REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 27 OF 2019

BETWEEN

ALFRED MOFFAT MICHIRA .....APPELLANT

AND

JAMES ONWONG'A OMBATI ..... 1ST RESPONDENT

JULIUS BIRUNDU MOKAYA ..... 2ND RESPONDENT

D. A. MICHIRA ..... 3RD RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. S. N. Makila , SRM dated 1st February 2019 at Kisii Magistrates Court in Civil Case No. 281 of 2001*)

JUDGMENT

1. The 1st respondent was the plaintiff before the subordinate court. He sued the appellant, who the 1st defendant and the 2nd respondent as 3rd defendant. The 3rd respondent, who was sued as the 2nd defendant, did not enter appearance or file defence. His case was that he was injured in an accident that took place on the night of 16th and 17th June 1998 while he was travelling in motor vehicle registration number KAE 465Q allegedly belonging to the appellant and 3rd respondent and which was involved in a collision with motor vehicle KAJ 175T belonging to the 2nd respondent. After hearing the case, the trial magistrate found the appellant fully liable and awarded the 1st respondent Kshs 300,000/- and Kshs. 8,118/- as general and special damages respectively. The suit against the 2nd respondent and 3rd respondent was dismissed.

2. The appellant now appeals against the judgment on the basis of the memorandum of appeal dated 26th February 2019 which states as follows:

> *1. The learned trial magistrate erred in fact and in law in holding that the Appellant was 100% liable for the accident.*
>
> *2. The learned trial magistrate erred in fact and in law fundamentally misdirected herself that the Appellant is the owner of Motor vehicle registration Number KAE 465 Q Isuzu Bus.*
>
> *3. The learned trial magistrate erred in fact and in law in not holding that the 2nd Respondent and another party not before the court were liable for the accident.*

3. The 1st respondent has also cross-appealed against the judgment and decree based on the memorandum of appeal dated 16th July 2019 in which he set out the following grounds;

> *1. The Learned Trial Magistrate erred in law and in fact in not finding that there was a head on collision between motor vehicles registration numbers KAE 465 Q and KAJ 175T,*
>
> *2. The Learned Trial Magistrate erred in law and in fact in dismissing the Appellant's suit against the 2nd and 3rd defendants against the weight of evidence.*

3. The general damages awarded by the Learned Trial Court given the injuries the Appellant suffered, the early awarded ex parte and the authorities submitted (sic).

4. The appeal raises the issue of liability and quantum of damages. The parties filed written submissions in support of their respective positions. I shall deal with the issue of liability first. The appellant submitted that the 1st respondent failed to prove that the appellant was the owner of bus registration no. KAE 465Q in which he was a passenger. He pointed to the fact that the 1st respondent did not produce the certificate of search to prove its ownership. Counsel submitted that the police abstract which was marked for identification and not produced in evidence could not be relied upon to prove ownership. He cited the case of ***Kenneth Nyaga Mwige v Austin Kiguta and 2 Others*** **[2015] eKLR** where the Court of Appeal held that a document marked for identification is not an exhibit. Counsel further contended that it was the appellant's case that he was a director of the Company that owned the bus hence he could not be sued and was not liable. As regards the liability, the appellant submitted that the 1st respondent did not establish how the accident took place hence negligence was not proved. Counsel relied on the case of ***Alfred Kioko Muteti v Timothy Miheso and Another*** **[2015] eKLR** where the court held that failure by the plaintiff to testify how the accident occurred and prove each or any acts of negligence attributed to the defence entitled the court dismiss the case as no material was presented for the court to infer negligence.

5. The 2nd respondent supported the decision of the trial magistrate that the appellant was entirely to blame for the accident as the 1st respondent, in his testimony, did not mention or demonstrate how he was liable. He added that during the trial, the 1st respondent confirmed that he was a passenger in the bus owned by the appellant. Counsel submitted that from the totality of the evidence no case was made out against the 2nd respondent and his appeal ought to be dismissed.

6. Counsel for the 1st respondent contended that the trial magistrate ought to have held both the appellant, 2nd and 3rd respondent's liable as there was a collision involving their vehicles. He submitted that the appellant established the ownership of the buses. As regards the appellant, counsel submitted that the 1st respondent stated in his testimony that the bus registration no. KAE 465Q was one of the buses owned by and in the management and of the company in which he was a director and that the trial magistrate was right in holding the appellant liable.

7. The issues raised by the appellant and 1st respondent are questions of fact and since this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd*** **[1968] E.A. 123, 126**).

8. At the hearing only the 1st respondent (PW 1) and appellant (DW 1) testified. PW 1 testified that on the material night he was travelling in a bus registration number KAE 465Q from Kisii to Nairobi. On reaching Jogoo near Nakuru an accident occurred involving the bus he was travelling in an Otange Bus KAJ 175P. He stated that, *"The oncoming bus collided with our bus. The bus was coming from Nairobi left its lane causing the head on collision."* He fell to the ground and found himself outside the bus. He sustained the following injuries; cuts on the left thigh and left knee, head injury on the right side, lacerated wound on the right thigh and tenderness on the cervical spine. PW 1 further testified that the appellant was the owner of KAE 465Q while the 2nd respondent was the owner of KAJ 175P. The police abstract was marked for identification.

9. When cross-examined by counsel for the appellant, PW 1 told the court that motor vehicle registration no. KAE 465Q belonged to the appellant and 3rd respondent. He stated that he carried out a search at KRA but did not produce it. Although he admitted that he could not tell how the accident occurred, the two buses collided with each other. When cross-examined by counsel for the 2nd respondent, he told the court that he was asleep when the accident took place and he only found himself injured outside the vehicle. He stated that the appellant and 3rd respondent were the owners of bus registration KAE 465Q while the 2nd respondent was the owner of the Otange bus. He admitted that he did not have the search certificates for the buses. He also stated that the accident was not caused by the trailer which was stationary and off the road.

10. DW 1 testified he was a public transporter and was one of the directors of Premier Coach Limited and that the bus registration no. KAE 465Q was one of the buses it managed. He denied that he knew A.O or D.A Michira who were named as owners of the bus in the police abstract. He told the court that he only heard about the accident from the press. When cross-examined by counsel for the 2nd respondent, he stated that the bus was owned by the company he was director.

11. Under our law, a plaintiff bears the burden of proving negligence through admissible evidence. **Sections 107**, **108** and **109** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** places the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. It was thus the duty of the 1st respondent to prove, on the balance of probabilities, that the drivers of the buses he had sued caused the accident. The only evidence of the circumstances of the accident is the testimony of PW 1 since DW 1 was not at the scene of the accident and only heard about it.

12. As to whether liability could be attributed to the appellant and 2nd respondent is dependent of whether the 1st respondent established the onwership of the buses. This is a question of fact hence a matter of the evidence. The starting point is of such an inquiry is **section 8** of the ***Traffic Act (Chapter 403 of the Laws of Kenya)*** which provides that, *"The person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle"*. This means that a logbook or certificate of search is only prima facie and not conclusive proof of ownership hence a person may show by some other evidence or prove that someone else is the owner of a vehicle (see ***Wellington Nganga Muthiora V Akamba Public Road Services Ltd & Another*** **KSM CA Civil Appeal No. 260 of 2004 [2010] eKLR**).

13. PW 1 did not produce the respective searches of the motor vehicles. What then was the other evidence to show ownership? PW 1 referred to the Police Abstract to which showed the onwers of the buses. In ***Joel Muna Opija v East African Sea Food Limited*** **KSM CA Civil Appeal No. 309 of 2010 [2013] eKLR**) the Court of Appeal dealt with the status of a police abstract in establishing the ownership of a motor vehicle and stated as follows;

> *[W]e agree that the best way to prove ownership would be to produce to the court a document from the Registrar of motor vehicles showing who the registered owner is but when the abstract is not challenged and is produced in court without any objection, it contents cannot be later denied.*

14. The police abstract in this case was marked for identification. Since it was not produced, it could not be relied on as evidence. The effect of documents marked for identification and not produced was considered by the Court of Appeal in ***Kenneth Nyaga Mwige v Austin Kiguta and Others*** **NRB CA Civil Appeal No. 140 of 2008 [2015] eKLR** where the Court observed that;

> *22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.*

15. The totality of the evidence is that the only evidence of ownership of the bus is the testimony of PW 1. Such evidence cannot of itself establish ownership particularly where the appellant had specifically denied the ownership of the motor vehicles. In his testimony, DW 1 admitted that the bus registration KAE 465Q was owned by a company in which he was director. The trial magistrate accepted this and the fact that he admitted that the company name was on the police abstract as evidence that it was owned by the appellant hence found the appellant vicariously liable.

16. I find that the trial magistrate erred in finding the appellant liable for several reasons. First, the police abstract was not admitted in evidence hence it could not form the basis for establishing liability. Second, the testimony of DW 1 was that he was a director of the company that owned and managed the vehicle. He was not the owner hence he could not be liable. Thirdly and in the absence of the police abstract and other evidence particularly documentary evidence, the testimony of PW 1 and DW 1 was inconsistent on the issue of ownership of the bus. Under **section 3 of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, a fact is not proved if it is neither proved nor disproved. The only conclusion from the evidence is that the appellant did not prove ownership of the vehicles on the balance of probabilities.**

17. Even assuming that the ownership of the vehicles was established, the next level of the inquiry is whether the 1st respondent proved negligence by establishing the fact that collision took place between two vehicles by relying on the doctrine of *res ipsa liquitor* to make the case that the appellant and 2nd respondent were liable. In ***Nandwa v Kenya Kazi Limited*** **[1988] eKLR**, Court of Appeal (Gachuhi JA) cited, with approval, a portion ***Barkway v South Wales Transport Company Limited*** **[1956] 1 ALLER 392**, **393 B** on the nature and application of the doctrine of *res ipsa loquitur* as follows:

> *The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.*

18. As the Court of Appeal explained, once the plaintiff establishes a prima facie case, the defendant must discharge the burden by showing that it was not negligent or that the accident was fortuitous and occurred without any negligence on its part. Apart from the fact that the accident took place, the evidence of PW 1 is not clear how the accident could have occurred. There is no evidence, for example, regarding the point of collision from which the court could infer negligence on the part of the respective bus drivers.

19. I am aware that in the courts have held that where a collision involving the two motor vehicles is established, the court is entitled to infer negligence as was held in ***Hussein Omar Farah v Lento Agencies*** **CA NAI Civil Appeal 34 of 2005 [2006] eKLR observed** that:

> ***In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.***

20. While I agree with that decision, I would point out that even in cases where the court has found both vehicles liable there was evidence of how the accident occurred and the issue before the court was how to apportion liability between the defendants as the court has a basis for inferring negligence. In ***Abby Abubakar Haji Patuma Ali Abdulla v Freight Agencies Limited*** **MSA CA Civil Appeal No. 67 of 1983 [1984]eKLR**, the evidence was such that the trial court could not reconstruct what had taken place and therefore ascribe negligence to one, either or both parties. Nyarangi Ag JA (as he then was) concluded in that case that:

> *The position must however be different where there is no evidence to establish that any party was negligent. That would be the case where the evidence adduced points one way and there is no conflicting evidence. In that case it cannot be right to apportion blame there being no evidence on which apportionment could be based. As was stated in LAKHAMSHI v ATTORNEY GENERAL (1971) E A page 118 at page 121 by Spry – V P. It is difficult to appreciate how a party can be held to have been negligent if there is no evidence that he was in fact negligent.*

21. In this case, the testimony of PW 1 was insufficient to establish facts upon which the court could infer negligence on the part of the owners of the buses. In the circumstances, I must find and hold that 1st respondent failed to prove his case on the balance of probabilities and on that count this appeal succeeds.

22. Notwithstanding my finding on the issue of liability, I must consider the issue of quantum of general damages raised in the cross appeal.

It was not disputed that the 1st respondent sustained injuries as a result of the accident. After the accident he was taken to Molo District Hospital where he was admitted for a day and thereafter transferred to Hema Hospital, Kisii where he was admitted for 3 days. He produced the P3 medical form, the hospital discharge summary from Hema Hospital, a booklet from Kisii Level 5 Hospital dated 24th September 2001 showing that he attended physiotherapy and various receipts confirming hospital attendances and purchase of drugs. The medical report by Dr H. P. Owuor was marked for identification and not produced in evidence.

23. From his testimony, PW 1 stated that he sustained the following injuries: cut on the left thigh, cut on the left knee, cut wound on the left knee, head injury on the right side, lacerated wound on the right thigh and tenderness on the cervical spine. At the time he gave evidence, he stated that he had not recovered and that he had problems on his neck, right knee and sexual weakness.

24. Before the trial court, the 1st respondent submitted that a sum of Kshs. 2,000,000/- was reasonable as general damages. He called in aid two cases. In ***Sammy Machoka Oira v Josphat Mwangi Kihuro*** **NBI HCC No. 433 of 2005 [2008] eKLR** the plaintiff sustained an injury to his lumbar spine which affected his ability to walk properly. The doctors who examined him found assessed and awarded his different levels of permanent disability. He was awarded Kshs. 1,750,000/- in 2008. In ***Mumias Sugar Company Limited v Mohammed Kweyu Shaban*** **KKG HCCA No. 14 of 2016 [2018] eKLR** the claimant was awarded Kshs. 800,000/- in 2018 where sustained a prolapse of intervertebral discs between L4 and L5-SI vertebra with moderate compression on cauda equine. He was awarded 15% disability and was required to wear a cosset and would be affected for the rest of his life.

25. The appellant, without citing any decisions, suggested that a sum of Kshs. 200,000/- would be reasonable. The 2nd respondent also suggested a sum of Kshs. 200,000/- would be reasonable based on three decisions. ***Ndungu Dennis v Ann Wangari Ndirangu and Another*** **KBU HCCA No. 54 of 2016 [2018] eKLR** where the plaintiff sustained minor bruises on the back and tenderness on the leg. The court awarded Kshs. 100,000/- as general damages in 2018. In ***Morris Miriti v Nahashon Muriuki and Another*** **MRU HCCA No. 43 of 2014 [2018] eKLR**, the plaintiff sustained tender chest posterior and anterior, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lung contusion and fracture of the right scapula and was awarded Kshs. 300,000/- while in ***Gogni Construction Company Limited v Francis Ojuok Olewe*** **HB HCCA No. 1 of 2014 [2015] eKLR**, the claimant was awarded Kshs. 350,000/= as general damages in 2015 for having sustained a fracture of the left distal radius and ulna and dislocation of the left elbow and was hospitalised for 6 weeks.

26. In considering the issue of quantum of damages, I am guided by the principle laid down in ***Butt v Khan*** **[1981] KLR 349** where it was held that for an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied.

27. Since the medical report was not produced in evidence and Dr H. P. Owuor was not called to testify, this court can only speculate on the extent and long term effects of the injuries sustained by the 1st respondent. My assessment of the injuries is that they may be classified as soft tissue injuries thus the decisions cited by the 2nd respondent are on the higher side and represent more serious injuries. While the trial magistrate did not refer to the cited decisions, I have looked at the decisions cited by the 2nd respondent and they represent the current trend of awards in injuries similar to those sustained by the 1st respondent. I would therefore affirm the award of Kshs. 300,000/- as general damages.

28. In light of the findings I have made on the issue of liability, I allow the appeal and dismiss the cross-appeal. I set aside the judgment of the subordinate court and substitute with a judgment dismissing the 1st respondent's case. The appellant shall have costs of this appeal and the appellant and 2nd respondent shall have the costs in the subordinate court.

SIGNED IN NAIROBI BY

D. S. MAJANJA

JUDGE

DATED and DELIVERED at KISII this 25th day of JULY 2019.

R. E. OUGO

JUDGE

Mr Bosire instructed by Bosire Gichana and Company Advocates for the appellant.

Mr Aunga instructed by Momanyi Aunga and Company Advocates for the 1st respondent.

Mr Otieno instructed by O. M. Otieno and Company Advocates for the 2nd respondent.