REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL DIVISION

CIVIL APPEAL NO. 97 OF 2023

FORMERLY KIAMBU HC CIVIL APPEAL NO. E 191 OF 2021

ALFRED KINYUA MTHARI ..... 1ST APPELLANT

SIMON MUIRURI CHEGE ..... 2ND APPELLANT

VERSUS

ROSE WARUGURU MUCHEMI. ..... RESPONDENT

(Being an Appeal from Judgement of Hon. J.M Nang'ea, Chief Magistrate in Thika Civil Suit No. 654 of 2017 delivered on 14 September 2021)

JUDGEMENT

1. This appeal arises from a suit filed by the Respondent against the Appellants for:
   (i) Special Damages for Kshs 3,050/=
   (ii) General damages;
   (iii) Costs of the suit
   (iv) Interest on (i), (ii) and (iii) at court rates;
   (v) Such other and further relief that this Honourable Court may deem fit and just to grant.

2. The particulars of the suit are that on1 April 2016, the Respondent was a lawful fare paying passenger duly abord Motor vehicle registration number

KAQ 697A, which was travelling along Thika- Matuu Road, when at Leather Industries, the Appellants' driver, employee, servant or agent, so carelessly and negligently drove, controlled and/or managed the aforesaid vehicle in a manner that the same was involved in an accident. The Respondent sustained serious injuries.

3. The Appellants entered appearance and filed a Statement of Defence dated 7 November 2017, denying the allegations by the Respondent. The Appellants averred that the accident occurred purely out of and as a result of the negligence of the Respondent.

4. By a Chamber Summons dated 7 June 2019, the Appellants sought and were granted leave to issue a Third-Party Notice to Joyce Njeri Githuku and Catherine Rwamba Githuku, the alleged owners of motor vehicle registration number KAN 908Q. The Appellants averred that the said third parties were the sole cause of the accident. The record shows that the said third parties failed to enter an appearance, and interlocutory judgment was entered against them on 28 July 2020.

5. At the hearing, PW1, the Respondent, adopted her witness statement. She testified that on the material day, she was traveling in a motor vehicle that was speeding and overlapping. The passengers protested the speeding. Subsequently, the driver hit a bum and the vehicle rolled into a ditch. On cross examination, the Respondent categorically stated that she did not know if a second vehicle was involved in the accident. She could not recalls seeing any other vehicles at the scene of the accident.

6. PW2, Dr. Eunice Mugweru, a medical Doctor based at Kiambu Level 5 Hospital, testified and produced a Medico-Legal Report and a duly filled Police Medical Report (P3 Form). The P3 Form dated 25 August 2016 noted the degree of injury as grievous harm.

7. PW3, PC Charles Mwadime, a Police Officer from Thika Police Station, produced the Police Abstract. He testified that the matter was still under investigation.

8. The Appellants' opportunity to present their case was set for 25 May 2021, after several prior adjournments had been granted. The record of 25 May 2021 is illuminating. DW1, PC Denlison Mwamobe, began to testify, but was interrupted by Counsel for the Appellants, who made an application to stand down the witness because the witness was making reference to an Abstract that was not in their possession. The trial court, in a Ruling, correctly observed that the only Abstract had been issued and was already in evidence. The trial court declined the application for adjournment, directing that the hearing continues.

9. Faced with a refusal by Counsel for the Appellants to proceed, the trial court rightly exercised its discretion, declined the oral application for adjournment and deemed the defence case closed. Consequently, the Appellants adduced no evidence to rebut the Respondent's testimony, to prove their allegations of contributory negligence, or to substantiate their claim against the Third Parties.

10. Parties filed their respective submissions. In its judgement in favour of the Respondent, the trial court found the Appellants to be wholly liable, jointly and severally. The court awarded general damages of Kshs 350,000/= and special damages of Kshs 2,000/=. The Respondent was also awarded interest at court rates and costs of the suit.

11. Being aggrieved by the judgement, the Appellants lodged this appeal on the following grounds:

(i) That the learned trial Magistrate erred in fact and law and misdirected himself in finding that the Respondent is entitled to general damages of Kshs 350,000/= which amount is excessive for soft tissue injury;

(ii) That the learned trial Magistrate erred in fact and law and misdirected himself in finding the Appellant 100% liable when indeed the Third-Party motor cycle and motor vehicle registration KAN 908Q were to blame for the accident;

(iii) That the learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and liability and relevant authorities on quantum and liability cited in the written submissions presented and filed by the Appellants'

(iv) That the learned trial Magistrate proceeded on wrong principles when assessing the damages and liability to be awarded to the Respondent (to apply precedents and tenets of law applicable);

(v) That the learned trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and liability thereby arriving at a decision unsustainable in law;

(vi) That the learned trial Magistrate erred in law and in fact in arriving at his said decision;

(vii) That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice;

(viii) That the learned trial Magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

12. Parties were directed to file submissions in respect of this appeal. Despite numerous opportunities to do so, the Appellant did not file any submissions.

Analysis and Determination

13. The duty of a first appellate court is well settled. It entails revisiting, re-evaluating and considering afresh the evidence presented before the trial court for the appellate court to make its own independent conclusions

bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. This was set out in the case of ***Selle & Another vs Associated Motor Boat Company Limited, [1968] EA 123.***

14. It is trite that though an appellate court has mandate to interfere with findings of fact made by a trial court, this mandate should be exercised cautiously and only when it is clear that the trial court's decision or finding of fact was not based on any evidence or was based on a misrepresentation of the evidence or on wrong legal principles.

15. I have keenly read the contents of the Record of Appeal and the submissions by the respective parties. The appeal herein is on one issue; quantum of damages.

Liability

16. The Appellants' first ground of appeal is that the trial court erred in finding them 100% liable when indeed the third-party motor vehicle registration Number KAN 908Q was to blame for the accident. This ground of appeal is misconceived and must fail for two fundamental reasons. First, the Appellants' failure to adduce evidence is fatal to their defence. The Respondent provided a clear, consistent and *prima facie* case of negligence against the Appellants' driver. She testified that he was speeding, overlapping and subsequently lost control and rolled the vehicle. This testimony was sufficient to establish, on a balance of probabilities, the negligence pleaded.

17. The Appellants filed a defence and third-party claim alleging that KAN 908Q was to blame. These are pleadings. It is a foundational principle, as articulated by Madan, J (as he then was) in ***CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) KLR 103****,* that pleadings are not evidence. They are mere averments that must be proved by evidence.

18. The Appellants were afforded their day in court on 25th May 2021 but, through their own counsel's conduct, failed to adduce any evidence whatsoever. They did not put forth any testimony or documents to rebut the Respondent's account or to substantiate their own allegation against the Third Party.

19. The law on this is settled. Where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of facts, unsubstantiated and unproven. (See ***Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others eKLR*** and ***Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited eKLR*****).** The legal consequence is that the plaintiff's evidence, being unchallenged, is to be believed.

20. The trial court's decision to deem the defence case closed was a proper and necessary exercise of his judicial discretion and case management powers under the overriding objective of the Civil Procedure Act. The court cannot be held at ransom by a party that is unwilling or unprepared to prosecute its own case. Therefore, the court's finding that the Respondent's evidence was uncontroverted was not an error; it was the only logical and legal conclusion available to him.

21. Secondly, the Appellants misunderstand the nature of third-party proceedings. The Respondent's claim was against the Appellants. The Appellants' claim was against the Third Parties. The Respondent was only required to prove her case against the Appellants, which she did. The Respondent had no legal obligation to prove a case against the Third Parties, whom she did not sue, and whose involvement she was unaware of.

22. The Appellants' remedy for their claim that KAN 908Q was at fault was to pursue their Third-Party Notice. The trial court correctly captured this legal distinction in his judgment at paragraph 14, where he found the Third Parties

liable *"...as between them and the defendants"*. This finding did not absolve the Appellants of their primary liability to the Respondent; it merely established the Appellants' right to seek indemnity or contribution from the Third Parties for the sums they are liable to pay the Respondent.

23. The Appellants' attempt to use their own claim against the Third Party as a shield against the Respondent's valid claim is a legally untenable argument.

24. For these reasons, the Appellants' appeal on liability is wholly without merit and is hereby dismissed.

Quantum of Damages

25. The Appellants' second ground of appeal is that the award of Kshs 350,000/- in general damages was excessive for a soft tissue injury and that the magistrate failed to consider conventional awards or the Appellants' submissions.

26. The principles upon which this Court, as an appellate court, can interfere with an award of general damages are clear. The assessment of damages is a matter of the trial court's discretion. This Court will only interfere if the Appellants can demonstrate that the learned trial magistrate applied the wrong principles, such as by taking into account some irrelevant factor or leaving out of account some relevant one, or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.

27. This principle has been restated in numerous authorities, including those cited by the Respondent: ***Catholic Diocese of Kisumu vs Sophia Achieng Tele 2 KLR 55*** and **Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others KLR 457. (See *Kemfro Africa Ltd t/a Meru Express Services & Another v A.M. Lubia & Another [1982-88] 1 KAR 727*)**

28. The Appellants' entire argument on quantum is premised on their characterization of the Respondent's injuries as soft tissue injuries. From the evidence presented by the Respondent, these were not minor soft tissue injuries. Grievous harm" is a serious classification, and a deep cut on the thorax resulting in permanent and severe scarring is a significant injury that attracts more than a nominal award. The Appellants, in their submissions, appear to have ignored this crucial evidence and focused only on the abrasions. The trial court, in awarding Kshs 350,000/-, clearly did not misapprehend this evidence.

29. The only remaining question is whether the award of Kshs 350,000/= in 2021, for injuries classified as grievous harm is inordinately high. This Court has considered the authorities. In the trial court, the Appellants, relied on ***Sarah Karungari Munene v Anestar Secondary School [2020] eKLR***, where an award of Kshs 40,000/- was upheld. That case is distinguishable, as the plaintiff there suffered blunt trauma with "no broken ribs" and no mention of any permanent scarring.

30. In the trial court, the Respondent cited 2012 and 2013 authorities for awards of Kshs 350,000/-. The Magistrate's award, nearly a decade later, accounting for inflation, is *prima facie* reasonable. The trial court did not misapprehend the evidence, nor did it apply any wrong principle.

31. The appeal on quantum is, therefore, found to be without merit and is also dismissed.

32. In view of the foregoing, this appeal is hereby dismissed. Costs are awarded to the Respondent, assessed at Kshs 50,000/=.

Dated and Delivered at THIKA this 21 day of NOVEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered virtually in the presence of:

For Appellants: N/A

For Respondent: Ms Omollo h/b Gachau

Court Assistant: Lucy Mwangi