REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL APPEAL NO. 17 OF 2015

MORRIS NJAGI ....1ST APPELLANT/RESPONDENT

MUNYI ALEXANDER...2ND APPELLANT/RESPONDENT

V E R S U S

BEATRICE WANJIKU KIURA...RESPONDENT

JUDGMENT

1. The respondent had filed a case against the appellants seeking damages for injuries sustained as a result of a road traffic accident on 03/02/2013 along Kenol-Sagana road. That she was a passenger in the appellants motor vehicle KAY 567R when it lost control and collided with KBM 335M causing her severe bodily injuries.

2. In its judgment, the trial court held the appellants 100% liable for the accident. On the issue of quantum, the court formed an opinion that she sustained soft tissue injuries. It awarded the respondent general damages of Kshs.400,000/= and special damages of Kshs.2,500/=.

3. The appellants have appealed against the said judgment on both liability and general damages.

4. The appeal is based on the following grounds:

a) The Learned Magistrate erred in law and in fact in disregarding the evidence adduced by the Appellants that the accident was not caused by the Appellants.

b) The Learned Magistrate erred in law and in fact in failing to consider the evidence of DWI on record and a police abstract produced as DEXH-1 and the contents of the police file clearly indicating that motor vehicle KBM 335M was to blame for the accident.

c) The Learned Magistrate erred in law and in fact in failing to consider the evidence of DW2 on record indicating that motor vehicle registration number KBM 335M was to blame for the accident.

d) The Learned Magistrate misdirected himself in determining that the Appellants were to blame for the accident, which fact was against the weight of the evidence on record.

e) The Learned Magistrate erred in law and in fact and in law in failing to consider the Appellants' submissions on liability and quantum.

f) The Learned Magistrate erred in law and in fact in making an award on liability and quantum that was so excessive as to amount to an erroneous estimate of damage payable to the Respondent.

g) The Learned Magistrate erred in law and in fact in failing to reply on the duly established legal principles in determining the award on liability and quantum and therefore arriving at the wrong decision in awarding damages that were against the weight of evidence adduced.

5. The appellant is praying that the appeal be allowed and the case against the appellants be dismissed with costs.

6. The Judgment of the trial Magistrate dated 7/5/15 be set aside and damages be assessed again. The appellant be awarded costs.

7. The appeal proceeded by way of written submissions. The appellants submissions were filed by **Kairu and McCourt Advocates** while those of the respondent were filed by **G. Ombachi.**

8. For the appellant it was submitted that they will address two issues arising from the grounds of appeal which are –

1) Liability.

2) Quantum.

9. It is submitted that there were two Civil Suits which are No. 48/2013 and 47/2013 which were consolidated for the purpose of assessment of liability. Civil Suit No. 48/2013 was used as the test suit. It is submitted that based on the evidence which was tendered before the trial court the accident was caused by the sole mistake of the driver of motor vehicle KBM 335M who encroached on the land of the Toyota Matatu KAY 567. They contend that the trial Magistrate erred in fact and law and this court ought to re-evaluate the evidence afresh and arrive at the proper conclusion with regard to causation of the accident and how liability was apportioned by the trial court. The applicant relies on the case of **Oluoch Erick Gogo –v- Universal Corporation Limited 2015 eKLR** where the Court restated the duty of the appellate court as follows:-

> "***As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of SELLE & ANOTHER-VS- ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER (1968) EA 123,, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect ……"***.

He submits that the burden to prove negligence was on the respondent and relies on **Sections 107, 108 and 109** of the **Evidence Act Cap 80 Laws of Kenya** which provides:-

> ***107. Burden of proof (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. Incidence of burden. 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.***
>
> ***109. Proof of particular fact***
>
> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

10. The appellant relies on the case of **East Produce Kenya Limited –v- Christopher Astiado Osiro in Civil Appeal No. 43/01** where the court held:-

> ***"It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku –v- Kenya Cargo Hauling Services Ltd 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."***

11. It is submitted that the negligence of the driver was not established and or determined simply because the person claiming was a passenger in the subject motor vehicle.

12. On quantum it was submitted that the applicant did not prove her case on a balance of probabilities and the issue of quantum is an academic exercise. It is submitted that the award was inordinately too high considering that the respondent sustained soft tissue injuries.

13. It is submitted that the trial Magistrate erred by relying on wrong principles to arrive at such a high award as general damages for soft tissue injuries. The applicant submits that based on some cited authorities the award of damages should be between Kshs 100,000/- and 150,000/-.

14. For the respondent it is submitted that P.M.CC Baricho Court No. 47/2013 was to apply herein for the purpose of determination of liability. He submits that the appeal is without merits and ought to be dismissed with costs.

15. I have considered the appeal. As submitted by the applicant, this being the first appellate court it has jurisdiction to consider the facts and law and make a determination. This court has to consider the evidence, evaluate it and come up with its own independent finding or uphold the finding by the trial magistrate. I only need to leave room for the fact that unlike the trial Magistrate I did not have an opportunity to see the witnesses and assess their demeanor.

The Summary of Evidence:

PW-2- Beatrice Wanjiku Kiura (the respondent herein) testified on 3/2/2013 she was a passenger in motor vehicle KAY 567R Nissan Matatu which was being driven from Nairobi towards Kianjogu. The motor vehicle was moving at a high speed. The vehicle knocked another which was coming from the opposite direction. The vehicle left its lane and knocked motor vehicle KBM 335M.

16. In cross-examination she told the court that the driver was on his lane, the left lane. That their vehicle left its lane knocked the other motor vehicle which was on the right side of the road. She maintained that it is the vehicle she was travelling in that left its lane and knocked motor vehicle KBM 335. She did not call any witness but relied on a police abstract. The abstract shows that the police intended to charge the driver of motor vehicle KBM 335M Moses Kinyanjui Mburu arising from the accident.

17. The respondent did not tell the court why the driver suddenly swerved and caused an accident.

18. The defence called Samuel Njogu Gichovi(DW-1-) who was the driver of motor vehicle KAY 567R. He testified that at the scene of the accident which was at Mrima Swara area a motor vehicle registration KBM 335M Toyota wish came from the opposite direction and was overtaking. He tried to avoid a head on collision and swerved on the left side off the road. His vehicle rolled several times. The vehicle KBM 335M followed him and hit his motor vehicle on the right side at the rear. He stated that he blamed the driver of the motor vehicle KBM 335M for the accident.

19. DW-2- is No. 69631 P.C John Mugo attached to Makuyu Traffic Base. He testified that the report which was made was that the accident occurred when the motor vehicle KBM 335M was overtaking other motor vehicles heading to Thika direction. The 'Matatu' motor vehicle was heading towards the opposite direction. The matatu moved to the extreme left to avoid head-on collision but unfortunately it was hit at the rear part and it rolled. The driver of motor vehicle KBM 335M was charged with offence of driving uninsured motor vehicle. The driver of KBM 335 M was to blame for the accident.

20. I have considered the evidence tendered. The fact of collision perse does not imply that the driver was negligent. Prove of negligence which gives rise to liability must be proved with cogent evidence. That evidence must prove that the accident was caused by an act of omission by the person who is alleged to have caused the accident.

21. The respondent in her plaint dated 16/7/2013 alleged that the driver of motor vehicle KAY 567R was negligent as he failed to maintain a proper look out was driving at a speed, drove dangerously, carelessly and recklessly. That he failed to avoid the accident and caused the accident she also relies on the doctrine of Res Ipsa Loquitor.

22. The respondent had the burden to proof that the driver of motor vehicle KAY 567R was negligent. He who alleges must proof. The issue of burden of proof is laid out under **Section 107,108 & 109 of the Evidence Act** which I have quoted above. It is the respondent who had the burden to proof that the driver of motor vehicle KAY 567R was to blame.

23. The evidence tendered by the respondent does not proof that the driver of KAY 567 R was negligent. She did not proof that the driver was driving at an excessive speed. Though she said the driver was speeding she did not tell the speed. Looking at the defence evidence speed is not what contributed to the cause of the accident. The respondent stated that the driver swerved. She did not tell the court why the driver suddenly swerved. The driver of KAY 567R gave reasons why he swerved. He stated that he swerved to avoid collision with the on coming vehicle which was at the time trying to overtake other vehicles when it was not safe to do so. The police confirmed this and blamed the driver of the motor vehicle KBM 335M for causing the accident.

24. This case is related to Civil Appeal no. 18/2015. I will therefore consider the evidence which was tendered as that I can determine the issue of liability. In Civil Case No. 48/15 the Plaintiff relied on the evidence of Beatrice Wanjiku Kiura adduced in Civil Case No. 47/2013. They also called PWIII No. 74546 P.C Rashid Hassan. A general duty Police Officer at Makuyu Police Station. He told the court that the driver of KAY 567R Toyota Matatu driven by Samuel Njogu tried to avoid a head on collusion with an oncoming motor vehicle KBN 335M Toyota Wish. He swerved on extreme left and veered off the road. From the investigations conducted the accident occurred due to over speeding and loss of control of motor vehicle KAY 567R.

25. The evidence shows that what contributed to the cause of the accident was the vehicle which was overtaking forcing the driver of KAY 567 to swerve to the extreme left. As such liability ought to have been found on the driver who was to blame for the State of affairs leading to the accident.

26. The driver of KAY 567R lost control as he tried to avoid the collusion. He swerved to the extreme left side of the road and succeeded in avoiding a head on collusion.

In **Michael Hubert Kloss & Another –v- David Soreney & 5 Others 2009 eKLR.**

On the issue of determination of liability in road traffic accident, the Court of Appeal proceeded to state;

> **The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:**
>
> ***"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it…………***
>
> ***"The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened,***

but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

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28. It is clear from the evidence tendered before the trial Magistrate that the single fact which contributed to the cause of the accident is the manner of driving by the driver of KBM 335M. Nothing pointed a finger on the driver of KAY 567 R as the one who caused the accident.

29. I find that on the evidence tendered there was no sufficient evidence to proof that the driver of motor vehicle KAY 567 R was solely to blame for the accident. He is not the one who was overtaking, there was no prove that he was driving at an excessive speed and he was lawfully on his side of the road. He tried to avoid the accident but the vehicle KBM 335M followed him and hit him at the rear.

Liability:

The respondent had the burden to proof the element of tort of negligence on a balance of probabilities. **IN TREADSETTER TYRES LTD –V- JOHN WEKESA WEPUKHULU (2010) EKLR** where Ibrahim J allowed an Appeal quoted Charles Worth & Percy On Negligence, 9Th Edition at P. 387 on the question of proof, and burden thereof where it is stated:-

> "*In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence maybe reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is infact inferred."*

30. It is upon the respondent to discharge the burden to proof negligence. The Court of Appeal in **East Produce Kenya Limited –v- Christopher Atsiado Asiro, Supra**, it was reiterated who alleges negligence bears the burden of proof, court quoted with approval the case of **Kiema Mutuku –v- Kenya Cargo Hauling's Services Ltd 1991** on the holding that ***'there is yet no liability without fault in the legal system in Kenya and the plaintiff must prove some negligence against the defendant where the claim is based on negligence'.***

31. The plaintiff failed to prove negligence. The alleged swerving has been proved to have happened due to the negligence of the driver of KBM 335M who was overtaking when it was not safe to do so as there was an oncoming vehicle. He failed to swerve, to slow down or to avoid the accident. Blame must fall where it lies. The driver of KBM 335 was at fault. Liability falls on the driver who was at fault. Fault is determined from the facts of the case. The respondent did not prove negligence on the driver of KAY 567R.

32. Having found this fact which was before the trial Magistrate, he erred by finding the driver of KAY 567R 100% liable when there was no evidence to support the finding. The burden of proof did not shift to the appellant's driver. I find that having analysed the evidence on record the respondent failed to prove on a balance of probabilities that the appellants driver was negligent. The trial court erred as, based on the evidence tendered before it, it ought not to have found in favour of the plaintiff in respect of liability. This ground must succeed.

On Quantum.

The respondent had sustained the following injuries:

a) Head injury

b) Multiple cuts and bruises

c) Right lateral penobital bruise.

d) Abrasion of the nasal passage.

33. Doctor Kane Maina (PW-2-) stated that the injuries were soft tissue in nature and she suffered physical & psychological trauma. The trial court awarded Kshs 400,000/- as general damages. The issue is whether this court should interfere with that award.

1. Damages

In the celebrated case of ***Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini –vs- A M Lubia & Olive Lubia*** **[1982-88] KLR 727** the Court of Appeal held:

> ***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 wither that 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.***

Refer to **Power Lighting Comp. Ltd & another v Zakayo Saitoti Naingola & another [2008] eKLR**

The court held;

> **On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages**
>
> **(1) Damages should not be inordinately too high or too low.**
>
> **(2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.**
>
> **(3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.**
>
> **(4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment………..**
>
> **This court has taken note of the court of appeal decisions to the effect that an award of damages is a matter of the courts discretion and can only be interfered with if among others**
>
> **- The award is inordinately too high or too low.**
>
> **- It is based on cursory principles. The principles applied by the lower court in the assessment was that of taking a narrative of the injuries by the witnesses**
>
> **- Calling for proof of the same by visual observation if pointed out and medical records**
>
> **- By seeking guidance from other decisions and this is what the learned trial magistrate did and this is evident on the record. The court, therefore makes a finding that no wrong principles was applied in the assessment on quantum.**

34. The trial magistrate captured the injuries sustained and the cited cases. He stated the respondents did not file any submission on the issue of quantum in this matter and the submission in **Civil Suit No. 48 of 2013 (Appeal No. 18 of 2015)** indicates an award of 300,000/= would be reasonable. Perusing through the submissions in that case, the authority relied upon by the appellants in that case was in regard to a fracture.

35. The appellants have therefore proved that the trial court *proceeded on wrong principles* by taking into account some irrelevant factor, adopting the wrong approach and/or *misapprehended evidence so as to arrive at a wrong figure.*

Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR

The Court in allowing appeal on quantum stated;

> **Secondly, if one takes into consideration the actual injuries suffered by the Respondent – to wit soft tissue injuries to the lower right leg and to the back – it becomes readily obvious that an award of Kshs. 300,000/= is manifestly excessive.**
>
> **Given the policy goal of Courts to try to compensate comparable injuries as far as possible by comparable awards, these two factors call for this Court to revise the quantum awarded to the Respondent. In my view an award of Kshs. 100,000/= would be adequate to compensate for the injuries suffered in this case.**
>
> T*he award of damages was inordinately high so as to represent an entirely erroneous estimate of damages. An award of damages is meant to compensate for the injuries but not to enrich. The principles are that they need not be too high or too low as to be erroneous and must be based on relevant factors. The damages awarded must be based on the injuries suffered, the extent and the effect they may have on the plaintiff. Past decisions must be taken as guides but the court exercises discretion to determine the Quantum of damages based on the circumstances of the case.*

36. In this case the Quantum of damages was too high and erroneous as it was based on an irrelevant factor, based on a past decision where quantum was based on injuries including fractures. This court has therefore reason to interfere with the award by the trial Magistrate. The appeal on Quantum succeeds. I find that since the respondent sustained soft tissue injuries an award of Kshs 100,000/- as general damages for pain and suffering would have been reasonable and adequate.

In Conclusion:-

For the reasons I have stated the respondent having failed to proof negligence against the appellant driver, her claim was unsustainable. The appeal succeeds. I order as follows:-

1. The appeal is allowed.

2. The Judgment of the trial Magistrate is set aside and substituted with an order dismissing the plaintiff’s case.

3. I award the costs of the appeal to the respondent.

Dated at Kerugoya this 14th Day of November 2019.

L. W. GITARI

JUDGE