REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 69 OF 2018

SALALA LOGISTICS CONSULTANTS……1st APPELLANT

KAMANDE OSCAR & NZOMO T/A

SALALA LOGISTICS CONSULTANTS…...……....2ND APPELLANT

VERSUS

TITUS KILONZO MASYA…..……...……...……RESPONDENT

(Being an Appeal from the Judgment and Decree by the Honorable Y.A Shikanda (Senior Resident Magistrate) delivered on 15th March, 2018 in Machakos CMCC 151 of 2016)

BETWEEN

TITUS KILONZO MASYA……...……...……....……..… PLAINTIFF

VERSUS

SALALA LOGISTICS CONSULTANTS…..……1ST DEFENDANT

KAMANDE OSCAR & NZOMO T/A

SALALA LOGISTICS CONSULTANTS……...…….2ND DEFENDANT

JUDGEMENT

1. The appellant herein, by way of a plaint filed dated 14th March, 2016 filed in court on 17th March, 2016, claimed general and special damages as well as interests and costs of the suit against the Respondents herein arising out of a road traffic accident that it was alleged occurred on 20th April, 2015.

2. According to the plaint, on that day, the respondent was alighting from Motor Vehicle registration number KBV 96A which was being driven along Machakos-Kitui Road when near Machakos Primary School, the respondents' by themselves, their driver, servant and/or agent drove, controlled and/or managed the said motor vehicle so negligently that he permitted the same to suddenly start off when the respondent had not alighted and as a result he was thrown off the vehicle and crushed by the rear tyres of the suit vehicle. As a result, the respondent sustained blunt injury to the left lower limb and fracture of the left lateral femur condoyle. The Respondent pleaded the particulars of negligence in the Plaint and sought general damages and interest and costs of the suit. He particularised the special damages suffered totalling Kshs 260,760.00 which he claimed from the Appellants.

3. It was his case that as a result of the said accident, he sustained open oblique fracture of the middle third of the right femur, lacerations to the left thigh and blood loss.

4. In their joint defence, as amended on 13.3.2017 the appellants denied the ownership of the suit vehicle and denied negligence and denied that the respondent was a passenger. They denied the injuries and loss and pleaded that the accident was caused solely and substantially

contributed to by the negligence of the respondent who hang on to the suit vehicle and in the alternative that the accident was caused by inevitable accident. They prayed that the suit be dismissed with costs.

5. In his evidence, the Respondent testified that on 20th April, 2015, he boarded a minibus registration no KBV 096A at Kitui and arrived in Machakos at around 5.00 am. At Machakos Primary School along Kitui Machakos Road, the conductor asked the driver to stop the vehicle and directed those who were to alight at Machakos to alight there. Four passengers including the Respondent stood up to alight the Respondent being the last one. As he stepped on the last stair with his right leg, the motor vehicle abruptly moved. As a result, he was hit on the left shoulder and thrown outside the vehicle where the rear tyre ran over his left leg which became numb. He was then taken to Machakos level 5 Hospital by the same vehicle but he was not attended to immediately as the X-ray machines were out of order.

6. When his son arrived, from Nairobi he was taken to Bishop Kioko Hospital an X-ray was taken but no fracture was found and he was only given pain killers. Dissatisfied with this result, they sought a second medical opinion and he was taken to Coptic Hospital in Nairobi where an X-ray revealed that there was a fracture as his leg was swollen. He underwent an operation and a metal implant was affixed at the fracture site. He produced his admission form, the discharge summary, invoices, receipts and X-ray request form. According to him, he continued attending clinics and was treated by **Dr Sitoti** and produced the receipts from the said doctor. Further X-rays were done and he produced the same from Sonar Imaging Centre as well as payments receipts. According to him, since he was experiencing pain, he took drugs to alleviate the same and produced receipts for the same.

7. The Respondent testified that he reported the accident to the police and was issued with a police abstract which he exhibited. He was also issued with a P3 form which was filled in and exhibited the same together with a payment receipt for the same. It was his testimony that he obtained a copy of the records from the registrar of motor vehicles which he paid for and produced both the records and the receipt. He was examined by **Dr Kimuyu** who prepared a report for him which he produced and which indicated that he still had the metal implant at the fracture site and that he required an estimate of Kshs 300,000/- for the same to be removed. He produced the sae as exhibit and stated that he was felling discomfort when walking.

8. According to the Respondent, the driver and the conductor were to blame. He stated that the conductor alighted and went to talk to a police officer but the driver did not wait for the conductor to give him a signal to drive off. He denied that he attempted to alight from a moving vehicle and prayed for compensation and costs. He also prayed for damages for future medical expenses.

9. In cross-examination the Respondent stated that he was seated in the middle of the bus on the right and that when he was on the last stair, the motor vehicle moved abruptly while he was alighting though it had stopped when he started alighting. According to him, he was admitted for 5 days though he could not tell how much he spent on the implant alone but he was told that the implant ought to be removed.

10. PW2, **Dr John Mutunga**, from Machakos Level 5 Hospital testified that he had worked with **Dr Judy Kimuyu** for 5 years but the latter was away in Mombasa on official duties. He was however conversant with her handwriting and had with him a medical report prepared by **Dr Kimuyu** for the Respondent. According to the said report, **Dr Kimuyu** relied on the discharge summary, P3 form and x-ray films and listed the injuries sustained by the Respondent therein, signed the report and formed the opinion that further surgery to remove the screws would cost Kshs 300,000/= in a private setting. He proceeded to produce the said report. The witness was however of the view that depending on where the Respondent intended to go, the cost of future medical expenses would be Kshs 150,000/- being the cost of operation only though there would be other charges such as bed and food.

11. In cross-examination the witness stated that he did not personally examine the Respondent and had never seen him. Neither was he present when the report was made though it was made by a colleague. He clarified that his opinion on charges was based on public hospitals. He however pointed out that one cannot have the exact figure of the cost of future medical expenses.

12. In cross-examination he stated that the Kshs 150,000.00 is theatre fee, surgeon's fee and the drugs needed. There is also hospital stay of about 4 days or more.

13. PW3, **PC Robert Tomno**, the officer in charge of police records from Machakos Traffic Base testified that he had the OB No. 7 of 21/4/2015 in which it was reported that the driver stopped the motor vehicle at Machakos Primary School area and passengers started alighting. However, the motor vehicle went into motion before all passengers alighted and the Respondent was injured. The Respondent was issued with a police abstract which was filled in by **Cpl Lemoyng** who was on transfer. He proceeded to produce the said abstract.

14. In cross-examination, PW3 stated that he was not the investigating officer and had no primary knowledge of the accident hence could not tell what happened but simply relied on the contents of the OB. According to him the accident which occurred at 6 am was reported the following day by the driver of the said motor vehicle. The abstract however did not indicate who was to blame for the accident though in his view the person to blame was the conductor of the same because the door of the motor vehicle should be closed when the vehicle is moving and the conductor should inform the driver when passengers have alighted. According to him the police confirmed that the Respondent was alighting when the accident occurred.

15. On the part of the Appellants, they called **Dr Jeniffer Kahuthu** who was employed by Directline Assurance Company. She appeared in court to produce a medical report prepared by her colleague, **Dr Leah Wainaina**, who was on maternity leave for the Respondent. According to the said report the Respondent was in a good general condition and walking with a normal gait. He had a healed surgical scar on the left knee lateral aspect and the knee joint was normal. A repeat X-ray was done and both confirmed that he sustained a fracture. It was recommended that he would require the removal of the screws at a cost of Kshs 40,000/= in a government hospital. According to the witness, insertion of implants is costlier that the removal and the doctor relied on a quotation from Kenyatta National Hospital. He produced the said medical report as exhibit.

16. In cross-examination, she confirmed that the signature appearing on the report belonged to **Dr Leah Wainaina**. According to her, the Respondent was re-examined once the same day. While the 1st report gave the assessment of future medical costs the 2nd did not though they bore the same date. According to her, the quotation by **Dr Leah Wainaina** was obtained from Kenyatta National Hospital, a government

public hospital. The same was from the general ward. According to the witness, **Dr Wainaina** was aware that the Respondent was seen at Coptic Hospital, a private hospital but chose one from a public hospital. According to him, the costs vary from doctor to doctor. In re-examination she confirmed that it was most likely an error to include medical costs in the 1st Report but stated that the Kshs 40,000.00 was all inclusive.

17. DW2, **Kilonzo Kimuli**, testified that on 20th April, 2015, he was ferrying passengers from Kitui to Nairobi. As he approached Machakos bus Stage, a police officer stopped him inspected the motor vehicle then allowed him to drive off. He checked the side mirror as the vehicle was in motion and saw a passenger alighting and applied brakes. According to him the conductor was in the motor vehicle and that the passenger was not pushed off the vehicle. In his evidence the passenger was at fault as he alighted from a moving motor vehicle.

18. In cross-examination he stated that the vehicle had a passenger whose name he was unable to tell. He however admitted that the tyres ran over the passenger. He however did not see the other passengers alighting at the scene which was about 200 metres to the bus stage. According to him, the door was open as the police officer had just inspected the motor vehicle. He admitted that the passengers' cabin was separate from the driver's cabin and he could not see where the conductor was seated. In his evidence he did not see the passenger alighting and that he applied brakes when the passengers screamed. He confirmed that he saw the passenger as he was driving off and saw the passenger through the side mirror as he was falling off the vehicle. According to him the passenger was knocked down by the left rear tyre and he only saw the passenger after he had alighted. He however admitted that the passenger did not jump off the vehicle but alighted while the vehicle was still in motion. He had moved for a distance before he saw the passenger. In his evidence the passenger waited for the motor vehicle to move before he alighted.

19. In his judgement the learned trial magistrate found in favour of the Respondent against the Appellants. According to him, the respondent had not alighted when the vehicle was set in motion hence the driver of the suit vehicle was solely negligent and found the respondents 100% liable. He awarded Kshs 200,000/- for future medical expenses; Kshs 480,000 as general damages for pain, suffering and loss of amenities and Kshs 246,440/- as special damages.

20. Aggrieved by the judgement the Appellant has lodged this appeal.

21. The appeal was canvassed vide written submissions that both parties filed and exchanged. It was submitted on behalf of the Appellants that the Appeal the Appellant raises the Three (3) related Grounds of Appeal which the Appellants argued under one ground of liability.

22. According to the Appellants, from the evidence on record it is clear that the plaintiff/respondent was the author of his own misfortune for alighting from a moving vehicle. It was the Appellant's submission that indeed the Plaintiff/Respondent did not tender sufficient evidence for the court to find him 100% liable for the accident and relied on **Oluoch Eric Gogo vs. Universal Corporation Limited [2015] eKLR**, where the court re-stated the duty of the first appellate court.

23. It was submitted that since the testimony by DW2 was that the plaintiff/respondent alighted from the vehicle while it was in motion, the plaintiff/respondent was the author of his own misfortune and the trial court ought not to have found the Appellants 100% liable and reliance was placed on the case of **Peter Okello Omodi vs. Clement Ochieng [2006] eKLR.**

24. It was submitted that the Respondent failed to prove the particulars of negligence as set out in the Plaint. On the other hand, the Appellant through Dw2 who adduced evidence to prove that the Plaintiff caused the accident by alighting from a moving vehicle. Consequently, the Appellant submitted that the Plaintiff/Respondent should have been held at least 50% liable for causing the accident and they relied the case of **Joyce Wambui Burugu vs. Kenya Bus Services Limited [2004] eKLR**, where the court held as follows:

> **"Having examined the record of the proceedings, I am fully satisfied that the trial court based its decision on the evidence before it. The Appellant clearly admitted in evidence that she knew it was dangerous to disembark using the rear door; that there were notices to that effect in the bus; that she was an experienced traveler; that she fell down because she missed a step; and that she did not see anyone else fall down. These admissions are clear. Secondly, the Respondent's witnesses produced an inspection report from the Police prepared immediately after the accident to show that there were no defects in the bus. I concur with the trial court that according to the evidence before it the Appellant simply missed the step and fell off the bus, and got injured. The Respondent was not negligent in any manner. Accordingly, I find no need to interfere with the decision of the lower court, and hereby dismiss this appeal with costs to the Respondent."**

25. In view of all the foregoing, it was the Appellants' submissions that the trial court erred in fact and in law and this Honourable Court ought to re-evaluate the evidence afresh and arrive at the proper conclusion with regard to the causation of the accident and negligence. The Court was urged to allow the Appeal as prayed with costs to the Appellants.

26. On the part of the Respondent, it was submitted that based on the evidence adduced, the Respondent proved that the accident was caused by the negligence of the Appellants and he urged the Court to dismiss the appeal.

Determination

27. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not**

bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

28. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

29. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

30. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

31. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellants proved their case on the balance of probabilities. That the burden of proof was on the appellants to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

32. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

33. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A

draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

34. Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the appellant chose to remain silent.

35. In this case the Appellant testified on how the accident took place. According to him, they were traveling in the subject motor vehicle and upon reaching Machakos primary School, the vehicle stopped apparently upon siting traffic police officers and the conductor ordered those who were going top Machakos to alight there. The conductor then went to talk to the traffic police officers while the 4 passengers were alighting, the Respondent being the last one. However, as he stepped on the last stair, the driver abruptly started the vehicle and as the vehicle started, the respondent was hit on the left shoulder and thrown outside the vehicle where the rear tyre ran over his left leg.

36. The defence case on the other hand was that the Respondent was alighting when the vehicle was in motion. However, from the evidence of DW2, he never saw the Respondent alighting and he only realised that he was alighting when he heard screams from the other passengers. It was his evidence that where he was seated he could not see the conductor. There was no evidence that he was given the go ahead by the conductor before he started the vehicle. He ought to have waited for the conductor to signal him that all was okay before he started to drive the vehicle. It was the responsibility of DW2 to ensure that there was no passenger alighting from the vehicle before starting the vehicle. Although DW2 testified that he looked into the mirror before driving off, the fact that he was not able to brake a vehicle which had just started moving is evidence enough that he started the vehicle abruptly otherwise he ought to have brought the vehicle to a standstill without causing serious injuries to the Respondent. In my view, it is the responsibility of the conductor to ensure that the motor vehicle door was closed at all times when the vehicle was in motion and the failure to do so makes the driver and/or the conductor and hence the owner of the vehicle liable.

37. I associate myself with the decision of **Wambilyangah, J** in **Mgao vs. Wokabi & Another Mombasa HCCC No. 165 of 1990 [1993] EA 685** in which he expressed himself as hereunder:

"The scenario of getting into a moving bus or matatu by a passenger is very common in this country. A prudent driver of a public vehicle should easily foresee that some passengers may be hampered by all sorts of factors, whether personal or otherwise from speedily jumping into the vehicle; and so it behoves him to be patient and allow them enough time to safely get into the vehicle. He should ensure that all his passengers are safely aboard or have safely alighted before he drives from that stage…I find as a fact that the driver in the present case failed to observe those fundamental rules. Instead he hastily and negligently drove off from the stage without checking that more passengers were still struggling to get in: and that is how or why the plaintiff was injured. So the 1st defendant's liability is assessed at 100%; and the 2nd defendant as his employer is vicariously liable."

38. I also agree with the position adopted by **Aburili, J** in **Mary Njeri Murigi vs. Peter Macharia & Another [2016] KLR** that:

"A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof."

39. Based on the evidence on record, the findings of fact by the learned trial magistrate cannot be faulted. It is my finding that he arrived at the correct decision based on both facts and law and that his decision was legally and factually sound and ought not to be disturbed.

40. Since the submissions were only in respect of liability, I find no merit in this appeal which I hereby dismiss with costs to the Respondent.

41. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 10th day of March, 2020.

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Geoffrey