



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 98 OF 2014**

**ISHMAEL MUSEMBI MUTIE.....APPELLANT**

**VERSUS**

**EVERLYNE MWIKALI JOHN.....RESPONDENT**

**J U D G M E N T**

1. On 20<sup>th</sup> June 2014, Hon. Ekhubi, SRM, delivered a judgment in Mombasa CMCC No. 994 of 2011 and apportioned liability at 85%:15% in favour of the Respondent against the Appellant then awarded to the Respondent an aggregate sum of Kshs.2,270,915/= made up as follows:-

Pains and suffering	-	550,000/=
Lost years	-	1,699,680/=
Special damages	-	21,235/=

2. That judgment and finding did aggrieve the Appellant, as the judgment debtor, who then filed this appeal and faulted the trial court on four (4) grounds:-

**i. That the Learned Magistrate erred in fact and in law by apportioning liability in ratio of 85:15 in disregard of the appellant's evidence on record indicating that the Respondent was to blame for the accident.**

**ii. That the Learned trial Magistrate erred in fact and in Law by awarding General Damages for Lost Years that were inordinately high.**

**iii. That the Learned trial Magistrate erred in fact and in Law by awarding a multiplier of years which was too high in the circumstances.**

**iv. That the Learned trial Magistrate erred in fact and in Law by awarding General Damages for Lost Years that were inordinately high.**

3. It is evident that the appellant challenges the trial court's finding on both liability and quantum. This being a fast appeal, my mandate is by way of a retrial. The law mandates that I re-appraise the entire evidence afresh and to come to own conclusion while always bearing in mind that I lack the benefit the trial court enjoyed in seeing and hearing the witnesses testify. To discharge the mandate of the court, this

determination will seek to address two issues:-

**i. Whether or not the trial court was entitled to apportion liability in the ratios it did?**

**ii. Whether or not the trial court was right in assessing damages as it did?**

### **Liability of the appellant to the Respondent**

4. At trial the Respondent, as plaintiff, called three witnesses being PW 1, Dr. S. Ndegwa who produced medical reports and receipts for payment and assessed the plaintiff's disability at 20%, PW 2 No. 66461 P.C. Pius Njiiru, was called to produce the police file and confirmed not having been the investigating officer and further that the matter was still pending under investigations. The plaintiff herself was called as PW 3. My reading of the Record of Appeal reveals that it is only the plaintiff's evidence that shed some light on how the accident occurred. Her evidence was that she was knocked while off the road and the vehicle then rested in a ditch. On cross examination however she said she was knocked as she was crossing the road only to repeat at Re-examination that she was knocked off the road.

5. Against that evidence the Appellant called two witnesses, DW 1 No. 66461 P.C. Pius Njiiru and the Appellant Moses Nzioka. The most interesting thing in this matter is that PW 2 was again called as DW 1 and his evidence in these two capacities are not in harmony. For the Appellant this witness having been called to produce police records, having not been the investigating officer, gave evidence that the investigating officer had blamed the pedestrian for the accident and recommended that the file be closed as she crossed the road without checking and while running. On cross examination, he admitted having given evidence for the plaintiff and that between the two dates he gave evidence no further statement had been recorded. He went on to say that the motor vehicle was damaged on the left side, that the pedestrian had crossed the other side of the dual carriage way and that was suggestion that the pedestrian had not just started crossing the road. I have noted that this evidence was not evidence of what the witness perceived at the scene but his deductions from the police file. Moreover having changed his version to suit who was calling him, he is not a very reliable witness.

6. The evidence of DW 2, the driver is of more relevance. That witness said that he was driving from Mikindani to Mombasa and that the other lane had a traffic snarl up. His evidence was to the effect that at Bangladesh the respondent came running from behind a semi trailer headed toward Nairobi direction and that she was hit on the left side of the road fell down off the road and was rushed to the hospital.

7. On cross examination the witness then admitted that the road was usually busy with pedestrian and that he had driven by the same road for a period of five months before the accident. He went on to say:-

**“The container obscured my vision. I could not have been able to see the plaintiff. I saw her when she joined the road running. It was about 3 metres away. I hit her on the left side of the motor vehicle. She fell off the road. I know PRISCILA MGAGHA. She was a passenger.....she stated that passengers shouted to alert me of the pedestrian crossing the road.....according to her statement she says she was seated on the front seat she does not say the plaintiff was running..... I could have anticipated the risk”.**

8. Having reviewed the evidence as was its duty, the trial court in coming to his apportionment of liability said as follows:-

**“The driver, DW 2 admitted that he was alerted by Passengers. When the statement of PRISCILLA MGAGHA was put to him, of the imminent danger and he applied brakes but because of the close proximity he could not avoid the accident. This clearly illustrates that the driver was not keen and cautious while driving such that he had to be alerted by the passengers in the car. Furthermore his attempts to apply brakes failed, could imply that he was driving at a high speed, not the 40 kph he suggested. It is clear that the driver was driving at an excessive speed. He was not on the look out and had to be warned by the passenger in the vehicle. It also emerged that the passenger who recorded her statement did**

**not indicate that the plaintiff was running across the road. Therefore whether the plaintiff was running cannot be ascertained. What can be ascertained is that the plaintiff landed in a ditch off the road due to the impact. This would probably suggest that she was off the road or almost off the road.**

**DW 2 during cross examination stated- “I could have anticipated the risk”. He indicated that at the time of the accident that there was a traffic snarl up on the other side. It is also in evidence that at that point there is heavy human traffic crossing the road from sides of the road. Therefore the driver must have failed to exercise reasonable care to avoid hitting the plaintiff.**

**Conversely, I find the plaintiff equally to blame for the accident for not taking caution and reasonable against imminent danger is in itself negligence.**

9. It is indeed a strong case for an appellate court to overturn a trial court on findings of facts. An appellate court can only do so where it is demonstrated that findings were not based on evidence or just perverted the evidence on record. In *Mwanasokoni vs Kenya Bus Services Ltd [1985] KLR 931* the Court of Appeal said:-

**“Accordingly on when a finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere”.**

10. These excerpt underscores the fact that an appellate court should not be eager to readily and lightly reverse the factual findings by a trial court because to a some of lent the evaluation of evidence leading to apportionment of liability between two tortfeasor involve to a large extent discretion of the trial court. Wherever discretion is involved an appellate court should only interfere in exceptional circumstances.

11. Applying the foregoing principles to the facts before the court now, there has not been any demonstration that there was any error in principle or that the finding by the trial court as quoted above was farfetched, perverted or based on no evidence. The record indeed reveal that there was evidence what the trial court did analyze and came to the conclusion it did. In any event the offending driver confirmed that the road was dual carriage connoting that it was large enough and open for an observant driver to take requisite precaution.

12. To the extent that there was prima facie evidence that the Respondent was knocked and fell off the road and that it is the passengers, who had no duty on the control of the motor vehicle, are the people who alerted the driver of the presence of the respondent on the road, had I sat I would have found the driver even wholly liable. However that opinion cannot be lightly substituted for that of the trial court. The trial court had the benefit of interacting with the witnesses and was better equipped to make the determination on the factual positions on causation of the accident. This ground of appeal fails and it is hereby dismissed.

### **Assessment of damages**

13. Assessment of damages for personal injuries is now accepted as a difficult task calling upon the trial court to apply its judicial discretion and service of justice to the facts and evidence proving injury and the court in coming to a figure tries to come with a sum that its sense of justice commends to be reasonable a compensation to the injuries. As and when a court of first instance exercise discretion any appellate court can only interfere where there is evidence of departure by the trial court from its duty in law. That departure would be evidence by failling to take into account relevant factors or taking into account irrelevant factors or where the damages so awarded are obviously and openly so inordinately low or so high to demonstrate wholly erroneous estimate.

14. In the matter before court now, there is no demonstration of consideration or failure to consider irrelevant or relevant matters. That must be discernable from the record and never difficult to lay hands

on where it exists. In fact the Appellant has not made any attempt to discharge its duty towards that end. It is not enough to say there was an error and leave it at that without pin pointing that error.

15. The more difficult matter for consideration is what constitutes a wholly erroneous assessment of damages. This in my view is the realm of use of *stare decisis* and coming up with comparable awards for compensable injuries. An appellate court may only say that an award was outside the ordinary and reasonable range where the trial court chooses not to be guided by past decided case on comparable injuries and other factors like erosion of value of money by incidence of passage of time and attendant inflationary trends.

16. In this matter, and from the way grounds 2,3 & 4 of the memorandum of appeal are couched, the Appellants complaint seem to be that award of damages for loss of earning capacity based the multiplier adopted, the award is inordinately high. For those grounds therefore, a determination on the propriety of the multiplier would determine the entire issue since the multiplier is not disputed.

17. In law, a judge assessing damages for lost years or lost dependency and opting to adopt a multiplier formula exercises a judicial discretion and is often governed by the known retirement age or the age at which one is reasonably expected to work to come with the active productive years deemed lost and for that matter to be purchased, by the award.

18. In the instant case, the Respondents age on the date of the accident is agreed to have been 30 years. She was terminated after the accident and had not been lucky to get a job at the time she testified in court. In *John Mbatia vs Esther Muthoni Mbuvi [2017] eKLR* this court said;

**“.....the choice of a multiplier is a decision grounded judicial discretion and not amenable to be disturbed unless it is arrived at berefit of reasons”.**

19. The trial court in its judgment cannot be faulted for plucking the multiplier of 20 years for the air and without reason. The court said:-

**“The plaintiff told the court that she is 30 years old. PW 1 opines that the plaintiff has a risk of developing epileptic fits in the future and she should keep off strenuous work. The plaintiff suffers permanent incapacity which was assessed at 20%. As I had already pointed out this was not challenged by any other evidence. The plaintiff also suffers from severe headaches and she cannot stand for long. I take notice of the fact that the job market has become highly competitive especially in the private sector, where employers expect high throughput from employees. The plaintiff told the court that she was dismissed from employment from her employer due to her failure to meet targets. She has been unable to secure employment. She is at risk to develop epilepsy. From the evidence presented and my analysis herein above, it is clear that the chances of the plaintiff securing a suitable employment has been greatly diminished. I thus hold that the plaintiff is entitled to be compensated for the “lost years”.**

20. I am not persuaded that the records in this appeal reveal any error or misdirection by the trial court to warrant being interfered with.

The result is that the entire appeal lacks merit and the same is therefore dismissed with costs to the Respondent.

**Dated and delivered at Mombasa this 10<sup>th</sup> day of March 2017.**

**HON. P.J.O. OTIENO**

**JUDGE**