REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 7 OF 2013

REAL TILAK ENTERPRISES.....APPELLANT

VS

SAMUEL MUSEMBI MUTUKU.....RESPONDENT

(An appeal from the decision of the Hon. Principal Magistrate's Court at Kilungu in Civil Case No. 25 of 2011 delivered on 29th November, 2012)

JUDGMENT

Introduction

1. This is an appeal from the judgment of the trial Court in a personal injury claim. The respondent had sued the appellant for both general and special damages for pain and suffering following a road traffic accident where it was alleged that he was travelling as a lawful passenger in Motor Vehicle Registration No. KBM 633 belonging to the Appellant when an accident occurred and he sustained injuries. The matter proceeded to hearing and judgment was entered in favor of the plaintiff/respondent as against the defendant/appellant in the sum of Ksh300,000/- in general damages. The appellant was aggrieved by the judgment and lodged this appeal. This suit in the trial Court was chosen as a test suit on liability amongst other files.

The Appeal

2. The Appellant raised specific grounds as follows:

1) The learned Magistrate erred in law and in fact in entering judgment against the Appellant and finding that the appellant was 100% negligent when considering the evidence of the same had not been proved.

2) The learned Magistrate erred in law and in fact in finding that the Appellants were 100% liable for the accident when there was no eyewitness to corroborate the Plaintiff's evidence as to the occurrence of the accident.

3) The learned Magistrate erred in law and in fact by applying an erroneous standard of proof placed upon him as a matter of law.

4) The learned Magistrate erred in law and in fact by granting the sum of Ksh.300,000/= in respect of general damages which was inordinately high taking into account the injuries sustained by the Respondent and the judicial authorities submitted by the Appellant.

5) The learned Magistrate erred in law and in fact in failing to appreciate the evidence before him and the submissions made on behalf of the Appellants.

6) The learned Magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before him.

It is therefore proposed to ask this Hon. Court for **ORDERS.**

a. That the appeal herein be allowed and the judgment of the subordinate Court be set aside and the suit in the subordinate Court be dismissed with costs.

Alternatively

b. That the liability between the Appellants and the Respondent be varied to the extent that this Honourable deems fit

c. The quantum of damages be varied and reduced to the extent that this Honourable court deems fit.

d. *That the costs of this Appeal be awarded to the Appellant in any event*.

Submissions

Appellant's Submission

3. The Appellant urged that the vehicle involved in the accident was an Isuzu Truck. The respondent's evidence from his testimony is that he was travelling at the back of the said lorry when there was a notice on the door prohibiting carrying of unauthorized passengers.

4. The evidence by the respondent that he had been hired by the driver to harvest sand could not be viable since he had no authority either written or express to employ persons on behalf of the Appellant. The Court was referred to section 2 of the Traffic Act which states;

> *"A commercial vehicle means a motor vehicle constructed or adopted for the carriage of goods or burdens of any description with any trade or agriculture"*

The appellant urged that the vehicle was authorized to carry three passengers including the driver, and therefore, the respondent was not a passenger in the vehicle as alleged. Further, it was urged that Rule 88 of the Traffic Rules prohibited persons riding in a commercial except on the seat provided for passengers as follows:

> *"No person shall be permitted by the owner, driver or other person in charge of a commercial vehicle to travel on the vehicle whilst it is being used on a road otherwise that sitting on the seats provided for the passengers."*

The Respondent was the author of his own misfortune since he was not authorized to board the vehicle as a passenger.

5. It was submitted further that the Respondent could not have seen how the accident had occurred while at the back. The Investigating Officer was not there to see the accident happen. The Appellant's driver had testified that he was avoiding a head on collision with a car, which was overtaking when he lost control of the vehicle.

6. The trial Court had awarded damages, which were excessive contrary to the evidence placed before him and the nature of injuries. In his evidence the respondent (at page 68 line 25 of the Record of Appeal) had testified that he was injured on the left shoulder, left ribs, side neck, belly and face. Yet in his Plaint he had pleaded fracture to the right side $8^{th}/9^{th}$ ribs. The doctor had testified that he would heal without any complication and, therefore, a sum of Ksh.100,000/= would be adequate.

7. Finally, the court was urged to re-examine the whole evidence on record and draw it's own conclusion as held in ***Selle v. Associated Motors Boat Co. Ltd*** [1968] EA 123.

Respondent's Submissions

8. The Respondent opposed the appeal by stating that the trial Court did not err in entering judgment against the appellant and finding them liable. It is their submission that the Respondent was a passenger in the vehicle as evidenced by the police abstract. The Respondent had been hired to load sand by the appellant's driver who had been instructed to carry sand and thus it was in the course of his employment. The driver was an agent of the appellant and therefore vicarious liability applied as held in ***HCM Anyanzwa & 2 Ors v. Lugi De Casper & Anor*** (1981) KLR 10 where it was stated:

> *"Vicarious liability depends not on ownership but on the delegation of tasks or duty."*
>
> *In **Mungowe v. A.G. of Uganda** [1967] EA 17,*
>
> *"The test of a master's liability for the acts of his servant does not depend upon whether or not the servant honestly believes that he is executing his master's Orders. If that were so the master would never be liable for the Criminal Act of the servant at any rate when the Criminal Act is towards benefiting the servant himself.*
>
> *Each case must depend on it's own facts. All that one can say, as I understand the law, is that even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his act s for which his master is liable."*

9. Further the doctrine of *'res ipsa loquitor'* applied since it was a self-involving accident and that the driver of Motor Vehicle Registration No. KBM 633P did not tender evidence to exonerate him.

10. The Appellant's assertion that there was another vehicle involved in the accident was not supported by their pleadings and the Appellant could have joined it as a third party. Thus the Court did not err in holding them liable for the occurrence of the accident since the respondent's evidence was corroborated by the police.

11. The Court was referred to the case in ***Kemfro Africa Limited T/A Meru Express Services & Anor v. A.M. Lubia*** [1982-1988] KLR 728

where the Court of Appeal established the principles to observe in deciding whether or not to disturb quantum of damages. The respondent had suffered two fractured ribs and other soft tissue injuries and he had been admitted for a day, and that he would suffer future medical complications. The amount awarded was not high.

12. The trial Court had considered both submissions for the appellant and respondent unlike what the Appellants are alleging.

13. Finally, the Court was urged to strike out the Appeal with costs.

Issues for Determination

14. The Court has referred to the Record of Appeal, the Submissions and has framed the following issues for determination;

1. Whether the respondent was a lawful passenger in the vehicle.

2. Whether the driver could hire on behalf of his employer.

3. If so, was the driver liable for the occurrence of accident.

4. Whether the appellant was vicariously liable for the act committed by the driver.

5. How much compensation was adequate for the injuries sustained?

Determination

15. The determination in this suit shall bind Kilungu CMCC NO. 36 of 2011 and 38 of 2011 since Kilungu CMCC No. 35 of 2011, which led to this instant appeal, had been chosen as a test suit. Both parties did not attach the authorities relied on.

Duty of first appellate Court to review evidence

16. This is a Court of first appeal and the Court has a duty to re-evaluate, analyze and make it's own independent conclusion. The Court has to bear in mind that whereas the trial Court had a chance to see the witnesses testify and see their demeanor, this Court did not have such an advantage. In *Peter v. Sunday Post Ltd* (1958) EA 424 at page 424, the Court stated;

> *"It is a strong thing for an appellate Court to differ from the finding on a question of fact of a Judge who tried the case and who had the advantage of seeing and hearing the witnesses."*

17. The respondent availed three witnesses whereas the appellant availed one witness.

On the first issue, the respondent in his plaint-dated 24.10.2011 at paragraph 4 had alleged that he was travelling as a lawful passenger in Motor Vehicle Registration No. KBM 633P along Nairobi – Mombasa highway when an accident occurred. The Respondent in his evidence in Court had testified that he was a casual labourer and specifically a sand loader. On 5.8.2011 he was at Salama Market waiting to be hired when the driver of Motor Vehicle Registration No. KBM 633P Isuzu lorry Mr. Muli hired him together with 4 others. He boarded the lorry though he was not to pay fare. The Appellant's driver on the other hand testified that the respondent was a pedestrian walking off the road when he was hit. He further stated the cabin capacity of the vehicle was only 3 passengers including him. He had only carried his two turn boys who were not the respondent.

18. Section 107 of the Evidence Act provides as follows;

> *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.*

The Court has analyzed as above on the evidence tendered on whether the respondent was a passenger or not. The respondent had even gone further and called a police officer who confirmed that the respondent was a passenger upon completion of investigations. The respondent was bound to prove the existence of the fact he wanted the Court to rely on. The Appellants driver (DW1) had also testified that it would take two hours for six people to fill the lorry with sand, which had a capacity of 14 tons. He had testified that he had carried his two turn boys. There was need for the driver to get four more loaders and this court finds that the respondent had been hired as a loader hence his evidence was proof enough that he was a passenger in the vehicle, though the appellant urged there was a notice on the door of the lorry prohibiting carrying of unauthorized passengers.

19. Having established as above evidence that the respondent was a passenger in motor vehicle registration no. KBM 633P Isuzu, the next issue for determination is whether the driver of the said vehicle had hired the respondent on behalf of his employer. The driver (DW1) had clearly told the Court in examination in chief that he was a driver employed by Real Tilak the appellant herein and he had worked for 5 years. The driver (DW1) had said the lorry required six (6) loaders of sand, and since he already had 2 loaders provided by the company, he had to hire 4 more loaders. The respondent had testified by saying he had known the driver (DW1) for two years and he had hired him at Salama Market. The driver (DW1) testified that he had recorded his statement with the police. The Police (PW2) testified that he had also

recorded statements from persons. At this point then the police could have concluded that the injured were either passengers or pedestrians. The respondent went on to testify in re-examination that he boarded the vehicle as usual. This gave an opinion that the driver would usually hire him from Salama Market to go and load sand.

20. The driver (DW1) testified he was to go fetch sand from Emali. He was an employee of the appellant. The driver (DW1) was carrying the sand for his employer. This was not disputed by the appellant. The driver hired the loader to carry out work that had been assigned by his employer.

Was the driver liable for the accident

21. The drier (DW1) testified that while going downhill he encountered a vehicle on his lane. He swerved to avoid a head on collision but he veered off the road and rolled severally before the vehicle stopped. This was a self-involving accident and the respondent could not have contributed to the occurrence of the accident. He had confirmed to the Court that he was the driver. In addition to this he had been charged after completion of investigations as per the evidence of (PW2) the Police Officer who testified in Court. The driver recorded a statement on 19.3.2012, which was filed in court and forms part of the record at page 31. He recorded that, "*the vehicle rolled three times and landed upside down. We were all thrown off the vehicle immediately it started rolling*." This shows the respondent could not have caused the accident since he was not in control of the vehicle. The Police Officer (PW2) had testified that the accident was self-involving and this collaborates the respondent's testimony. The appellants had urged that the driver was avoiding a head on collision with a saloon car, which registration number was not given and the owner of the said saloon car was not enjoined as a third party in the proceedings.

22. The Appellant had urged that the respondent be held 50% liable for the accident since he had voluntarily assumed the risk of being in the lorry despite the warning and the Traffic Rules and Regulations. The Respondent was not in control of the vehicle as demonstrated above and this must fail. This court finds that the trial court did not errer in finding the driver wholly liable for the occurrence of the accident. He is the one, as an agent/servant of his employer, who hired the loader to load sand for the benefit of the employer, and the loader had no choice as to his means of travel to do the work. It might have been different if the plaintiff was a lift-seeker who accepted a lift at the back of the truck despite the warning that the driver had no authority to carry passengers, and therefore accepted the lift on the back was at his own risk, which may amount to contributory negligence.

Whether the Appellant was vicariously liable

23. The appellant herein is a company and the driver (DW1) testified to be the driver of Motor Vehicle Registration No. KBM 633P, Isuzu lorry which was owned by the Appellant. In his statement dated 19.3.2012, he averred that on 5.8.2011 he was assigned duties of collecting sand from Kawese river in Emali and transporting it to the Company premises. He further said that he had already gone for one trip and the accident occurred as he was going for the 2nd trip. It is therefore confirmed that the driver was driving the said vehicle in the course of his employment. In ***HCM Anyanzwa & 2 Ors v. Lugi De Casper & Anor*** (1981) KLR 10, the Court stated:

> "*Vicarious liability depends not on ownership but on the delegation of tasks or duty."*
>
> *This Court is further in agreement with the case in* ***Mungowe v. Attorney General of Uganda*** *[1967] EA 17 in which New bold P, stated:*
>
> "*Each case must depend on it's own facts. All that one can say, as I understand the law, is that even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which his master is liable."*

The driver was carrying sand for the Appellant and this was not challenged.

24. The driver's negligence caused the accident and a presumption arises that it was driven by a person whose negligence the owner is responsible. Though the appellant had urged that there was a warning on the door in regard to Rule 88 of the Traffic Rules which provides as follows:

> "*No person shall be permitted by the owner driver or other person in charge of a commercial vehicle to travel on the vehicle whilst it is being used on a road otherwise then sitting on the seats provided for the passenger's*"

They urged the respondent had boarded the vehicle despite a warning on the door of the lorry hence he was the owner of his own misfortune. This Court considers that the employer was liable for his driver's act of carrying the unauthorized passengers. The respondent had testified that he was hired by the driver to load sand onto the lorry and this was not challenged even if this court finds otherwise, a wrongful act being within the course of employment is a question of fact which was discussed in **Clerk & Lindsell** on Torts, 19th Edition page 335 that a wrongful act is deemed to be done in the course of the employment.

> "*If it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorized mode of doing some act authorized by the master. It is clear that the master is responsible for acts actually authorized by him for liability would exist in this case, even if the relations between parties was merely one of agency and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for the acts which he has authorized provided they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes of doing them."*

How much compensation was adequate for the injuries sustained.

25. The Respondent in his Plaint dated 24.10.11 pleaded the following injuries:

i) Blunt chest injury

ii) Fractured ribs $8^{th}/9^{th}$ on right side.

iii) Blunt trauma to the abdomen.

iv) Blunt trauma to the left shoulder.

The Plaintiff testified he was injured on the left shoulder, left ribs side, neck, belly and face. This court is in agreement with the appellant that he did not testify on the fracture to the right ribs. On Cross-Examination he still testified to have sustained injury to the left ribs. This discharge summary from Machakos General Hospital indicates that the respondent was admitted on 6.8.11 and discharged on 8.8.2011. He did not produce any X-ray film to confirm to the court he had sustained a fracture of the $8^{th}/9^{th}$ right ribs; though the initial treatment document indicates a fracture of $8^{th}/9^{th}$. The medical report by Dr. Mutuku confirms the same injuries. These are clearly soft tissue injuries.

Principles for interference with award of damages

26. The principles upon which the appellate Court may interfere with the award made by the trial court are settled as observed in ***Kemfro Africa Limited T/A "Meru Express Services 1976"*** & ***Gathogo Karimi v. A.M Lubia & Olive Lubia*** [1982 – 1988] 1 KAR 727, 730 where Kneller J.A. said -

> *"The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the damages, took into account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."*

27. The trial Court awarded a sum of Ksh.300,000/= as general damages. The court considers that since no compensation can restore a plaintiff to the state of health and physical integrity as he enjoyed before the accident, the respondent is only entitled to what is fair compensation on the principle that comparable injuries should be compensated by comparable awards. It is clear that the award of the trial court was inordinately high to warrant interference by the appellate court. This Court finds that an award of Ksh.300,000/= for what was clearly soft tissue injuries is a wholly inordinately high award and the appellate court must interfere to reduce the award to reflect the nature of the injury. An award of Ksh.150,000/- would be adequate compensation for the injuries sustained.

ORDERS

28. Accordingly, for the reasons set out above, the Court makes the following Orders:

a) The Appeal is allowed to the extent of the quantum of damages but dismissed on liability.

b) The trial court's award of general damages for pain and suffering in the sum of ksh.300,000/- is set aside and substituted with an award of **Ksh.150,000/-.** Special damages proved are allowed at Ksh.3170/-. The appellant shall, therefore, pay to the respondent **Ksh.153,170/-** with interest at court rate of 14% p.a. from the date of judgment in trial.

c) The Respondent shall have the costs of the suit in the trial Court.

d) Each party shall bear its own costs in the appeal.

Order Accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 25TH DAY OF JANUARY 2019

G.V. ODUNGA

JUDGE

Appearances:

M/S Archer & Wilcock Advocates for the Appellant

M/S J.A Makau & Co. Advocates for the Respondent.