REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. E087 OF 2024

FELIX WEKESA WEPUKHULU ..... APPELLANT

- VERSUS -

WEBUYE T. JUNCTION JIWEZESHE

SELF HELP GROUP..... 1ST RESPONDENT

WANDERA DAVID BARASA ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. P.Y Kulecho PM delivered on 17/5/2024 in Webuye SPMCC No. E055 of 2023)

JUDGMENT

1. The appellant filed suit before the trial court vide a plaint dated **18/4/2023** claiming general and special damages for injuries sustained following a road traffic accident that occurred on **19/3/2023** at Malaha along the Webuye – Kitale road.

2. The respondents entered appearance and filed a statement of defence dated **9/5/2023** in which they denied the appellant's claim and instead claimed contributory

negligence on the appellant's part whilst also alleging fraud on the appellant's part in bringing the suit.

3. The matter proceeded to trial, and by a judgment delivered on 17/5/2024, the trial court dismissed the suit against the 2nd defendant and entered judgment against the 1st defendant as follows: -

    a) ***Liability at 100% for the appellant against the 1st respondent.***

    b) ***General damages Kshs. 150,000/-***

    c) ***Special damages Kshs. 6,690/-***

    d) ***Total = Kshs. 156,690/-.***

4. Dissatisfied with the said Judgment/decree, the appellant lodged this appeal by the Memorandum of Appeal dated 5/6/2024 and raised four (4) grounds of appeal as follows: -

    a) ***That the learned trial magistrate erred in law and in fact in dismissing the appellant's case against the 2nd respondent when the learned trial magistrate had already entered judgement for the appellant against both the respondents.***

    b) ***That the learned trial magistrate erred in law and in fact in dismissing the appellant's case against***

the 2nd respondent, when the appellant's evidence was uncontroverted.

c) ***That the learned trial magistrate erred in law and in fact in considering extraneous matters and hence arriving at a wrong decision that the identity of the driver was not known.***

d) ***That the learned trial magistrate erred in law and in fact in awarding damages that were inordinately low given the injuries that were sustained by the appellant, the authorities cited by the appellant and the rate of inflation.***

5. The appeal was disposed off by written submissions that I have duly considered.

ANALYSIS AND DETERMINATION

6. This being a first appeal, the Court is duty-bound to evaluate the evidence at the trial afresh and come to its own independent findings and conclusions. (see Selle & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123).

7. Before the trial court, the appellant gave evidence as Pw1. He adopted his witness statement dated 18/4/2023 as his evidence in chief and his list of documents as P. Exhibits 1 – 10. The appellant's testimony reiterated the averments in his plaint that on 19/3/2023 he was a lawful fare-paying

passenger in a motor vehicle registered as KBZ 461X, which was negligently driven by the 2nd respondent, causing it to lose control and roll. That, as a result of the accident, he sustained blunt injuries to the head, neck, chest, back, right elbow and right knee. That, at the time of his testimony, he had since recovered, save for occasional chest pains.

8. In cross-examination, the appellant told the court that he was seated in the rear seat and thus could not clearly see what was going on in front. He also stated that he had fastened his seat belt. The appellant then closed his case.

9. The respondents did not call any witnesses in support of their defence and elected to close their case.

10. The grounds of appeal may be summarised as ***whether the trial court erred in dismissing the suit against the 2nd respondent*** and ***whether the trial court erred in awarding damages that were inordinately low given the injuries sustained***.

11. As to whether the trial court erred in dismissing the appellant's suit against the 2nd respondent, the appellant's case was that the 2nd respondent was the negligent driver of the suit vehicle and was therefore liable for the accident. 0791429599

12. In its judgement, the trial court held that there was no evidence linking the 2nd respondent to the claim, and therefore the claim against him failed.

13. It is trite law that he who alleges must prove. ***Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya***, provides that: -

> ***"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."***

14. In Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that: -

> ***"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."***

15. Accordingly, it was the appellant's duty to produce evidence that the 2nd respondent was liable for causing the

accident that led to the injuries sustained. I have perused the documents adduced by the appellant in support of its case. None of the documents refer to the 2nd respondent as the driver of the suit vehicle. In fact, the Police Abstract, adduced as P. Exhibit 6, identified only the vehicle owner as the 1st respondent.

16. The appellant contended that the trial court erred in dismissing the suit against the 2nd respondent, despite the respondents' failure to controvert his evidence on record.

17. It is trite that where a plaintiff gives evidence in support of his case but the defendant fails to call any witness in support of its allegations, the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007, Ali-Aroni, J., citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter, Civil Appeal No. 23 of 1997, held that:

> ***"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere***

allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".

18. The fact that a defence is treated as mere allegations in no way lessens the burden on the plaintiff to prove her case. In the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR, the court stated:

> ***"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not."***
>
> ***(See Kirugi and Another v Kabiya and Others [1983] e KLR).***

19. Despite the absence of evidence from the respondents, the appellant was obliged to prove its case on the balance of probabilities. Considering the evidence adduced before the trial court, I find no evidence linking the 2nd respondent to the accident. The Police Abstract he sought to rely on did not identify the 2nd respondent as the driver of the suit vehicle.

20. Consequently, this limb of the appeal lacks merit and has to fall.

21. As to whether the trial court erred in awarding general damages that were too low, the law on the circumstances under which the court will interfere with an award of quantum by the trial court is settled. The appellate court will only interfere with the award of damages if, in exercising its discretion, the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion, resulting in injustice, as held in the cases of Mbogo & another Vs Shah (1968) EA and Mkube v Nyamuro 1983 KLR 403.

22. The principle was re-stated by the Court of Appeal in **Kemfro Africa Ltd -Vs- A.M. Lubia and Another (1988) KAR 722,** thus: -

> ***"The Principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor or left out of 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. The same position was taken in Denshire Muteti Wambui V. KPLC (2013) eKLR."

23. In the present case, the appellant proved that he sustained multiple soft tissue injuries to the head, neck, chest, back, right elbow and right knee. In his testimony, the appellant stated that he had since recovered, except for occasional chest pain. The trial court awarded Kshs. 150,000/- as general damages.

24. I have found the following cases quite helpful for comparison: -

a) In Daniel Gatana Ndungu & another v Harrison Angore Katana (2020) eKLR the respondent sustained a cut wound on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. The court set aside the finding by the subordinate court that awarded Kshs 350,000 on general damages and substituted it with an award of Kshs 140,000.

b) In Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa (2020) eKLR, the respondent suffered a blunt object injury to the lower lip, blunt object injury to the chest and blunt object injury to the left wrist and was

awarded Kshs 300,000 On appeal Nyakundi J. set aside that amount and awarded Kshs 150,000.

c) In John Wambua v Mathew Makau Mwololo & another (2020) eKLR, the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. The trial court assessed general damages for pain and suffering in the sum of Kshs. 120,000 and this was affirmed by the High Court.

d) In Charles Gichuki v Emily Kawira Mbuba & another (2018) eKLR, the respondent suffered a blunt injury (tender) on the right side of the face, a blunt injury (tender) on the shoulders, a blunt injury (tender) on the chest and a blunt injury (tender) to the left thigh. Sergon J. (as he was then) substituted the trial court's award of Kshs 400,000 with Kshs 300,000.

25. Having reviewed the decisions on comparable injuries, and although no two injuries can be exactly the same, I find that the trial court did not commit any error in assessing general damages for the injuries sustained. The trend demonstrated above is to award general damages in the range of Kshs 150,000 to Kshs. 300, 000. Taking into account inflation and the time lapse since the earlier awards were made, it is my view that an award of Kshs 150,000 was

not inordinately high to warrant my interference with the trial court's award.

26. I am therefore not persuaded that I should interfere with the trial court's award of general damages. As a consequence, the appeal herein against the quantum of damages fails.

27. The upshot of the above is that I find that this appeal lacks merit. I proceed to dismiss it with costs to the respondent.

Dated, signed and delivered virtually this 16th Day of April 2026.

R.E. OUGO

JUDGE

In the presence of:

Miss Oriko h/b for Mr. Okara -For the Appellant

Respondent – Absent

Wilkister/ Adan - C/A