REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

CIVIL CASE NO. 229 OF 2015

MACHARIA MIRIAM.....1ST APPELLANT

DAVID MACHARIA MWANGI.....2ND APPELLANT

VERSUS

MUEMA NDILA.....RESPONDENT

***(Being an appeal from the Judgment of the Chief Magistrate's Court of Kenya at Milimani Commerical Court before Hon. Obulutsa S.P.M delivered on the 30th day of April, 2015 in Civil case No. 7247 of 2013*)**

JUDGMENT

This appeal follows an award to the respondent against the appellants by the lower court. The proceedings related to injuries sustained by the respondent in an accident involving him and motor vehicle registration No. KAS 492W owned by the 1st appellant and driven by the 2nd appellant at the time of the accident

From the pleadings and evidence, the plaintiff was cycling along Garden Estate Road when the 2nd appellant suddenly opened the driver's door causing the respondent to collide with the said door leading to the injuries sustained.

As a result the respondent is said to have sustained an unstable pelvic fracture, injuries to the bladder and urethra, deep cut wound to the perineum region, another cut wound to the abdomen, urethral stricture and bruises to the right hand.

His claim was denied by the appellants but after the trial the lower court found the appellants liable to the extent of 90% while the respondent was found to be 10% liable. The lower court proceeded to award Kshs. 1,400,000/= general damages and Kshs. 139,068/= special damages. The said sums were subjected to 10% deduction being the respondents degree of liability, leaving a balance of Kshs. 1,385,161.20/=. The appellants were aggrieved by the said judgment and filed this appeal.

The thrust of the appeal is that the lower court was wrong in analysing the evidence and thereby making wrong conclusions, and that the award was excessive. Both learned counsel have filed submissions to the appeal.

The occurrence of the accident has not been denied. The respondent was riding a bicycle, and from the evidence the motor vehicle driven by the 2nd appellant was stationary. This is clearly captured in the document produced by the 2nd appellant appearing at page 42 of the record of appeal. It states in part as

follows,

> **"I parked behind the pharmacy, and as I opened the door to get out, a fast cyclist hit the door which was now open. The cyclist got injured and I took him to Neema Hospital and then Kenyatta Hospital."**

The 2nd appellant gave evidence as the sole defence witness in the lower court. Under cross examination, he said as follows,

> **"It is the driver's door that was hit. I did not look behind. It was not necessary to check."**

On the other hand, the respondent told the court he was riding a bicycle by the road. The motor vehicle passed him, stopped and the door opened suddenly. He could not swerve to either side. This was because on the right there was a wall and on the other side the road was being used by cars. He could not brake and that he was not at high speed.

After considering the evidence the lower court found the appellant to blame to the extent of 90% and the respondent 10 %. As the appellate court, it is my duty to evaluate all the evidence adduced and come to independent conclusions. This I have done.

The 2nd appellant admitted that he did not look behind before he opened the door to the car. He said it was not necessary to do so. That was negligent on his part. The cyclist also should have foreseen the unexpected. This is because the car that passed him had suddenly stopped. Weighing one thing against the other, I would still have come to the same conclusion that the 2nd appellant was more to blame for the accident. The apportionment of liability made by the trial court was therefore correct.

The injuries sustained by the respondent appear in the medical report dated 10th September, 2013 prepared by Doctor A.K. Mwaura. It indicated that the respondent was admitted to Kenyatta National Hospital for 39 days and discharged to traumatology clinic. He later developed complications of retention of urine due to urethral stricture and was admitted for four days for an operation, after which he was discharged to continue attending (neurology clinic) traumatology clinic.

At the time of the examination by Doctor Mwaura the respondent complained of pain when passing urine and weakness of the right leg. It will be noted that the examination was about 5 months from the date of the accident. The doctor noted that the injuries were healing though very slowly and would leave permanent scars. There was residual pain in the pelvic region which in years to come would increase due to osteoarthritis of the pelvic bone. He was likely to develop the second urethral stricture in future.

Although the doctor concluded that the respondent is a disabled person permanently, the degree of incapacity is not given. Clearly, this was a case that required a second medical examination but this was not done.

The learned trial magistrate relied on some cases in making the award on quantum but the details thereof are lacking in the judgment. In the case of **Alphas Ochieng Were Vs Kenya Bus Services and Joseph Maina – Nairobi civil case No. 2450 of 1997** which was relied upon by the learned trial magistrate, the plaintiff became unconscious immediately after the accident and was hospitalised for six months. He had sustained fractures to the right side pelvis, the urethra had a tight and complete stricture near the urinary bladder and the urethra was torn. Surgical repair was not successful and therefore developed urinary leaks. He was going to be subjected to future operations which would require about two months hospitalization.

The court observed that the plaintiff sustained serious injuries and had been in pain since the date of the accident. He emitted unpleasant smell and could not sit with other people because of the stench. Future surgery would not restore him to 100% and at most would achieve 25-30% with the success rate of 25 to 50%. His future had been rendered bleak after the accident and his sexual life had been affected. The

court made an award of Kshs. 1,000,000/= general damages. This was in December, 1997.

The injuries sustained by the plaintiff in the cited case were more serious than in the present case. However, that was 1997 about 20 years to date. The learned trial magistrate made an award of Kshs. 1.4 Million in the instant case. The appellate court can only interfere with the award of the trial court if the award is inordinately high or low so as to prejudice the parties and if the court acted on wrong principles.

I am unable to interfere with the said award for the reason that it is not too high considering the injuries sustained by the respondent.

Accordingly this appeal is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 17th Day of January, 2017.

A.MBOGHOLI MSAGHA

JUDGE