



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 71, 72 & 73 OF 2013

TOM OBITA NDAGO.....1ST APPELLANT

LUCY WANJIRU OTIENO.....2ND APPELLANT.

VERSUS.

ALFONSE OMONDI OTIENO.....RESPONDENT

JUDGMENT

1. Alfonse Omondi Otieno, Siprosa Amolo Ambogo and Molly Akoth Oloo (the respondents) in this appeal were the plaintiff's in Migori SPMCC. 32, 29 & 30 of 2012 respectively in which they sued the appellants herein tom Obita Ndago and Lucy Wanjiru Otieno 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 27th November, 2009 at 7.20a.m. along Awendo Kisii road near Sony Sugar Outgrowers Company gate. Apparently while Alfonse was riding a motorcycle registration Number KMFC 793F the 1st defendant was driving motor vehicle registration number KAK 217G Toyota saloon so negligently thus he lost control, veered off from his lane to the extreme right thereby hitting Alfonse and his two passengers who were Siprosa Amolo Ambogo and Molly Akoth Oloo. The 1st defendant was thus held liable directly liable for the said accident while the 2nd defendant was vicariously held liable as the owner of motor vehicle registration No. KAK 217G.

2. In their plaints the respondents have particularized the particulars of negligence on the part of the 2nd defendant, his driver, servants and or 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 KAK 217G Toyota Saloon thereby knocking the plaintiff while he was a rider of motorcycle registration number KMCF 739F.

d. Failing to apply brake, stop and or swerve to avoid the accident.

e. Driving a defective motor vehicle causing and or permitting the said motor vehicle to rear off its left lane from Awendo to the extreme verge of the right lane of the road thereby knocking down the plaintiff.

f. Driving in a ziz zag manner on the road.

3. With regard to particulars of injuries Alfonse particularized as follows:-

- *Contused dislocation of the right hip and knee joint.*
- *Deep lacerated cut wound on the dorsum of the right foot in 8 inches long oblique from media.*

4. With regard to particulars of injuries Siprosa particularized as follows:

- *Comminuted fracture of right mid third femur(Compound).*
- *Contused right foot.*

5. With regard to particulars of injuries Molly particularized as follows:-

- *Contused abdomen with an intra uterine foetal death of term.*
- *Fractured right tibia fibular lower 1/3 .*

6. Thus the respondents claimed both general and special damages. The defendants on their part filed a written statement of defence denying liability and the particulars of negligence attributed to the 2nd defendant. In the alternative and without prejudice, the defendants averred that if at all the plaintiffs were involved in the accident and were injured the same was wholly civil/ or substantially contributed to by the motorcycle rider(Alfonse) and the plaintiff's negligence.

7. The defendants particularized particulars of negligence of Alfonse(the motorcycle rider) as follows:-

- a. Driving un insured motorcycle.*
- b. Driving a motor cycle without a license.*
- c. Driving at an excessive speed in the circumstances*
- d. Driving a defective motorcycle.*
- e. Allowing a defective motorcycle to be used on the road.*
- f. Driving without due care and attention to other road users.*
- g. Intentionally causing the accident.*
- h. Failing to swerve, brake, slowdown or act in any other way to avoid the accident.*
- i. Failing to abide by the highway code and the traffic act.*

8. The particulars of negligence on both Molly and Siprosa were particularized as follows:-

- a. Failure to have any sufficient regard for her own safety.*
- b. Boarding uninsured motorcycle.*
- c. Engaging the motorcyclist in a conversation and thereby distracting him.*
- d. Boarding a defective motorcycle.*

9. During trial in civil suit No. 32 of 2012 Alfonse who testified as PW1 told the court that on 27th November, 2009 he was riding his motorcycle from Kokuro going to take Molly to deliver he baby at

Awendo health Center Hospital. They were also in the company of Siprosa.

10. On reaching Sony Sugar outgrowers they saw a vehicle from the opposite direction, which lost control and headed in his direction. He made efforts to avoid it but it hit him off the road and he in turn landed on the left off the road. The said vehicle KAK 217G stopped near where it had knocked them and they were taken to Awendo hospital (for first aid) then later they were taken to Ombo Hospital. He also told the trial court that he was admitted three days. He produced his discharge summary as PExh.1.

11. In addition to this he told the court that he suffered a dislocation of the hip bone, cut wound in right leg and produced the X-ray result as PMF.1, he also produced receipts of payments he had made as PExh.3 A-D. Later he reported the accident at Awendo Police station and produced both P3 form and medical report by Dr. Indagiza which were marked as PMFI.4 and PMFI- 5 respectively. He also produced a receipt of kshs. 3,000, and a search certificate showing that 2nd defendant is the owner of the said vehicle as PExh.7 and demand notices issued to the defendant which were marked as PExh.9 and PExh.10.

12. In concluding his testimony, he blamed the defendants (1st defendant) for encroaching on the lane. He also stated that he has not healed as he still experienced pain during rainy seasons and thus he wanted compensation and costs of the suit.

13. On cross-examination he acknowledged that he was carrying two passengers.

14. PW2 was Dr. Aggrey Akidiva a medical practitioner in Migori. He told the court that on 16/11/2011 he examined Alfonse Otieno and noticed a deep laceration on dorsal foot. He also had pain on the knee and his joint had a scar on dorsal of right foot. He thus framed the opinion that he sustained soft tissue injuries at 2% disability by looking at Alfonse's treatment records and X-ray films.

15. Lastly, he confirmed that he filled the p3 form and produced it as PExh.4 and produced the medical report as PExh.5. He also confirmed that he had charged the Alfonse kshs. 3,500 for his services.

16. PW3 was No. 70874 Corporal Stephen Nyamai attached at Awendo police station assisting in the traffic section. He recalled that on 27th November, 2009 an accident was reported to their station involving KAK 217G Saloon car and motorcycle KMF 793F Platinum. On visiting the scene he noted that the road was under construction thus vehicles were using one lane (left lane) as one travelled from Kisii towards Migori. At the scene of accident was a Sony out growers near Awendo town. The driver of the saloon car was the 1st defendant and Alfonse was carrying the pillow passengers one of who was pregnant(Molly) and the other (Siprosa) supported the pregnant woman.

17. Furthermore, he told the court that the accident was caused by the driver of KAK 217G(1st defendant) who was from Awendo direction. He explained that the road was under construction, the shoulders were arched and the saloon driver (1st defendant) did not check the rider and the lorry who were both coming from the opposite direction. In addition to this he told the court that the rider had the right of way, the saloon driver should have stopped to pave way or slowed down to allow the lorry to pass and thus he (1st defendant) could not swerve to avoid hitting the rider.

18. Lastly, he confirmed that the rider (Alfonse) and all his passengers were all injured and were issued with P3 forms and police abstracts. He produce the abstract showing all the details as PExh.4.

19. By consent it was agreed that the evidence by PW3 be adopted in SPMCC NO. 29 of 2012 and 30 of 2012 mutatis mutandis. This marked the close of plaintiff's case in Civil Case No. 32 of 2012.

20. In civil case No. 29 of 2012 PW1 was Siprosa Amolo Ambogo who corroborated Alfonse's testimony that on 27th November, 2009 at 7.20a.m. she was taking a patient Molly Akoth to hospital using a motor bike to Awendo hospital. However there was an oncoming vehicle from Migori KAK 217G, it knocked them outside the road and they were pushed off the road. As a consequence thereof, she got a fracture

and could not stand. Immediately they were assisted to Awendo for first aid and later transferred to St. Joseph's Ombo Hospital where she was admitted for 3 days. Afterwards, she was taken to Kenyatta National Hospital. She produced PExh.4 a discharge summary from Ombo Hospital, a discharge summary from Kenyatta national Hospital where she was admitted for two months as PMFI-2 and a X-ray result as PMFI-3.

21. She then confirmed that she sustained a fracture in right thigh, left toes, and paid fees at Kenyatta Hospital and produced receipts amounting to Kshs. 6,698 as PExh.4. She reported the accident at Awendo Police station. Her p3 form was filled by Dr. Indagiza which she produced and the same was marked as PMFI.5-P3, Pmfi-6 Medical form, PExh.7- receipt of kshs. 3,000 and PMFI-8 police abstract and a motor vehicle search certificate as PExh.9.

22. Lastly, she stated that she has not fully healed since she was still attending clinic. She explained that her other leg was not proportional to the other and she had had to use a special shoe and a crutch. She confirmed that she was last in hospital in September, 2012, that the vehicle was being driven on the wrong lane and she blamed the defendants. She produced demand notice Exh.10 & PExh.11 and motor vehicle search receipts as PExh.12.

23. PW2 was doctor Aggrey Idagiza the doctor who examined the plaintiff (Siprosa). He confirmed that Siprosa had a commuted fracture of the right femur, mallunum and shortening of the lower limb, she had to use a walking stick and she had a special shoe raised about three inches. He then formed the opinion that he disability was 15% to her body and also confirmed seeing her treatment notes and x-ray film. He produced the medical report and P3 form as P.Exh.6 and PExh.8 respectively. He was also charged kshs. 3,500 for his service and receipt was issued.

24. In Civil Case No. 30 of 2012 the plaintiff (PW1) was Molly Akoth Oloo. She told the court that she was a student from Homabay and on 27th November, 2009 she was going to Hospital hence she had boarded a motorcycle from Rongo heading to Awendo. However, on reaching Sony Sugar Co. Limited a vehicle registration No. KAK 217G came to their lane and hit them off the road. She suffered a fracture on the right leg and also lost her baby which was due for delivery.

25. She received first aid at Awendo and rushed to Ombo Mission Hospital where she remained for one week. She produced the X-ray result which was marked as PMFI-1, the referral letter to Homa Bay as PExh.2, P3 form filled by Dr. Idagiza as PMFI-3, Police Abstract PMFI-4 and search of motor vehicle which confirmed that the 2nd defendant was the owner of the motor vehicle registration No. KAK 217G as PExh.5.

26. She also confirmed that Dr. Idagiza prepared a medical report as PMFI- 6. She also produced a receipt of payment as PExh.7 demand letters as PExh.8 and P.Exh.9. She complained that she has not healed as the leg still aches and thus wanted to be compensated and costs be paid.

27. PW2 was Dr. Aggrey Idagiza a medical practitioner. He told the court that on 16th November, 2011 he examined PW4 and noted that she had contused abdomen which led to an intra uterine foetal death. Also, she had a fracture of the right tibila and fibula bone, she was treated in Ombo hospital though she still experienced pain on the leg and right ankle joint, she had swelling on the fractured side and there was a bone overgrowth.

28. He estimated disability at 10% produced his medical report PExh.6, P3 form PExh.3 and charged kshs. 3,500 for his services and produced a receipt as PExh.7. This marked the end of plaintiff's case.

29. The defendant's on their part called Tom Obita Ndago(1st defendant & driver of 2nd defendants car). He confirmed to the court that on 27th November, 2009 he was escorting a visitor by a vehicle registration KAK 217G Toyota Corolla. That on his way back upon reaching a place where there were road marks on the left side of the road, there was a diversion sign indicating that motorists were to share one lane. He stated that there was a lorry and motorcycle climbing at a speed rate of 30kph.

30. However the lorry was using the forbidden lane but the motorcycle was heading towards Awendo direction but using the forbidden lane. On seeing the lorry, the rider moved to his side and hit his right lamp(front side) thus he could not move to the left and the lorry was there and the right side had a steep edge.

31. That notwithstanding he stated that as a professional driver, he then stopped, the rider and the ladies fell off, they had no helmets with them and the rider had a reflector jacket. Immediately he stopped a canter heading to Kisii which took the injured to hospital. He then alerted police officers who visited the scene and towed the vehicle. Lastly, he confirmed that he was never charged with an offence and blamed the lorry driver and motorcycle rider for the accident.

32. Upon cross-examination he confirmed that traffic rules required that be on the left lane. That the lorry driver and himself were occupying the whole road i.e. the lorry on the left and him on the right. A consent was then reached that the evidence of PW1 be adopted as evidence of dW1 in SPMCC.NO. 29 OF 2012 and SPMCC. No. 32 of 2012. It was then agreed that counsels representing each party to file submissions which were duly filed.

33. In his judgment on liability of the defendant the trial magistrate noted as follows:

“The 1st defendant blamed the rider of the motorcycle for encroaching onto his lane. However the 1st defendant on being cross-examined admitted that he was following along from behind and then moved side by side and went on to admit that he ought to have kept behind the lorry on the left lane and finally admitted that he was driving on the right lane instead of the left lane this therefore leaves no doubt that the 1st defendant who was in control of motor vehicle KAK 217G had overtaken the lorry and therefore came into a head on collision with the motorcycle who was riding downhill towards Awendo”.

‘The evidence of the Police Officer Cpl. Stephen Nyamai (PW3) seems to reinforce this view. In that he stated that the motorcycle rider had the right of way and driver of motor vehicle KAK 217G should have stuck behind the lorry and was therefore responsible for the accident. Although the 1st defendant was not charged with a traffic offence he police officer was note in any doubt that the 1st defendant caused the accident.

Further the motor vehicle inspection report filed as one of the defence case shows that the defendant’s motor vehicle KAK 217G was defective prior to accident. The plaintiff herein having been a pillion passenger could not have been in control and thus cannot be in any way be said to have contributed to the accident and subsequent injuries.

In the premises I find the Defendants wholly liable in damages to the plaintiff and liability is hereby put at 100%’.

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

In civil case No. 30 of 2012 Molly Akoth Oloo v. Tom Obita Ndago & Lucy Wanjiku Otieno he gave plaintiff kshs. 400,000 as general damages for pain, suffering and loss of amenities. He also gave special damages of kshs. 3,500 thus kshs. 403,500.

35. In civil case No. 32 of 2012 Alfonse Omondi Otieno v. Defendants he noted that the plaintiff was examined by Dr. Idagiza who formed the opinion that the injuries were soft tissue in nature thus he gave the plaintiff kshs. 100,000 and 9,100 as special damages.

36. Lastly in Civil case No. 29 of 2012 Siprosa Amolo Ambogo the trial magistrate did not find any blame on the plaintiff as a pillion passenger since she was escorting a woman in labour and due to deliver. He also took judicial notice of the fact that motorcycles are the common means of transport

across the county.

37. On quantum he stated that Dr. Idagiza assessed her degree of disability at 15% to the body even though his medical report indicated soft tissue injuries which the doctor attributed as a clerical error. However, the trial magistrate did not doubt that assertion since the plaintiff appeared to have difficulties walking, had the special shoe on the affected leg and also had some walking aid with here. He further noted that the authorities cited by defendant counsel did not represent severe injuries are as those of the plaintiff. He then awarded kshs. 700,000 as general damages for pain and suffering and loss of amenities. He also awarded her kshs. 8,925 as special damages. Thus judgment was entered for the plaintiff against the defendants in the sum of 708,925/- plus costs and interests.

38. The respondents being aggrieved by the above judgment and decree preferred an appeal to this court. In their Memorandum of Appeal dated 26th June, 2013, the defendants have appealed against the entire judgment and decree of the trial magistrate on grounds inter alia:

- 1. The learned trial magistrate erred in law and in fact in arriving at his judgment on 3rd June, 2013 by relying on the wrong principles of law.*
- 2. The learned trial magistrate erred in law and in fact in entering judgment against the appellants both on quantum and liability contrary to the evidence on record.*
- 3. The learned trial magistrate erred in law and in fact in failing to the evidence tendered by the appellants.*
- 4. The learned trial magistrate erred in-law and in fact in finding that the Respondent had proved her case to the required standards when in fact there was no proof at all.*
- 5. The learned trial magistrate erred in law and in fact in finding that the Appellants were wholly liable for the occurrence of the accident contrary to the evidence on record.*
- 6. The learned trial magistrate erred in law and in fact in failing to have regard to the submissions by the appellants.*

39. When the matter came before me on 13th November, 2014 and it was agreed that the above three appeals be consolidated and the same be argued by filing and exchanging written submissions. All parties have duly filed their written submissions and I have read them.

40. This court, being conscious of its role as the first appellate court as stated in **Selle v. Associated Motor Boat Co. Ltd [1968] E.A 123** has to re-evaluate the evidence that was tendered 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.

41. From the Memorandum of Appeal, the court was urged to interfere with the trial court's finding on both liability and quantum of damages. On the issue of liability, it was the evidence of P3 Stephen Nyamai a traffic police officer in Awendo that the rider (Alfonse) had the right of way since the road that the two drivers were using was under construction and the shoulders were arched. Furthermore, it was his evidence that the saloon driver should have stopped to pave way or slowed down to allow the lorry to pass.

42. It is to be noted however that the rider was carrying two passengers and himself. Allegation by the defence counsel during trial in the lower court that the fact that the rider was carrying an excess passenger could have caused the accident were however thrown out the window by the fact that:-

- *DW1 who happened to be the one driving the saloon car admitted on cross-examination that himself and the lorry driver were occupying the whole road with the lorry driver were occupying the whole road with the lorry driver on the left and himself on the right. This in itself means that*

DW1 admitted the fact that it was infact the rider who had the right of way since he could not be able to swerve and avoid a head on collision with the rider.

- *On the issue of the rider carrying excess passengers it was the trial courts view and which I am persuaded to agree with the fact that Siprosa was actually assisting Molly who was already due to deliver her baby and thus she (Molly) needed someone to hold on to as she was being rushed to hospital. Thus the rider and his passengers weight was not the reason why the rider's motorcycle fell but the fact that the 1st appellant hit them.*

43. Therefore, the trial magistrate on a balance of probability was right to hold that the 1st defendant was 100% liable for the accident occasioned to the rider and his two passengers. Which implication means that 2nd defendant was vicariously liable as owner of the saloon car for the actions of 1st defendant.

44. Regarding quantum of damages, the learned trial magistrate did expressly state the authorities submitted by the parties before he arrived at the awards he gave to Alfonse, Siprosa and Molly. 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 as previous awards for similar injuries and such other relevant factors.

45. In the matters that were before the trial court each plaintiff testified, a medical report was produced and even the medical officer who examined the plaintiff's gave testimony. Alfonse the motorcycle rider according to Dr. Aggrey Akidiva suffered soft tissue injuries which according to the doctors view amounted to 2% disability.

46. Molly on the other hand according to Dr. Indagiza's testimony had a fracture of right tibia and fibula bone, had pain on the leg and right ankle, swelling on the fractured side and had a bone overgrowth she also lost her baby. The doctor estimated her disability at 10%.

47. Lastly, Siprosa according to Dr. Indagiza had comminuted fracture of the right femur, there was malunion and shortening and of the lower limb, she used a walking stick and had a special shoe raised about three inches. He thus formed the opinion that disability was 15% of her body. Although the doctor stated that the issue of his medical report having indicated soft tissue injuries was a clerical error, the learned magistrate stated in his judgment that he had no reason to doubt that an assertion since the plaintiff (Siprosa) indeed appeared to have difficulties in walking, had the special shoe on the affected leg and had some walking aid with her.

48. In his judgment therefore the learned magistrate awarded kshs. 100,000 to Alfonse as general damages for pain and suffering and 9,100 special damages. To Molly he awarded kshs. 400,000 as general damages for pain and suffering and kshs. 3,500 as special damages. Lastly to Siprosa taking into due regard that during the trial in the lower court she had not fully healed as she had been attending clinic the last being in September, 2012, the trial magistrate awarded her kshs. 700,000 as general damages for pain and suffering and loss of amenities. On special damages he awarded her kshs. 8,925.

49. In *Kemfro Africa Ltd t/a Meru Express and Another vs. A.M. Lubia and 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 one 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 damage".

50. Similarly in the case of **Sofia Yusuf Kanyare vs. Ali Abdi 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 too 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 post 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.

51. In the instant case, the learnt trial magistrate appreciated the authorities cited by each side and the submissions. In the case of **Orion Haulers Ltd v. Michael Esokhat Civil Appeal No. 55 of 2010** in the Court of Appeal Mombasa, the plaintiff in that case sustained fracture on the left femur and a shortened left leg. The appellant court upheld the award of kshs. 800,000 which was awarded in 2010. Furthermore, it has not been demonstrated that the trial magistrate took into account the wrong principles in arriving at the award or that he had misapprehended the evidence or that the figure awarded was so high as to constitute an erroneous estimate ending in failure of justice. Therefore, considering the awards made in the above authority/and the injuries suffered especially by Siproa I would not say the awards were too high.

52. Moreover, I am not losing sight of the fact that Molly due to the accident lost her unborn child and suffered a fracture something which could have been avoided had the 1st appellant kept to the left side of the road and no amount of damages can place Molly and Siproa back to their former position physically.

53. In my humble view therefore the learned trial magistrate considered all the relevant factors in this case in arriving at his decision. These factors are the expert opinion by the 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 appeal to be without merit and is hereby dismissed with costs. The order to apply mutatis mutandis to Civil Appeal No. 72 of 2013 and 73 of 2013.

Dated and delivered at KISII this 6th day of March, 2015

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Mainga for the appellant

Owade for the respondent

Edwin Court Clerk.