ***"A fact may be proved by the testimony of a single witness……."*** Applying this principle **Mutati's Mutandi's** to the facts of the present case it is in my Judgment there was prima facie evidence to warrant the Learned trial Magistrate's finding that third appellant was fully to blame in all these circumstances which amounted to causation and liability to the accident. In consideration of this question on contributory negligence this ground of appeal therefore fails.

Ground 2 – General Damages

General damages are those damages payable by a fortfeasor for any pain and suffering and loss of amenities occasioned due to acts of negligence. The law on this head I believe is quite properly laid down in various cases. In the case of **Rocliffe v Evans 1802 2GB 524-533** there were article and standard of proof for claimers for damages:

> ***"The character of the acts themselves which produce the damages and the circumstances under which these acts were done, more regulate the degree of consenting and particularly with which the damage done ought to be stated and proved. As much certainty and particularly must be insisted on, both in pleading any proof of damages, as is reasonable having regard to the circumstances and to the incident of the acts themselves by which the damage was done. To insist upon less would be to relax old and intelligible principles. to insist upon more would be the vairese pendetry."***

In assessing general damages the guidelines for related by Lord Morns in the case of **West (H) & Sons Ltd v Shepard 1964 AC 326** and Lord DR Morning in **Limpho Choo v Cariden and Ishuington Area Health Authority 1979 1 ALL ER 332**. To this rest the law in the case of **Livingstone v Ranyaras Coal Co. 1880 5 App 25** where Lord Blackburn stated as follows:

> ***"I do not think there is any difference of opinion as to its (sic) being a general rule that where any injury is to be compensated by damages, in setting the sum of money to be given for compensation or damages, one should as nearly as possible get all the sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not sustained the wrong."***

The court therefore would be taking into account:

> ***1) The intent and exhibit of the injuries sustained.***
>
> ***2) The intent and gravity of the resulting physical disability***
>
> ***3) The pain and suffering which had to be endured***
>
> ***4) The loss of amenities and***
>
> 5) ***The extent to which, consequentially, the claimant's pecuniary prospects have been materially affected (see*** **Woodum of C.J. in Cornilliac v Schocus 1965 7 WLR 491**).

It is trite that the assessment of general damages by the trial court is a discretionary function. The appellate court only interferes with the decision in response to the clear principles which are well settled in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Karuri vs A. M. Lubia & Another [1982-1988] KLR** where the Court of Appeal stated as follows:

"The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that wither that 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage."

With the above view in mind, in the instant appeal the point is this that the respondent suffered a fracture of the left femur thigh as confirmed by **Dr. Adede** who examined the respondent on 3rd September 2014. In his report even if the bones finally unite it is expected that the joint

wear and tear would sent in osteoarthritis. It is also clear from his report that the respondent will have to incur medical expenses in future to have the metal implants removed and in his opinion it will cost approximately Kshs.90,000/= for that purpose. This future medical expenses were specifically pleaded by respondent in the plaint dated 25th September 2014.

Having analyzed the material evidence which culminated in award of general damages of Kshs.600,000/= by the Learned trial Magistrate, I find no error that the exercise of such a discretion was wrong in law or fact. With regard to the claim on future medical notwithstanding that the respondent specifically pleaded that he will require Kshs.90,000/= for surgery and removal of the metal plates there is no mention of it in the Judgment by the trial court. The Learned Magistrate did not rule at that stage whether the respondent was justified or not in the circumstances of the evidence to be awarded the claim on future medical expenses. I am therefore persuaded that the Learned Magistrate was wrong for failing to take account and in not awarding any damages under this limb.

Accordingly, I have no hesitation to find the Learned Magistrate misdirected himself with the result that the error ought to be corrected by this court. In the circumstances I award the respondent Kshs.90,000/= damages for future medicals in this case. Consequently, save for the variation in the award of future medicals as said above the decision of the trial court cannot be criticized save to that limited extent. In the premises I partially allow the cross-appeal, dismiss the main appeal with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF JULY, 2019.

.....

R. NYAKUNDI

JUDGE