**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 299 OF 2019**

**LAWRENCE KANAI GATHUNYA.....APPELLANT**

**-VERSUS-**

**LISBETH MUTHENYA.....RESPONDENT**

***(Being an appeal against the judgment and decree delivered by Hon. S.G. Gitonga (Mrs.) (Senior Resident Magistrate)***

***on 24th May, 2019 in Milimani CMCC no. 5850 of 2017)***

**JUDGMENT**

1. Lawrence Kanai Gathunya, the appellant herein, filed a suit against the respondent and sought for both general and special damages plus costs of the suit and interest thereon.

2. The appellant pleaded in his plaint that sometime on or about the 9th of March, 2016 he was travelling as a lawful passenger aboard the motor vehicle registration number KCF 370K ("the subject motor vehicle") along the Eastern By-Pass when the respondent lost control, resulting in an accident which left the appellant with serious bodily injuries.

3. The appellant attributed the accident to negligence on the part of the respondent by setting out the particulars thereof in his plaint.

4. Upon service of summons, the respondent entered appearance and filed her statement of defence to deny the allegations set out in the plaint.

5. At the hearing of the suit, the appellant testified and called one

(1) additional witness whereas the respondent testified for the defence case.

6. In the end, the trial court dismissed the appellant's suit with no order on costs in the judgment delivered on 24th May, 2019.

7. The aforementioned judgment is now the subject of the appeal before this court. To challenge the judgment, the appellant has put forward the following grounds of appeal vide his memorandum of appeal dated 31st May, 2019:

***i. THAT the learned trial magistrate erred in law and in fact and misdirected herself by failing to consider the submissions filed by the parties and particularly the respondent's submissions wherein she had admitted liability at 50%.***

***ii. THAT the learned trial magistrate erred in law and in fact by failing to critically analyze the evidence adduced by the parties thereby arriving at a wrong judgment.***

***iii. THAT the learned trial magistrate erred in law and in fact by making a findings which were not supported by the evidence on record.***

8. This court directed the parties to file written submissions on the appeal.

9. On liability, the appellant submits that the trial court ought to have taken note of the fact that the respondent admitted partial liability in her submissions and therefore ought to have entered a finding of liability against the respondent, thereby citing the case of **C. Mehta and Company Limited v Barclays Bank of Kenya Limited [2019] eKLR** where the court held that:

***"Having carefully considered the words used in the aforesaid letters amongst others, I am convinced that the defendant actually admitted having wronged that plaintiff. In fact, the defendant exonerated the plaintiff from any wrong doing. In my view, I think the aforesaid letters can be treated as admissions which at the same time act as a mitigating factor. I am satisfied that the defendant admitted liability."***

10. The appellant also submits that the trial court ought to have found that it is the negligent acts of the respondent that resulted in the accident and consequent injuries to the appellant and that the respondent had changed her story numerous times in the course of her testimony as well as at the submission stage.

11. It is the contention of the appellant that he could not have contributed to the accident in any way since he was a mere passenger in the subject motor vehicle and that the mere fact that he did not summon the investigating officer to give evidence could not in itself have been fatal to his case. To buttress this point, the appellant cites the case of **Techard Steam & Power Limited v Mutio Muli & Mutua Ngao [2019] eKLR** in which the court reasoned thus:

***"However, proof of negligence being on a balance of probabilities does not solely depend on the evidence of the investigation officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims."***

12. The appellant is therefore of the view that the trial court ought to have been more convinced by the version of events presented by him as opposed to that given by the respondent.

13. On quantum, it is the contention of the appellant that an award of Kshs.800,000/= would have sufficed on general damages for pain, suffering and loss of amenities, with reliance on the case of **Vincent Mbogholi v Harrison Tunje Chilyalya [2017] eKLR** where the court awarded the sum of Kshs.500,000/= for a fracture of the left tibia leg bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe.

14. The award which would have been made on special damages was not challenged by the appellant.

15. On her part, the respondent simply argues that the appellant did not satisfy the standard of proof for negligence and cites among others, the case of **Timsales Ltd v Willy Nganga Wanjohi [2006] eKLR** where the court rendered that in a claim for negligence, the onus is on the plaintiff to prove that the accident and injuries sustained were the result of negligence on the part of the defendant.

16. The respondent concludes with the submission that the appeal is without merit and therefore warrants a dismissal with costs.

17. I have considered the rival written submissions on appeal. Moreover, I have re-valuated the evidence which the trial court had the opportunity to consider.

18. It is clear that the appeal lies against the findings on liability and quantum. It is thus appropriate for me to address the appeal under the two (2) heads, beginning with liability.

19. In his evidence as PW1, the appellant stated that on the material date, he was at the bus stage at Joska waiting to board a matatu when the respondent offered him a lift in the subject motor vehicle, where he sat at the back seat and wore his safety belt.

20. The appellant stated that as they approached Triple O Hotel on the Eastern By-Pass, the respondent attempted to overtake another vehicle when they were met with an oncoming lorry, following which the respondent swerved to the right and hit an electricity pole.

21. In cross-examination, it was the testimony of the appellant that though he did not know the respondent personally, they lived in the same estate.

22. It was also the testimony of the appellant that the respondent swerved to the right to avoid hitting the oncoming lorry which had its lights on.

23. In re-examination, the appellant testified that he only saw the lorry suddenly upon the respondent's attempts to overtake a probox which was ahead of the subject motor vehicle.

24. P.C. Dominic Talam who was PW2 produced the police abstract as an exhibit and stated in his evidence that the accident was self-involving in nature.

25. In cross-examination, the witness stated that he was not the investigating officer and that he could not explain the circumstances surrounding the accident.

26. The witness further stated that he had no knowledge of the contents of the investigation file and that he also could not tell who had visited the scene of the accident.

27. In re-examination, it was the evidence of PW2 that the accident occurred on the right side of the road.

28. The respondent who was DW1 testified that on the material date she gave the appellant a lift on her way to work and that she was driving on the left side of the road at all material times when she noticed an oncoming trailer approaching the subject motor vehicle.

29. The respondent testified that she tried to flash her headlights at the oncoming trailer but that the driver did not move, thereby forcing her to swerve off the road to avoid a collision, hitting an electricity pole instead.

30. The respondent denied overtaking another vehicle as alleged by the appellant and stated that there was no vehicle ahead of her.

31. In cross-examination, it was the evidence of the respondent that she was familiar with the route used and that she was driving at a speed of 50km/hr.

32. It was also the evidence of the respondent that at first, she swerved to the left side but on noticing a ditch, changed course to the right side where she knocked the electricity post. This was echoed in re-examination.

33. On her part, the learned trial magistrate reasoned that from the evidence tendered, the circumstances surrounding the occurrence of the accident remained unclear and there was nothing to indicate who was to blame for the accident.

34. On that basis, it was the learned trial magistrate's finding that the appellant failed to discharge the burden of proof for the claim of negligence, consequently dismissing the suit.

35. Upon my re-examination of the evidence tendered before the trial court, I observed that it is not in dispute that the accident occurred involving the subject motor vehicle. It is also not in dispute that the appellant was a passenger aboard the subject motor vehicle and sustained injuries on the material date and that the respondent was the driver at all material times.

36. This brings me to the question of negligence which will in essence answer the question of liability.

37. The appellant on the one hand stated that the respondent was attempting to overtake a lorry/trailer when the accident took place and which statement the respondent attempted to controvert.

38. Upon my re-examination of the evidence, I note as the learned trial magistrate did, that the investigative officer did not attend court to give evidence or to shed light as to the occurrence of the accident, and PW2 stated that he did not visit the scene of the accident.

39. Though the investigating officer did not visit the scene of the accident, there was sufficient evidence showing that the respondent was liable for the accident to a certain extent. It was therefore wrong for the trial magistrate to hold that the appellant had failed to establish his case to the required standards.

40. The occurrence of the accident is not disputed and no one had pleaded contributory negligence.

41. In the circumstances, I am of the view that the learned trial magistrate arrived at wrong finding on liability hence it must be interfered with.

42. Under the second head touching on quantum, it is upon me to consider whether the award to be made by the learned trial magistrate on general damages for pain, suffering and loss of amenities would have been reasonable had the appellant succeeded in his case.

43. Under that head, the appellant proposed the sum of Kshs.800,000/= before the trial court, citing the case of **Vincent Mbogholi v Harrison Tunje Chilyalya [2017] eKLR** also cited on appeal and set out hereinabove.

44. In contrast, the respondent suggested an award in the sum of Kshs.150,000/= and quoted the case of **Sultan Kiti Kiti Karisa v Hassan Saleh Hassan HCCC No. 192/88** where an award of Kshs.90,000/= was made for related injuries.

45. The learned trial magistrate settled for an award in the sum of Kshs.300,000/= but did not cite any guiding authorities.

46. Upon re-examining the pleadings and material which was tendered at the trial, I observed that the injuries sustained by the appellant and supported by the medical evidence are blunt chest injury and fracture of the left tibial plateau.

47. In the medical report dated 19th May, 2017 prepared by Dr. Cyprianus Okoth Okere, permanent incapacity was assessed at 20% whereas Dr. Ashwin Madhwala in the medical report dated 17th April, 2018 concluded that no permanent incapacity would result.

48. Upon my study of the authorities cited by the parties, I find the one cited by the appellant to contain relatable injuries whereas I agree with the reasoning of the learned trial magistrate that the authority cited by the respondent was quite old.

49. I further considered the case of **Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR** in which the court upheld an award in the sum of Kshs.300,000/= made to a plaintiff who had suffered various injuries including tenderness on the anterior chest, cut wound on right leg below the knee without fracture, and a fracture of the left tibiofibular. The court in that case also noted that for such injuries, awards ranging from Kshs.300,000/= and Kshs.500,000/= would be reasonable; and I support such reasoning.

50. In view of the foregoing circumstances, I find that the assessment made by the learned trial magistrate under the above head is reasonable.

51. On a balance of probabilities, the appellant tendered evidence showing that the respondent is liable for the accident. The learned trial magistrate therefore erred in dismissing the appellant's case. The appeal is allowed. Consequently, the order dismissing the suit is set aside and is substituted with an order entering judgment in favour of the appellant. The appellant is awarded a sum of ksh.300,000/= as general damages plus interest at court rates from the date of judgment on appeal until the date of full payment. The appellant is awarded costs of the suit and the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021.**

**…….……..**

**J. K. SERGON**

**JUDGE**

In the presence of:

……. for the Appellant

……. for the Respondent