



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HIGH COURT CIVIL APPEAL NO.99 & 98 OF 2015

ELIZABETH BOSIBORI.....APPELLANT

SAMMY NYABENKI.....APPELLANT

-VERSUS-

DAMARIS MORAA NYAMACHE.....RESPONDENT

[From the original civil suit No.2 &3 of 2015 in the Senior. Resident Magistrate Court at Keroka]

J U D G M E N T

Damaris Moraa Nyamache and Elizabeth Bosibori were the plaintiff's in **Keroka SRMCC No. 2 & 3 of 2015** respectively in which they sued the defendant Sammy Nyabenki for both special and general damages for injuries sustained as a result of a road traffic accident which is said to have occurred on the 13th September 2014 along Keroka Sotik road near Kegogi. Apparently, while the plaintiff's were lawfully riding as pillion passengers on motor cycle No. KMBH 692R, the appellant was driving motor vehicle registration No.KBZ 168L Toyota Premio so negligently thus he lost control causing it to veer off along the said road and violently knock the motorcycle the plaintiffs were riding on.

In their complaints the respondents have particularized the particulars of negligence on the part of the defendant, his driver/servants and its agent as follows:-

- (a) Driving at a high speed in the circumstances.**
- (b) Driving without due care and or attention to other road users.**
- (c) Failing to be in full control of the motor vehicle registration number KB2 168L.**
- (d) Failing to give any adequate warning of his approach**
- (e) Failing to stop, slow down to swerve it in any other way to manage or control the said motor vehicle as to prevent the said accident.**

- With regard to particulars of injuries Damaris particularized as follows:-
- **Deep cut wound on the chin**
- **Bruises in the forehead**
- **Deep cut wound in the right knee.**

With regard to particulars of injuries Elizabeth particularized as follows:

- **Disclosure of the right knee**
- **Fracture of the distal right femur**
- **Compound fracture of the right tibia**
- **Laceration in the right knee**

Thus the plaintiffs claimed both general and special damages. The defendant on his part filed a written statement of defence denying liability and particulars of negligence attributed to him. In the alternative and without prejudice the defendant averred that if at all the plaintiffs were involved in the accident and were injured the same was wholly and or substantially contributed to by the motorcycle rider and the plaintiff's negligence.

The defendant particularized particulars of the plaintiff or rider of the alleged motorcycle as follows:-

- (a) Boarding a motor cycle with three passengers contrary to the law.**
- (b) Riding on a motor cycle without licence**
- (c) Riding motorcycle which is defective and not road worthy.**
- (d) Riding motorcycle without insurance**
- (e) Failing to wear safety apparels and gadgets.**
- (f) Riding thoughtlessly and without conscience as to the direction of his journey while on foot.**
- (g) Jumping onto the path of a moving vehicle and leaving the driver with no option other than to run him over.**

During, trial in **Civil suit No.2 of 2015** Dr. Ogando Zoga testified as PW1 and told the court that he examined one Damaris Moraa Nyamache on 12/11/2014 who had sustained injuries due to a road traffic accident. According to PW1 the 1st respondent had the following injuries:-

- **Deep cut wound in the chin**
- **Bruises of forehead**
- **Cut wound on the right knee(soft tissue injuries)**

He also confirmed that the injuries had healed at the time of examination. He produced the medical report as P. Exhibit 1 and a receipt of the charges the Damaris paid him Kshs. 6,500 as P. Exhibit 2. He also produced the P3 form which he had filled as P. Exhibit 3 and a discharge summary from Tenwek Hospital which he had relied on as P. Exhibit 4.

By consent a demand letter dated 10/11/2014 was produced as P. Exhibit 5 and receipt from Tenwek for Kshs.9,100 dated 14/9/2014 was produced as P. Exhibit 6.

PW2 was No.2322752 CI Abraham Ndegwa currently based at Keroka Police Station overseeing traffic matters. He told the court that on 13/9/2014 an accident was reported at around 7:15 p.m. Apparently, the defendant was driving motor vehicle registration No.KBZ 168L Toyota Premio from Sotik towards Keroka direction. That on reaching at Kegogi corner while negotiating the corner the defendant failed to keep his rear side hence he collided into the motorcycle KMDH692 R TVS star whereby the plaintiffs who were both pillion passengers in this motorcycle were injured. He further told the court that the court that the defendant was charged with a traffic offence of careless driving contrary to section 49 (1) of the Traffic Act. That he pleaded guilty to the charge and was convicted on the same. He further stated that in the police records, the owner of the motor vehicle was the defendant. He produced a police abstract as P. Exhibit 5.

On cross examination he stated that the sketch plans were produced in the traffic case and in the absence of the sketch plans they could not tell the point of impact.

PW3 was Elizabeth Bosibori Nyamache the 2nd Plaintiff herein. She told the court that she was a police officer at G.S.U. Headquarters in Nairobi. That on the material day i.e 13/9/2014 she was at Keroka Town in the company of her sister (PW1) when they boarded motorcycle Reg. No. KMDH 692R to take them home at Kiambere in Nyamira County. That on getting to Keroka – Sotik road she saw a motor vehicle coming from Sotik direction registration No.KBZ168L. That the motor vehicle was on high speed, it left its lane and came to their lane. Apparently the rider tried to avoid the accident but the motor vehicle kept coming towards them and finally knocked them down.

That as a result of the said accident, she sustained the following injuries:-

- **Dislocation of right knee**
- **Fracture of right femur**
- **Compound fracture in the right tibia**
- **Laceration in right knee**

That she was treated at Keroka District Hospital and then referred to Tenwek Mission Hospital with her sister (PW1). She was then admitted in hospital for a period of 3 weeks. She produced a discharge summary as P. Exhibit 3. She also reported the accident at Keroka Police Station and was issued with a P3 form which she produced as P. Exhibit. 4 and a police abstract P. Exhibit 5.

That PW1 (Dr. Ogando) wrote a medical report P. Exhibit 1 and she paid him Kshs.6,000/= as evidenced by a receipt P. Exhibit 2.

She further stated that her advocate did a search of the motor vehicle and she produced a copy of the search as P. Exhibit 6(a) and receipt 6(b).

She further stated that she sued the defendant as owner of motor vehicle. She produced a demand letter as P. Exhibit. 7 and stated that she used Kshs.12, 175 as medical expenses. She produced a bundle of receipts as Exhibit 8 (a) to (i). She further stated that she was still on medication, she undergoes checkups and she now uses crutches to walk hence she seeks compensation for injuries, expenses of case, costs and interests.

Lastly she stated that she is now disabled due to injuries suffered.

On cross-examination she stated that neither she nor her sister were wearing a reflective jacket or helmet. That she reported the accident on 22/10/2013 while accident had occurred on 13/10/2013. She further revealed that the registered owner of motor vehicle is one Isaac Rotto but her advocate did a search and noted that he had sold the motor vehicle to Sammy Nyambeki. She also clarified that she had been admitted to Tenwek for 2 weeks.

In **Civil case No.3 of 2015** PW1 was Dr. Ogando Zoga. He told the court that he examined the 2nd plaintiff herein Elizabeth Bosibori Nyamache on 12th November 2014. Apparently she had sustained the injuries in a road traffic accident and noted the following:

- **Dislocation of knee right side**
- **Fracture of right femur**
- **Compound fracture of right tibia**
- **Laceration on right knee**

He further stated that she had been treated at Tenwek Hospital and internal fixation was done. He also noted that she had a scar and was using crutches to walk. He also noted that she had sustained severe injuries and was expected to undergo an operation to remove fixation at Kshs.100,000. He produced a medical report dated 2nd November 2011 as Exhibit 1 and a receipt of Kshs.6,000 for the same as P.

Exhibit 2. The P3 and discharge summary were produced as P. Exhibit 3 and P.Exhibit 4.

On cross- examination he stated that the 2nd respondent had not undergone the 2nd operation. That the 2nd operation is compulsory to be done after 1 ½ - 2 years after implants was put. That he examined the plaintiff 3 months after the accident, dislocation of knee would heal after 6 months and laceration after 1 month. That a compound fracture meant a broken bone that penetrates through the skin to the surface.

PW2 was No.232752 Corporal Abraham Ndegwa based at Keroka Police station. He told the court that on 13/9/2014 an accident was reported at around 7.15p.m. involving a motor vehicle registration No.KBZ 168L Toyota Premio from Sotik towards Keroka direction. The said motor vehicle was being driven by the Appellant. That on reaching at Kegogi corner and while negotiating the corner the appellant failed to keep to his rear side and as a consequence thereof, he collided with motorcycle KMDH 692R TVS Star. The occupants of the motorcycle were the 1st and 2nd respondents' pillion passengers and they were both injured. As a result the defendant was charged of the traffic offence of careless driving contrary to **Section 49(1)** of the traffic Act. Apparently, he on his own plea pleaded guilty to the charge and was convicted. He further stated that in the police records the owner of the motor vehicle was the defendant. He produced an abstract which was issued to the plaintiff dated 22nd October 2014 as P. Exhibit. 5.

By consent the evidence of PW2 in **Civil Case No.3 of 2015** was applied to **Civil case No.2 of 2015**.

PW3 was Elizabeth Bosibori Nyamache the 2nd plaintiff herein told the court that on 13th September 2014 she was at Keroka town when her sister the 1st plaintiff and herself boarded a motorcycle to their home at Kiambere in Nyamira County. On reaching Keroka-Sotik road she saw a motor vehicle coming from Sotik direction registration No.KBZ168L. Apparently the motor vehicle was driven at high speed and consequently it left its lane and came into their lane. She further stated that the rider tried to avoid the accident but the motor vehicle kept coming towards them and finally knocked them down. As a result of the accident she sustained the following injuries:

- **Dislocation of right knee**
- **Fracture of right femur**
- **Compound fracture on right tibia**
- **Laceration on right knee**

She further stated that she was treated at Keroka District Hospital and referred to Tenwek Mission Hospital with the 1st respondent. She was in admitted for 3 weeks. She produced a discharge summary as P.Exhibit.3 at Keroka police station and was issued with a P3 form which was produced as P. Exhibit 4 and a police abstract as P. Exhibit 5.

She confirmed that PW1 wrote a medical report P. Exhibit 1 and she paid him Kshs. 6,000 as evidenced by the receipt produced as P. Exhibit 2. She also produced a copy of a motor vehicle search as P. Exhibit 6(a) and receipt 6 (b). She also produced a demand letter P. Exhibit 7 and stated that she used Kshs.12, 175 for medical expenses. She attached a bundle of receipts as **P. Exhibit 8(a) to (1)**. She lastly, she confirmed that she undergoes check-ups and that now she used crutches to walk. She thus sought for compensation for injuries, costs of this suit and interests.

On cross-examination she confirmed that neither the 1st respondent had a crush helmet or a reflective jacket.

This marked the close of the plaintiff's case. By consent the evidence of the plaintiff herein applied in **Civil Case No.2 of 2015** with regard to liability.

DW1 was the defendant herein Sammy Nyabengi. He told the court that on 13/9/2014 he was driving motor vehicle KBZ 168L from Kericho towards Kisii. That on reaching near Keroka from at around 8.00p.m. evening, a motor vehicle that was before them came at high speed, his driver tried to avoid the rider but it was too late and an accident happened.

He further stated that the motorcycle was being driven at high speed and zigzag manner.

Afterwards, he reported the accident at Keroka police Station, police came to the scene and towed motor vehicle to the police station. His driver was then arrested, charged with the offence of careless driving and fined in court. He blamed the rider of the motor vehicle accident as he was carrying two pillion passengers and riding at high speed. He further stated that the point of impact was in the middle of the road, the motorcycle was oncoming in the opposite direction and he blamed the motor cycle rider for he did not keep to its lane.

By consent PW1's evidence was to apply to **Civil case No. 2 of 2015.**

In her judgment on liability of the defendant the trial magistrate noted as follows:

"I have carefully looked at the evidence produced by the 1st plaintiff, the Base Commander and the defendant herein. The plaintiff says that the motor vehicle left its lane and came to the lane of motor cycle thus causing accident. The defendant on the other hand says accident occurred on the lane of the motor vehicle that is the left side as you face Kisii direction then later again says it occurred in the middle of the road where the point of impact was the traffic officer states that the driver of motor vehicle is the one that failed to keep to his near left thus causing the accident but could not tell where the point of impact was. However one thing in the whole evidence is clear that accident occurred at night around 7.15p.m. to 8.00p.m. therefore it was dark. I will use the evidence of the plaintiff herein and the defendant to evaluate liability. Being that it was at night the visibility was not clear. Both plaintiff and defendant were at scene of accident. If plaintiff says accident occurred on the lane of the motorcycle and the defendant says it occurred in the middle of the road then it means both the rider and driver of the motor vehicle were not keeping to their lanes. Furthermore, the Plaintiff testified that she did not have a helmet or a reflective jacket and neither did her sister have them.

I note that the defendant's driver herein was charged in court with the offence of careless driving where he pleaded guilty and was fined. The plaintiff's counsel urges court to find the defendant 100% liable because the driver was charged and convicted in court. The defendant submitted in this point citing the case of DILIPASAL -vs- HERMA MUGE AND ANOTHER COURT OF APPEAL IN KISUMU CIVIL APPEAL NO.49 of 2000 where court found that an admission of guilty in a criminal case does not necessarily bar the person from pleading that the other party was also negligent in contributing to the accident in civil cases.

The plaintiff herein seems to be laying blame on the defendant merely because his driver was charged and convicted of an offence of careless driving. I have carefully read the authority cited by the defendant and I do agree with the counsel that indeed a conviction in a criminal case is not conclusive proof that the person convicted was solely to blame for the accident. Further that the defendant herein had a right to plead in the case that even the plaintiff herein also contributed some degree for the accident which he did by blaming her for allowing herself to ride in a motorcycle while they were 2 pillion passengers instead of one thus leading to the overloading of the motorcycle.

This is a case where court has to rely on evidence of the plaintiff and the defendant. None of the parties called an independent witness. Each blaming the other and in the circumstances, it is difficult to lay blame on either side wholly. I have no option to apportion blame between both plaintiff and the defendant in the basis of 70:30%."

On quantum after considering authorities filed by counsels representing all parties the trial magistrate held:-

"I have considered authorities cited by both sides. I note that the plaintiff in authorities cited suffered more severe injuries to those the plaintiff herein sustained. Having considered the

evidence, submissions of counsel and the authorities cited, I find it fair to award kshs.900,000 as general damages. Dr. Ogando Zoga in his medical report noted that the 2nd plaintiff would need another operation to remove the implants in her legs at a cost of KShs.100,000. The defendant did not dispute this cost I will therefore award future medical expenses of kshs.120, 000."

In civil case No.2 of 2015 the trial magistrate observed:-

"The plaintiff counsel suggested kshs.250, 000 and cited PANNY ESLA –vs- DOROTHY MUCHENE NRB HCCFR NO.642 OF 1991 where a plaintiff was awarded Kshs.100,000. The defendant counsel suggested Kshs.70, 000 and cited the authorities MOSES GIERALO ODONGO –vs- JULIUS BIRUNDU MOKAYA KISII HCCRA NO.32 OF 2002 AND BENSON MULWA MULANDI –vs- MACHAKOS RANCHING CO.LTD (MACHAKOS HCCC NO.302 CONSOLIDATED WITH 304 UPTO 313 OF 1994.

Having analyzed the evidence on record, the submissions and authorities cited and taking into consideration the inflation of the Kenyan Shilling. I find it fair to award Kshs.220,000. The judgment was then entered for the plaintiffs as follows: 1st plaintiffs general damages Kshs.6, 500 less 30% on liability, Kshs.158, 550. For the 2nd plaintiff general damages kshs.900, 000 plus future medical expenses 120,000 plus special damages Kshs.15, 090 less 30% contribution kshs.724, 653 plus costs and interests."

The appellants herein Sammy Nyabenki and Elizabeth Bosibori being aggrieved by the above judgment and decree preferred an appeal before this court. The appellant (Sammy Nyabenki) was regarded as the respondent in **Civil Appeal No.97 of 2015** and the grounds of appeal in **Civil Appeal No. 98 of 2015** were deemed to be a cross Appeal in **Civil Appeal No.97 of 2015**.

In **Civil Appeal No.97 of 2015** the appellant Elizabeth Bosibori Nyamache has appealed against the above judgment and decree on grounds inter alia:-

1. **THAT** the learned trial magistrate erred in finding that the injuries to the Appellant could have been compensated by an award of Kshs.900,000 for general damages a sum that is so manifestly low as to amount to an erroneous estimate of the damage suffered to the appellant.
2. **HAT** the learned trial magistrate erred in not taking into account entirely the submissions of the Appellant.
3. **THAT** the judgment of the Honourable trial magistrate has occasioned a failure of justice and/or resulted in a gross miscarriage of justice.

REASONS WHEREFORE

The appellant in **Civil Appeal 97 of 2015** prayed for:

- (a) **THAT** the Appeal be allowed
- (b) **THAT** the court do enhance the award of general damages due to be awarded to their Appellant consummate to the injuries sustained by her.
- (c) **THAT** costs of the suit be granted.

In **Civil suit No.98 of 2015** the appellant Sammy Nyabenki cross appealed against the quantum awarded to Damaris Moraa Nyamache plaintiff in **Civil suit No.2 of 2015** on the following grounds:

1. **THAT** the learned trial magistrate erred in law and in fact by awarding general damages which were manifestly high thus occasioning miscarriage of justice.

2. **THAT** the learned trial magistrate erred both in law and principle by applying erroneous principle computation by damages payable thus arriving at erroneous and grossly excessive estimates of general damages payable.

3. The learned trial magistrate erred in law and fact when he failed to subject the costs payable to percentage of contribution borne by the Respondent.

4. **THAT** the learned trial magistrate acted in error when the same failed to properly evaluate evidence on record thus reaching erroneous decision.

REASONS WHEREFORE the appellant prayed for the following orders:-

(a) The judgment/decreed of the learned trial magistrate dated 30th day of September 2015 be set aside and/or quashed.

(b) This court be pleased to re-visit the issue of assessment of the quantum of the general damages payable and assess review I vary the same to reasonable amount applying the right principles and law.

(c) That the court be pleased to order that the costs of the suit awarded in the subordinate court was subject to contribution if liability agreed upon at 70:30% infavour of the respondent.

(d) Costs of the appeal be borne by the 1st respondent.

(e) Any such further orders that the honourable court shall deem just and expedient in the circumstances.

When the above matter came before me on 22/8/2016 It was agreed that the above two appeals be consolidated and the same be argued by way of written submissions. All parties have duly filed their written submissions and I had read them.

This court, being conscious of its role as the first appellant court as stated in **Selle –vs- Associated Motor Boat Co. Ltd 1968 E.A 123** has to re-evaluate the evidence that was rendered before the trial court assess it and make its own conclusions. The court must however bear in mind that it neither saw nor heard the witnesses and hence make due allowance for that.

From the Memorandum of Appeal the court was urged to interfere with the trial court finding on quantum. Regarding quantum of damages the learned trial magistrate did expressly state the authorities submitted by the parties before she arrived at the awards she gave to the plaintiffs. It is trite law that an award of general damages is an exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award must however, be reasonable and neither extravagant or oppressive. The trial court has to be guided by such factors and previous awards for similar injuries and such other relevant factors.

In the matters that were before the trial court Elizabeth testified, a medical report was produced and even the medical officer who examined Elizabeth gave testimony. Elizabeth one of the pillion passengers in the motorcycle according to Dr.Ogando Zoga suffered dislocation of knee (right side), fracture of right femur, compound fracture of right tibia and laceration on right knee. Dr. Zoga also stated that Elizabeth needed to go through a second operation which was to be done 1 ½ - 2 years after to remove fixation which would cost about Kshs.100,000. He also stated that Elizabeth's knee dislocation would heal after 6 months, laceration after 1 month and hence there was no permanent disability.

Damaris on the other hand according to Dr. Ogando Zoga suffered a deep cut wound in the chin, bruises on forehead and cut wound on right knee. The doctor stated that the injuries had healed at the time of examination and had infact healed well.

In her judgment the learned trial magistrate awarded Kshs.900,000 to Elizabeth as general damages for pain and suffering kshs.120,000 for future medical expenses, Kshs.15,090 for special damages less 30% for contributory negligence which totaled up to Kshs.724, 653 plus costs and interest.

As for Damaris, the learned trial magistrate awarded her kshs.220,000 as general damages, special damages of 6,000 less 30% contributory negligence which totaled upto to Kshs.158,550 plus costs and interest of the suit.

In Kemfro Africa ltd t/a Meru Express & Another –vs- A.M. Lubia & Another (No.2) (1987) KLR 30. It was held as follows:

"the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly, erroneous estimate of the damages"

Similarly in the case if **Sofia Yusuf Kanyare –vs- Ali badi Sabre & Another Nairobi HCCC No.478 of 2007** the court listed the principles that the court must bear in mind when assessing damages. They include:-

(a) An award of damages is a matter of discretion on the part of the court that is seized of the matter.

(b) The award should not be high or low, the award is not meant to enrich the victim but to try as much as possible to restore him/her in the position they were before the accident.

(c) Award in past decisions are meant to be mere guidelines and each case should be mere guidelines.

(d) Where awards in past cases are taken into consideration their age rate of inflation as well as the value and power of the Kenyan Shilling should be taken into consideration.

In the instant case, the learned trial magistrate appreciated the authorities by each side and the submissions. It has not been demonstrated by the appeals that the trial magistrate took into account the wrong principles in arriving at the award or that she had misapprehended the evidence or that the figure awarded was so high or so low as to constitute an erroneous estimate ending in failure of justice.

Therefore considering the awards made in the above judgment and the injuries suffered especially by both Damaris and Elizabeth and taking into due regard that they did not suffer from any permanent disability I would not say the award was so low or so high respectively.

Moreover I am not losing sight of the fact that Elizabeth due to the accident would have to undergo another 2nd operation which was estimated to cost about kshs.100,000. The learned trial court considered the said costs and awarded Kshs.120,000 to cater for the same.

In my humble view therefore the learned trial magistrate considered all the above factors in this case in arriving at his decision. These factors are the expert opinion by doctors, the authorities in which awards for similar injuries were granted and the inflation rate in the country at the time of delivering the judgment.

I therefore find the above appeals are without merit and dismiss the same with orders that each party bears their own costs. This judgment applies *mutatis mutandis* to **Civil No.98 of 2015.**

Dated at Nyamira this 17th day of February 2017.

C.B. NAGILLAH

JUDGE

In the presence of:-

Soire hold brief for O.M. Otieno for Appellant

Nyaega hold brief for Ochoki for Respondent

Mercy & Nancy - Court clerk