



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A)**

**CIVIL APPEAL NO. 294 OF 2016**

**BETWEEN**

**GIDEON NDUNGU NGURIBU.....1<sup>ST</sup> APPELLANT**

**PAUL KARIUKI WANJOHI.....2<sup>ND</sup> APPELLANT**

**AND**

**MICHAEL NJAGI KARIMI.....RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at*

*Nairobi (Waweru, J.) dated 22<sup>nd</sup> August, 2013*

*in*

*H. C. C. No. 889 of 2004)*

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**JUDGMENT OF THE COURT**

1. On 23<sup>rd</sup> June, 2002 at around 8:00 p.m. **Michael Njagi Karimi** (the respondent) was waiting to cross the road at Waiyaki Way along the Nakuru/Nairobi road when he noticed a motor vehicle approaching from Nakuru direction being driven at high speed. Suddenly, the vehicle lost control and veered off the road hitting him. Four days later he woke up at Kenyatta Hospital with severe injuries. He was not only hospitalized for a period of over six months but it also took him almost one year before he could walk without any assistance.

2. At the hospital he learnt from **PC Justus Chimbevo** (PW2) that he was hit by motor vehicle registration number KAL O17L which was at the time being driven by **Gideon Ndungu Nguribu** (1<sup>st</sup> appellant). It was the 1<sup>st</sup> appellant who had reported the incident at the police station. Subsequently, the respondent filed suit in the year 2004 against the 1<sup>st</sup> appellant claiming damages for the injuries he sustained as a result of the accident.

3. It appears that the respondent filed an amended plaint on 4<sup>th</sup> July, 2005 enjoining **Paul Kariuki Wanjohi** (the 2<sup>nd</sup> appellant) who was the registered owner of the vehicle in question claiming that he was

vicariously liable for the 1<sup>st</sup> appellant's negligence. In his plaint, the respondent set out the particulars of negligence against the 1<sup>st</sup> appellant, that is, he failed to drive the motor vehicle with care and attention; drove beyond the legally permitted speed and failed to take care of other road users. He also pleaded *res ipsa loquitor*.

4. In their joint statement of defence, the appellants denied the allegations made by the respondent. They challenged the competency of the amended plaint on the ground that it had been filed without leave of the court and enjoined the 2<sup>nd</sup> appellant against whom the cause of action was time barred. The appellants denied that the accident occurred as portrayed by the respondent. They attributed the accident to negligence on the part of the respondent and/or his agents. In particular, they set out the following particulars: -

***(a) Placing a tyre in the middle of Waiyaki Way in order to stop, slow down and/or ambush the 1<sup>st</sup> defendant (1<sup>st</sup> appellant).***

***(b) Approaching the 1<sup>st</sup> defendant in his car while armed and knocking his car window with an object with the intension of smashing it and/or attempting to hijack the motor vehicle to steal from the 1<sup>st</sup> defendant.***

***(c) Standing in the path of the motor vehicle KAL 017L in order to prevent the 1<sup>st</sup> defendant from escaping and/or driving off.***

5. At the trial, **Dr. James Otieno Ochieng** (PW1), a consultant orthopedic surgeon, produced two medical reports he had prepared after examining the respondent on two occasions, that is, 27<sup>th</sup> November, 2004 and 9<sup>th</sup> May, 2011. He testified that the respondent had sustained severe injuries and had undergone a series of operations prior to his discharge from hospital. In addition, he was required to undergo several more surgeries to remove mental implants and correct deformities. He gave two estimates for the cost of operations to be undertaken in future as Kshs. 500,000 and Kshs. 850,000 at the Kenyatta Hospital and a private hospital respectively. He finally assessed the respondent's overall incapacity as 35%.

6. Apparently, after two of the respondent's witnesses had testified the respondent filed an application on 6<sup>th</sup> June, 2011 seeking *inter alia*: -

***(i) Leave to file suit out of time against the 2<sup>nd</sup> appellant.***

***(ii) Amended plaint filed on 4<sup>th</sup> July, 2005 be deemed as properly filed.***

The application was premised on the grounds that a motor vehicle search revealed the 2<sup>nd</sup> appellant was the registered owner of the vehicle in question; it was crucial for the 2<sup>nd</sup> appellant to be enjoined since he was vicariously liable for the 1<sup>st</sup> appellant's conduct; the respondent's former advocate inadvertently filed the amended plaint without seeking the requisite leave; and the appellants' did not stand to suffer any prejudice. The application was heard *ex parte* before Mwera, J. who allowed the same on 7<sup>th</sup> June, 2011.

7. When the respondent took to the stand, the appellants' advocates brought the *ex parte* leave which they deemed as irregular to the attention of the trial Judge. In his own words the trial Judge expressed:-

***"As hearing of the suit had already commenced it would have been prudent to serve the application upon the defendants. Further, it is an application that ought to have been referred to the Judge already seized of the matter to deal with in the interest of good orderliness in handling court business.***

***Be that as it may, let the application be forthwith served upon the defendants counsel so that if he is so minded he will be placed to challenge the leave granted during cross examination of the***

***plaintiff.”***

8. The issue was never raised again even during cross examination of the respondent. After the respondent gave his testimony, his case was closed. The appellants elected to close their case without giving any evidence. Upon weighing the evidence on record, the trial Judge (Waweru, J.) entered judgment in favour of the respondent on 22<sup>nd</sup> August, 2013 in the following terms:-

***“In summary I will enter judgment for the plaintiff against the defendants jointly and severally as follows:-***

***(i) For pain, suffering and***

***loss of amenities: Kshs.2,000,000.00***

***(ii) For future medical***

***treatment Kshs. 550,000.00***

***(iii) Special damages: Kshs. 123,567.50***

9. It is that decision that provoked the appeal before us which was based on a total of 15 grounds which can be aptly summarized as:-

***The learned Judge erred in law and fact by -***

***(a) Finding that the appellants were 100% liable.***

***(b) Failing to appreciate that there was evidence of contributory negligence on the part of the respondent.***

***(c) Holding that the 2<sup>nd</sup> appellant was vicariously liable.***

***(d) Relying and rendering judgment on the basis of defective pleadings.***

***(e) By shifting the burden of proof to the appellants.***

***(f) Assessing and awarding excessive and unreasonable damages against the weight of the evidence before him.***

10. While emphasizing that the trial Judge erred in relying on defective pleadings, Mr. Kinyanjui, learned counsel for the appellant, reiterated that the amended plaint was filed without leave of the court. To make matters worse, the respondent applied for the said leave six years after filing the defective amended plaint; the *ex parte* leave granted by Mwera, J. was irregular and aimed at denying the appellants an opportunity to challenge the same. He argued that despite the trial Judge acknowledging the foregoing he went on to proceed with the hearing and rendered his judgment. Accordingly, the proceedings thereto were null and void. Mr. Kinyanjui added that the least the trial Judge ought to have done is to have directed the hearing to start *denovo* so as to give the 2<sup>nd</sup> appellant an opportunity to cross examine the respondent's witnesses.

11. He took issue with the trial Judge finding that the appellants were 100% liable yet in his view, this was contrary to the weight of the evidence before him. He argued that during cross examination the respondent admitted that he was in a hurry to cross the road thus, it followed that he contributed to some extent to the accident. Moreover, the trial Judge erred in finding that the appellants had not tendered any evidence in support of their allegations. The Occurrence Book which was produced before the trial court corroborated the appellants' version of how the accident occurred. According to him, the trial Judge in

holding that the appellants had not proved their case simply for the reason that they did not testify was tantamount to the trial Judge shifting the burden of proof to the appellants contrary to the law.

12. Mr. Kinyanjui faulted the learned Judge for awarding what he termed as excessive damages without any justification. Last but not least, he contended that the impugned judgment was delivered two years after the close of the hearing contrary to **Order 21 Rule 1** of the **Civil Procedure Rules** which stipulates that a judgment ought to be delivered within 60 days of the close of hearing.

13. In response, Mrs. Gichuhi, learned counsel for the respondent, submitted that the trial Judge properly evaluated the evidence before him and arrived at the correct conclusion. There was overwhelming evidence that the 1<sup>st</sup> appellant was 100% liable. In any event, the appellants never proved the allegations set out in the statement of defence. She contended that the 2<sup>nd</sup> appellant was not ambushed and in fact the appellants defence was based on the amended complaint. Be that as it may, the order granting leave to the respondent to file suit against the 2<sup>nd</sup> appellant out of time was never challenged by way of an appeal or during the hearing of the suit. Consequently, the issue was moot. As far as she was concerned, pleadings could be amended at any stage of the proceedings.

14. At one point Mrs. Gichuhi argued that the award of damages ought to be enhanced. Without giving too much consideration to this submission, it is not in dispute that the respondent did not file a cross of appeal but filed a notice affirming the trial Judge's decision. It is therefore not open for her client at this stage to challenge the trial Judge's decision. In Mrs. Gichuhi's view, the delay in delivery of the judgment by itself did not render the same illegal or unlawful. She urged us to dismiss the appeal.

15. We have considered the record, submissions by counsel and the law. This is a first appeal and on the authority of among other decisions ***Selle vs Associated Motor Boat Company Ltd. [1968] EA 123***, this Court has the duty of re-evaluating the evidence, assessing it and making its own conclusions without overlooking the conclusions of the trial court. Whilst bearing in mind that unlike the trial court we neither saw nor heard the witnesses.

16. Generally speaking amendments to pleadings ought to be allowed where such amendments facilitate the determination of the issue in dispute. This much was appreciated in ***Eastern Bakery vs Castelino [1958] E. A. 461*** and ***Halsbury's Laws of England, 4<sup>th</sup> Ed. (re-issue), Vol. 36(1)***. In the case before us it is not in dispute that the respondent filed the amended complaint on 4<sup>th</sup> July, 2005 without leave of the court. It is on that basis that the appellants in their defence dated 11<sup>th</sup> August, 2005 averred they would apply for the suit against the 2<sup>nd</sup> appellant to be struck out. It was not until 25<sup>th</sup> May, 2011 that the appellants made the said application when the matter came up for hearing. The trial Judge held: -

***"I will not allow this trial to be sabotaged. I refused adjournment in the morning. This suit was filed in 2004. Any application to strike out should have been brought a long time ago. Hearing to proceed."***

17. To the best of our knowledge and having perused the record, the appellants neither sought to set aside the above ruling nor appealed against it. As it stood, that decision dispensed with the issue of striking out the amended complaint. It could not be properly raised at this stage. Equally, the ruling by Mwera, J. dated 7<sup>th</sup> June, 2011 granting leave to the respondent to file suit against the 2<sup>nd</sup> appellant out of time and deeming the amended complaint as properly filed was not set aside or appealed against. Unlike the trial Judge, we find that such leave could only be set aside by the appellants' filing an appropriate application for review or by lodging an appeal. The learned Judge had no jurisdiction to deal with the same at the trial since it would have been tantamount to sitting on appeal against a decision of a court with concurrent jurisdiction. We also find that the 2<sup>nd</sup> appellant was not prejudiced by the leave granted since it is clear that the appellants' defence was based on the amended complaint.

18. The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in ***Stapley vs 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.”***

19. In this case there were specific acts of negligence pleaded by both parties in their pleading and the onus was on them to prove those allegations on a balance of probabilities. Taking into account the foregoing, we concur with the following findings by the trial court:-

***“We have only the uncontroverted testimony of the Plaintiff as to how the accident occurred. That testimony was that the accident vehicle for some reason veered off the road and found the Plaintiff standing on the central reservation dividing the dual carriage-way and there knocked him down. No reason was given to court why the 1<sup>st</sup> Defendant who was the driver of the vehicle did not testify. He had the opportunity to explain how the accident might have occurred. Vehicles do not ordinarily veer off the road without reason. The Defendants pleaded in their defence that some obstruction in the form of a tyre had been placed in the middle of the road thus forcing the 1<sup>st</sup> Defendant to swerve in order to avoid it, and presumably thereby going off the road.***

***However, this was a mere allegation that was not supported by any evidence. The Plaintiff specifically denied that there was any such obstruction placed on the road. He also testified that the 1<sup>st</sup> Defendant was driving at a high speed.***

***Upon the evidence now before the court the only irresistible conclusion to be drawn is that the 1<sup>st</sup> Defendant at the time of the accident was driving without due care and attention, thus causing his motor vehicle to veer off the road and find the Plaintiff where he was standing, and there knocking him down. I find that the accident was caused by the sole negligence of the 1<sup>st</sup> Defendant. The alleged contribution of the Plaintiff to the happening of the accident was not supported by any evidence and I reject it.”***

20. On the issue of assessment of damages, it is trite that in making such an assessment a Judge exercises discretionary jurisdiction which should always be based on sound legal principles and the evidence. This Court while discussing when it can interfere with such discretion in Ali vs Nyambu t/a Sisera Store [1990] KLR 534 at page 538 quoted with approval the principles laid down by the Privy Council in Nance vs British Columbia Electric Railways Co. Ltd. [1951] AC 601 at page 613 where it held that:

***“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint vs Lovell [1935] 1KB 354) approved by the House of Lords in Davis vs Powell Duffryn Associated Collieries Ltd. [1941] AC 601.”***

See also *Kemfro Africa Ltd t/a Meru Express Service, Gathogo Karimi vs A. M. Lubia and Another [1982 - 88] 1 KAR 727.*

21. The injuries sustained by the respondent were set out in the medical report produced by Dr. James thus:-

*(i) Bruises, swelling and tenderness of the right arm and forearm and a displaced fracture of the right humerus.*

*(ii) Deformity and swelling of the right forearm and fractures of the right radius and ulna with displacement.*

*(iii) Injury to the right lower limb involving the right leg which was tender, swollen and deformed. X-ray examination showed a fracture of the right tibia and fibular.*

*(iv) Swelling and deformity of the left thigh with apparent shortening; x-ray revealed a segmental fracture of the left femur with marked displacement.*

In light of those injuries coupled with the extended hospitalization, future medical needs of the respondent and comparable awards given in respect of similar injuries, we see no reason to interfere with the trial Judge's assessment of damages for pain and suffering. There is also no reason to upset the special damages issued.

22. With regard to the delay in delivery of the judgment, this Court considered a similar situation in the case of *Nyagwoka Ogora alias Kennedy Kemoni Bwogora vs Francis Osoro Maiko - Civil Appeal No. 271 of 2000 (unreported)* and had the following to say:

*"The real question is what is the consequence of non-compliance therewith" No doubt that rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if noncompliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void IPSO facto. The rule cannot and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while noncompliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officer concerned from those in-charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal."*

23. Whereas we feel the lengthy delay here was not warranted and would urge judicial officers involved in the hearing of cases including applications to ensure compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, we feel the same as was felt in *Ogora's case (supra)* that it would create injustice and confusion in the court corridors if non-compliance were to be met with orders declaring such judgments or rulings void.

24. In the end, we find that the appeal lacks merit and is hereby dismissed with costs.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of October, 2017.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**