**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 39 OF 2015**

**SALOME MANTAI…...…….....1ST APPELLANT**

**JOSEPH SIPARO……2ND APPELLANT**

**VERSUS**

**LUCIA WANJIRU MWANGI…….....…….…….…….RESPONDENT**

**(Being an appeal from the Judgement of Honourable M.O. Okuche (SRM) delivered on 31/7/2015)**

**JUDGEMENT**

This is an appeal from the decision of the lower court delivered on 31/7/2015 in Civil Case No. 138 of 2011. In the said case judgement on liability and quantum was given in favour of LUCIA WANJIRU MWANGI hereinafter referred to as the respondent, against SALOME MANTAI and JOSEPH SIPARO hereinafter referred as the appellants.

The learned trial magistrate in his judgement found the appellants 100% negligent and awarded Ksh.1.5 million general damages and special damages of Ksh.483,297/= plus costs and interest thereon at court rates. The appellants being dissatisfied with the entire judgement filed this appeal.

**Background:**

The facts of the case are very simple and straight forward. The injuries to the respondent which gave rise to the civil claim for compensation, resulted from a motor traffic accident along Namanga – Kitengela road on the 7th April 2010. The respondent boarded motor vehicle registration KBA 542H belonging to the 1st appellant and being driven by the 2nd appellant along the said road heading to Nairobi.

The evidence on record from the respondent was that in the course of the journey at Yukos Area along Namanga – Kitengela road the vehicle overturned. As a result she sustained physical injuries. The respondent blamed the 2nd appellant of negligently driving the subject motor vehicle at a high speed as a result she was injured. The respondent according to her evidence sustained severe injuries constituting fracture of the right distal humerus fracture of the right clavicle, fracture of the scapula, multiple fractures of the ribs and right haemopneumohemothorax.

At the trial the respondent adduced evidence on how the accident occurred. She further testified that the injuries led to her admission at Kenyatta National Hospital for examination and treatment. In her testimony at the trial court she was admitted for one and half months undergoing treatment incurring medical bill of over Ksh.400,000/=. She tendered exhibits in support of the expenses, discharge summary and P3 form issued by the hospital to confirm the diagnosis and nature of injuries suffered.

PW2 PC Andrew Koech also testified on the nature of investigations conducted regarding circumstances of the accident. It was however established that he was not the officer who investigated the accident nor visited the scene. His testimony can as well be described as hearsay.

PW3 Dr. Okere a medical consultant who examined the respondent and prepared a medical – legal report testified and opined that the degree of injury suffered by respondent as grievious harm. In his assessment the degree of severity could be apportioned at 25%.

The appellant denied any negligence at their part in the pleadings and defence filed. During the hearing at the lower court evidence of one witness Dr. Leah Wainaina testified on behalf of Dr. Wairoto who prepared a medical report regarding the injuries sustained by the respondent. The justification of the appellants calling for a second medical report was to counter the opinion and prognosis by Dr. Okere called to give evidence on behalf of the respondent. The two medical reports by Dr. Okere and Dr. Wairoto confirmed that the respondent suffered injuries to right clavicle, right arm, chest and right humerus. Dr. Okere prognosis placed the degree of grievious harm at 20% while Dr. Wairoto found no disability associated with the injuries.

The appellants during the trial and cross-examination maintained that the accident was caused by a tyre burst and not negligence on the part of the driver, 2nd respondent. That claim with regard to the accident was dismissed by the learned trial magistrate.

Not satisfied with the judgement an appeal was preferred against the decision to this court. The grounds of appeal of the appellants are as follows:

> **(a) The learned trial magistrate erred in fact and in law in holding the appellant 100% liable despite the overwhelming evidence surrounding the circumstances of the accident and also evidence adduced by the plaintiff and her witness PW2 and the cause of the accident was a tyre burst.**
>
> **(b) The learned magistrate erred in fact and in law in relying on the evidence of PW2 in assessing liability in complete obviation of the other witnesses account and the finding of police investigations as far as how the alleged accident occurred.**
>
> **(c) The learned magistrate erred in fact and in law in awarding Ksh.1,500,000/= as general damages disregarding the evidence of DW1 Dr. Wainaina and the medical report that was produced disputing the alleged rib fractures and the degree of disability.**
>
> **(d) The learned magistrate erred in fact and law in ignoring the defence medical evidence adduced by DW1 while assessing damages of Ksh.1,500,000/= as general damages which is excessive for injuries suffered.**

The appellants in this appeal were represented by Kairu McCourt Advocate while the respondent was represented by Wanyoike Macharia Advocate.

The arguments by way of written submissions by both counsels are quite comprehensive. The respondent's counsel raised no new issues but responded to the ones raised by the appellants' counsel.

It seems to me however in looking at the four crafted grounds of appeal by the appellants, key issues for determination of this appeal arise:

> **(1) Whether the trial court was right when it held that given the peculiar circumstances of this case, there was evidence to prove negligence on the part of the respondents. This issue formulated differently whether the respondent discharged the burden on a balance of probability against the appellants.**
>
> **(2) Whether the trial court was right in holding and assessing general damages at Ksh.1.5**

**million and specials at Ksh.483,297/= on the evidence tendered before it for damage sustained by the respondent.**

**ON APPEAL**

In the written submissions filed by learned counsel for the appellants, challenged the reasons relied upon by the learned trial magistrate in arriving at a finding on liability on negligence at 100% in favour of the respondent.

The contention by the learned counsel was that the respondent did not adduce any evidence to prove negligence to have warranted liability against the appellant. He alluded to the evidence of a tyre burst as the cause of the accident contrary to the conclusion reached by the learned trial magistrate.

It was contended by learned counsel that from the evidence, respondent did not discharge the burden of proof on a balance of probabilities against the appellants. He further contended that as the evidence by PW1 and PW2 was woefully insufficient to establish negligence on the part of the driver of accident motor vehicle, the trial magistrate was wrong to infer negligence.

In support of the proposition on the burden of proof and incidents constituting that burden lies on the person who wishes the court to believe in its existence. Learned counsel relied on the provisions of Section 107 – 109 of the Evidence act.

Secondly on the legal principles in the cases of ***Eastern Produce (K) Ltd v Christopher Atiado Osiro Eldoret HCCA 43 Of 2001; Kiema Mutuku v Kenya Cargo Hangling Services Ltd 2 KAR 258, Statpack Industries v James Mbithi Munyao CA 152 of 2003, Shamakame Adam Mbui v Kyoga Hauliers (K) Ltd [2013] eKLR, Patrick Nguthiru Gichuki v David Denny [2013] eKLR***. The proposition of law that runs through the thread of these authorities as submitted by learned counsel is that there is no liability without fault. Secondly, the plaintiff on a claim based on tort must prove negligence against the defendant where the claim is based on negligence. Thirdly, the burden of proof of any fact or allegation is on the plaintiff to discharge it on a balance of probabilities.

It was further submitted by learned counsel for the appellant that from the above observations the learned trial magistrate applied wrong legal principles and relied on extraneous evidence in his determination on liability. He therefore concluded that the view held by the learned trial magistrate was contrary to the above judicial authorities. Learned counsel argued that in absence of the evidence against the appellants on liability the order by trial court should be quashed.

On quantum learned counsel submitted that the learned trial magistrate took an erroneous view which occasioned an award manifestly excessive. It was contended by learned counsel that the learned magistrate to have made an award of Ksh.1,500,000/= disregarding the evidence of Dr. Leah Wainaina (DW1) in that medical report. Learned counsel argued that part of the injuries relied upon like rib fractures and ratio of disability was disputed throughout the trial.

Learned counsel referring to the judgement of the trial court submitted that no reasons were given in awarding the claim for damages. The contention that the learned trial magistrate factored no reasons to support his decision was completely erroneous. Learned counsel relied on the duty imposed by statute under Order 21 rule 5 of the Civil Procedure Rules which require the court to give reasons for its decision. Learned counsel urged this court to allow the appeal in its entirely.

**Respondent's Submissions**

In reply the learned respondent's counsel opposed the appeal and argued that it lacks merit on both grounds. Learned counsel reiterated the testimony of PW1 on liability regarding the manner and circumstances of occurrence of the accident.

It was submitted that the testimony by PW1 on how the driver, 2$^{nd}$ appellant drove the motor vehicle at a

speed of 100km/h was not controverted. Counsel submitted relying on the cases of;

***(1) Patrick Mwiti M'imanene & Another v Kevin Mugambi Nkunja [2013] KLR***

***(2) Abdul Halim T/A Tawfique Bus Services v Justus Thuranira CA 305 of 2005 Nyeri*** on the proposition that the defence of a tyre burst cannot be availed without evidence demonstrating that all other factors in respect to negligence were absent.

Learned counsel further submitted and defended the award on quantum in favour of the respondent. Counsel contention was that the testimony by the respondent and medical reports by Dr. Okere and Dr. Wainaina captured nature of injuries, pain and suffering with loss of amounts associated with the accident.

Learned counsel further argued that there seems to be a misunderstanding on the part of the appellant's counsel that trial magistrate relied on reasons which are different from that given at the trial. It was contended by the learned counsel that similar injuries like those ones suffered by the respondent have attracted awards of ranging between Ksh. 1,700,000/= - 2,000,000/= for pain and suffering. He placed reliance on the case of ***Zacharia Onchiri v Tashrif Bus Services Ltd HCC No. 226 of 1998 and Nicodemus Owuor Ongendo v Chemilil Sugar Co. Ltd HCC 3217 of 1997***. Learned counsel urged this court to find that no legal basis has been laid by appellant to interfere with the judgement of the lower court by counsel for the appellants.

**DISCUSSION AND RESOLUTIONS**

It is trite that the exercise of the first appellate court is to evaluate and scrutinize the evidence of the trial court in order to make its own findings of fact and law, but with no right to substitute its own views of the evidence for those of the trial court. In doing so the court has to be vigilant that it has neither seen nor heard the witnesses and make due allowance for that. See ***Kamau v Mungai & Another Civil Appeal No. 59 of 2001 eKLR***.

I have considered the evidence at the trial court, findings by the learned trial magistrate, submissions on appeal by both counsels representing appellants and respondent. As earlier stated it is pertinent to reiterate that this appeal will succeed or lost depending on the evaluation and conclusion reached by this court on;

(1) Liability

(2) Quantum.

**Liability**

The bone of contention revolves arrived the position taken by the trial court that the accident which took place on 7/4/2010 involving motor vehicle KBA 542H it was due to negligence of its driver. The appellants contended that the accident was as a result of a tyre burst.

From the record it is not in dispute that the respondent was a passenger lawfully travelling on 7/4/2010 in motor vehicle reg. No. KBA 542H. It is not disputed that along Namanga – Kitengela road an accident occurred in which the respondent suffered physical injuries. According to (PW1) the plaintiff, the accident occurred due to over speeding by the driver which she approximated to be over 100km/h.

PW2 PC Koech stated that he never conducted any investigations but only took over the file which he produced before court with annextures as an exhibit. As alluded elsewhere a police officer who neither visited the scene, or drew sketch plan and investigated the case has no rote to be called as a witness to prove existence of any fact.

In the plaint against the defendant/appellant it was averred that the driver was negligent interalia by;

**(1) Driving at an excess speed in the circumstances failing to swerve, stop, slow down, apply brakes in time or at all or otherwise act so as to avoid the accident.**

**(2) Driving without due care and attention.**

It's pertinent to mention that the defendants/appellants in their defence denied any breach of duty or acts of negligence on their part.

The issue raised is whether the 2nd appellant was negligent in the manner of driving thereby contributing to the accident. The trial court in considering the evidence made a finding that the accident was due to a tyre burst and speeding. The testimony by respondent that 2nd appellant drove the vehicle over 100km/h was not controverted.

What can be deduced from the testimony of PW1? The issue is not the manner of driving simplified by the driver but an inference of negligence due to excessive speed, the accident resulting on the basis that the driver failed to control, slow down or apply brakes to avoid overturning of the vehicle.

There are two elements on the assessment of liability namely; causation and blame worthiness. See ***Baker v Will Oughby [1970] AC 467, Statpack Industries v James Mbithi Munyao Civil Appeal 152 of 2003***. The court held thus:

**"It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury."**

In my view there is no contestation that the vehicle had a tyre burst. However there can be no excuse for the driver to slow, or control, or apply brakes in the circumstances to avoid the vehicle overturning. The defence of a tyre burst cannot be availed to the respondent to take refugee when evidence has been tendered pointing at over speeding and the vehicle overturning soon thereafter.

Can every tyre burst be a defence in an occurrence of an accident? The explanation from the defence to answer to the question to the effect that the tyre burst was such that it made it impossible to control the vehicle is applicable in this appeal. The answers as to the gradient of the road, the width of the road, the surroundings at the scene are all relevant to dissuade the court from an inference of negligence.

The respondent in her evidence in chief and on cross-examination in support of the pleading on causation and blame was irresistible. I would not disagree with the learned trial magistrate's finding that the 2nd appellant's speed was excessive in the circumstances and occasioned failure to control, stop or apply brakes to avoid the accident.

The appellants further deny that they were guilty of any acts of negligence or omission with regard to the respondent's accident and the injuries sustained therefrom on the material day. However they failed to call evidence to rebut the aforesaid manner of driving on the public highway which resulted in the vehicle overturning.

In my opinion the inference to be drawn from the pleadings and evidence of the accident was as a result of the negligence manner in which the 2nd appellant's driver managed and controlled the vehicle on the fateful day.

I think it is fair to resolute that every driver while driving in our public highway should obey the law and observe the speed limit of 80km/h. This is in regard for the life and safety of passengers in the case of public vehicles and also other users. The respondent testimony on how he observed the speed as being over 100km/h has not been challenged. What was the consequential effect of over speeding, the failure by the appellant's driver to control brake in time to avoid the overturning of the vehicle.

It is not only be preposterous but will defeat the object of the law to hold that every tyre burst on the road

absolves a driver from acts of negligence. Negligence imposes a duty of care. The failure to take reasonable care where there is a duty is attributable to the person who has fallen short of that duty of care.

I am therefore of the conceded view that in the ordinary course of things, vehicles do not overturn on the highway because a tyre burst has occurred. I respectfully agree with the learned magistrate that the 2nd appellant was to blame for the accident at 100%. There was no evidence to denote that the respondent contributed to the cause of the accident to apportion liability.

In the case of ***Embu Road Services v Remi [1968] EA 22 – 25 Sir Charles Newbold P***, in consideration with approval the holding in ***Mzuri Mulhidni v Nazzor Binself [1960] Ea 201*** and ***Meneses v Slylianders Ltd CA No. 46 of 1962*** held thus:

> **"As I understand the law as set out by these two judgements of this court, where the circumstances of the accident give rise to the inference of negligence, the defendant in order to escape liability, has to show in the words of *(Sir Alistair Forbes)* that there was a probable cause of the accident which does not create negligence or in the words which I have previously used that the explanation for the accident was consistent only with an absence of negligence."**

In applying the principles in this case to this appeal before me, I am of the view that no explanation was forthcoming at the trial to exonerate the appellant from negligence. The fact of over speeding and failure to control or apply brakes are acts of negligence which called for an answer. That answer was never availed. *The testimony by PW1 remained unchallenged*.

I am further supported by the Court of Appeal holding on the proposition in the case of ***Devshi v Kuldips Touring Co. [1969] EA 189*** where the court pronounced itself as follows:

> **"A person relying on inevitable accident must show that something happened over which he had no control and the effect of which could not have been avoided by the greatest care and skill. Where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistence only with an absence of negligence. In order to avoid liability must prove to the satisfaction of the court that they took all reasonable steps to ascertain that the tyre was fit for use on February 27. The mere external examination of a tyre which had run 21750 metres part of which was done on bad roads driven by drivers who had no instruction to report on unusual and heavy blow to the tyre and without any examination of its internal surface during the whole of that time seems to me to leave the defendant with the burden undisclosed of satisfying the court that they had taken all reasonable steps to avoid the accident. The duty imposed on the owner of an omnibus must be higher than that placed on the driver of a car, nevertheless there is clearly a duty imposed on the latter to make at least a visual inspection of the threads and walls of the hired car tyres. There is no evidence of any such inspection in the present case either before the car was hired out or before it left Dodoma on its way back to Mombasa inspite of the fact that one of the tyres had a puncture and another a near blow out and was badly cut. There is no evidence of the state of the road at the place of the accident and in particular whether there were sharp stones on the road which would have caused a blow out."**

In the instant case my take is that in absence of evidence on the condition of the tyre, the state of the road and the cause of the tyre burst that fact cannot be relied by the appellants to controvert inference of negligence. What the trial court heard was direct evidence from PW1 that the driver drove above motor vehicle at a speed of 100km/h. The presumption of negligence is that of failure to slow, brake or control the vehicle following a tyre burst. Can one be blame a tyre burst as if it is an act of God? The answer is in the negative. What is clear therefore, I find no reason to interfere with the findings of the trial court on liability. That ground on liability is lost.

**Quantum**

I now turn to the ground on the award of damages. The learned counsel for the appellant contested the award as being excessive and at variance of the injuries suffered by the respondent. Counsel further contended the compensation made by the trial court was not supported with reasons the respondent evidence on the aspect of pain and suffering was supported with exhibits at Kenyatta National Hospital for 1½ months. She apparently suffered fracture 1/3 of the humerus drop, fracture right clavicle, scapula comminuted facture, haemopneumothorax.

According to Dr. Okere who examined the respondent and prepared a medical report, in his report the above injuries were confirmed. In his prognosis after 7 months the fractures had not resolved. The respondent would be predisposed to posttraumatic osteoarthritis of the right shoulder. He estimated the removal of metal implant at Ksh.100,000/=.

In arriving at the figure of Ksh.1,500,000/= as general damages in favour of the respondent the learned trial magistrate relied on the medical report prepared by Dr. Okere. The respondent's counsel had also placed the following authorities for guidance in exercising discretion:

> ***(1) Nicodemus Owuor Ongendo v Chemilil Sugar Co. Ltd Nrb HCCA 3217 of 1997.***
>
> ***(2) Zacharia Onchiri v Tashrif Bus Services Ltd HCCC 226 of 1998.***

In this case, plaintiff sustained severe hand injury, factures to the head, facture cervical spine compound comminuted fracture of the left libia and fibula compound fracture of right libia and fibula, loss of 5 upper teeth. The court awarded 1.7 million.

I have considered the evidence by the respondent as adduced at the trial. Further the medical reports prepared by Dr. Okere and a second one by Dr. Wairoto. I think in reading the two medical reports they present the true picture as regards injuries sustained by the respondent. The variation can only be said to be found on the prognosis and estimate on future medicals.

In this appeal the award by the trial court is contested. The principles to be observed by an appellate court in deciding whether it is appropriate to interfere with award of quantum by the trial court are well settled. The appellate court must be satisfied either the trial magistrate in assessing damages took account on irrelevant factor, or left out of account a relevant one or that the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage. See ***Ilanga v Manyoka [1961] EA 705; Kemfro Africa Ltd v A.M. Lubia & Another [1988] 1KAR 727.***

In considering damages on personal injury claims, courts often are clothed with tools to assist in exercise of discretion. I find one such principle by ***Lord Morris*** in the persuasive case of ***West (H) & Son Ltd v Shepherd [1964] AC 326 at Pg 345***.

> **"But money cannot renew a physical frame that has been shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general material of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that the amounts which are awarded are to be considerable extent conventional."**

In the instant appeal and on perusal of the record and evidence, the trial magistrate had the advantage of latest medical report by Dr. Okere dated 30.4.2013. The crucial aspect of the report was that the respondent's serious injury was to the right arm and forearm fracture right distal humerus and right clavicle injuries involving right clavicle, scapula, clavicle and right forearm attracted awards of Ksh.450,000/= in 1996. (See the case of ***Cecilia Mwangi & Another V Ruth Mwangi CA 251 Of 1996***).

In the case ***James Rutto v The Hon. Attorney General HCC 165 of 1996***, the plaintiff suffered fracture of the left humerus, hand injury laceration of the forehead, a metal plate had to be fixed in the humerus. The disability was assessed at 5%. He was awarded Ksh.250,000/=. ***Abdulah Shee Mwadallika v Tawfiq Bus Services HCC 67 of 1999 Mombasa***, the plaintiff suffered comminuted fractures of the left humerus fracture of upper third of ulna, deep wound in the lower lip. He was awarded damages of Ksh.390,000/= on 11th February 2002.

On consideration the authorities I have referred to are over 16 years. This court takes into account that the injuries are not identical to those suffered by the respondent but they do provide a guide. The authority of ***Zacharia Nyabuti Onchiri (Supra)*** replied upon by the trial court depicts more serious injuries compared with that of the respondent. The general damages which the learned trial magistrate assessed was in my view manifestly high. The trial magistrate in exercising discretion erred in law in applying the principle that similar awards should guide the court in reaching a determination.

I am satisfied that this court has to interfere with the discretion of the learned trial magistrate in respect to the award on general damages being an error of principle. The award of general damages set aside and substituted with an award of Ksh.700,000/=. The claim on special damages was pleaded and proved at Ksh.483,297/=. I make no interference on special damages.

**DECISION**

In the result this appeal succeeds in the following terms:

**(a) The appeal on liability lacks merit, accordingly dismissed.**

**(b) The appeal on general damages partially succeeds from being set aside and substituted with Ksh.700,000/= for pain and suffering.**

**(c) The claim on specials lacks merit. It is therefore affirmed.**

**(d) The court awards costs of this appeal and interest on the sum from the date of judgement of the lower court.**
**Accordingly the judgement of the lower court delivered on 31/7/2015 affirmed with modification on award in respect of general damages.**

It is so ordered.

**Dated, delivered in open court at Kajiado on 7th day of October, 2016.**

**……**

**R. NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Mwaura holding brief for Rukunga for the appellant present

Mr. Mateli Court Assistant