



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: A.K NDUNG'U J**

**CIVIL APPEAL NO 24 OF 2019**

**SAWAYI FREDRICK..... 1<sup>ST</sup> APPELLANT**

**EARNEST RAGIRA OYOGI..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**MARY MORAA OMBASA..... RESPONDENT**

***(Being an appeal from the judgment of Hon. S.N Makila – SRM dated 25<sup>th</sup> January 2019 in Kisii CMCC No. 62 of 2014)***

**JUDGEMENT**

1. By a Plaintiff dated 13<sup>th</sup> March 2014, the Respondent sued the appellants for general damages, special damages of Kshs. 7,000/- together with interests and costs. The claim arose from a road traffic accident which occurred on 1<sup>st</sup> September 2013 along the Suneka-Asumbi Road involving motor cycle registration number KMCW 068Q and motor vehicle registration number KBR 675T. The respondent in her plaint alleged that the 1<sup>st</sup> appellant was the registered owner of motor vehicle KBR 675T and the 2<sup>nd</sup> appellant the beneficial owner.

2. The respondent pleaded that she was a passenger in motor cycle registration number KMCW 068Q, when the 1<sup>st</sup> appellant drove the Motor Vehicle Registration No. KBR 675T so negligently that it caused a collision with the motor cycle. As a result of the collision, the respondent suffered a brain concussion, laceration on the right forehead, bruises on the right eyebrow, tenderness on the right posterior and around the pelvic.

3. The appellants filed their statement of defence on 22<sup>nd</sup> April 2014 and denied the occurrence of the accident. In the alternative they pleaded that if the accident did occur then it was caused by the sole or significant negligence on the part of the respondent.

4. At the hearing before the trial court, Mary Moraa Ombasa testified for the plaintiff. She testified that on 1<sup>st</sup> September 2013 she was a pillion passenger when the driver of the motor vehicle hit them and she woke up at Nyangena hospital. She testified that she was treated at Nyangena Hospital before being transferred to Kisii Level 5 Hospital. She produced her attendance chits from both hospitals in evidence including the medical report from Dr Ogando. The appellants did not call any witness to support their case. The trial court after considering the evidence before it held as follows:

*“I therefore find the 2<sup>nd</sup> and 3<sup>rd</sup> defendants 100% liable severally and jointly for the accident that subject matter of this suit.*

...

*In conclusion judgment is hereby entered at 100% liability against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants at a sum of Kshs. 256,500/- plus cost and interest of the suit.”*

5. Aggrieved by the judgment of the trial court the appellants have filed the memorandum of appeal before this court raising the following grounds of appeal;

1. THAT the Learned Magistrate proceeded on wrong principles in entering judgment for the Respondent for the sum of Kshs 250,000/- in general damages.

2. THAT the Learned Trial Magistrate erred in failing to scrutinize/evaluate the evidence tendered in support of the injuries suffered by the Respondent and to correctly relate them to case law cited to him and thereby failed to arrive at a fair and reasonable

compensation to the Respondent for his injuries.

3. THAT the learned trial magistrate erred in failing to give his reasons for finding that the sum of Kshs 250,000/- in general damages to the Respondent was reasonable and/or adequate compensation.
4. THAT the learned magistrate erred in law and in fact in failing to find that the nature of injuries suffered by the respondent did not warrant an award of Kshs 250,000/-.
5. THAT the learned trial magistrate erred in law in failing to uphold the doctrine of precedent.
6. THAT the learned trial magistrate erred in awarding such an inordinately high award of damages for such injuries that have resolved and the said award can only be adjudged to an entirely erroneous estimate of the correct damages awardable to the respondent.

6. The appeal was canvassed by way of written submissions. The appellant in their submissions contend that the judgment by the trial court did not comply with provisions of **Order 21 Rule 4 and 5 of the Civil Procedure Rules** and cited the decision of Makhandia J in the case of **South Nyanza Co. Ltd v Omwando Omwando (2011) eKLR**. They explained that the trial court did not give any reason for finding that the sum of Kshs 250,000/- was reasonable compensation. They proposed that an award of Kshs 100,000/- would be sufficient compensation as the respondent sustained soft tissue injuries. They cited the case of **Kakamega HCCA No. 29 of 2012, Channan Agricultural Contractors Ltd v Fred Barasa Mutayi [2013] eKLR** where the plaintiff therein sustained blunt injury to the chest, cut wound to the head and left leg and was awarded Kshs 150,000/-. In **Meru HCCA No 126 of 2006, Kithoka Youth Polytechnic v Lucy Kithira Riungu** the plaintiff suffered multiple soft tissue injuries consisting of bruises on the right shoulder, right glutesus, right leg and cut wound on the right forearm at the wrist and was awarded Kshs 100,000/- as general damages. They also contend that the plaintiff did not attend court to testify afresh when the matter came up for hearing on 15<sup>th</sup> August 2018.

7. The respondent opposed the appeal and urged the court that the award of Kshs 250,000/- was arrived at in consideration of the authorities cited by the respondent before the trial court. They also relied on the case of **Francis Ochieng & Another v Alice Kajimba [2015] eKLR** in which the plaintiff therein was awarded Kshs 350,000/- as general damages for soft tissue injuries.

#### **DETERMINATION**

8. After looking at the proceedings before the lower court, I note that on 25<sup>th</sup> August 2018 at the hearing of the respondent's case the appellants were not in attendance despite being served with the hearing notice. Pw1 proceeded to give her oral testimony and the court marked the plaintiff's and defence case as closed.

9. The appellants through an application dated 7<sup>th</sup> September 2018 sought to have both the plaintiff and defendant's case re-opened. The trial court after hearing the application set aside the proceedings of 25<sup>th</sup> August 2018 and directed the Plaintiff to restate her evidence and be cross examined. The 2<sup>nd</sup> defendant was also allowed to call witnesses in defence of the claim. When the matter was set down for hearing the appellants were not in attendance and the court ordered that the matter to proceed from the last position.

10. The Court having set aside the proceedings of 25/8/2016 and directing the plaintiff to restate her evidence and be cross examined was in error, when, on 17/10/2018 directed that the plaintiff was to file submissions after the defendants failed to appear for hearing.

11. The proceedings of that day went thus;

*Ms Kerubo (for plaintiff); The plaintiff had testified and closed its case. I ask that the plaintiff be allowed to file submissions.*

*Court; The defendants (2<sup>nd</sup>) was given a chance to recall DW 2 for cross examination on 11/5/2018 but has not done so to date. I will allow the plaintiff's application that the case proceeds from the last position.*

*Mention for submissions on 7/11/2018.*

12. It is manifestly clear from the record that both the counsel for the plaintiff and the court were oblivious of the fact that upon the proceedings of 25/8/2016 being set aside by the court, there was now no evidence upon which the plaintiff was to submit.

13. The Order of Court of 25/8/2016 was clear that the plaintiff was to tender evidence afresh. This is what ought to have transpired in court on 17/10/2018, the absence of the defendants notwithstanding.

14. Clearly, the conduct of the defendants in this matter is reprehensible and must be deprecated. Despite what is an apparent over indulgence by the court, they failed for a second time to prosecute their case. They in my view engaged in a blatant abuse of the court process.

15. That said, however, the fact of the matter remains that once the proceedings of 25/8/2016 were set aside, the case was back to square one off the blocks and that is where the plaintiff ought to have started on the 17/10/2018.

16. Going by the proceedings the last position was that the plaintiff was required to give its evidence a fresh. However the trial court erred in directing the plaintiff to file submissions with no evidence to support its claim. **Section 107(1) of the Evidence Act (Chapter 80 of the**

Laws of Kenya), provides that;

*‘whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.’*

17. Having found that there was no evidence tendered before the trial court to which the court could make a finding, I shall look at the powers of an appellate court under the **Civil Procedure Act, 2010. Section 78** provides that:-

**“78. Powers of appellate court**

*(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—*

*(a) to determine a case finally;*

*(b) to remand a case;*

*(c) to frame issues and refer them for trial;*

*(d) to take additional evidence or to require the evidence to be taken; (e) to order a new trial.*

*(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”*

18. In the circumstances, the ends of justice in this matter demand that I set aside the finding and judgment of the Learned Trial Magistrate and remand the suit for trial. The outcome, then, is the following:

a) **THAT the lower court file be placed before the Chief Magistrate’s Courts at Kisii for directions on 18<sup>th</sup> December 2019 with a view to allocating this matter to a magistrate other than the Trial Magistrate for the taking of evidence and a final determination on basis of the evidence and submissions presented.**

b) **Costs shall be in the cause.**

**Dated and Delivered at KISII this 11<sup>th</sup> day of December, 2019.**

**A. K. NDUNG’U**

**JUDGE**