



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 57 OF 2017

(FORMERLY MOMBASA HCCA NO. 175 OF 2017)

AUM TRANSPORTERS LIMITED APPELLANT

VERSUS

DAVID KARARI THUKU..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Senior Principal Magistrate Hon. Lutta N. in PMCC No. 435 of 2015 delivered on 23rd August 2017 – Mariakani)

CORAM: Hon. Justice R. Nyakundi

Ms. Omwenga for the Appellant

Ms. Jengo for the Respondent

JUDGMENT

The appellant Aum Transporters Ltd, the defendant in the original cause of action being pursued by **David Karari Thuku**, the respondent and cross-appellant to this appeal lodged an appeal against the Judgment and decree of the trial court dated 23.8.2017.

In the impugned Judgment, the Learned trial Magistrate arrived at findings on liability at 90%:10% and an award of Kshs.2,000,000/= as general damages material damage of Kshs.526,720/= and specials arising out of medical expenses Kshs.609,548. The respondent was also awarded costs and interest on the total sum. Being aggrieved with the entire Judgment, the appellant in its memorandum of appeal relied on the following grounds:

- 1. The Learned Magistrate erred in awarding General damages in disregard of medical evidence properly on record on the extent of injuries sustained.***
- 2. The Learned Magistrate erred in law and in fact in awarding excessive General damages in the circumstances.***
- 3. The Learned Magistrate erred in not properly considering the Defendant's medical evidence and submissions hence arriving at an erroneous decision on quantum.***

On the part of the respondent he cross appealed for being aggrieved with the Judgment challenged the decision on the following amended grounds in his appeal.

- 1. The Learned trial Magistrate erred in law, in fact in attributing contributory liability and or negligence to the cross appellant when no evidence of negligence was adduced against the cross-appellant.***
- 2. The Learned trial Magistrate erred in law and in fact in failing to address the claim for loss of user of motor vehicle registration number KAG 130S from the date of the accident to the Judgment date.***

Through their respective counsels an order to vary or set aside part of the Judgment complained of was sought from this court.

Procedural History

In the original plaint filed in court on 21st December 2015 **David Karari Thuku** (cross-appellant) sued **Aum Transporters Ltd** (appellant), alleging various acts of negligence in tort committed by its servants, employee or driver, or agent in the course of his employment on 24th December 2013 while driving motor vehicle registration number KBP 680P.

The respondent/cross-appellant claimed damages against the appellant based on vicarious liability as the owner of the motor vehicle KBP 680 P which was carelessly and negligently driven that it collided with his motor vehicle KAG 130S. As a result of the accident, the respondent suffered personal injuries to the forehead, subdural hematoma, left shoulder and lower limb.

In addition, the respondent motor vehicle was extensively damaged, occasioning total loss valued at Kshs.526,720/=. The respondent claimed a total of special damages on treatment expenses at Kshs.609,548.

The appellant in its defence dated 1.3.2016 denied liability and averments in the plaint. Further the appellant on liability pleaded particulars of negligence in paragraph 7 in the statement of defence against the respondent which did contribute to the accident, loss and damage.

The trial Learned Magistrate as a trier of the case on the merits heard four witnesses in support of the claim which in answer to the issues raised, the appellant called the driver of motor vehicle KBP 680P ZD 5053.

It is against the evidence on record that Judgment on liability and quantum was assessed by the Learned trial Magistrate.

In light of the above, it was agreed that the appeal be disposed of by way of written submissions.

Mr. Mogaka for the appellant submitted there is no contestation on liability as apportioned at a ratio of 90%:10% in favor of the plaintiff/cross appellant. **Mr. Mogaka** submitted that the real question in this appeal is the erroneous award of general damages assessed by the Learned trial Magistrate at Kshs.2,000,000/= of what he considers as soft tissue injuries. **Mr. Mogaka** proceeded to analyze the evidence by the complainant on pain and suffering together with the findings made by the medical doctors who diagnosed the gravity and nature of treatment to restore the damage.

According to Mr. Mogaka's submissions, there was no material evidence nor corresponding similar awards before the court that would support the award of Kshs.2,000,000/= for the respondent.

To buttress his submissions to show that the trial Magistrate's finding was erroneous and wrong in principle counsel cited the following cases of **Jah Hendricks v David Charo Sirya [2016] eKLR**, **Ali Issa Ali v East Africa Portland Cement Company Ltd [2016] eKLR**, **Panniack Investments Limited v Davidson Mwanzia Kamuta [2018] eKLR**.

Counsel argued and submitted that on the above decisions the air and just compensation for the respondent /cross appellant would have been within the range of Kshs.400,000/= - Kshs.600,000/= as general damages for pain and suffering.

Mr. Mogaka further proceeded to analyze the dismissed claim on loss of user raised in this appeal by the respondent. His contention is simple the claim was not specifically pleaded nor proved as required in Law.

As regards apportionment on liability Mr. Mogaka's contention was that the evidence adduced and in cross-examination as well as the analysis by the Learned Magistrate a correct decision on contributory negligence was determined as between the appellant and the respondent agent or servant. Counsel placed reliance on the case of **Peters v Sunday Post Limited [1985] EA 424**. As the 1st appellate court jurisdiction to evaluate the evidence by the trial court so as to draw its own conclusions on the matter. With all these in view, counsel urged this court to partially allow the appeal on general damages and dismiss the submissions by the respondent.

The respondent submissions

Mr. Jengo for the respondent submitted and vehemently opposed the arguments by the counsel for the appellant in respect of the award of general damages for personal injuries, loss and amenities. It is the respondent counsel submissions that in assessing damages under the limb on personal injuries, loss and damage, the court considered the evidence more so the prognosis in the medical reports on record.

Learned counsel submitted and urged this court to make reference to the medical reports by **Dr. Adede** and **Dr. Kiboi Githinji** which reached a consensus of opinion as to the nature of injuries and permanent partial disability suffered by the respondent.

Whilst making submissions on the assessment damages, counsel distinguished the authorities referred to by the appellant counsel as awards made based on different nature and character of injuries compared to those suffered by the respondent.

Under this head of general damages Learned Counsel submitted and urged the court to be guided by the principles and awards made in the following cases: **J.K.N. v Jacob le Masika Kipaa & Another HCCC No. 32 of 2015** where the court made an award of Kshs. 5,000,000/= for pain and suffering **P.N.N v Charles John Musee HCCC No. 112 of 2013** the court assessed general damages at Kshs. 10,000,000/= for pain and suffering for injuries to the head and brain. In **Joseph Gichuhi Thomas v K. G. HCCA No. 32 of 2017** the court assessed damages at Kshs.1,800,000/= for injuries to the head and brain. Counsel therefore contended that the award of Kshs.2,000,000/= was within the range of similar awards under this limb which the respondent had as a result of the accident. Counsel, therefore submitted that appeal on this ground lacks merit.

In dealing with the ground on liability counsel submitted that the apportionment on liability in negligence was based on the evidence and circumstances of the accident between the respondent and the appellant's agent, driver or servant. Learned counsel relied on the following

authorities regarding delictual and quasi delictual liability as between the appellant and cross-appellant **Ann Wambui Nderitu v Joseph Ropkoi & Another CA No. 345 of 2000, Mariam Athman Senengo v Sun “N” Sand Beach Hotel & 3 others HCCC no. 72 of 2000**

Accordingly, learned counsel argued and submitted that its clear from the record that the accident involved motor vehicle registration number KAG 130S and KPB 680P. Therefore, learned counsel contended by reason of negligence on the part of the respondent in causing the accident. Contributory negligence of 10% was not erroneous.

Counsel on the other hand submitted that there is no dispute that the occurrence of the accident resulted in the damage of the respondent motor vehicle. The effect of it was loss of user suffered by the owner and beneficial user herein. That it was an error for the trial court not to address the issue on loss of user by awarding a reasonable amount under this claim. For this legal proposition, counsel relied on this **Halsbury Laws of England 4th Edition Vol. 12 Paragraph 1165** where it is stated;

“Loss of use of nonprofit earning chattel. In the case of a chattel which is not employed for private gain, the plaintiff is entitled to general damages for loss of use. A private individual is entitled to general damages for inconvenience due to loss of use of a chattel such as a motor car.”

After hearing both counsels on the grounds taken on this appeal it is now my singular duty to deal with the issues and determine the matter within the principles laid down in **Selle (supra)** case

Analysis

What is the test for the assumption of jurisdiction by the 1st appellate court?

a). Has the appellant and cross-appellant established an arguable case on appeal in respect of the impugned judgment on quantum awarded by the trial court?

b). Who bears the costs of this appeal?

I now turn to consider the issues in this appeal.

Issue No (1)

In dealing with the jurisdiction of the first appellate court in respect of a Judgment arising out of a subordinate court factors based approach for adjudication and criteria was clearly set out in the case of **Peters (supra)**. The various factors vary from evaluation and scrutiny of the evidence on record and other relevant material as the case stands and final Judgment being appealed against.

The cautionary test of bearing in mind the advantage the Learned trial Magistrate had in observing the demeanor of witnesses while an appeal court lacks that advantage becomes of paramount importance. The weight given to the various aspects of the case by the trial court and the right significance which was the decisive factor in the impugned Judgment.

It is therefore perfectly discretionary power being guided with the principles and the test in **Henry Hiday Ilanga –vs- Mangena Manyaka [1967] 1 EA 705**

“Whether the assessment of damages be by a judge or by a jury the appellate court is not justified in substituting a figure of its own for what awarded below simply because it would have awarded a different figure if it had tried the case in the first instance ... before the appellate court can properly intervene it must be satisfied either that the judge, in assessing damages, applied a wrong principle of law as by taking into account some relevant factor or leaving out of account some irrelevant one, or short of this that the amount awarded is so inordinately low or inordinately high that it must be wholly erroneous estimate of damage

An appellate court has the jurisdiction and opportunity to examine all aspects of the plaintiff and defendant case at the trial with a fine tooth comb to establish whether issues raised on appeal are capable of giving efficacy to the Judgment or a good and arguable case exist for its interference. Such will be the power and jurisdiction to be exercised by this court in determining this appeal.

Issue No. 2

The claim against the appellant was based on negligence alleged and the particulars thereof were pleaded in paragraph 3 of the plaint. The appellant denied negligence that the said collision was solely caused by the respondent. As to the finding on liability the trial court apportioned contributory negligence at a ratio of 10%:90% in favor of the respondent. For the respondent counsel it was submitted that the Learned Magistrate misapprehended the law and facts when she resolved that the respondent was liable in negligence. This is therefore alive issue in this appeal.

The law

The principle as to what constitute negligence was defined in the classic statement made by **Alderson B. in Blythe v The Birmingham Waterworks Company 11 Exch. 781** where he said

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.”

As far as possible the trial court when considering two litigants whose claim is based on collision of two motor vehicles and the degree of care required of them in cases of this nature will need to be guided by the principles in case of **Zarina A. Shariff v Noshir P. Sethna (6) ([1963] E.A. at p. 249)** where **SINCLAIR P.** states:

“The speed at which a prudent driver approaches an intersection must bear some relation to the nature of the intersection. Such matters as the width of the roads, the number of traffic lanes and the general visibility must always be relevant and each case be considered on its own facts. ORMEROD, L. J.’s observation in Williams v Fullerton (2) that if a driver exercises proper care, he approaches a crossing with his foot off the accelerator and ready on the brake to deal with any traffic from the minor road by slowing down or stopping, is no doubt to be related to the facts of that case and the nature of the crossing in question. It cannot apply with full force to all crossings. In the present case, however, the crossing was a dangerous one; the roads were comparatively narrow, there was some obstruction of the second respondent’s vision to the right and a substantial obstruction on his left. At such an intersection a driver could not justifiably place complete reliance upon an expectation that traffic on the minor road would conform to the requirements of the ‘Yield’ sign. He could not, of course, be expected to cope with every form of reckless or outrageous conduct on the part of other road users, but ordinary prudence would require him to approach at a speed which, combined with a proper look-out, would leave him able to take reasonable avoiding action if the need became apparent. What is reasonable is a question of degree depending on the particular circumstances. If he did not do so, or deprived himself of his opportunity to take avoiding action by not keeping a proper lookout, that could be negligence contributing to an accident.”

In the testimony of the respondent, he blamed the appellant driver for negligence for reason that he swerved onto his lane while overtaking and in those circumstances a collision occurred. The appellant driver **Benson Manene** in his testimony told the court that the respondent drove his motor vehicle in a zigzag manner and without due care and attention which ended up colliding with his motor vehicle.

As observed from the impugned Judgment the trial Magistrate considered this two equivalent evidential material and in his analysis apportioned liability at 10%:90% for the respondent.

First, I note that sequentially none of the drivers was charged with a traffic offence of careless or dangerous driving. These were two actions derived from a common scene of an accident. What happens in a situation like the one before the trial court was that the elements of negligence will first turn out on the valuation of the existence of facts available and the nature of the evidence to prove that fact.

Although both drivers were held to be at fault in not keeping a proper look out the level of contributory negligence I will in my view be answered by the principles in the of **Selle v Associated Motor Boat Co. Ltd EA 123 and Peters v Sunday Post [1958] EA 424**. That for the sake of this appeal and the findings by the trial court it is apparent that the Learned Magistrate considered the evidence on contributory negligence. The respondent counsel well agitating for review on this aspect failed to show that the decision on liability was arrived at on the failure of the Learned trial Magistrate for not appreciating certain facts or on wrong principles. The instant appeal is certainly not one which I can exercise appellate jurisdiction to interfere with the findings made by the trial court on liability. It is to be noted here that when it comes to appeals and the issue turns out on the demeanor and credibility of witness, it is trite that the trial court findings will usually carry the day notwithstanding, that each case must depend on its own particular circumstances. This long held principle on appellate jurisdiction is clearly illustrated by the House of Lords in the case of **Powell and Wife v Streatam Manor Nursing Home [1935] A. C. 243** it states as follows:

“Where the judge at the trial has come to a conclusion upon the question which of the witness, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be; and the appellate tribunal will generally defer to the conclusion which the trial judge has formed.”

LORD WRIGHT, in the course of his speech at p. 265 said:

“Two principles are beyond controversy. First, it is clear that, in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal “must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.”

In light of the above nothing has been said by the appellant counsel for this court to impeach the demeanor and credibility of PW 1, PW 2, DW 3 who majorly alluded to the facts and evidence to the trier of the case.

Issue No. 3

The assessment of General and special damages

Legal framework

The respondent pleaded in his statement of claim, breach of duty of care and particulars of negligence against the appellant. The evidence by both parties crystallized into the Judgment being impugned in this appeal on grounds on award of general damages.

In the case of **Southern Engineering Company Ltd v Musungi Mutia [1985] eKLR 730** the assessment of general damages for the claim on pain, suffering and loss of amenities is a matter for the discretion for the trial court. The only rider is that it must be exercised judiciously

and the court's decision ought to be supported with clear reasons as a basis for the award. The rule that the award perhaps capture the doctrine of justice and fairness is found in the formulation of the principles in the English case of **Livingstone v Rawyards Coal Company 1880 5 AC. 25** where the court then held thus:

“Where an injury is to be compensated by damages, is setting a sum of money to be given for damages, you should as nearly as possible get at that sum of money which will put the party who has been injured in the same position he would have been in if he had not sustained the injury for which he is now claiming compensation.”

One useful authority here is that of **West (H) & Son Ltd vs Shephard [1964] AC 326 – 353**

“But 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 endeavor 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 is still must be that amounts which are awarded are to a considerable extent conventional. The difficult task of awarding money compensation in a case of this task is essential matter of opinion of judgment and of experience. In a sphere in which no one can predict with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitable differences of views and of opinion, he does not however proceed to dismiss as wrong a figure of award merely because it does not correspond with the figures of his own assessment.”

The balancing approach on assessment of damages involves various considerations and there is no iron clad rule necessary to be followed by the trial court to meet the demands of justice. The onerous task as to the just and fair measure its ideally placed under the guidance of legal principles developed over time and prior relevant cases with similar awards.

This approach has two rationales as illustrated in the authorities of **Lini Pho Choo v Camdeen and Islington Aaree Health Authority [1979] ALL ER 332** as adopted in **Tayals v Kinamu 1982 – 881 KAR 90**.

First, it is the Law that, due regard be given to the range of damages assessed with comparable cases with similar features suffered by the claimant. Secondly, the claimant is only entitled to what is in the circumstances a fair compensation, fair both to her and the alleged defendant (tortfeasor). Thirdly, the plaintiff or claimant has to prove on a balance of probabilities, the loss and damage suffered. Fourthly, the assessment of damages is not meant to punish the defendant who has been found liable of negligence. In the case of **Lord Morris in Jag Singh V. Toong Fong Omnibus Co. Ltd [1964] 1 WLR 1382, at p 1386** stated as follows:

“As far as possible it is desirable that two litigants whose claims correspond should receive similar treatment just as it is desirable that they should both receive fair treatment. Those whom they sue are no less entitled.”

In the instant appeal, it turned out the appellant counsel complaint was against the high award and the decisions relied upon in the reasoning of the Learned trial Magistrate when he finally settled for damages of Kshs.2,000,000/= to compensate the respondent for pain and suffering.

The respondent counsel submitted there was considerable evidence and authorities which were realistic and correctly applied by the Learned Magistrate to award the quantum of Kshs.2,000,000/= being impugned by the appellant.

The injuries at hand are clearly tabulated in the medical report of Dr. Adede dated 24.12.2013 who on examining the respondent confirmed the following injuries:

Ø Head brain injury with 1). Loss of consciousness 2). Bleeding in the brain-right chronic subdural haematoma 3). Headaches 4). Left sided paralysis

Ø Blunt object injury to the left shoulder and head.

Ø Blunt object injury to the left lower limb.

Ø Bruises on the forehead.

Whereas Dr. Sheth, on 27.6.2016 described the nature of the injuries suffered by the respondent to consist of:

Ø Chronic sub-dural haematoma over right frontoparietal area

Ø Weakness of left side of body and semi-conscious state.

Prognosis:

Ø 25cm healed operative scar mark over right tempo-parietal area of scalp. Dr. Sheth opined that the respondent had fully recovered with no permanent incapacity.

Considering **Dr. Adede** and **Dr. Sheth's** examination findings it is clear that the major injury suffered by the respondent was the one involving the scalp of the head. The sum total of any assessment of damages will therefore subsequently take into account aggravating factors associated with such injuries. For this court to address any variance in assessment of damages it is instructive to make reference to similar awards on pain and suffering and loss of amenities.

1. **Paul Onyango v Dismas O. Nyaiga HCC 1977 OF 2000** The plaintiff suffered the following injuries

Ø Head injury

Ø Right side extra haematoma

Ø Sub-dural hygroma

Ø Cut wound right forehead

Ø Shock 17th teeth extraction

The court awarded Kshs.1,500,000/=.

2. **Cecilia Mwangi & another v Ruth N. Mwangi [1997] eKLR** the applicant sustained:

Ø Head injury

Ø Convulsion

Ø Cut wound over the vertex of the scalp.

The court awarded Kshs.950,000/=.

3. **Lucy Ntibuka v Benard Mahora and others, the HCC 17 OF 1993** The plaintiff suffered:

Ø Brain convulsion

She was awarded Kshs.500,000/=.

4. **Ben Menges v Edith Makungu Lande [2013] eKLR** in this case the appellant suffered:

Ø Blunt injury to the head, both shoulders

Ø Blunt injury to the back

Ø Tender lumba

Ø Sacral spine

The court awarded Kshs.900,000/=.

I note from the legend on the measurement of quantum of damages that no two cases are precisely the same either in the nature of the injury or in the age, circumstances or other relevant conditions to the persons injured. I am of the view that upon reflecting on the facts of the case of **Sylvano N. Nyaga & another vs Joseph Kogi Ngotho HCCC NO. 95 OF 2002 NYERI** by contrast the claimant Sylvano suffered more serious injuries than that of the respondent. The respondent from the two medical reports appear to have suffered serious head injuries with loss of consciousness. Although Dr. Sheth is of a different opinion as to the permanent incapacity on the other hand Dr. Adede assessed 5% permanent partial disability associated with the injuries sustained and subsequent surgery to rectify the deformity. The common thread in the two medical reports is on the nature of injuries and that over two years down the line the respondent had not fully recovered going by Dr. Adede's report. I am mindful of the position taken by Dr. Sheth in regard to his opinion that the respondent had recovered fully with no permanent deformity. By such a reinforcement does not trump the expert evidence of Dr. Adede despite his evaluation being carried out four months earlier than Dr. Sheth's report. One set of concern I had in respect of his expert opinion is that he may have understated the conclusion on permanent incapacity of the respondent. It is clear that the real defence of the opinion was to play as a gatekeeper for the appellant given the fact this is a claim of monetary compensation and as it turns out the medical reports are understood to be given much weight in assessment of damages.

By dint of the similar awards pointed out elsewhere in this appeal and having gone through the record the long term effect of the head injury for a 67 year old claimant cannot be completely ruled out. Be that has it may be I am afraid that the Learned Magistrate was in error when he awarded the respondent general damages of Kshs.2,000,000/=.

On the basis of the authorities outlined above and on the proper appraisal of the evidence this specific award ought to be interfered with by

this court by setting it aside and substituting it with an award of Kshs.1,500,000/=. In deciding this appeal, I think the extent to which regard should be given is to the range of awards in other cases which are comparable with the instant claim at hand. I will conclude that the Learned Magistrate assessment was by all means generous.

I now turn to the matter of special damages. The rule however, is in order to succeed on special damages it must be specifically pleaded and clearly proved. From the record in this aspect of evidence have compared the accuracy of the evidence and am satisfied the material assessment made was within the pleadings and the evidence by the respondent. Having regard to the evidence and to the incidence on the burden of proof in cases of this nature I find myself in agreement with Mr. Jengo's submissions that there is nothing to show that the Learned Magistrate misdirected himself in law in considering the award given on special damages. I must also add now that the loss of user was not pleaded and not specifically proved. So to speak that I address it as a common ground on appeal without new evidence being availed again in respect of the claim I would have no jurisdiction to reach out to assess any possible such damages.

As I have indicated, I will allow partially this appeal on general damages,

set aside the quantum appealed from and order it be substituted with an award of Kshs.1,500,000/= in favor of the respondent. Fortunately, with regard to the rest of the claims, I also concur with the view taken by the Learned trial Magistrate.

In the circumstances therefore the appeal Judgment consist of the following orders:

- | | |
|--|--------------------------------|
| (i). Liability | 90%:10% |
| (ii). General damages for pain and suffering
and loss of amenities | Kshs.1,500,000/= |
| (iii). Loss of motor vehicle and attendant costs | Kshs. 526,720/= |
| (iv). Special damages for treatment costs,
Medical report and transport | <u>Kshs. 609,548/=</u> |
| TOTAL | <u>Kshs.2,636,268/=</u> |

Costs and interest at court rate, save for special damages and loss of material damage for motor vehicle to attract interest from the date of filing suit. On general damages interest be calculated from the date of Judgment of the trial court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER 2019.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Atiang for Jengo for the respondent
2. Mr. Omwenga for the Appellant