REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

APPELLATE SIDE

CIVIL APPEAL NO. 13 OF 2018

KENYA TRANSMISSION CO. LTD.....APPELLANT

VERSUS

TERESIA NANDWA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Emily Kigen, RM, delivered on 2 February 2018 in Eldoret CMCC No. 537 of 2017)

JUDGMENT

[1] This is appeal was filed by the Appellant, Kenya Transmission Co. Ltd, from the Judgment and Decree passed by the Resident Magistrate's Court in **Eldodret CMCC No. 537 of 2017: Teresia Nandwa vs. Kenya Transmission Co. Ltd.** The Respondent had sued the Appellant in that suit for General and Special Damages, interest and costs. Her cause of action was that, on or about the **31 March 2017**, she was lawfully walking as a pedestrian besides the road along Kitale-Eldoret Road at Mti Moja area when the Defendant's driver, servant agent and/or employee so negligently drove, managed and or controlled **Motor Vehicle Registration No. KBQ 651D** that he caused the same to knock her down, thereby causing her to suffer severe bodily injuries.

[2] Particulars of negligence and of the injuries sustained by the Respondent were supplied in paragraph 4 and 6 of the Plaint along with Particulars of Special Damage; all of which were denied by the Appellant in its Statement of Defence dated **9 June 2017**. The Defendant, likewise, denied that it was the owner of the subject motor vehicle and averred, in the alternative that, if any accident occurred as alleged on **31 March 2017** then the same was due either to the sole negligence of the Respondent or was substantially contributed to by the Respondent. Accordingly, the Defendant prayed for the dismissal of the Respondent's claim before the lower court.

[3] Upon hearing the parties, the lower court made a determination in favour of the Respondent, in a Judgment delivered on **2 February 2018**. It however apportioned liability in the ratio of 90:10 in favour of the Respondent and entered Judgment for her in the sum of **Kshs. 905,400/=** together with interest thereon and costs of the suit.

[4] Being aggrieved by the said Judgment, the Appellant lodged this appeal on **28 February 2018** on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law and fact in apportioning liability against the Appellant at 90% despite the evidence on record.
>
> **[b]** That the Learned Trial Magistrate erred in law and in fact in failing to hold the Respondent largely and/or wholly liable for the accident that occurred.
>
> **[c]** That the Learned Trial Magistrate erred in law and in fact in adopting the wrong principles in the assessment of damages payable to the Respondent.
>
> **[d]** That the Learned Trial Magistrate erred in law and fact in awarding damages which were excessive in the circumstances considering the injuries pleaded and proved.

[5] Accordingly, the Appellant's prayer was that the Judgment and Decree in **Eldoret CMCC No. 537 of 2017** be set aside and substituted with an order dismissing the Respondent's suit with costs to the Appellant.

[6] The appeal was canvassed by way of written submissions pursuant to the directions made on **5 March 2019**. Hence, it was the submission of the Appellant that the decision of the lower court cannot stand because the findings and conclusions made therein were neither supported by the evidence on record nor were any reasons given therefor as required by **Order 21 Rules 4 and 5** of the **Civil Procedure Rules**. Counsel cited, among others, the case of **Florence Rebecca Kalume vs. Coastline Bus Safari & Another [1996] eKLR** for the proposition that particulars of negligence must be proved. He quoted the holding, by **Hon. Waki, J.** (as he then was) that:

> **"…several acts of negligence have alleged against the respective drivers of the motor vehicles. Their particulars must be proved before the court is called upon to find fault with the said driver. I am not entitled to infer negligence where none is proved…"**

[7] On quantum, Counsel for the Appellant urged the Court to be guided by the principles laid down in **Kemfro Africa Ltd vs. A. M. Lubia & Another [1982-1988] KAR 727; Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-1988] KAR 5** and **Simon Taveta vs. Mercy Mutitu Njeri [2014] eKLR**; which is basically that awards should not be excessive; and that comparable injuries should as far as possible be compensated by comparable awards. In his submission a sum of **Kshs. 400,000/=** would suffice to compensate the Respondent for her injuries. He relied on **Soren Peterson & Another vs. Charles Muhavi Isinga [2008] eKLR; George Okewe Osawa vs. Sukari Industries Ltd [2015] eKLR** and **Francis Wachauri Murage & Pwani United Builders vs. P.O.K & Another [2016] eKLR** to support his proposal.

[8] Counsel for the Respondent, on his part, defended the Judgment of the lower court and submitted that there was credible evidence placed before it to support the findings and conclusions reached by the Learned Trial Magistrate; namely, that the accident occurred off the road where the Respondent was lawfully walking as a pedestrian. It was further the Respondent's submission that, granted the injuries pleaded and proved, the award of **Kshs. 1,000,000/=** as General Damages was justified. Counsel relied on **Mombasa HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf** and **Mombasa HCCC No. 95 of 1995: Wilson Okoko Makuchia vs. Taita Estate Ltd** wherein similar awards were made for more or less similar injuries. Counsel, accordingly urged for the dismissal of the appeal with costs on the ground that it lacks merit.

[9] On a first appeal such as this, it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded; while giving allowance for the fact that it did not have the advantage of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** it was held 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..."**

[10] Thus, I have perused the record of the lower court and given consideration to the evidence adduced before it. That record shows that the Respondent testified before the Court as **PW2** and adopted her Witness Statement dated **19 May 2017**, wherein she stated that she was lawfully walking as a pedestrian beside the Kitale-Eldoret Road on **31 March 2017** when she was knocked down by the Appellant's **Motor Vehicle Registration No. KBQ 651D.** It was her evidence that the said motor vehicle was so negligently and/or recklessly driven that it veered off the road and knocked her; thereby occasioning her serious injuries for which she was admitted for 27 days at Moi Teaching and Referral Hospital while undergoing treatment.

[11] It was the testimony of the Respondent that, upon her discharge from hospital, she submitted herself for medical examination by **Dr. Sokobe**; in respect of which a Medical Report dated **28 April 2017** was prepared. She produced the Medical Report as an exhibit in this case. She was also examined by **Dr. Lodhia** and the record of the proceedings of the lower court show that **Dr. Lodhia's** Medical Report was admitted by consent and marked the Defendant's **Exhibit No. 1** herein.

[12] The Respondent also called **P.C. Cheserek Kiptoo (PW1)** to testify on her behalf. His evidence was that indeed an accident occurred on **31 March 2017** at **Mti Moja** area along the Eldoret-Kitale Road involving **Motor Vehicle Registration No. KBQ 651D Toyota Hillux** and **Teresia Nandwa**, the Respondent herein. He explained that the motor vehicle was being driven from Webuye direction towards Eldoret Town when the Respondent was knocked as she was trying to cross the road. In cross-examination, **PW1** stated that the point of impact was off the road on the left side, facing the direction of Eldoret Town. He produced the Police Abstract as an exhibit before the lower court.

[13] The Appellant called **Daniel Makambo Chibaja,** the driver who was in charge of the subject motor vehicle at the material time. **DW1** adopted his Witness Statement filed on **27 July 2017**. His testimony was that he was driving the subject motor vehicle on **31 March 2017** at about 5.06 a.m. when at **Mti Moja**, he saw a lady who was crossing the road from his right side to the left side. He added that the pedestrian was running while crossing the road; and that he tried his best to avoid knocking her but was not successful. He therefore conceded that the Respondent was hit and got injured; and that he stopped to take her to the hospital but angry onlookers wanted to attack him; thus, forcing him to flee from the scene for his safety. He further stated that he immediately reported the accident to Eldoret Central Police Station.

[14] It was, thus, on the basis of the foregoing evidence, the lower court was convinced that the Respondent had discharged the burden of proving her case to the requisite standard. It proceeded to apportion liability at 90:10 against the Appellant and the Respondent, respectively, reasoning that:

> **"…the plaintiff has discharged her burden of proof, proving that the accident took place as result of the negligence on the part of the defendant who are also held vicariously liable. However, it is my finding that the plaintiff as well ought to have been more careful while using the road and hence cannot escape blame as such I find that the plaintiff should shoulder 10% of the blame. Liability is thus entered in the ratio of 90:10 in favour of the plaintiff as against the Defendants.**

[15] On quantum, the Learned Trial Magistrate followed **Civil Appeal No. 30 of 1997: Osman Mohammed & Another vs. Saluro Bandi**

Mohammed for the principle that damages must be within limits which the Kenyan economy can afford; and that high awards are inevitably passed to members of the public, the vast majority of whom cannot afford the burden, in form of increased insurance or increased fees. The lower court, having been thus guided, proceeded to hold thus:

> **"The Plaintiff's advocate submitted that a figure of between Ksh. 300,000/= and Ksh. 350,000/= would be reasonable and attached authorities in support of the same. While the plaintiff submitted that a figure of Ksh. 1,400,000/= would be reasonable. Considering the nature of the injuries and cost of inflation, I find that an award of Kshs. 1,000,000/= is sufficient compensation for the injuries sustained by the plaintiff. The plaintiff also gets special damages of Ksh. 6,000/= which was pleaded and proved."**

[16] The duty of the Court is therefore to re-evaluate the evidence and satisfy itself as to the findings of the lower court on the twin issues of **liability** and **quantum**; and from the summary of evidence aforestated, there is no dispute that an accident did happen on the **31 March 2017** at **Mti Moja** area on the Eldoret-Kitale Road involving the **Appellant's Motor Vehicle Registration No. KBQ 651D**, Toyota Hilux. The parties were in agreement that at all material times, the said motor vehicle was being driven by **DW1**; and that he knocked the Respondent and occasioned her bodily injuries for which she was hospitalized between **31 March 2017** and **27 April 2017**. Indeed, **DW1** told the lower court that he was intent on personally taking the victim to hospital but had to flee for his own safety.

On Liability:

[17] The Respondent pleaded the doctrine of *Res Ipsa Loquitor* before the lower court and testified that she was walking beside the road when she was knocked by the Appellant's motor vehicle. According to her, had the Appellant's driver not veered off the road, the accident would not have occurred. In particular, the Respondent pleaded the following particulars of negligence on the part of the Appellant's driver:

[a] Driving at an excessive speed in the circumstances;

[b] Failing to keep any or proper look out or to have any or sufficient regard for the pedestrians, more particularly the Plaintiff;

[c] Failing to swerve, brake and or otherwise control **Motor Vehicle Registration No. KBQ 651D** in time sufficient enough to keep the same from causing an accident;

[d] Failing or being unable to exercise any or any proper or effective control of **Motor Vehicle Registration No. KBQ 651D;**

[e] Being careless, reckless and or negligent;

[f] Driving without the presence of his mind and or being intoxicated;

[g] Driving a defective or an unroadworthy motor vehicle.

[18] Looking at the totality of the evidence of the Respondent before the lower court, there is no suggestion that the Appellant's driver was intoxicated or that he was driving a defective motor vehicle. There is similarly no direct evidence that he was driving at an excessive speed as was alleged. Nevertheless, **DW1** conceded that there was not enough time for him to avoid the accident, thereby suggesting that he may have been driving at a high speed. Here is what he had to say on this:

> **"…I saw a lady who was crossing the road from my right side to the left side. She was running while crossing and so it was of short notice for me to avoid her. I tried my best to do what I could but was not successful to avoid her completely.**
>
> **She was hit from the right side of the vehicle and she got injured…"**

[19] It is noteworthy however that, the assertion of **DW1** was that the Respondent **"…was running while crossing the road…"** and that she was crossing from his right side to the left side. His evidence was that he was driving from Maili Nne to Eldoret Town and therefore that he was on his correct lane when the incident occurred. His version had the support of the evidence of **PW1** who told the lower court that point of impact was on the left side of the road facing Eldoret direction. He added that from the investigations conducted by the Police, it was established that:

> **"…the motor vehicle was being driven from Webuye direction heading to Eldoret when at Miti Moja the pedestrian was knocked when crossing the road from the right to the left…"**

[20] Thus, the trial court ought to have analyzed these two conflicting accounts and made a decision as to which version to believe, giving reasons for her decision as required by **Order 21 Rule 5** of **the Civil Procedure Rules**. In my re-evaluation, there is more credence in the Appellant's account, not only because it is supported by the evidence of the Respondent's own witness **(PW1),** but also by the P3 Form wherein the Respondent is quoted as having given the brief details of the incident thus:

> **"SHE ALLEGES THAT SHE WAS INVOLVED IN A ROAD ACCIDENT AT MITI MOJA AREA ALONG KITALE-ELDORET ROAD WHILE CROSSING THE ROAD…"**

[21] In the premises, it cannot be said that the Respondent proved her allegations of negligence against the Appellant on a balance of probabilities as was required of her. In the premises, her suit ought to have been dismissed by the lower court.

On Quantum:

[22] 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."**

[23] Although the Defendant averred in paragraph 7 of its Defence that it was unaware of the injuries sustained by the Respondent and put the Respondent to strict proof thereof before the lower court, there was indubitable evidence before the lower court to prove the said injuries on a balance of probabilities. The pleaded injuries, as set out in paragraph 6 of the Plaint, were lifted directly from the Medical Report of **Dr. Joseph Sokobe**, dated **28 April 2017** (at page 12 of the Record of Appeal). Those injuries were set out as follows:

[a] Deep cut wound on the occipital scalp;

[b] Bruises on the face;

[c] Blunt injury to the neck;

[d] Blunt injury to the chest;

[e] Fracture of the pelvis;

[f] Fracture of the left inferior pubic ramus;

[g] Deep cut wound on the left knee;

[h] Degloving injury to the left foot;

[i] Cut wound on the right foot.

[24] According to that report, the injuries had not healed fully by the time the Respondent was examined on **28 April 2017**. Other than moderate tenderness on deep palpation of the pelvis, the Respondent could not walk long distance. **Dr. V.V. Lodhia** of **Eldoret Hospital Ltd**, whose report was commissioned by the Appellant, was likewise of the same findings as to the injuries suffered by the Respondent. By the time he examined the Respondent on **26 July 2017**, he established that her neck was still stiff and slightly painful. He thus assessed the Respondent's permanent disability at 1%.

[25] Granted the serious nature of the injuries suffered by the Respondent, I would not have disturbed the award by the trial court; granted the comparable awards made in the authorities relied on by Counsel for the Respondent.

[26] In the result, I find merit in the appeal. It is hereby allowed. Consequently, the Judgment of the lower court is hereby set aside and substituted with an order dismissing the Respondent's suit before the lower court. Granted the nature of the dispute and the injuries suffered by the Respondent, I would order that each party shall bear own costs of this appeal as well as of the lower court proceedings.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF DECEMBER 2019

OLGA SEWE

JUDGE