



REPUBLIC OF KENYA



KENYA LAW
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**Holiday Cars & Tours Ltd v Lokwongor (Civil Appeal 38 of 2018)
[2023] KEHC 3477 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL 38 OF 2018**

JK SERGON, J

APRIL 24, 2023

BETWEEN

HOLIDAY CARS & TOURS LTD APPELLANT

AND

FRANCIS PKIYACH LOKWONGOR RESPONDENT

(Being an Appeal from the judgment of the Honourable Resident Magistrate, Hon. Limo B. Benjamin dated 13th September, 2018 in the Chief Magistrate's Court, Civil Suit No. 44 of 2015 at Kericho)

JUDGMENT

1. On or about the 5th August, 2013 the Respondent herein was a lawful passenger aboard motor vehicle registration number KBL 592 Q along Kericho-Kisumu Road which was being driven by the Appellant's driver, servant and/or agent, who drove the said motor vehicle carelessly and/or negligently that it collided into motor vehicle registration no KBK 040 J. As a result Respondent sustained injuries to wit; fracture right distal 1/3 tibiofibular, fracture right distal 1/3 femur, fracture right proximal 1/3 humerus, deep vein thrombosis, multiple cut wounds on the upper limbs, deep cut wound on the forehead and multiple abrasions on the left leg. The Respondent subsequently filed a suit against the Appellant for general and special damages plus costs and interests arising as a result of the motor vehicle accident vide Chief Magistrate's Court Civil Suit No. 44 of 2015. The matter was heard and judgment delivered on 13th September, 2018.
2. The Appellant herein being aggrieved by the judgment dated 13th September 2018, in Chief Magistrate's Court Civil Suit No. 44 of 2015 preferred this instant appeal and put forward the



following grounds as contained in the memorandum of appeal dated 26th November, 2018 seeking to have the judgment and/or decree set aside and judgment on liability and quantum reviewed;

- (i) The learned magistrate erred in law in making a finding of excessive damages against the defendant.
- (ii) The learned magistrate erred in law and fact in holding that the defendant was 100% liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.
- (iii) The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to general damages of Kshs. 1,000,000/= without concrete documentary evidence.
- (iv) The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of Kshs. 2,005,500/= without concrete documentary evidence.
- (v) The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to net damages of Kshs. 3,005,500/=.
- (vi) The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law, thus bringing the law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.
- (vii) The learned magistrate erred in law and fact in failing to appreciate that the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the excessive award of damages.
- (viii) The learned magistrate erred in law and fact in entering judgement in favour of the plaintiff against the defendant inspite of the plaintiff's miserable failure to establish her case more especially on quantum.
- (ix) The learned magistrate erred in law and fact in failing to appreciate the legal position that in cases involving minors a global award ought to be considered. The court award is unsustainable and baseless in the circumstances.

3. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions and found the issues for determination put forward by both parties to be as follows:

- (i) Whether the trial court was right in finding the Appellant was 100% liable
- (ii) Whether the award of damages was excessive

4. On the issue of liability, the Appellants in its submissions, whilst contending liability, cited sections 107, 108, 109 and 112 of the *Evidence Act* which state that the burden of proof lies upon the party who invokes the aid of the law.



5. The Appellant asserted that it was incumbent upon the Respondent to prove his case to the required standard and the mere allegation of injury did not automatically shift the burden of proof or liability to the other party. The Appellant cited the following cases in support of its assertions *Startpack Industries v James Mbitji* in Nairobi Civil Appeal No. 152 of 2003 & *Muthuku Kiema v Kenya Cargo Hauling Services LTD* (1991) in which Justice Omollo AG. JA observed as follows; “there is no liability without a fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”
6. The Appellant reiterated that in instant suit the Respondent had failed to adduce evidence proving negligence on its part. The Appellant faulted the Respondent for the failure to wear a safety belt and submitted that the Respondent had authored his own misfortunes. The Appellant further pointed out that the Respondent’s willingness to ride aboard the motor vehicle despite crying foul that it was recklessly driven was indicative of the fact that the Respondent herein had no regard for his own safety or the safety of other road users.
7. The Appellant further faulted the Respondent for failing to prove his case on a balance of probability. The Appellant cited the case of *Cleophas Shimanyala v Mohamed Salat* [2018] eKLR where the court dismissed a plaintiff’s case for failure to prove the case on a balance of probability.
8. On the issue of quantum, the Appellant contended the quantum of damages awarded by the Trial Court whilst placing reliance on the case of *Stanley Maore v. Geoffrey Mwenda* Nyeri CA No. 147 of 2002 in which the Court of Appeal stated as follows; “ it has been stated now and again that in the assessment of damages, the general method of approach should be that comparable injuries should, as far as possible be compensated by comparable awards keeping in mind the correct level awards in similar cases.”
9. The Appellant contended that the general damages awarded for pain and suffering and loss of amenities was excessive and inordinately high and therefore warranted the courts interference. The Appellant contended that the award was out of trend with current awards and the fact the Respondent did not suffer any residual disability, during trial he confirmed through cross -examination that his injuries had healed in eight months, he had moved on with his life without any permanent incapacity.
10. The Appellant contended that special damages awarded were manifestly excessive in the circumstances and further that invoices are not evidence of payment and therefore the court ought to disregard the invoices tendered by the Respondent in the Trial Court. The Appellant urged the court not to award the amounts catered for by the medical cover as it was tantamount to double entitlement and/or enrichment.
11. On the issue of liability, the Respondent submitted that the cause of action arose out of a road accident that occurred on 5th August, 2013 along the Kericho-Kisumu Road and as a result of the subject accident the Respondent had sustained severe injuries and he produced several documents to wit; a discharge summary, treatment notes, police abstract, medical report, copy of records for motor vehicle no KBL 592 Q, letter of demand and receipts in proof of special damages in support of his case. The above notwithstanding, the Respondent relied on the doctrine of res ipsa loquitur and cited the case of *Embu Public Road Services LTD v Riimi EALR* (1968) in support of his case.
12. The Respondent contended that his case was uncontroverted and that the Appellants did not produce evidence to challenge and/or rebut the evidence tendered in support of his case.
13. On the issue of quantum, the Respondent argued that as a result of the said accident he sustained severe injuries, this was further corroborated by the contents of the medical report by Dr. Rispa (Pexb-6) and the said injuries were classified as grievous harm. The Respondent submitted that he suffers a



restricted range of movement in the right knee, a shortening of the right lower limb, a limping gait hence walks with the aid of a stick and reduced sensation on the left leg. The Respondent argued that for special damages, which must be proven he had attached a discharge summary from Mater Hospital, treatment notes, bundle of receipts from Kericho District Hospital and Gertrude's Children Hospital and motor vehicle search receipts for motor vehicle KBL 592 Q totaling to a sum of Kshs. 2,005,500/=. Therefore, the Respondent argued that the Trial Court did not misdirect itself in assessing the damages as awarded and neither did it take into account irrelevant facts or proceed on the wrong principles of law or misapprehend the evidence adduced.

14. This being a first appeal, the duty by the 1st Appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see and examine the witnesses.
15. Therefore, as the first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. This duty is captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: '... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' This was buttressed by the Court of Appeal in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR where it was held that: "We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *Ngui v Republic* [1984] KLR 729 and *Susan Munyi v Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported)."
16. On the issue of liability, the Respondent availed two (2) witnesses to testify namely a police officer who stated that following investigations into the accident they established that the Appellant's pro box was to blame for the accident for reckless overtaking and produced a police abstract and a medical doctor who testified and produced a medical report. The Appellant did not avail a witness to challenge the Respondent's case in the trial court. The Respondent's case was therefore uncontroverted and corroborated by the testimony of the police officer and the doctor. I therefore concur with the finding of the trial court holding the Appellant liable for the accident at 100%.
17. On the issue of quantum of damages, it is my considered view that the award of Kshs. 1,000,000/= as general damages was based on comparable decisions and injuries and it is therefore not excessive or inordinately high. In cases of *Frankline Chilibasi Spii v Kirangi Liston* [2017] eKLR where the plaintiff had compound and comminuted fractures of the right distal tibia and fibula among other injuries and was awarded Kshs. 1,800,000/= the case of *Ziporrah Nangila v Eldoret Express Limited & 2 Others* [2016] eKLR where the plaintiff sustained comminuted compound fracture of the distal and fibular, fracture of the left distal and fibular and was awarded Kshs. 2,400,000/= as general damages. The only time when the Appellate court can interfere is when the award is erroneous or wrong principles were applied. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 held inter alia as follows: "An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."
18. With regards to special damages, I find that the Trial Court erred. The law is well settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit. In the case of *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR Ngugi J. (as he then was) observed as follows; "Our decisional law is quite clear now that one consequence of this general principle is that a party claiming special damages must



demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test.”

19. Accordingly, I allow this appeal on quantum. Consequently, the award of Kshs. 2,005,500/= special damages awarded is set aside and is substituted with an award of Kshs. 11,232/= as pleaded and proven. Interest shall be paid on the awarded sums from the date of filing suit until the date of payment in full. A fair order of costs is that each party should bear their own costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 24TH DAY OF APRIL, 2023.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

No Appearance for the Appellant

No Appearance for the Respondent

