REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO.159 OF 2019

SOLOMOM TANUI...............................APPELLANT

VERSUS

TIMOTHY NYARIKI.........................RESPONDENT

(Appeal form Judgment in Eld CMCC No.762 of 2016 by

Hon. C. Obulutsa- CM delivered on 10/10/2019)

JUDGEMENT

Introduction & Background

1. The appeal before court arises from the judgement and orders of Honorable C. Obulutsa (CM) delivered on the 10th of October 2019 at Eldoret in Magistrates Court Civil Case No. 762 of 2016.

2. The facts of the case leading to the decision above are contained in the respondent's plaint dated the 11th of July 2016 and amended on the 18th of April 2018 wherein the respondent pleaded that on or about the 14th day of February 2014, he was instructed by the appellant herein to repair motor vehicle registration Number KAM 690Z Mitsubishi FH Lorry at Jua Kali garage near Zion Mall, when a car jerk slipped and consequently the said motor vehicle fell on him occasioning him severe bodily injuries, loss and damage. In this regard, the respondent sought general damages for pain and suffering, loss of amenities, loss of future earning capacity, loss of sexual function, future medical expenses and special damages.

3. The matter proceeded to full trial whereupon the learned magistrate delivered judgement on the 10th of October 2019, apportioning liability at 40% against the respondent and 60% against the appellant. The court further granted Kshs 4,563.900 as damages to the respondent herein as follows:

i. General damages…………Kshs 3,000,000/=

ii. Loss of Earning Capacity…Kshs 3,600,000/=

iii. Loss of sexual function...…Kshs 1,000,000/=

iv. Special damages....……….........Kshs 6,500/=

Total ....…………………. Kshs 7,606,500/=

Less 40% contribution…………………. Kshs 3,042,600/=

Net……........……………………………...…Kshs 4,563,900/=

4. Being aggrieved with the above decision on liability and quantum, the appellant via a memorandum of appeal dated the 29th of October 2019 preferred the instant appeal citing 8 grounds of appeal.

5. By directions given by court on the 17th of August 2021, the appeal was canvassed by way of written submissions and both parties filed their respective submissions.

Determination

6. Notably, this being a first appeal, it is the duty of court, as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion bearing in mind that unlike the trial court, it did not see the witnesses testify and should give due allowance for that.

7. This principle is anchored under ***Section 78 of the Civil Procedure Act*** and was pronounced in, ***Francis Ndahebwa Twala vs Ben Nganyi, Siaya Civil Appeal No. 5 of 2017*** where R. E. ABURILI J. stated as follows;

> ***" This being a first appeal, this Court is mandated by Section 78 of the Civil Procedure Act and as was espoused in the case of Kenya Ports Authority Vs Kushton (K) Ltd (2009) 2 EA, 212 wherein the Court of Appeal stated; inter alia: -***
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> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

8. The principle was reiterated in ***Williamson Diamonds Ltd and another v Brown [1970] EA 1***, with the court holding that:

> ***"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."***

9. During the trial's court proceedings, the plaintiff/respondent called five witnesses while the defendant/appellant called two witnesses.

10. PW1, Dr. Rono from Moi Teaching and Referral Hospital produced discharge summary for the respondent testifying that the respondent had serious injury to the brain. On cross, he testified that the respondent was still in hospital at the time.

11. PW2, a Dr. Sokobe of Eldoret Hospital testified on the same day, 30/8/2018, and produced the medical report for the respondent marked as PEX1 and dated 22/06/2015. He testified that the respondent had suffered loss of consciousness for 3 days, dislocation of tibia, loss of penile erection, incontinence and constipation. He put the respondent's permanent disability at 40%. On cross examination, he testified that the examination he had done was after a year since the accident.

12. PW3, PC Cheserek Kiplagat No. 84068 testified on the same day to the effect that an accident had been reported in March of 2017 for Motor Vehicle Registration Number KAM 690Z. Furthermore, PW3 testified that the accident had occurred in a garage and the injured person was a mechanic who was issued with a P3 form and abstract that he produced as PEX4. On cross examination, PW3 testified that he was not the Investigating Officer (I.O), as the I.O, one Abdi, was on transfer and retired.

13. PW4, Timothy Nyariki, the respondent, testified that he is a mechanic and that he used to repair the appellant's motor vehicle for Kshs 1000/=. He also adopted his witness statement wherein he noted that he was called by the appellant's servants, being the driver and the conductor, to repair the appellant's motor vehicle Mitsubishi Lorry Registration No. KAM 690Z. He further testified that the appellant's agents raised part of the Motor vehicle that he was meant to check using a jerk. It is while doing the repair work that the car jerk slipped and the said motor vehicle fell on him. He testified that after the accident, he sustained serious bodily injuries and was taken to Moi Teaching and Referral hospital where he was treated and admitted for 3 days and thereafter attended to at Kenyatta National Hospital and Tenwek Hospital. He testified that as a result of the accident, he has problem in having sex and that he also cannot work anymore. During cross-examination, PW4 testified that he was called to the garage by the appellant's workman called Felix and left him there at the garage working on the appellant's motor vehicle. He further testified that it was the turn boy who raised the jerk and noted that it was the appellant at fault as it is the appellant that put the flack. He also testified that he has 3 children and that he used to be paid Kshs 1000 per day.

14. PW5, Winfred Nyarike, wife to the respondent, testified that they have 3 children and produced her witness statement stating that since the time of discharge from hospital, the respondent is unable to work as he is unable to bend or stretch due to injuries to his lower back.

15. DW1, the appellant herein, testified on the 22/05/2019 and relied on his witness statement dated11th of July 2018. He testified that he does not know the appellant and has no relation with him. He testified that his car had faulty brakes and wiring and as a result, he instructed his driver to take the car to the garage that is owned by Obonyo. He further testified that the driver left the vehicle to Obonyo and went to do other things in town. On cross examination, he testified that his driver is Sila and that he does not have another driver. He further testified that he was not present at the garage and was only notified in the evening by his driver that a person has been injured but he did not know the person. On re-examination, the appellant testified that he knows Obonyo as a mechanic and the owner of the garage and that it was Obonyo who instructed the respondent to carry out repairs. In any case, he testified that his driver was not present at the garage at the time of the repairs and that he did not have any agents present at the garage at the time of the accident. He testified that he did not know the respondent's employer.

16. DW2, Sila Martim testified that he is the driver of the motor vehicle involved in the accident and that he does not know the respondent and did not call the respondent on the phone. He testified that he drove the vehicle to the garage and left it with Mr. Obonyo and left for other errands in town. He testified that he instructed Mr. Obonyo to repair the car and not the respondent herein or any other person. On cross-examination, he testified that he works at Obonyo's garage and that the garage has no owner. He noted that the vehicle was being repaired at the brakes and wiring and that he was informed later that a person had been injured. He admitted knowing Felix Too, a loader. On re-examination, DW2 testified that he is the one who took the car to the garage and that Felix is not an employee at the garage.

17. Considering that the appellant has faulted the judgement and decree of the trial court on both the finding of liability and the awards of

damages and taking into account the pleadings and submissions of the parties, it is my view that the 8 grounds of appeal can be summarized into two broad issues for determination namely:

> ***a. whether the trial court erred in apportioning liability at 60%-40% in favour of the respondent and if so,***
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> ***b. whether the quantum was proper.***

Liability

18. The appellant has faulted the decision of the learned trial magistrate for failing to appreciate and to evaluate in totality the evidence while assessing and apportioning liability, submitting that this amounted to an error in both law and fact. In particular, the appellant submitted that the trial magistrate erred in failing to consider the evidence of the appellant's witness DW1 and DW2 especially what he referred to as 'their unchallenged statements' to the effect that the appellant never instructed the respondent to repair his vehicle and that his driver only left the vehicle at the garage and proceeded to other errands in town.

19. It is trite law that liability follows fault and the burden of proof of any fact or allegation is on the plaintiff as was observed by court in ***Statpack Industries Limited vs James Mbithi Nairobi HCCA No.152 OF 2003***.

20. Burden of Proof means an obligation to adduce evidence of a fact. Accordingly, ***Phipson on the Law of Evidence, 18th Edition, Sweet& Maxwell, 2013*** indicate that the term 'burden of proof' has two distinct meanings:

> ***"Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.***
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> ***The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence."***

21. Moreover, ***Section 107 of Evidence Act*** defines Burden of Proof as– of essence the burden of proof is proving the matter in court.

22. ***Section 109 of the Evidence Act*** on the other hand exemplifies the Rule in Section 107 on proof of a particular fact and is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

23. The question therefore is whether the respondent herein discharged the burden of proof that the appellant was liable for the occurrence of the accident and ultimately, the injuries to the deceased.

24. In the instant case, the trial court considered the evidence on liability and held as follows;

> ***"It is apparent that the plaintiff was the one working on the MV and was injured. He blames the crew for not putting the jack properly. In the submissions, the defendant said that the accused had also a duty of care and use protective gear. The court has considered that angle. If as said that the agents hoisted the jack, it was incumbent on the plaintiff to check and ensure the jack was properly secured before starting his repairs. He owed himself a duty of care. He also didn't have any protective gear like a helmet. He cannot wholly blame the defendant and is also at fault. Having considered the evidence and submissions, the court finds that this is a proper case where liability will be apportioned at 40% against the plaintiff and 60% against the defendant."***

25. A look of the facts of the case indicates that the appellant indeed instructed his driver, one Sila Maritim, to take the vehicle to the garage for brakes and wiring repairs. This remains uncontroverted and is corroborated by both DW2 and PW 4. Secondly, it is clear that the vehicle was indeed delivered to the garage by the driver.

26. At this point, the driver DW2 testified that he left the car with the garage owner Mr. Obonyo and proceeded to run other errands. This was corroborated by DW1, the appellant. On the other hand, the respondent testified that he was called by the appellant's servants that is Sila, DW2 and conductor and they requested him to do some repairs on the appellant's motor vehicle. The respondent further testified that the appellant's agents raised the part of the said motor vehicle that he was meant to check using a jerk. It is this jerk that he testified slipped, resulting in the motor vehicle falling on him.

27. At trial, the respondent testified further during cross-examination that he was called to the garage by a man called Felix Too, whom he claimed was the appellant's workman. He also testified that he is not based at the garage where the accident occurred. He also testified that it was the turn boy who raised the jerk.

28. There is a lot of inconsistences in the witnesses testimony. First, in his witness statement dated the 11th of July 2016, the respondent claimed the appellant's servants called him to repair the appellant's motor vehicle. He stated that the servants were the driver and the conductor. However, he never identified who called him by name or number and further never suggested that he knew DW2 who is actually

the appellant's driver. In fact, DW2 testified that he does not know the respondent. Further the respondent did not call the said driver or conductor as witnesses to prove that indeed they called him to repair the said motor vehicle. He only stated at trial that he was called by Felix whom he claimed was the appellant's workman. He however did not substantiate this claim nor adduced any evidence to show the relationship between Felix and the appellant. He also never called Felix to support his claims.

29. Secondly, the respondent in the same witness statement stated that it was the appellant's agents who raised the motor vehicle using a jerk. At trial, his testimony was that it was the turn boy who raised the jerk. The issue here is that the respondent never called the alleged turn boy or conductor to testify or corroborate his testimony. It is also not clear who raised the jerk. Was it the turn boy? The conductor? The driver? or both of them?

30. The only consistent evidence is that it was only the driver, DW2 who delivered the vehicle at the garage and he was the only person with direct relation with the appellant. He however left before the repairs began and never hoisted the jerk. However, it is also clear from the evidence before the court that this was not the first time that the particular motor vehicle was being worked on at Obonyo's garage, and neither was it the first time the respondent was working on that motor vehicle. It is clear that the respondent was known by the appellant or appellant's agent. Indeed this is the reason as to why the appellant's driver left the vehicle with the respondent. Further it is clear that the so called Obonyo's garage was a facility used by independent contractors and that is why none of the parties herein were able to identify the said Obonyo so as to call him to testify. DW2 referred to Obonyo's garage, while at the same time testified that the garage has no owner. In my view the appellant is not being candid with the truth. He could not take his motor vehicle to a garage without an owner, and leave it with nobody in particular, since it is agreed that indeed there is nobody called Obonyo. The only way the appellant could have left the vehicle at the garage was if it was in good hands. And that good hand was indeed the respondent. The attempt to disown the respond was not well covered by the appellant. The allegation that the vehicle was left with Obonyo yet Obonyo is not a person, does not make sense as is the allegation that the appellant never instructed the respondent to work on the said motor vehicle.

31. It is the finding hereof that the appellant or his agents knew the respondent personally and that is the reason they were comfortable enough to leave him to work in the said motor vehicle in their absence.

32. The issue then is, who hoisted the car jack? The respondent states this was done by the appellant's turn boy called Felix. The appellant refuted this assertion. The appellant however acknowledge that Felix was his turn boy. This is important because should it transpire that the said Felix hoisted or assisted in hoisting the car jerk, that will provide a link between these unfortunate events and the appellant. The vehicle to be repaired was a Mitsubishi lorry. It is safe to state that such a lorry had a turn boy, and that in the event of it being subjected to repair, the turn boy would be around first to oversee. It is difficult to believe that the appellant's driver first delivered the motor vehicle to the garage and left. With whom did he leave the vehicle? What evidence was there that he left the vehicle in Obonyo's garage? I have no doubt in my mind that the appellant had a previous relationship with the respondent in terms of repairing the said vehicle, and that on that particular day the vehicle was left to him because he was known to the appellant and his agents.

33. I am also persuaded that one Felix, the turn boy of the said lorry helped in hoisting the jerk thereby providing a direct link with the appellant. Therefore, it is the finding hereof that the accident was caused by the negligence of both the respondent and the appellant's agents.

34. However, the person with the skills and personal know-how of the repairs was the respondent. He could not start working on the vehicle without ensuring that it was safe to do so.

35. Even if Felix assisted him to hoist the jerk, he had the responsibility to ensure that the same was safe. Therefore he was largely the author of the misfortune. I hold him responsible for his injuries at 80%. In my view, the appellant is only responsible for 20% of that injury.

36. On quantum, the respondent had claimed general damages for pain suffering and loss of earning which the trial court assessed at kshs.3,000,000/-. In my view and based on the authorities which were placed before the court, the sum of kshs.3,000,000/- was excessive. I reduce the same to kshs.2,000,000/-.

37. The trial court also allowed kshs.3,600,000/ being loss of earning capacity. This sum is not exaggerated and is supported by the earning of kshs.15,000/- per month for a period of 20 years the respondent would have worked. I will not interfere with it.

38. I will also not disturb kshs.1,000,000/- granted by the trial court on account of loss of sexual function. Special damages of kshs.6,500/- shall also stand.

39. In the end, the appeal largely succeeds. The court award is as follows:

i. Liability: respondent 80% liable

appellant 20% liable

ii. General damages kshs.2,000,000/-

iii. Loss of sexual function kshs.1,000,000/-

iv. Special damages kshs.6,500/-

Total.................6,606,500/-

Net....................kshs.1,321,300/-

v. Parties to bear own costs of the appeal

DATED, SIGNED AND DELIVERED AT ELDORET THIS 31ST DAY OF JANUARY 2022.

E. O. OGOLA

JUDGE