REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 37 OF 2018

BETWEEN

CHARLES OKWOYO GETUME.....APPELLANT

AND

CAROLINE NYANGARISA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E.A. Obina, SRM dated 25th April 2018 at the Magistrates Court at Kisii in Civil Case No. 203 of 2017)

JUDGMENT

1. Following a road accident that took place on 16th March 2017 at Daraja Mbili – Nyamataro Road in Kisii, the respondent was injured and claimed damages from the appellant who was the owner of motor vehicle registration number KCH 392D which collided with motor vehicle KBL 367A in which she was a passenger. The trial magistrate found the appellant fully liable and awarded the respondent Kshs. 300,000/- and Kshs. 7,050 as general and special damages respectively.

2. The appellant now appeals against the trial court's finding on liability and quantum of damages. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see ***Selle and Another v Associated Motor Boat Company Ltd*** **[1968]EA 123**)

3. I will deal with the issue of liability first. In the plaint, the respondent stated that on the material day she was travelling as a lawful passenger in motor vehicle KBL 367A when the driver of motor vehicle KCH 329A negligently drove it causing it to lose control and collide with motor vehicle KBL 367A.

4. The substance of the appellant's defence is that he blamed the respondent and or the driver of motor vehicle KBL 367A.

5. At the hearing the respondent testified and called one witness while the appellant did not testify or call any witness. The respondent (PW 1) testified as follows, *"I was travelling from Kisii to Kerina on the Kisii Migori Road. I was in KBL 367A. I did not reach safely. A motor vehicle came from ahead. It knocked us. It was KCH 392D …. I blame Charles the driver came to our side. He left his lane ….."* In cross-examination, she recalled that, *"It was a head on collision. We were on the left side of the road. He came on our side. I saw him coming. I was behind the driver."* PC Caleb Osodo (PW 2, attached to Kisii Central Police Station, testified that motor vehicle KBL 367A, a Toyota Matatu was being chased by auctioneers and was evading arrested when it collided with motor vehicle KCH 392.

6. The trial magistrate held that the respondent was a passenger and since the appellant appeared to be blaming a third party for the accident, it should have taken out third party proceedings.

7. Mr Otieno, counsel for the appellant, attacked the judgment on the basis that from the circumstances of the case, the appellant was blameless as the accident was caused by collision caused by the third party being chased by an auctioneer. In his view, since the respondent did not attribute or prove any fault on the part of the appellant the issue whether the appellant should have joined the third party was moot as negligence was not proved. Mr Otieno alluded to the decision of the Court of Appeal in ***Kiema Muthuku v Kenya Cargo Handling Services Ltd*** **[1991] 2 KAR 258** where Omolo Ag. JA stated as follow;

[I]t was for the appellant to prove, of course on a balance of probability, one of the forms of negligence as was alleged in the plaint. Our law has not yet reached the stage of liability without fault. The appellant clearly failed to prove any sort of negligence against the respondent and in my respectful view his claim was rightly dismissed ..

8. Mr Ochoki, counsel for the respondent, countered that the respondent proved her case and that the trial magistrate was correct in concluding that in order to apportion liability or find the third party liable, the appellant had to take out third party proceedings.

9. I have evaluated the evidence and I take the following view of the matter. PW 1 testified that she saw motor vehicle, KCH 392D coming towards them. Since it was a head on collision, it is difficult to see how the driver of the appellant's motor vehicle could not have seen it in order to avoid the collision. In my view, the mere fact that the third party vehicle was being chased by auctioneers did not absolve the appellant's driver from taking due care and attention. I therefore hold that the appellant was liable.

10. It follows that to enable the court apportion liability, the appellant ought to have taken out third party proceedings. By failing to do so, the court was left with no option but to hold the appellant fully liable and I so find. I would adopt the observation by Kimaru J., in ***Pauline Wangare Mburu v Benedict Raymond Kutondo*** **NKU HCCC No. 210 of 2003 [2005]eKLR** that:

[T]he defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability. [Emphasis mine]

11. The same point was made by the court in the case cited by the appellant before the trial court, ***Benson Charles Ochieng and Another v Patricia Atieno*** **BSA HCCA No. 69 of 2010 [2013]eKLR** where it was held:

According to the Appellants, the trial court erred when it held the Appellants solely liable for the accident yet there was evidence that the accident was substantially contributed by the negligence of the third-party motor vehicle. It is trite law that a party is bound by his pleadings. In this appeal, although the Respondent did not sue the owner of the third-party motor vehicle together with the Appellants, upon being served with the suit, it was incumbent upon the Appellants to seek the leave of the trial court to issue third-party notice to the owners of the third-party motor vehicle. The Appellants did not do this. Instead, they argued that that duty was on the Respondent. This court was not persuaded by this argument. Any person who is of the view that it ought to enjoin another party to the proceedings as being the person who was responsible for the act or omission that is subject of the suit, is required to make such application before the trial court.

12. I now turn to the issue of quantum of damages. It is well established that for the appellate court to interfere with an award of damages it must be shown that the trial court, in awarding of the damages, took into consideration irrelevant factors or failed to take into account relevant factors or the sum awarded is inordinately low or high so as to lead to the conclusion that the award was a wholly erroneous estimate of the damage. The appellant may also establish that a wrong principle of law was applied (see ***Butt v Khan*** **[1981] KLR 349).**

13. In the plaint, the respondent pleaded that she sustained blunt trauma on the chest, bruises on the left leg and blunt trauma to the mouth. PW 1 testified that she was treated at Iyabe Sub-County Hospital and at the time of the hearing she was not fully healed and had a chest and leg ache. Dr Morebu Peter Momanyi prepared a report which was admitted by consent. He examined PW 1 on 13th April 2017. He confirmed that the injuries sustained by the appellant and noted that at the time she was complaining about her inability to chew food due to pain on the upper and lower gums. He concluded that the respondent sustained severe multiple injuries which were in the process of healing.

14. The parties filed written submission before the trial court. The respondent suggested that Kshs. 500,000/- was adequate compensation in the circumstances. She relied on ***Charles Maati Onyancha v Ndungu Transport Company Limited*** **KSI HCCC No. 198 of 2002 [2004]eKLR** where the plaintiff sustained a cut wound above the left eye and a brain concussion. He was awarded

Kshs. 400,000/- in 2004. In ***Pan Paper Mills [EA] Limited and Another v Asha Hassan*** **ELD HCCC No. 204 of 2004 [2007] eKLR**, the plaintiff sustained a cut wound on the left eye, severe blunt trauma to the left shoulder, severe blunt trauma to the right leg, dislocation of the left wrist joint, severe blunt trauma to the chest, severe injuries incurred during and the accident. The court affirmed an award of Kshs. 300,000/- in 2007.

15. The appellant submitted that Kshs. 100,000/- was reasonable and relied on ***Benson Charles Ochieng and Another v Patricia Atieno*** **(Supra)** where plaintiff sustained a swollen forehead which was tender with a haematoma, a swollen and tender neck, blunt trauma to the chest which was tender, both hip joints and knees were swollen and tender and a cut wound on the left. The court affirmed an award of Kshs. 120,000/- in 2013. In **Michael Kariuki Muhu v Charles Wachira Kariuki and Another NRB HCCA No. 415 of 2010[2015]eKLR** where the court affirmed an award Kshs. 120,000/- in 2015 where the plaintiff sustained a deep cut wound on the forehead, blunt hip injury and pain following blood loss.

16. Counsel for the respondent cited the case of *Sosphinaf Company Limited v James Gatiku Ndolo* NKR CA Civil Appeal No. 315 of 2001 [2006]eKLR where the Court of Appeal observed that:

The assessment of damages for personal injury is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous awards and principles developed by the courts, ultimately what is a reasonable award is an exercise of discretion by the trial judge and will invariably depend on the peculiar facts of each case.

17. I have considered the injuries sustained by the respondent. They were classified by Dr Morebu as severe multiple soft tissue injuries which would gradually heal. At the time of the hearing, the respondent no longer complained of her inability or difficulty in chewing food. I note that in his decision, the learned trial magistrate did not set out how he derived the final award from the decisions cited by the parties. The cases cited by the respondent, which reflected higher awards, were older cases than those cited by the appellant which were more recent and reflective of current trends. I therefore find the sum of Kshs. 300,000/- on the higher side and reduce the same to Kshs. 200,000/- which I now award as general damages.

18. In conclusion I affirm the trial court's finding on liability and set aside the award of Kshs. 300,000/- as general damages. I substitute the same with an award of Kshs. 200,000/-.

19. As the appeal has been partially successful, I make no order as to costs.

DATED and **DELIVERED** at **KISII** this **21st day of DECEMBER 2018.**

D.S. MAJANJA

JUDGE

Mr Otieno instructed by O.M. Otieno and Company Advocates for the appellant.

Mr Ochoki instructed by Ochoki and Company Advocates for the respondent.