**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 63 OF 2012**

**(CORAM: F. GIKONYO J)**

***Appeal arising from the judgment of Hon. S.M. Githinji, Chief Magistrate (as he then was) delivered on 6.6.2012 in NKUBU PMCC NO 9 OF 2011***

**FRANCIS MURANGIRI JOSIAH.....1ST APPELLANT**

**EPHANTUS MWANGI JOSIAH.....2ND APPELLANT**

**Versus**

**STANLEY KIURIAM'MUTUNGA.....RESPONDENT**

**JUDGMENT**

**The Appeal**

[1] In this appeal, the following four significant grounds were preferred:

> **(i) The Learned Chief Magistrate erred by finding the appellants liable at 100% when the Respondent was a pedestrian**
>
> **(ii) The Learned Chief Magistrate ignored and or failed to consider evidence before him and arrived at an excessive and exorbitant award**
>
> **(iii) The Learned Chief Magistrate erred by awarding excessive, not commensurate with the injuries suffered by the Respondent**
>
> **(iv) That by any standard the judgment was ill considered, and evidence before the court could not support the verdict.**

[2] Essentially, the above grounds portend only two points for determination, to wit

> **(i) Whether the Learned Chief Magistrate erred in law and fact in finding the Appellants to be 100% liable for the accident in question; and**
>
> **(ii) Whether the award herein was excessive given the injuries suffered by the Respondent.**

**Directions by court**

[3] On 7th April 2016, the court directed that this appeal shall be canvassed by way of written submissions. Parties filed their respective submissions which are discussed and considered in the decision below.

**Analysis by court**

[4] As this is first appeal, the court will re-evaluate the evidence and come to its own conclusions and findings except it should be minded that it neither heard nor saw the witnesses when they testified. But, my style in re-evaluating the evidence is not to rehash the evidence,for; it is already part of record.See the case of See **SELLE vs. ASSOCIATED MOTOR BOAT COMPANY (1968) EA 123.**

**Of liability**

[5] The trial court found the Appellants to be 100% for the accident of 21st July 2010 involving the Respondent and motor vehicle registration number KJZ 367. What does evidence say? The Respondent who testified as PW2 stated that, on 21.7.2010 he and ZakayoKinyua were walking along Nkubu-Muujuwa road. Zakayo informed him that there was a vehicle behind him which was moving in a zig-zag manner. He immediately went off the road. But before he had taken cover, the vehicle hit him and resting its rear tyre on his chest. The vehicle had to be lifted off him. He said that he did not see the vehicle as it was coming from behind him. He also told the court that he did not hear it come. But he admitted that his mind was not on the road as he was having a chat with Zakayo.Zakayo testified as PW3 and confirmed the account of events as were narrated by the Respondent to the court. He stated that he checked behind just as cautionary measure when he saw the vehicle moving in a zig zag manner. He said that it hit the Respondent off the road. DW1, the driver of the fateful vehicle stated that the section of the road where the accident happened was bad. He told the court that the Respondent was standing beside the road when he was hit by the side mirror of the vehicle. He termed the accident as bad luck. He admitted in cross-examination that, in an attempt to avoid hitting children, he veered into the road side where he hit the Respondent. Parties had their own appreciation of the facts of the case as below.

**Appellants: Respondent was absent-minded**

[6] The Appellantssubmitted that the Respondent as a pedestrian on the road had a duty of care to other road users. According to the Appellants, the Respondentwas deeply involved in a talk with another person while walking along the road, thus, being absent-minded. They laid specific emphasis on the fact that the witness ‘’admitted’’ in cross-examination that had the Respondent been careful he could not have been hit. On this basis, the appellants sought 30% contributory negligence from the Respondent. But, they lamented that the trial learned magistrate did not consider that fact.

**Respondent: Driver wholly liable**

[7] The Respondent submitted that the evidence by PW2 and PW3 is consistent and showed that DW1 drove the vehicle herein off and on the wrong side of the road. He hit the Respondent completely off the road. He is therefore 100% liable for the accident.

**DETERMINATION**

[8] On my part, careful evaluation of the evidence tendered by parties reveals the following. For whatever reasons, the driver of motor vehicle registration number KJZ 367 veered off the road and continued to drive off the road in a zigzag manner. It appears that Zakayo looked behind and when he sawthe said motor vehicle coming their way in a zigzag manner, he alerted the Respondent of itspresence and both went off the road completely in a bid to avoid being hit. DW1, the driver of the fateful vehicle admitted that he saw the Respondent standing beside the road. He did not tell the court what action he took to avoid hitting the Respondent. It was his duty to avoid hitting the Respondent. Again, when DW1 noticed the presence of children as he alleged, he ought to have realized that was a signal for danger and should have slowed down considerably or stopped the vehicle. He stated that the road there was in bad condition. These facts should have caused a prudent driver to slow down considerably and below 40kph. In any

event, a vehicle that is being driven at 40kph would still have stopped within a short distance. DW1 did not explain why he maintained 40kph even after he had veered off the road. He did not also explain why he did not slow down drastically or stop after seeing the children. It seems DW1 chose to procced with his journey by driving off the road at a speed of 40kph and in a zigzag manner. More important,is that he did so without care and attention to the other road users including the Respondent. In these circumstances, DW1 was 100% liable for the accident. At this point, I wish to correct the wrong impression being created by the Appellant when he made the following submissions that:-

> **‘’PW2...while under cross-examination admitted that had the plaintiff been careful he could not have been hit’’.**

I have looked everywhere in the proceedings and I wish to state that the Respondent never made such admission in cross-examination or examination-in-chief or re-examination.It is now clear the direction the court is taking. However, before I close, it is profitable to state that, as the Appellants pleaded contributory negligence in paragraph 4 of the Defence, they bore the legal burden to prove contributory negligence. See **HALSBURY’S Laws of England, 4th Edition, vol. 17.**I have evaluated theevidence by DW1 and it does not support any of the particulars of contributory negligence pleaded in paragraph 4 of the defence. The statements he made in court showed that he was negligent. And, the fact that the Respondent and Zakayo were engaged in a chat *per se* is not proof of contributory negligence. The evidence showed that the Respondent went off the road when he was alerted of the presence of a vehicle that was being driven in a zigzag manner behind him. Accordingly, I do not find anything which could impel this court to interfere with the finding by the trial court that the driver of KJZ 367 was 100% to blame for the accident which occurred on 21st July 2010.Accordingly, the 2nd Appellant as the driver of KJZ 367 caused the accident while in employment of the 1st Appellant. As such, in law, the 1st Appellant is vicariously liable for the torts committed by the 2nd Appellant. Thus, I hold the Appellants to be liable jointly and severally in this case. I uphold the decision by the trial magistrate on liability.

**Of quantum**

[9] By a string of judicial authorities, it is a well-established law that, assessment of damages in a claim for general damages is at the discretion of the court. And that exercise of that discretion will not be interfered with by the appellate court except where the trial court in assessing damages:

> **a) Took into account an irrelevant factor or**
>
> **b) Left out of account a relevant factor or,**
>
> **c) The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.**

[10] These principles were set out by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by our own Court of Appeal. For further illumination on this see:

> **1) Kanga V. Manyoka [1961] EA 705, 709, 7013**
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> **2) Lukenya Ranching and Farming Co-op. Society Ltd V. Kavoloto [1979] E. A. 414, 418, 419**
>
> **3) Kemfro Africa t/a Meru Express & another v. A. M. Lubia& another (1982 – 88) 1 KAR 727; and**
>
> **4) C. A Civil Appeal No.66 of 1982 Zablon Manga v. Morris W. Musila** *(unreported)*

[11] From the medical report, the Respondent submitted that the Respondent suffered:

**(i) Fracture of the right clavicle.**

**(ii) Fracture of two left sided rib fractures with haemothorax (abnormal collection of blood in the pleural space).**

**(iii) Laceration of the right lower eyelid; and**

**(iv) Bruise on the left side of the chest**

Doctor Macharia testified as PW1. He told the court the fracture of the clavicle had healed but with mal-alignment which gave the Respondent pain on movement of the right shoulder. The pain will, however, ease with time. The doctor stated that the mal-alignment of the clavicle is a permanent deformity. But, the rib fractures had healed with no complications. For these injuries, the trial magistrate awarded Kshs. 800,000 as general damages. The Appellants considers this award to be exorbitant and out of line with the nature of the injuries suffered. They proposed Kshs. 600,000 general damages. The Respondent on the other hand is of the view that the award is reasonable and should not be disturbed. The parties cited judicial authorities in support of their arguments. I have considered the decision by the trail court and I find that the learned magistrate was alive to the fact that inflation is a factor of consideration in determining quantum of damages. He rightly stated that the authorities relied by the Appellant were old; one was decided in 1986 and another in 1997. He also observed that the one by the Respondent was a more recent decision having been decided in 2009. And, the trial magistrate correctly appreciated that the disparity in the awards in these decisions was due to inflationary effects which comes with time. The trial magistrate also considered the severity of the injuries sustained in assessing damages. I note that the injuries sustained are serious with mal-alignment of the clavicle. Contrary to the argument by the Appellants, the doctor stated that the mal-alignment of the clavicle is a permanent deformity and will continue to give the Respondent pain. Although the doctor stated that the pain may subside with time, he, however, opined that, if the pain persists, it may require future medical care. These were relevant factors to consider and the trial magistrate considered them and stated in his judgment that these injuries were serious- Therefore, my overall impression of the decision by the trial magistrate is this. The trail magistrate did not commit any error in principle, for he considered all relevant factors and did not take into account any irrelevant factor in his estimation of damages. Accordingly, his estimation of damages was reasonable and fair compensation of the injuries sustained. I find nothing on which to fault his decision. I uphold his decision on quantum.

**Special damages**

[12] As for special damages, the sum of Kshs. 3,500 was specifically pleaded and proved through production of receipts. I award the Respondent a sum of Kshs. 3,500 as special damages.

The upshot

[13] The upshot of my analysis is that I dismiss this appeal with costs to the Respondent. It is so ordered.

**Dated, signed and delivered in open court at Meru this 10th day of May 2017**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Mwanzia advocate for respondent

Mr. Mugambi advocate for Mr. Ondari advocate for appellant

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**F. GIKONYO**

**JUDGE**