REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 331 OF 2014

MULTIPLE HAULIERS (E.A.) LIMITED.....APPELLANT

-VERSUS-

ONESMUS KYALO MUNUVE.....1ST RESPONDENT

LEE COACH SERVICES.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Honourable M. Chesang (Mrs.)

(Senior Resident Magistrate) delivered on 1st July, 2014

in Milimani CMCC NO. 3002 of 2005)

JUDGEMENT

1. Onesmus Kyalo Munuve who is the 1st respondent in this appeal lodged a suit against the appellant vide the plaint dated 22nd March, 2005 and sought general and special damages in the sum of Kshs.64,283/ plus costs of the suit and interest on the same for injuries sustained arising out of a road traffic accident. The appellant was sued in its capacity as the registered owner of the motor vehicle registration number UAA 017 C/ZA 7864 MERCEDES BENZ ("the first motor vehicle").

2. The 1st respondent pleaded in his plaint that he was travelling aboard the first motor vehicle sometime on or about the 18th day of April, 2003 at Samburu along Mombasa/Nairobi Road when the appellant's driver/servant/agent negligently and/or recklessly caused the first motor vehicle to collide with the motor vehicle registration number KAH 578Q/ZB 9986 MERCEDES BENZ ("the second motor vehicle") causing the 1st respondent to sustain serious injuries.

3. The appellant entered appearance on being served with summons and filed its statement of defence to deny the 1st respondent's claim. Upon obtaining leave of the court, the appellant took out a third party notice against the 2nd respondent, who then equally filed a statement of defence to deny the particulars of negligence set out in the appellant's defence.

4. At the hearing of the suit, the 1st respondent and the appellant each called two (2) witnesses. Upon considering the material placed before the court and the written submissions filed by the parties, the trial court entered judgment in favour of the 1st respondent and against the appellant in the following manner:

1. Liability	**100%**
2. General damages for pain, suffering	
and loss of amenities	**Kshs.1,600,000/=**
3. Future medical expenses	**Kshs.300,000/=**
4. Special damages	**NIL**
Total	**Kshs.1,900,000/=**

5. Being dissatisfied with the finding on liability as well as the award on general damages, the appellant lodged this appeal against the 1st and 2nd respondents vide the memorandum of appeal dated 31st July, 2014 and put forward six (6) grounds of appeal to challenge the same.

6. This court gave directions that the appeal be canvassed by way of written submissions. The appellant filed its submissions and argued that the trial court arrived at an erroneous finding on liability in the absence of sufficient evidence to point to negligence on the part of the appellant and in the absence of a finding of negligence against the 2nd respondent. The appellant therefore urges this court to interfere with the finding and substitute it with one of liability against the 2nd respondent. On quantum, it is the submission of the appellant that the award made on general damages is manifestly excessive and therefore urges this court to disturb the same. The appellant has cited the case of **Douglas Kalafa Ombeva v David Ngama [2013] eKLR** in which the Court of Appeal awarded general damages in the sum of Kshs.500,000/= on appeal to a plaintiff with a head injury which left him confused for three days, a fracture of the right femur which resulted in amputation and an assessment of disability at 70%; and the case of **Philip Musyoka Mutua v Leonard Kyalo Mutisya [2018] eKLR** where the court awarded general damages in the sum of Kshs.300,000/= for relatively similar injuries.

7. The 1st respondent on his part argues *inter alia*, that the trial court considered all relevant factors and evidence on record and therefore arrived at well-reasoned findings on both liability and quantum. The 1st respondent additionally argues that the award on general damages is reasonable and commensurate to the injuries sustained.

8. The 2nd respondent did not file any documents on appeal or participate in the hearing thereof.

9. I have considered the rival submissions and authorities cited on appeal. This being a first appeal, I am enjoined to re-evaluate the evidence placed before the trial court. It is clear that the appeal lies against the findings on liability and quantum.

10. Beginning with liability, Sergeant Jackson Musera who was PW1 gave evidence that the material accident involved the first and second motor vehicles, where the first motor vehicle which was being driven by John Ndambuki Mburu collided with the second motor vehicle being driven by Collins Limo. The witness also gave evidence that at the time of giving his testimony, the matter was still pending under investigations but that preliminary investigations revealed that the first motor vehicle was to blame for the accident.

11. It was the testimony of the witness that the accident took place at a straight stretch and hence the drivers of the respective motor vehicles would have had clear vision of each other. PW1 also testified that the material accident resulted in bodily injuries to the drivers of both motor vehicles and the 1st respondent who was a turn boy aboard the first motor vehicle.

12. During cross-examination, PW1 stated that he was not the investigating officer and that though the appellant's driver was initially served with a notice of intention to prosecute him, neither he nor anyone was ever formally charged in relation to the accident. In re-examination, the witness stated that at the time of the accident, the second motor vehicle was on the correct lane heading to Mombasa and that it is the driver of the first motor vehicle who entered into the opposite lane. The witness produced *inter alia*, the police abstract and the P3 form.

13. The 1st respondent who was PW2 testified that he was at all material times an employee of the appellant and that he was riding as a turn boy on the material date. The 1st respondent stated that the driver of the appellant was driving at a high speed when he encroached on the lane being used by the second motor vehicle. The 1st respondent further stated that he has never been called to testify as a witness before a criminal court in relation to the accident.

14. Robinson Riilu being DW1 gave evidence that he worked as an investigator and that he undertook investigations as to the circumstances surrounding the accident, on behalf of Cannon Assurance Limited. He stated that visibility was clear and that the road was straight with no obstacles ahead. The witness gave further evidence that upon questioning the 1st respondent and the driver of the first motor vehicle, he obtained information from them that it is the second motor vehicle that collided with theirs from the opposite direction. In cross-examination, DW1 stated that he undertook the investigations one (1) year following the accident and that neither the driver of the first motor vehicle nor the investigating police officer accompanied him to the scene of the accident. The witness stated that in his opinion, the driver of the second motor vehicle was to blame for the accident.

15. The final witness was John Ndambuki Mburu (DW2) who testified that he was driving the first motor vehicle on the material date and that it is the second motor vehicle which rammed into their vehicle. It was the evidence of the witness that he has never been charged but states that both he and the 1st respondent sustained injuries arising out of the accident. The witness blamed the driver of the second motor vehicle for the accident and indicated that he was driving at a reasonable speed.

16. The learned trial magistrate found the appellant's driver solely to blame going by the evidence adduced before her.

17. From re-examination of the material and evidence, it remains undisputed that an accident occurred on the material date involving the first and second motor vehicles. It is also uncontroverted that the first motor vehicle was at all material times owned by the appellant and that the 1st respondent was aboard the first motor vehicle at the time of the accident.

18. I observed that the investigating officer did not attend court to give his or her findings. That notwithstanding, PW1 who is also a police officer described that the accident took place on a straight road with clear visibility, going by the sketch maps produced, and this position was echoed by the 1st respondent and DW2. As the learned trial magistrate noted, both PW1 and the 1st respondent blamed the accident on the appellant's driver. While I observed that DW2 was of a different view, going by the evidence tendered at the trial, I find the position taken by the 1st respondent to be more plausible than that of the appellant. Moreover, DW1 who stated in his evidence that he investigated the circumstances surrounding the accident was not at the scene when the accident took place and further stated that his investigations were carried out much later following the accident.

19. Going by the evidence, it is important to point out that whereas no one was charged or convicted in relation to the accident, this being a civil claim, the standard of proof applicable is that of a balance of probabilities. In addition, I observed from the 1st respondent's pleadings that the doctrine of *res ipsa loquitur* was pleaded.

20. The above doctrine was aptly discussed in the authority of **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR** with reference to the **East African Court of Appeal's decision in Embu Public Road Services Ltd. v Riimi [1968] EA 22** where the following was enunciated:

> ***"The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant…The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control."***

21. Once pleaded, the *res ipsa loquitur* doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.

22. In the present instance, I am satisfied that the 1st respondent discharged the burden of proof by pleading the doctrine and it fell upon the appellant to disprove this or to show contributory negligence on the part of the 1st respondent, but it did not.

23. In the premises, I am satisfied that the learned trial magistrate arrived at a correct finding on liability and I am not inclined to disturb it.

24. I am now left with the issue of quantum, specifically the award on general damages for pain, suffering and loss of amenities.

25. The 1st respondent on the one part proposed a sum of Kshs.2,500,000/= and cited the case of **Anthony Mwondu Maina v Samuel Gitau Njenga [2006] eKLR** where the court awarded a sum of Kshs.1,200,000/ and the case of **Tracom Limited & another v Hasssan Mohamed Adan [2009] eKLR** in which an award of Kshs.750,000/= was made under a similar head. The appellant on the other part suggested an award of Kshs.180,000/= and relied inter alia, on the authority of **Moraa Maangi v Kerumbe Tea Estate & another [2011] eKLR** where the court on being faced with a compound fracture of the right elbow and other soft tissue injuries, awarded the plaintiff therein a sum of Kshs.200,000/=. In the end, the learned trial magistrate awarded a sum of Kshs.1,600,000/= under this head.

26. Upon re-examination of the pleadings and medical evidence, I observed that the following were the injuries sustained by the 1st respondent: fractures of the proximal phalange of the thumb, middle phalange of the index finger, middle phalange of the 3rd finger with dislocation of the proximal interphalangeal joints, proximal phalange of the ring finger, distal right humerus. The 1st respondent also sustained a commuted fracture of proximal ulnar involving the joint margins. Moreover, in the medical report prepared by Dr. J.M.M. Njokah and dated 13th April, 2003 residual incapacity was assessed at 70% though no permanent incapacity was assessed in the other medical reports.

27. From the record, I observed that the authorities relied upon by the 1st respondent were decided many years ago whereas those cited by the appellant entailed less serious injuries in comparison to those suffered herein. In addition, the learned trial magistrate did not cite any authorities that guided her award. In that case, I considered the case of **China Road and Bridge Corporation (Kenya) v Job Mburu Ndungu [2021] eKLR** in which the court upon considering a plaintiff with fracture of the left radium, fracture of the left ulna, fracture of the right tibia and fracture of the right fibula and some degree of incapacity, upheld an award of Kshs.2,000,000/= made on general damages for pain, suffering and loss of amenities. I similarly considered the case of **Robert Jeriot v Geoffrey Nyakundi Abere [2021] eKLR.** In this particular case, the plaintiff had sustained head injury accompanied with loss of consciousness for one hour, fracture of the right pelvic bone, fracture of the right acetabular bone, fracture of the right radius, fracture of the left radius, deep extensive cut wound on the High Court on appeal upheld an award of Kshs.1,500,000/= under the same head.

28. Upon being guided by the above authorities which offer comparable awards, I am convinced that the learned trial magistrate arrived at a reasonable sum on general damages. I see no reason to interfere with the said award.

29. Consequently, the appeal is hereby dismissed for lack of merit, with costs to the 1st respondent. However, the appellant is at liberty to take appropriate steps in seeking indemnity from the 2nd respondent.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JULY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY 2021.

J. K. SERGON

JUDGE

In the presence of:

Ms. Khamala holding brief for Mr. Kioko for the Appellant

Mr. Obae for 1st respondent

Mrs. Owora holding brief for Mr. Churchil Midiwa for 2nd respondent.