REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.12 OF 2018

PETER NGUGI MBURU.....APPELLANT

VERSUS

NAKURU CRATER PURE WATER BOTTLERS LTD.....1ST RESPONDENT

DAVID MWANGI CHUMA.....2ND RESPONDENT

(Being an appeal from the judgment of Hon. J. Omido in Nakuru CMCC No.703 of 2010 delivered on 19th day of January 2018.)

JUDGMENT

1. This appeal arises from a suit in the lower court by the appellant/plaintiff against the 1st and 2nd respondent for injuries he sustained when the 1st respondents motor vehicle registration number KQJ 339 driven by the 2nd respondent hit him. He prayed for special damages, general damages, future medical expenses and costs of the suit. The trial magistrate found the 2nd respondent/2nd defendant 100% liable for the accident and awarded damages as follows: -

a. Special damages …….. kshs 8,000

b. Incidentals (doctor's expenses) ……kshs20,000

c. General damages……...kshs 400,000

d. Total……. kshs 428,000

2. Being aggrieved by the determination of the lower court, the appellant herein filed this appeal on the following grounds: -

i. That the learned magistrate erred in both law and facts in finding that the 2nd Respondent was not vicariously liable for the tortuous acts of the 1st Respondent on the grounds that the issue of vicarious liability was not pleaded despite evidence showing that the tort feasor, 1st Respondent was acting in the course of his employment;

ii. That the learned trial magistrate erred in law and fact in dismissing the suit against the 1st respondent despite the evidence that there existed master – servant relationship between the 1st & 2nd respondent;

iii. That the learned trial magistrate erred in both law and facts in failing to appreciate that the omission to directly refer to the 2nd Respondent's liability as being vicarious is not necessarily fatal to the appellant's case against the 2nd Respondent;

iv. That the learned trial magistrate erred in law in failing to appreciate that it is sufficient that the primary facts were pleaded and evidence led to show the 2nd respondent was the employer of the 1st respondent and from which vicarious liability can be inferred as a matter of law thereby arriving at a wrong conclusion;

v. That the learned magistrate erred in law and in facts in failing to appreciate that the issue of vicarious liability was raised both during trial and in submissions and therefore left to the court for decision thereby arriving at a wrong conclusion;

vi. That the learned trial magistrate erred in law and facts in failing to take into account the evidence and submission of the appellant

without proper cause thereby failing to award the appellant future medical expenses and awarding the appellant general damages that are in all circumstances inordinately low;

vii. That the learned trial magistrate erred both in law and facts by considering other extraneous matters in the judgment.

3. Parties herein agreed to proceed by way of written submissions.

APPELLANT'S SUBMISSIONS

4. The appellant submitted that the trial magistrate proceeded on a wrong principle in determining vicarious liability, erred in law and in facts in finding the 1st respondent was not vicarious liable for the tortious acts of the 2nd respondent. And finally arriving at a wrong conclusion which resulted in the award of too low damages. The appellant filed a suit claiming damages as a result of an accident. The lower court determined in his favor and found the 2nd respondent 100% liable however the 1st respondent was absolved from any liability on the basis the appellant did not plead the issue of vicarious liability.

5. The appellant submitted that at the time of the accident he was employed by the 1st respondent as a sales agent, while the 2nd respondent was a driver employed by the 1st respondent. He blamed them for negligent; he blamed the 2nd respondent for reversing the lorry without care thereby hitting the appellant against concrete wall causing him to sustain the life-threatening injuries and blamed the 1st respondent for not employing a competent driver.

6. The 2nd respondent did not testify to rebut the appellant's testimony apart from a medical report by **Dr. Malik** which was produced by consent, as per the doctor, he suffered 40% permanent disability; he sustained fracture of the pelvis, rupture of the urethra resulting into urethral stricture and injury to the rectum resulting into anal stricture. The appellant submitted he was in the course of his duties and he acted as was required of him and no evidence was tendered to the contrary.

7. The appellant submitted that the trial magistrate erred by failing to award future damages and that future medical expense forms part of the general damages and the same ought not to be pleaded separately.

8. Further that he failed to award damages for loss of consortium despite having been pleaded in paragraph 9 of the amended plaint; that the appellant lost his sexual functioning organs but the trial magistrate failed to comment on the same thus awarding the appellant an award that is inordinately low without considering all the circumstances in the case. He urged Court to allow this appeal and set aside the trial courts judgment and enter judgement based on the evidence on record.

RESPONDENTS' SUBMISSION.

9. The respondents submitted that the appellant's submissions were not based on the raised ground of appeal but on others issues. The respondents submitted that the appellant should be bound by grounds 1, 2, 3, 4 and 5. Respondents further submitted that the appellant failed to prove his case on a balance of probability.

10. The respondents further submitted that the trial magistrate did not error in concluding that the 1st respondent was not vicarious liable for tortuous liability of the 2nd respondent as no prove was tendered that he was an employee of the 1st respondent.

11. The respondents submitted that the issues raised by the appellant do not show any negligence or contributory negligence on the part of the 1st respondent; that no duty of care owed to the appellant was proved to have been breached by the 1st respondent occasioning injuries to the appellant.

12. Further that the trial court correctly found the water bowser was in good condition and stated that the appellant testified that he was standing behind the lorry when it was reversing and he did not give the driver any sign at the time of the accident thus he wholly organized his own misfortunate.

13. On ground 6, the respondents submitted that a party is bound by his/her pleadings and in his pleadings the appellant did not plead for consortium or future earnings; therefore, the trial magistrate did not error in finding they were not proved.

14. In respect to special damages, the respondent submitted that no receipts were produced to prove the same and award of damages is an award of discretion by the courts and the appellate court is not bound to interfere with the lower court's decision except on special circumstances.

15. Respondent submitted that on ground 7, the appellant did not submit on the same and ought to be dismissed.

ANALYSIS AND DETERMINATION

16. This being the first appellant court I have a duty to reevaluate evidence adduced before the trial court and arrive at an independent determination. The role of the first appellate court was stated in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** as follows: -

> **"…An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own**

conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect…"

17. In view of the above, I have perused and considered evidence adduced before the trial court and considered submissions herein and consider the following as issues for determination: -

i. Whether the 1st respondent should be held vicariously liable for the negligence of the 2nd respondent.

ii. Whether this court should interfere with award of damages.

i. Whether the 1st respondent should be held vicariously liable for the negligence of the 2nd respondent

18. From evidence on record both the appellant and the 2nd respondent were employees of the 1st respondent; the 2nd respondent as a driver and the appellant as a sales person. It is not disputed that at the time of the accident the appellant and the 2nd respondent were supplying water using the 1st respondent's tanker registration number KAJ to a customer. While the appellant was removing a pipe from the tanker, the 2nd respondent reversed and hit the appellant pushing him to the wall. He blamed the driver for not being careful.

19. The trial magistrate's argument in dismissing the case against the 1st respondent is that vicarious liability was not pleaded. However, on particulars of negligence and/or breach of duty paragraph 8(c) reads failure to provide competent and/or qualified drivers. The appellant indicates that it's the driver who told him to go out of the vehicle to remove the pipe from the tanker; he therefore knew he was behind and he was also expected to use side mirror while reversing. The fact that he failed to do that showed he was incompetent or unqualified or careless driver.

20. It was the duty of the 1st defendant to employ and ensure that his vehicle was driven by qualified driver. It is not therefore true that the issue of vicarious liability was not pleaded.

(ii) **Whether this court should interfere with award of damages**

21. The appellant's argument is that he was not awarded costs for future treatment and damages for loss of consortium.

22. There is no doubt that the appellant prayed for damages for loss of consortium. The doctor's evidence confirm that he sustained rapture of urethra mauling leading into stricture removing and rectum injury resulting to stricture and that he had pain in penis. This no doubt was to affect his sexual functioning and he deserved damages however he did not specifically plead for damages for loss of consortium. In my view the award under general damages would cover that as there was no specific prayer.

23. In respect to future treatment it is clear from the doctor's evidence that he would require dilation that would cost between 20,000 to 40,000 and a minimum kshs 100,000 in a private hospital failure which he will suffer kidney failure. In his report he stated that the stricture will have to be rectified at least once a year. He however prayed for kshs 200,000 since according to the doctor it has to be done yearly it would be reasonable to award kshs 200,000 pleaded even if he is to be treated in a public facility at a minimum cost of kshs 20,000. The appellant was 29 years old at the time of the accident as per record. If treatment in a public facility the kshs 200,000 claimed would cover treatment for 10 years. I find that the trial magistrate erred by failing to award kshs 200,000 pleaded for future treatment.

24. In respect to award under general damages. I note that as per the **Dr. Kiamba's** report the plaintiff sustained the following injuries: -

a. Fracture of the pelvis

b. Rapture of the urethra resulting in urethral stricture.

c. Injury to the rectum resulting in anal stricture

25. From the report the plaintiff was admitted in hospital from 2nd January 2008 up to 9th January, 2008. The doctor indicated that the plaintiff was advised to have anal dilation. At the time of examination, complaints were pain in passing stool, dysuria and loss of libido. He assessed temporal disability of 18 months and permanent disability of 40%.

26. A second medical report by **Dr. Malik** was produced by consent. He confirmed that the appellant sustained fractures of the right superior and inferior pubic rami, slightly distended bladder, small and sphincter stricture but no urethral stricture. He confirmed that the appellant had difficulty passing stool and urine and dilation of anal opening done to alleviate his problems. According to him the appellant has no permanent disability. His medical report was not however subjected to cross examination as it was produced by consent.

27. The plaintiff in submissions filed in the lower court proposed an award of Kshs 2,000,000 and cited several authorities to justify that while the respondents proposed kshs 100,000 under this head. I have compared the injuries herein and injuries suffered in the cited authorities and in my view the award of kshs 400,000 is inordinately low. There is no doubt that the injuries were serious and resulted in 40% permanent disability. Under this head I find an award of kshs 1,000,000

28. FINAL ORDERS

1. Order dismissing suit against the 1st respondent is hereby set aside.

2. The 1st respondent is held vicariously liable for tortious acts of the 2nd respondent

3. Award under general damages is set aside and plaintiff is hereby awarded kshs 1,000,000 under this head

4. The appellant is awarded kshs 200,000 for future treatment.

5. Each party to bear own costs of the appeal.

Judgment dated, signed and delivered via zoom at Nakuru This 26th day of November, 2020

……

RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

No appearance for appellant

Ms. Ekesa H/B for Konosi counsel for the respondents