



**Wanderi v Aisha Auto Kenya Limited & another (Civil Case
214 of 2020) [2024] KEMC 136 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEMC 136 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE 214 OF 2020
PA NDEGE, SPM
MAY 21, 2024**

BETWEEN

MERCY WANGARI WANDERI PLAINTIFF

AND

AISHA AUTO KENYA LIMITED 1ST DEFENDANT

WILSON MOENGA MOMANYI 2ND DEFENDANT

JUDGMENT

1. The plaintiff in this case, Mercy Wangari Wanderi, is praying for judgment against the Defendant, Aisha Auto Kenya Limited, and Wilson Moenga Momayi, for special and general damages emanating from a road traffic accident that occurred on or about 07.07.2018, as a consequence of which she sustained severe soft tissue injuries. She brought this suit vide a Plaint dated 09.03.2020 and filed on 10.03.2020.
2. It is common ground herein that the plaintiff was a pedestrian along the Nakuru- Nairobi road when at a Zebra crossing, the accident herein occurred. It is the plaintiff's case that the accident was solely caused by the defendants, when they negligently drove, managed and/or controlled the Motor Vehicle KCJ 2X9Y as a result of which it violently hit her and subsequently caused her serious injuries, namely: -
 - a. Blunt injury to the right ankle joint leading to soft tissue injuries
 - b. Severe soft tissue injuries of the lumbar sacral region of the back
 - c. Severe soft tissue injuries of the left elbow joint
3. The plaintiff particularized her claim of negligence on the part of the defendants at Paragraph 4 of her plaint as follows: -
 - a. Driving the said motor vehicle KCJ 2X9Y in excessive speed in the circumstances
 - b. Driving without due care and attention to other road users



- c. Failed to slow down, swerve or in any way maintain the said motor vehicle so as to avert the accident
 - d. Hitting the plaintiff with motor vehicle KCJ 2X9Y
 - e. Hitting the plaintiff while she was crossing at the zebra crossing
 - f. Failing to apply brakes on time to avoid the accident
 - g. Failed to ascertain that the road ahead was clear before proceeding on
 - h. Driving a defective motor vehicle in the circumstances
 - i. Driving without proper look out before proceeding on
 - j. Driving with an excessive speed in the circumstances
 - k. Res ipsa loquitor.
4. The Defendants have thus been sued in their capacity as registered, beneficial and/or insured/ authorized drivers of the motor vehicle registration number KCJ 2X9Y. In their Amended Statement of Defense amended on 15/07/2021, filed by the firm of Messrs. Kinyanjui Njuguna & Co. Advocates, they mainly disavowed the alleged negligence attributed on them and/or their agent while in control of the motor vehicle. Furthermore, the defendants attributed the accident to the negligence of the plaintiff; and particularized the same in Paragraph 6 of the Amended Statement of Defense, as follows:
- a. Walking and/or standing on the road when it was unsafe and dangerous to do so.
 - b. Failing to keep any proper look out or to have any sufficient regard for traffic that was/ might reasonably be expected on the said road.
 - c. Failing to walk on the designated and/or pedestrian walk off the road.
 - d. Exposing himself to the unnecessary risk of injury.
 - e. Failing to see Motor vehicle Registration Number KCJ 2X9Y at all or in sufficient time so as to avoid the accident.
 - f. Failing to maintain a safe distance.
 - g. Failing to take care of his own safety.
 - h. Failing to take steps to avoid the accident.
 - i. Failing to give way to Motor Vehicle Registration Number KCJ 2X9Y.
5. The plaintiff testified and called a police officer as her witness, while the 2nd defendant was the only witness for the defense. Parties then filed and, I believe, exchanged their written submissions. At the close of the hearing and submissions, the accident and injuries have not been challenged. The remaining issues for determination are mainly as captured by the learned counsel for the Plaintiff's written submissions. Basically, it is a determination on liability and quantum.
6. On liability, the plaintiff testified and adopted his statement that was filed in court on 10.03.2020 that on the material morning, she was lawfully crossing the road at the zebra crossing along Nakuru-Nairobi Highway. That the motor vehicles that was on the outer lane from Nairobi direction stopped to enable her cross the road at the zebra crossing. That while she was crossing and upon getting to the inner lane, the motor vehicle herein came at a high speed without stopping and knocked her down. The accident



was reported to the police and she was subsequently issued with a P3 form and police abstract. She blames the driver of the motor vehicle herein for the accident as he was driving at a high speed and did not observe the traffic rules as regards the zebra crossing which resulted in the occurrence of the accident. In cross-examination she stated that the road was clear at the time she was crossing. That the defendants' vehicle came without hooting or signaling her.

7. The police officer, PW2, NO. 6XX79 PC SIMON OKELLO, from Nakuru police station's traffic base referred to their records, mainly OB NO. 16/7/7/2018 and stated that the defendant was to be blamed for driving under the influence of alcohol. He stated that their records tally with the plaintiff's evidence on how the accident occurred.
8. The 2nd Defendant, in his evidence, DW1, stated that it is the plaintiff herein who suddenly emerged and stepped into the road in a bid to cross. That he braked but that the plaintiff was still able to hit his car on the left side of the bonnet and fell down. That because of the rowdy motor bike riders, he decided to drive to the Nakuru Central Police station where he reported the incident under OB 15/7/7/2018. He denied over speeding at the time of the accident because there are bumps and zebra crossing at the area. In cross-examination, he denied having been under the influence of alcohol at the time of the accident. He however accepted that had he seen the plaintiff, or had he applied his brakes and stopped, then accident would not have happened.
9. In a bid to determine and or apportion liability herein, I have gone through the impressive submissions by the two learned counsel for the respective parties herein. I do agree that in an action for negligence, the burden of proof falls on the plaintiff alleging to establish each element of the tort, hence it is for the plaintiff herein to adduce evidence of facts on which he bases his claim. It must be established that there was a duty of care which was breached resulting to loss and damage to the plaintiff. The plaintiff herein therefore has a duty to prove her case on a balance of probabilities that the defendant was so negligent so as to occasion the accident that led to the plaintiff's injuries. However, once the legal burden of proof is discharged by the plaintiff, the evidential burden might shift to the defendant to prove his claim of plaintiff's sole or contributory negligence as pleaded.
10. Learned counsel for the defendant has referred me to the provisions of sections 107 and 108 of the Evidence Act which are as follows:
 - 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
11. In the case of *Muringu Kanoru Jeremiah VRS Stephen Ungu M'mwarabua* [2015] eKLR the superior court held as follows with regard to the burden of proof:

....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had



the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.

12. I also refer to The Halsbury's Laws Of England, 4th Edition, Volume 17, at paras 13 and 14: which describes it thus:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to act; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

13. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the plaintiff, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

14. In this case, both the plaintiff and the defendant were using the road herein, and more specifically at the time of the accident herein. Both therefore owed a duty of care to each other. It is common ground herein that the plaintiff was using the zebra crossing at the time. Some other vehicles had stopped for her in one of the lanes to enable her cross the zebra crossing. The defendant was therefore expected to stop to enable her complete crossing the road. The defendant's driver at the time, DW1, has however confirmed in his evidence that he did not see the plaintiff cross the road and had he seen her, he could have stopped the vehicle and that that would have been sufficient to avert the accident herein. I find this sufficient admission of the plaintiff's contention and evidence that he was negligent. He failed to give way or stop or act in any reasonable manner to avoid the accident herein. It cannot be true that it is the plaintiff who knocked herself onto his vehicle which was then moving in a slow motion as claimed in his evidence. The injuries sustained by the plaintiff herein were severe and are not consistent with ones that could be occasioned in such a manner as claimed by the defendant in his evidence in defense. I find that the plaintiff has been able to her case against the defendant herein to the required standard on balance of probability, mainly that the 2nd defendant was driving without due care and attention to other road users, failed to slow down, swerve or in any way possible maintain the motor vehicle herein so as to avert the accident herein, hit the plaintiff with the motor vehicle when she was crossing at the zebra crossing, being a designated pedestrian crossing area and when other motor vehicles had stopped to allow her cross, failed to apply brakes on time to avoid the accident etc. I thus find the defendant herein 100% liable.

15. On quantum, both parties herein agree that the plaintiff was injured in the manner as pleaded. The medical evidence adduced herein prove so. There is however no one best formula of assessing damages in injuries claims. Such assessment is an act of art rather than science. In HCCC NO. 752/1993 Mutinda Matheka Vs Gulam Yusuf that was cited by Warsame, Ag. J (as he then was) in Jenipher Milay O. Okuku Vrs Kenya Bus Services Ltd (KISUMU HC MISC. CIVIL APPL. 172/2001), it was held that the court will essentially take into account the nature of the injuries suffered, the period of recuperation etc.



16. I am also aware of the other guiding principles in awarding general damages such as: - damages should be within the limits set out by decided cases, within my pecuniary jurisdiction, within the limits that the Kenyan economy can afford and must be commensurate to the kind of injury, and extent of pain and suffering. Justice Ngugi in *Ndungu Dennis Vrs Ann Wangari Ndirangu*, [2018] eKLR, stated that the policy goal of Courts is to try to compensate comparable injuries as far as possible by comparable awards.
17. I find the authority of *Lake Naivasha Growers Vrs Muigai Thuka* [2020] eKLR, cited by the learned counsel for the Plaintiff, to be the more relevant herein. The injuries sustained by the victim therein i.e. severe soft tissue injuries of the left thigh and soft tissue injuries of the left leg, are almost similar to, if not less serious than, the ones sustained by the plaintiff herein. I therefore rely on the same to find Kshs. 250,000/= proposed by the counsel for the plaintiff to be sufficient compensation for the pain and suffering that the plaintiff underwent.
18. As to special damages, it is trite, and as correctly submitted by the learned counsel for the defence, that the plaintiff is only entitled to special damages pleaded and proved by way of evidence (usually receipts). The plaintiff pleaded the following special damages:
- a. Medical Report receipt: Kshs. 8,000/=
 - b. Filing of P3 Form: Kshs. 1,000/=
 - c. Police abstract: Kshs. 1,000/=
 - d. Medical expenses: Kshs. 2,250/=
 - e. Official search: Kshs. 573/=
- Total: Kshs. 12,823/=
24. I have gone through the exhibits produced by the plaintiff herein. I do find that only Kshs 2250/= medical expenses, Kshs. 550/- cost of official search, and Kshs. 8,000/- costs for the medical report have been proved vide PEXH NOs. 3, 7 and 9, respectively. I do therefore assess the special damages to that extent only, i.e. Kshs 10,800/=.

Conclusion and Disposal Orders.

19. Judgment is therefore hereby entered against the defendant herein, and in favour of the plaintiff herein for Kshs. 260,800/- being general and special damages. The plaintiff to also get the costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 21ST DAY OF MAY, 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

