REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. E051 OF 2023

MAUREEN KAMBURA NGAI…… APPELLANT

VERSUS

ANTHONY MUGAMBI GITARI……1ST RESPONDENT

JOSEPH WAGURA GICHUKI……2ND RESPONDENT

(Appeal from the judgment of the Senior Resident Magistrate's court at Murang'a delivered by Hon. S.K Nyaga on the 26th August 2022 in Civil Suit No. E132 OF 2021)

JUDGEMENT

1. This appeal is against both liability and quantum awarded following a traffic accident claim.

2. By a Plaint dated 14th July 2021, the Appellant averred that on or around 24th December 2020 along Kenol Murang'a road, the 1st Respondent, being the driver of motor vehicle registration number KCW 594B and in which motor vehicle one Maureen Kambura Ngai, was aboard drove and managed the subject motor vehicle so negligently and carelessly that the motor vehicle veered off its lane and crashed with an oncoming motor vehicle and as a result of which Maureen Kambura Ngai was seriously injured. The Appellant had been born on 31st January 2018.

3. It was averred that the 1st Respondent's negligence was evident in the manner in which he controlled the subject motor vehicle without due regard to other road users as he was both fast and reckless. Resulting in injuries of multiple facial fractures, commuted fractures, fracture of right maxilla, tenderness of the abdomen, hematoma on the abdomen.

4. Therefore, the appellant sought special damages of Ksh. 242,290.00 comprising:

    i. Copy of motor vehicle records Ksh. 550.00
    ii. Ksh. 10,000.00 demand notice
    iii. Ksh. 229,690 medical expenses

5. Additionally, the appellant sought general damages for pain and suffering, loss of amenities and diminished earning capacity.

6. The 1st Respondent denied the claim through the statement of defence dated 1st April 2021. The 1st Respondent specifically denied ownership of the subject motor vehicle and in the alternative pleaded contributory negligence by the driver of motor vehicle registration number KBN 018T for driving at an excessive speed and failing to keep any proper control of the motor vehicle.

7. The matter proceeded to trial where PW1 Maureen Kambura Ngai testified by adopting her witness statement and bundle of documents. She stated that she is a form four student at Kanyuru Day Secondary school and was injured on her right eye and head. She found herself at Outspan hospital and the bills were paid by her aunty Betty alongside NHIF.

8. PW2 Dr. Nicholas Konge testified that she examined the appellant on 16th March 2022. She had a diagnosis of multiple facial bone fractures, head injuries, blunt abdominal trauma and soft tissue injuries. She was admitted at outspan hospital from 24th December 2020 t0 29th December 2020 and at KNH from 20th January 2021 to 1st February 2021. She had a mouth opening, malnutrition and cannot bite. Right eyebrow laceration, difficulty in hearing of the right ear. She also had a fracture of the orbit, upper jaw, blunt abdominal injury. She had undergone CT Scan, abdominal CT Scan, X ray of the mouth jaw and was

in coma. The wounds were cleaned; fractures were surgically treated and implants fixed and got antibiotics analgesics and tetanus. She had headaches and would require removal of implants. Re-examination might cost Ksh. 500,000.00.

9. DW1 Anthony Mugambi Gitari testified that on 24th December 2022 he left Nairobi at 5.00pm with PW1 and the deceased. The traffic was heavy along Thika road and it took them around 4 hours to get to the point of impact. The oncoming motor vehicle was unseen and there is nothing he would have done to prevent the accident. He was the driver of Motor vehicle KCW 594B and he has never been charged of any traffic offence arising from the accident. The accident occurred within a month of being issued with a driving license.

10. The trial court found that the 1st Respondent could not avoid the accident as the road was busy and traffic was heavy despite trying his best. Therefore, the court dismissed the case against the 1st Respondent. However, the trial court found that the 2nd Respondent was to blame for the accident and had in fact been charged accordingly.

11. Aggrieved and dissatisfied with the judgment of the trial court, the appellant lodged the instant appeal on grounds that:

    i. The learned Magistrate erred I law and fact in the manner she apportioned no liability on the 1st Respondent which was against the weight of evidence.

    ii. The learned Magistrate erred in law and fact in finding no liability on the 1st Respondent despite the 1st Respondent admitting while testifying on oath that at the time of the accident, his motor vehicle had left its lawful lane (Kenol- Murang'a)

and had encroached on the opposite lane (Murang'a- Kenol)

iii. The learned Magistrate erred in law and fact by dismissing the Plaintiff's suit while blaming the 2nd Respondent for causing the accident and failing to enter judgment on liability and quantum against the 2nd Respondent despite the 2nd Respondent having been enjoined as a party to the suit.

iv. The learned Magistrate erred in law and fact by arriving at a finding that the 2nd Respondent was charged at Kigumo law courts with careless driving without any evidence to the same effect.

v. The learned Magistrate erred in law and fact in the manner she apportioned all liability on the 2nd Respondent despite the Occurrence Book extract stating that the matter is pending under investigation and the investigating officer who visited the scene of accident had indicated that he could not determine the person who caused the accident.

vi. The learned Magistrate erred in law and fact by relying solely on the evidence of the police abstract to arrive at her finding and which abstract was filled without any investigations as to who caused the accident being carried out.

vii. The learned trial Magistrate erred in law by awarding the 1st Respondent the costs of the suit.

12. Reason wherefore the appellant prayed that the judgment of the trial court be set aside and the court reevaluate the evidence and make its own finding and judgment in regard to liability and quantum.

13. The court directed that the appeal be canvassed through written submissions.

14. The appellant submitted that the mere fact that the 1st Respondent admitted to have been in the middle of the road when the accident happened is proof that he was driving without due care and attention. Therefore, the trial court erred in dismissing the appellant's claim.

15. It was further submitted that as a result of the accident, she suffered:

    i. Lower back pains
    ii. Loss of full function of the back
    iii. Abdominal tenderness
    iv. Chest pains
    v. Right hip tenderness
    vi. Bruises on the right knee

16. Following the accident, the appellant still suffers from incessant back pains that bar her from lifting heavy loads. She therefore attends physiotherapy and counselling clinics which will cost her around Kshs. 100,000 in a year. Relying on **Sammy Machoka Oira vs Josphat Mangi Kihuro & another (2008) KLR** where the plaintiff was awarded Kshs. 1,750,000 for similar injuries, the appellant urged that she be awarded damages of Kshs. 1,500,000 special damages of Kshs. 239,076 and future medical expenses and Kshs. 100,000.

17. I have gone through all the material placed before me and I am of the view that the gravamen of the Appellant's case is whether the trial court properly directed itself in apportioning liability and whether the trial court erred in failing to make an assessment on quantum.

18. **Selle v. Associated Motor Boat Company [1968] EA 123** is probably the most pivotal authority on the review scope of the High Court as the first appellate forum for matters emanating from the sub-ordinate courts. The court stated that:

    *"…**this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."***

19. This court will therefore reevaluate the evidence on record, if necessary, to be able to arrive at an independent decision on liability.

20. I take note that in his testimony given under oath the 1st Respondent expressed that he was the driver of motor vehicle registration number KCW 594B while carrying the appellant and other passengers. At the time of the accident, he had held his license for a period of one (1) month. The trial court in its judgment took note of the same deposition.

21. By his own admission, the 1st Respondent testified that he was not on his lane. Also, he was not in a position to see any oncoming vehicle as he had not anticipated that a vehicle would emerge from anywhere, therefore, he was unable to avoid the accident as whether he swerved to the right or left, an accident would still have occurred as there was heavy traffic on the road.

22. While it is true that the traffic might have been heavy, the 1st Respondent has by his admission demonstrated that he contributed to the accident as he was not on his rightful lane. The mere fact that other motorists had overlapped

and left their legitimate lane was not a sufficient excuse for the 1st Respondent to join them in flouting traffic rules. Moreover, the fact that the 1st Respondent had been a licensed driver for only a month placed on him the huge responsibility of utmost compliance with traffic rules. It is unfortunate that his quest to join other motorists resulted in an accident where a minor's life was untimely extinguished and other passengers, including the appellant herein, suffered serious injuries.

23. In **Simba v Langat (Civil Appeal 84 of 2021) [2024] KEHC 2110 (KLR)** the High Court at Nakuru observed that:

"The basic principle underlying the defense of contributory negligence is that people should take reasonable care for their own safety as well as for that of others."

24. I am persuaded that the 1st Respondent by his own actions contributed to the accident and therefore the trial court erred in absolving him of any liability.

25. The appellant's case is that the 1st Respondent contributed to the accident by failing to keep a proper look out thus was unable to control the vehicle in a proper manner to avoid the accident.

26. Whereas the trial court absolved the 1st Respondent of liability on the fact that the 2nd Respondent had been charged. There was no evidence on record to demonstrate that indeed a person had been charged with the offence of careless driving. Without such proof, it is difficult to conclusively determine the truth of the allegation that a person, the 2nd Respondent, was indeed charged for the accident. a perusal of the police abstract shows that the matter was still marked as PUI, meaning, there was no conclusive determination on liability.

27. In any case, a police abstract in and of itself is not proof of liability, it simply demonstrates that an accident that allegedly occurred was reported to a police station. Therefore, liability has to be proved by both fact and circumstance of the accident. In the instant case, I find that the appellant's had proved their case on liability against the 1st Respondent on a balance of probability.

28. I realise that there was no representation by the 2nd Respondent, therefore, I have no benefit of his testimony regarding the manner in which the accident occurred. As a result, going by the testimony of the 1st Respondent and the appellant regarding the circumstance of the road at the time of the accident, it is evident that there was no clarity on how exactly the accident occurred.

29. In such instances, the preferred approach is as per the clear principle that where there is no conclusive proof of who caused or contributed more to the accident, the law often apportions blame between parties. This principle was established in the case of **Barclay–Steward Limited & Another Vs. Waiyaki [1982-88] 1 KAR 1118**, where the Court said:

"The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."

The Court said further: -

The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame.

In **Baker v Market Harborough Industrial Co-operative Society LTD [1953] 1 WLR 1472** at 1476, Denning L.J. (as he then was) **observed inter alia as follows:**

Every day, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them……..

See also Welch v Standard Bank LTD [1970] EA 115 at 117 and Simon v Carlo [1970] EA 285. It cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame……..”

30. In this case, the evidence does not conclusively establish exclusive fault on either side. Although the 2nd Respondent did not defend its case, the 1st Respondent admitted to have failed to keep to his lane and was unable to clearly anticipate and see any oncoming traffic. This non-compliance with the Highway Code may have affected his control of the motor vehicle at a critical moment. The trial court's decision to place 100% liability on the 2nd Respondent fails to account for these complicating factors.

31. Nevertheless, the law also holds that in the absence of clear proof pinpointing who primarily caused or contributed to the accident, liability ought to be shared. This is because

neither side provided conclusive evidence that the other was solely responsible. As a corollary, passengers, who merely boarded the motor vehicle, are to be viewed as innocent parties unless specific evidence shows they contributed to the cause of the accident. In the instant case, no evidence was led to suggest that the appellant was responsible for the accident in any way.

32. On the balance of probabilities and guided by the principle of fairness, I find that the trial court erred in apportioning 100% liability on the 2nd Respondent without any proof that he had indeed been charged with any criminal offence relating to the accident. Also, the trial court erred in absolving the 1st Respondent without conclusive evidence on the manner in which the accident occurred. The safer conclusion, consistent with the facts and the rule that doubtful or unproven causation should lead to shared liability, is to hold both parties equally responsible.

33. On the issue of quantum, I have noted that the trial court, contrary to well established principles of law, failed to make a determination on quantum.

34. The appellant relied on **Sammy Machoka Oira vs Josphat Mangi Kihuro & another (2008) KLR**. The injuries suffered by the Appellant are comparable to those suffered in the Sammy case, though the injuries in the Sammy case are a bit more serious. The Court of Appeal in **Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR** stated that ***"comparable injuries should attract comparable awards".***

35. The Court is alive to the fact that one person's injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible the injuries are comparable. From Dr. Nkonge's Medical Report it is clear that the Appellant herein sustained injuries not amounting to fractures, in which she was recovering well.

36. While appreciating that money cannot renew a physical frame that has been shattered or battered, the Appellant is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards and of course with the emphasis that an award of damages is not meant to enrich the victim but to compensate them for the injuries sustained.

37. Taking into account the injuries sustained by the Appellant as well as inflation, I find that an award of Kshs. 1,500,000.00 would be fair compensation for pain and suffering.

38. The uncontroverted testimony of Dr. Nkonge is that the appellant would incur future medical expenses of Kshs. 100,000. I therefore proceed to award the future medical expenses at Kshs. 100,000.00 as prayed.

39. The appellant is also entitled to special damages of Kshs.239,076 as pleaded and proved which I hereby award.

40. In the upshot, I find that the 1st Respondent contributed to the accident and I enter judgment as follows:

    i. The judgment of the trial court apportioning 100% liability to the 2nd Respondent is hereby set aside.

    ii. In place thereof, liability is apportioned on a 50:50 basis between the 1st Respondent and the 2nd Respondent.

    iii. Pain and suffering at Kshs. 1,500,000

    iv. Future medical expenses Kshs. 100,000

    v. Special damages Kshs. 239,076.

    vi. Each party to bear its own costs of the appeal and at the trial court.

Dated Signed and delivered virtually this 9th day of April, 2026

HON. T. W. OUYA
JUDGE

For Appellant – Mr. Muthomi Gitari
For Respondent – Ms. Olung'a for 1st Respondent
Court Assistant - Nyabuto