



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 78 OF 2019**

**EUROCHEM INTERNATIONAL LIMITED.....APPELLANT**

**VERSUS**

**EMMA KABURA KARIUKI.....RESPONDENT**

**JUDGMENT**

1. This is an appeal arising out of the judgment of Honourable T. K. Kwambai, Senior Resident Magistrate in Embu CMCC No.38 of 2019 as delivered on 13<sup>th</sup> November, 2019.

2. The cause of action arose from a traffic accident that occurred on 9<sup>th</sup> December, 2018 involving the respondent and motor vehicle registration number KBX 081F; the respondent instituted a suit against the appellant seeking compensation for injuries she allegedly suffered as a result of the accident; after a full trial the trial court found the appellant 100% liable and proceeded to award the respondent Kshs.300,000/= as general damages for pain and suffering.

3. Being dissatisfied with the decision the appellant instituted this appeal and listed seven (7) grounds of appeal which can be summarized into two (2) grounds as set out hereunder:-

- i. The trial Court erred in finding the applicant wholly to blame for the accident;
- ii. The trial Court awarded damages that were inordinately high in the circumstances.

4. The parties were directed to dispose of the appeal by filing and exchanging written submissions; hereunder are the parties rival submissions;

**APPELLANT'S CASE:**

5. The appellant has submitted that the respondent did not prove her case or discharge her burden of proof; it is the appellant's contention that the evidence of the respondent during trial was at variance with her filed pleadings and since a party is bound by its pleadings, the respondent's evidence should have been disregarded by the trial court; the appellant submitted at length on the inconsistencies of the respondent's evidence and prayed that this Court finds that the respondent did not prove her case.

6. With regard to quantum of damages, the appellant submitted that the trial court's award was on the higher side for the injuries suffered by the respondent; and prayed that the same be substituted with one for Kshs.100,000/=.

**RESPONDENT'S CASE:**

7. The respondent filed two sets of submissions; in the first set, the respondent submitted that the award of the trial court on general damages was not excessive and was commensurate to the injuries suffered by the respondent; the respondent urged this court not to interfere with the trial court's judgment.

8. In the second set of submissions the respondent submitted that she had proved her case against the appellant on a balance of probabilities and that this court should find the appeal devoid of merit and dismiss the same.

**ISSUES FOR DETERMINATION**

9. After reading and outlining the respective written submissions this court has framed the following issues for determination;

- i. Whether the respondent proved her case to the desired threshold;
- ii. The quantum of damages to be awarded.

### ANALYSIS

10. The Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; the Court held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect; in addition, the Court will normally as an appellate court, not interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law; the Court of Appeal also held that:

**“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”** (See also **LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403**).

### Whether the respondent proved her case to the desired threshold:

11. This court is guided by the above principles and will proceed to re-evaluate the evidence presented at trial;

12. Upon perusal of the Plaintiff, it is noted that the respondent pleaded at paragraph 4 as follows:-

**‘That on or about 9<sup>th</sup> December, 2018 within Embu town near Mathai supermarket the plaintiff was lawfully walking off the road on the left side when the defendant’s authorized driver drove motor vehicle registration number KBX 081F recklessly and negligently that the motor vehicle lost control and caused accident thereby occasioning the plaintiff serious injuries.’**

13. The particulars of negligence were also set out in paragraph 4 of the Plaintiff and read as follows:-

- a. Driving with no regard to other users of the road especially the plaintiff;**
- b. Driving on the wrong side of the road**
- c. Failure to stop or swerve in order to avoid causing the accident**
- d. Disregard of traffic highway code**
- e. Losing control of the motor vehicle and hitting the plaintiff way off the road**
- f. Driving recklessly and veering off the road hitting the plaintiff way off the road**
- g. Causing the accident**
- h. Veering off the road and hitting the plaintiff off the road.**

14. The plaintiff’s witness statement supported the version of events as pleaded in the plaintiff; from the respondent’s pleadings it can be surmised that the alleged accident occurred when the appellant’s driver veered off the road and knocked her down; the respondent was therefore duty bound to prove these assertions;

15. At trial, the respondent adopted her statement as her evidence in chief, then proceeded to give evidence of a version of events that was a complete departure from the adopted statement and indeed the pleadings filed; based on this version of events the trial Court found the appellant 100% liable for the accident.

16. It is trite law that a party is bound by its pleadings; the appellants relied on the case of **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others [2014] eKLR**;

17. **This court** is guided by the Court of Appeal’s holding in the said case; and while quoting with approval an excerpt from an article by **Sir Jack Jacob** entitled **“The Present Importance of Pleadings”** the appellate court stated:-

**“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part**

of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

18. The court record reflects that the respondent gave a new version of events at the trial which were in direct contrast to her pleadings; there is nothing on the court record that depicts that the Plaintiff was amended to include these new version of events; it therefore follows that the appellant was denied a chance to prepare its defence, thereto; and in essence the trial court found the appellant liable based on facts not pleaded by the respondent thereby going beyond its mandate.

19. It is this court's considered view that the trial court ought to have looked at the respondent's pleadings *vis a vis* the evidence adduced in court and it would have found that the respondent had not proved her case and that she had not discharged her burden of proof as set out in Section 107 of the Evidence Act, Chapter 80 Laws of Kenya which section reads as follows:-

**'107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'**

20. This court finds that the trial court ought not to have relied on this evidence when rendering its judgment; and finds that there is need to interfere with the trial court's decision as the respondent did not prove the averments in her pleadings; the trial court's judgment on liability is hereby set aside and substituted with dismissal of the respondent's suit.

21. This ground of appeal is found to be meritorious and it is hereby allowed;

#### **The quantum of damages to be awarded.**

22. Despite having dismissed the respondent's suit this court is still duty bound to render a determination on the issue of quantum; upon perusal of the Medical Reports of Doctor Mwaura and Doctor Wambugu, the respondent is said to have suffered soft tissue injuries with no permanent incapacity; for such injuries it is this court's considered view that the award of Kshs.300,000/= was inordinately high and therefore warrants interference by this court; case law relied on is the case of **Butt vs Khan (1977) 1KAR** Law JA stated that:-

**"An appellate court will not disturb an award for damages unless it is 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 arrived at a figure which was either inordinately high or low."**

23. Similarly in the case of **Kenya Breweries Ltd [1991] eKLR** it was held that,

**"...It is now well established that this Court can only interfere with a trial judge's assessment of damages where it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred...."**

24. Under the circumstances this court finds that the award was inordinately high and represents an entirely erroneous estimate; and an award of Kshs.150,000/= would be more appropriate.

#### **FINDINGS AND DETERMINATION**

25. For the forgoing reasons this court makes the following findings and determinations;

- i. The respondent is found to have failed to prove her case to the desired standard;
- iii. The appeal is found to have merit and it is hereby allowed; the judgment of the trial court dated the 13/11/2019 is hereby set aside and substituted with a dismissal of the suit with costs.
- iv. This court finds that an appropriate award would have been in the sum of Kshs.150,000/- for general damages;
- v. Each party to bear their own costs on appeal

It is so Ordered.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 22<sup>ND</sup> DAY OF APRIL, 2021**

**HON.A.MSHILA**

**JUDGE**