REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CIVIL APPEAL NO. 143 OF 2016

IMMACULATE KANINI MULWA.....APPELLANT

VERSUS

DANIEL MAGURU IRUNGU.....RESPONDENT

(Being an appeal against the decree and Judgment delivered by Hon. Mrs

PM Chesang- Principal Magistrate delivered at Kangundo

PMCC No. 106 of 2015 on 18th November, 2016)

BETWEEN

DANIEL MAGURU IRUNGU.....PLAINTIFF

VERSUS

IMMACULATE KANINI MULWA.....DEFENDANT

JUDGEMENT

1. The respondent herein had sought damages for pain and suffering and loss of amenities, special damages of Kshs 38,305/- and costs of the suit in the trial court. According to the plaint dated 2nd July 2015 the respondent was on or about the 3rd day of September 2012 riding motor cycle KMCH 136D along Kangundo-Nairobi road when m/v reg. No. KBK 343R that was registered in and or in the possession and or beneficially owned by the Appellant was so negligently driven that it was allowed to collide onto the motorcycle thereby causing the respondent serious bodily injuries and he endured pain and has suffered loss and damages. The respondent pleaded *res ipsa loquitor* and vicarious liability and that prior to the accident the respondent was a motor cycle rider earning Kshs 500/- per day but due to the injuries he could no longer engage in gainful occupation and permanent incapacity was assessed at 10%.

2. The appellant denied the ownership of the suit vehicle, the fact that the respondent was riding the motorcycle on the material day and the particulars of loss and injuries and denied the applicability of res ipsa loquitor and vicarious liability. The appellant pleaded that the accident was as a result of the negligence of the respondent as particularized in paragraph five of the defence dated 31.7.2015

3. The evidence tendered before the trial court was as follows. Pw1 was the respondent who sought to rely on his witness statement and his documents that were filed. He told the court that he was a jua kali artisan and that he had a fracture and he blamed the appellant for the accident. On cross-examination, he testified that he was riding the motor bike on Kangundo road heading to Nairobi and he was on the left side of the road and that the road had bumps and that the appellant knocked him from behind. However he stated that the respondent took him to Mama Lucy and later Kenyatta National Hospital. The respondent closed his case and the appellant presented her defence case.

4. Dw1 was the appellant who told the court that she was on the bumps when the respondent knocked her vehicle on the left side as he was overtaking her and came in front of her. It was her testimony that the respondent knocked her from behind. On cross-examination, she testified that the police told her that they would charge her and that the police abstract indicated that she was charged with dangerous driving at Kangundo Law courts and on re-examination, she informed the court that the case had not been concluded.

5. After hearing the evidence and looking at the submissions of the parties, the trial magistrate found that the appellant had admitted liability and admitted being charged before Kangundo Law Courts and did not accept the appellant's testimony that the Respondent knocked her from

behind. She found that a careful driver ought to drive slowly on a road that is in poor condition and has bumps and potholes hence found the appellant 100% liable. On quantum she found that the report of Dr. Theophilus Wangata was not disputed and made the following award:

General Damages	Kshs.	1,200,000/-
Special damages		awarded as pleaded

This thus precipitated the present appeal.

6. The appeal was canvassed vide submissions and the appellant framed two issues for determination; on quantum and liability. On the issue of liability, it was submitted that the particulars of negligence pleaded in the plaint had no factual basis. It was further submitted that the appellant's evidence was unchallenged and uncontroverted in cross-examination and that there was no independent evidence that corroborated or supported the respondent's version of events and that the mere fact that the appellant was charged is not a ground for finding her negligent. It was thus argued that liability be apportioned at 50:50 against each of the parties so as not to occasion a miscarriage of justice. On the issue of medical expenses, counsel submitted that the appellant testified that she paid for the same hence the trial magistrate was wrong to make an award of special damages. Counsel submitted that the award of General damages was manifestly excessive and proposed Kshs 350,000/- in line with the finding in the case of **Jitan Nagra v Abidnego Nyandusi Oigo (2018) eKLR.**

7. The respondent averred that there is no need for independent evidence as the appellant's testimony did not rebut the respondent's chain of events. Counsel urged the court to invoke the principle of *res ipsa loquitor.* Counsel submitted that the finding of the trial court of 100% liability on the part of the appellant was proper. On the issue of quantum of damages, counsel submitted that Dr. Theophilus Wangata's medical report was indicative of the injuries suffered and noted that the respondent suffered 10% incapacity and placed reliance on the case of **Geoffrey Mwaniki Mwinzi v Ibero (K) Ltd & Another (2014) eKLR** where Kshs 2,000,000/- was awarded for similar injuries hence the award of the trial court was proper. With regard to special damages, counsel submitted that special damages were pleaded and proved and therefore the amount awarded was proper and was not in error. Counsel urged the court to dismiss the appeal.

8. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**.

9. Having considered the pleadings and respective submissions, the issues for determination are whether negligence was proven to the required standard and if so, what is the apportionment of liability and what quantum of damages shall be awarded. It is trite that the burden of proof lies upon the party who substantially asserts the affirmative of the issue in dispute. The rule means that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on the party: see **Phipson on Evidence (16th Edition), 127**, and **Miller v. Minister of Pensions [1974] 2 All E.R. 372**.

10. It is also well settled that the standard of proof in civil cases is on balance of probabilities. **See Phipson**, **infra, 154** where it is stated that a balance of probabilities simply means that a court is entitled to say that, based on the evidence led before it, it is of the view that 'it is more probable than not ' that the fact asserted is made out"

11. It, therefore, follows that in the present case the burden of proof is on the Respondent as the party who has asserted the affirmative to prove on a balance of probabilities that the injuries suffered were as a result of the accident which was caused by negligence of the Appellant's agent or servant. Because the Appellant pleaded negligence on the part of the respondent, he also had a burden to prove the same.

12. In the case of **Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781** Baron Alderson made the following famous definition of negligence:

> "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"

13. For an action in negligence to succeed, the plaintiff must show that (a) there was a duty of care owed to him or her, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage: see Donoghue v. Stevenson [1932] A.C. 562.

14. This means that the all-important question to address is whether or not the accident was caused by the negligent driving of the suit motor vehicle. It is trite that a driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skillful driver would have in all circumstances. A reasonable skillful driver has been defined as one who avoids excessive speed, keeps a good look-out and observes traffic signs and signals. In addition to the duty incumbent to all road users comprises, inter alia, keeping a proper look-out and not going at an excessive speed.

15. Again, a driver of a motor vehicle should usually drive at a speed that will permit him to stop or deflect his course within the distance he can see clearly though it is not conclusive proof of negligence to exceed that speed. But if the driver strikes a person or object without seeing that person or object he may be placed in the dilemma that either he was not keeping a sufficient look-out or that he was driving too fast having regard to the limited look that could be kept: See **Evans v. Downer & Co Ltd (1933) AC 149 and Morris v. Lutton Corporation (1946) KB 114.**

16. Besides, decided cases abound with statements to the effect that drivers are not entitled to drive on the footing that other users of the road, whether drivers or pedestrians, will exercise reasonable care. Further, that although a driver is not bound to foresee every extremity of folly which occurs on the road, he is bound, nevertheless, to anticipate any act on the part of any road user which is reasonably foreseeable, whether negligent or not. See **Tart v Chitty & Co. (1931) ALL ER**.

17. It is imperative to apply the above-mentioned law to the facts in the present case. On one hand, there is the testimony of the Respondent who alleges that the suit vehicle was being driven at a high speed and it collided onto his motorcycle as a result of which he got serious injuries. On the other hand, the appellant testified that the accident occurred because the respondent overtook her and she knocked the motorbike.

18. Having considered the evidence in the present case, I wish to start by observing that the fact that the accident occurred is not in question. The respective testimonies of the appellant and the respondent are to that effect. In the same vein, the appellant led no evidence to challenge the fact that the respondent sustained injuries as, and to the extent, recorded in the medical report.

19. This means that the all-important question to address is whether or not the accident was caused by the negligent driving of the motor vehicle. It is trite that a driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skillful driver would have in all circumstances. A reasonable skillful driver has been defined as one who avoids excessive speed, keeps a good look-out and observes traffic signs and signals. In addition to the duty incumbent to all road users comprises, inter alia, keeping a proper look-out and not going at an excessive speed. See **Tart v Chitty & Co. (1931) ALL ER**.

20. To my mind, if indeed the appellant was driving the suit vehicle at a reasonable speed of 60 kilometers per hour he could have managed to stop the vehicle upon seeing the respondent overtaking him. Similarly, had the Respondent been riding at a reasonable speed and carefully on the toad, he would not have been hit. This means that, the fact that the appellant and the respondent failed to stop their respective vehicles is *prima facie* evidence that they were speeding. A reasonable driver driving or riding at a reasonable speed of 60 KPH cannot fail to stop well within a short distance. Similarly a rider ought to have properly applied the brakes without having the effect of being knocked by a vehicle on the road. The evidence herein thus point to one conclusion, to wit, the appellant and the respondent were speeding at the time of the accident herein otherwise they could have avoided the said accident.

21. All in all, it is my finding that the accident was caused by want of care on the part of the appellant and the respondent. The appellant drove the motor vehicle without due care and attention and at a speed which was excessive in the circumstances. It is also my finding that the motor cycle was driven in such manner that the respondent failed to so manage or control the motor the same. I, accordingly find that the appellant and the respondent are equally liable for the accident and therefore liability ought to be apportioned at 50:50 basis.

22. On the issue of quantum, the general principle upon which this court, as an appellate court, will interfere with an award of damages is if it is inordinately high or low as to represent an entirely erroneous estimate. It stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** as follows;

> An appellate court will not disturb an award of damages unless it is so inordinately 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 …."

23. According to the evidence on record, the respondent suffered a fracture of the left tibia and fibula and suffered a 10% functional incapacity. In assessing the claim for general damages, the trial magistrate awarded Kshs 1,200,000/-. However no reason was given and no authorities were included in support of the decision and this is also what the appellant has challenged**.**

24. **The case of Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** listed some principles to guide the court in awarding general damages, *viz*;

> ***a. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.***
>
> ***b. The award should be commensurate to the injuries suffered.***
>
> ***c. Awards in decided cases are mere guides and each case should be treated on its facts and merits.***
>
> ***d. Where awards in decided cases are to be taken into consideration then the element of inflation has to be taken into consideration.***
>
> ***e. Awards should not be inordinately high or too low.***

25. In **James Muriithi Ireri v Cyprian Mugendi Igonya & 2 others (2016) eKLR** the Appellant had suffered a compound comminuted fracture of the left tibia and fibula bone, soft tissue injuries over the left forearm, upper back and face. The fracture had healed with slight mal-alignment and that he would require removal of the plate at Kshs.50,000/-. An award of Kshs 400,000/= for general damages was maintained on appeal. In the instant case the amount of Kshs 1,200,000/- for general damages is rather high and because I am not satisfied that the evidence on record showed that the respondent proved that he suffered incapacity, i award Kshs 600,000/- for similar injuries as that suffered by the respondent. The authority was decided about three years ago and I have factored effects of inflation into account. Hence I will substitute the award by the trial court with the sum of Kshs 600,000/ as general damages for pain, suffering and loss of amenities.

26. For special damages I note that the respondent prayed for a total amount of Kshs. 38,305/- which the trial magistrate awarded the same as

prayed. The appellant testified that she took the respondent to the hospital meaning that she footed the respondent's medical bills and in this regard the search fees of Kshs 500/- and the medical report fees of Kshs 2,000/- seemed to have been the only expenses that the respondent met and in this regard the finding on special damages shall be substituted to that extent**.**

27. The appeal partially succeeds and I make the following award;

General Damages	Kshs.	600,000/-
Special damages	Kshs.	2,500/-
Less 50% Contribution	Kshs.	301,250/-
Total		**Kshs. 301,250/-**

Each party is to bear their costs of the appeal while the respondent will have full costs in the lower court.

It is so ordered.

Dated and delivered at Machakos this 22nd day of October,2019.

D. K. Kemei

Judge