REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 524 OF 2016

ANNE NYACHOMBA GITAU.....1ST APPELLANT

GEORGE ANDREW GITAU.....2ND APPELLANT

VERSUS

PAUL MUIGAI MURIGI.....RESPONDENT

(Being an appeal from the judgement of the Honourable Mrs. Murage Chief Magistrate

delivered on 11th December 2014 in Nairobi CMCC No. 2196 of 2009)

JUDGEMENT

1. The respondent filed instant suit claiming damages as a result of injuries sustained in a road traffic accident on 20/4/2006 involving 1st appellant's motor vehicle KVS 273 driven by 2nd appellant at the material time.

2. The appellants filed defence and denied the allegations.

3. The case was heard and the appellants were held liable as they never testified or call witnesses. On liability they were 100% liable. On general damages the respondent was awarded Kshs.600,000/=. Special damages Kshs.622,680/= totaling to Kshs.1,973,909/= plus costs and interest.

4. Being aggrieved by the above decision they lodged instant appeal and set out 6 grounds of appeal:-

> **(1) That the learned magistrate erred in law and in fact in holding that the respondent had proved his case against the appellants on a balance of probabilities when the issue of ownership of motor vehicle registration number KVS 273 was not proved or at all.**
>
> **(2) That the learned trial magistrate erred in law and in fact in holding the appellants 100% in negligence when the respondent's evidence on causation was inconclusive.**
>
> **(3) That the learned trial magistrate erred in law and in fact in awarding general damages in the sum of Kshs.600,000/= which amount was manifestly excessive in the circumstances.**
>
> **(4) That the learned trial magistrate erred in law and in fact in awarding special damages amounting to Kshs.1,393,909/= which amounts were not specifically proved as required for in law.**
>
> **(5) That the learned trial magistrate erred in law and in fact in finding judgment in favour of the respondent without putting into consideration the appellants' submissions.**
>
> **(6) That the learned trial magistrate erred and misdirected himself in law and in fact in awarding interest on special damages that were not specifically proved and when there was delay in prosecuting the suit on the part of the respondent.**

APPELLANTS' SUBMISSIONS:

5. The appellants submits that, the trial magistrate failed to dismiss the respondent's claim against the 1st appellant having found the 2nd appellant 100% to blame. Secondly, the learned trial magistrate erred in law and in fact by failing to make a finding as to whether or not the issue of vicarious liability had been proved or at all.

6. Consequently, in so far as the learned trial magistrate failed to dismiss the respondent's claim against the 1st appellant the trial court erred and her judgement ought to be interfered with to the extent that the respondent's' claim against the 1st appellant failed in its entirely and urge this honourable court to make such finding accordingly.

7. Thirdly, the appellants submitted that in so far as the trial court did not address itself to whether or not the 2nd appellant was at the material time acting within the course of his duties and/or scope of employment and/or as an agent of the 1st appellate the doctrine/principle of vicarious liability does not lie hence the trial court ought to have made that distinction by dismissing the respondent's claim against the 1st appellant. The effect of such a distinction is that the judgment of the trial court would rest solely on the 2nd appellant and would then not be capable of being visited in any manner upon the 1st appellant and/or her insurers.

8. The 2nd ground of appeal was on causation. They submitted that none of the particulars of negligence as pleaded was proved.

9. In the evidence adduced in court, and in the filed witness statement a new particular of negligence was added i.e. the driver of the offending motor vehicle dozed off occasionally while driving; it was alleged that the accident occurred when the 2nd appellant dozed off while behind the wheel.

10. It is trite that a party is bound by his/her pleadings. In this case nothing would have been easier than for the respondent to have pleaded that the 2nd appellant dozed off thereat leading to the subject accident.

11. The respondent's injuries were particularized as:-

§ *Extreme and severe craniofacial injuries.*

§ *Fractures of the jaw.*

§ *Fractures of facial bones.*

12. The respondent suffered no permanent incapacity or at all. The respondent's own doctor i.e. Dr. Kahugu in his report dated 18/5/2006 which was prepared hardly one month after the accident confidently opined that the respondent would, *"certainly make a full recovery and be fit to undertake any course the pursues in University"*.

13. It was on that basis that the appellants quantified the respondent's claim under the heading of general damages on account of pain, suffering and loss of amenities at Kshs.500,000/= which they submitted was fair based on the case law that was cited to the honourable trial court which they reiterated.

14. They submitted that the honourable trial magistrate erred in law and in fact by awarding general damages of Kshs.600,000/= which was excessive in the circumstances of this case, and, considering whether our economy can sustain huge awards in compensation as eventually such costs are passed on the already financially over-burdened citizens.

15. In this case the respondent pleaded special damages of Kshs.1,809,219/= consisting of:-

Medical expenses	- Kshs.1,205,519/=
Police abstract	- Kshs. 200/=
Medical report	- Kshs. 3,000/=
Motor vehicle search	- Kshs. 500/=
Cost of nursing care	
for six months	- Kshs. 600,000/=

Kshs.1,809,219/=

16. There was no evidence led before the trial court in respect of nursing care for the alleged period of 6 months as had been particularized. Therefore that sum should not have been considered or at all.

17. The trial court found that Kshs.622,680/= only had been proved as there were receipts tendered in evidence totaling to that amount.

18. They submitted that judgment of special damages ought to have been limited to the proven amount of Kshs.622,680/= only and not

together with Kshs.751,229.20 stated to be invoiced.

RESPONDENT'S SUBMISSIONS:

19. The respondent submits that, on proof of ownership, the evidence is contained in the proceedings. During the evidence in chief, in the trial court, the respondent testified the suit motor vehicle was under the wife of the deceased – as his administrator. The respondent produced the Grant of Letters of Administration dated 14th November 2005 which were issued to the 1st appellant as co-administrator.

20. The above facts on the beneficial ownership of the suit motor vehicle were also pleaded in the plaint.

21. On the evidence adduced during the trial the respondent proved the required standard that the 1st appellant was the beneficial, possessory and actual owner of the suit motor vehicle.

22. It is instructive to note that the appellants did not adduce any evidence to controvert the respondent's evidence that the 1st appellant was the beneficial, possessory and actual owner of the suit motor vehicle and the 2nd appellant was her driver and or agent. This fact is submitted by the respondent.

23. Section 8 of Traffic Act (Cap. 403) Laws of Kenya, envisage alternative forms of ownership of the suit motor vehicle other than registration on the certificate of ownership. This was also submitted by the respondent. The statutory provisions recognize and provide that if the contrary (to the registered ownership) is proved then the person in whose name the vehicle is registered is deemed not to be the owner of the motor vehicle at the time of the accident.

24. The court restated the judgment in ***Nancy Ayemba Ngana vs Abdi Ali HCCA No. 107 of 2008 [2010] eKLR,*** where it was held as follows:

> **"But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is cognizant of the fact that a different person, or different other persons, be the *defacto* owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given.**
>
> **And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership, beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration."**

25. Further to the above, the respondent pleaded in the plaint that the 2nd appellant was sued as the driver of the suit motor vehicle and or the agent of the 1st appellant. The respondent also pleaded the doctrines of vicarious liability as well as res *ipsa loquitor*.

26. The respondent during the hearing was able to prove to the required standard that the 2nd appellant caused the accident and, therefore, the cause of the respondent's extensive injuries.

27. During the evidence in chief the respondent fully adopted and relied on his witness statement. He further testified on the occurrence of the accident and blamed the 2nd appellant for the accident.

28. The respondent in his witness statement; extensively stated and testified that he was a passenger in the suit motor vehicle which was driven by the 2nd appellant. The respondent also stated that the suit motor vehicle suddenly crushed into and was trapped under a lorry and it was as a result of the accident that he suffered extensive injuries.

29. Further, the respondent in his oral evidence produced the police abstract, which indicated that the 2nd appellant was the driver of the suit motor vehicle.

30. As demonstrated above, the nexus between the appellants and the accident was proved through actual, possessory and beneficial ownership of the suit motor vehicle.

31. The 2nd appellant filed his handwritten statement, wherein he admitted to the following:-

- ***Being the son of Daniel Gitau Muigai (deceased), the registered owner of the suit motor vehicle KVS 273.***
- ***Being the driver and in control of the suit motor vehicle on 20th April 2006 and was accompanied by his cousin – the respondent herein.***
- ***The suit motor vehicle he was driving rammed into the rear of the lorry, thus causing the accident.***

32. In the absence of any evidence from the appellants to controvert the respondent's evidence on the occurrence of the accident in the absence of any reasonable explanation from the appellants, the trial court was correct in holding the 2nd appellant 100% liable for the accident.

33. In the case of ***Richard Kieti Kathuu vs Musee Mutemi [2018] eKLR*** the High Court held that the applicant's agent/driver owed the respondent a duty of care; having driven the vehicle negligently. He breached the duty of care and by so doing the respondent sustained injuries. The High Court further held that, *"in the circumstances, the negligence is attributed to the appellant, having authorized DW1 to drive the motor vehicle who committed the tortuous act. The High Court consequently, set aside the trial court's decision and held the appellant and co-appellant jointly and severally 100% liable."*

34. The respondent in his submissions urged the trial court to award Kshs.2,000,000/= as general damages for pain and suffering.

35. The respondent, in his submissions, further relied on the authority of ***Uziel Cohen vs Kenya Power and Lighting (2010) eKLR,*** where general damages was awarded for pain and suffering at Kshs.1,200,000/=. Judgment in that case was delivered on 23rd February 2010. The respondent also relied on ***Isaac Waweru Mundia vs Kiilu Kakie Ndeti*** where general damages was awarded at Kshs.1,000,000/=. Judgment therein was delivered on 23rd January 2012.

36. He urge this honourable court to find that the trial court's award of Kshs.600,000/= for general damages was manifestly low in consideration of the injuries suffered. He urge this honourable court to enhance the award to Kshs.2,000,000/=.

37. In saying so, he rely on the authorities of:

§ ***Uziel Cohen vs Kenya Power & Lighting Co. Ltd [2010] eKLR*** – Judgment delivered on 23rd February 2010. The respondent in that case suffered similar injuries to the respondent herein of multiple fractures of the mandible and maxilla and loss of teeth. The court awarded Kshs.1,200,000/= as general damages for pain and suffering.

§ ***Duncan Kimathi Karagania vs Ngugi David & 3 Others [2016] eKLR*** – Judgment delivered on 22nd March 2016. The respondent therein suffered among others, commuted fracture of maxilla bilaterally, compound fracture of the mandible, commuted fracture of right humerus, multiple lacerations on the face, hands and forearms. The court awarded Kshs.4,000,000/= for pain and suffering.

38. The respondent adduced evidence of medical expenses in form of receipts as follows:-

- *Receipts from Aga Khan University Hospital – Kshs.29,600/=. Respondent exhibit No. 6.*
- *Receipts from Karen Hospital – Kshs.439,300/=. Respondent's exhibit No. 9.*
- *Receipts from Upper Hill Medical Center – Kshs. 172,050/=. Respondent's exhibit No. 10.*
- *Receipts from Kenyatta National Hospital and Dr. Munyoro Kshs.10,530/=. Respondent's exhibit No. 11.*

39. The respondent also produced invoices to show the expenses incurred for his treatment as follows:-

- Karen Hospital – Kshs. 84,500/= and Kshs.751,229/=. Both respondent's exhibit No. 8.
- The respondent also adduced evidence in form of demand letter and that he and his family gave titles as security.

40. He urged this honourable court to find that the respondent did adduce evidence and prove his special damages to the required standard.

41. The respondent specifically pleaded for interest on both general damages and special damages. The trial court was correct in awarding interest on both general and special damages as they were pleaded as required under the law.

42. The duty as a first appellant court, is to re-evaluate as well as examine afresh the evidence and to arrive at our own conclusion having regard to the fact that we have not seen or heard the witnesses. This position was stated in the case of ***Selle & Another vs Associated Motor Boat Company Ltd & Others (1968) EA 123*** as follows:-

> **"… This Court must reconsider the evidence, evaluate itself and draw its own conclusions though it shall always bear in mind that it had neither seen or heard the witness and should made due allowance in that respect …" [See also Jivanji vs Sanyo Electrical Company Ltd (2003) KLR 425]**

EVIDENCE ADDUCED:

43. PW1 Dr. Wokabi testified and produced medical report. He indicated that respondent sustained major lacerations. He could not close mouth together.

44. On cross examination he said he examined respondent 7 years after the accident. He relied on earlier medical report. The doctor was not aware respondent moved nursing care.

45. PW2 the respondent relied on his statement. He said he was in the motor vehicle in issue. There was a lorry ahead. Something confused them and they had an accident. He was injured as pleaded. He went to MP Shah and Aga Khan vide receipt he paid Kshs.29,000/=. Kenya National Hospital vide invoice for surgery he paid Kshs.751,229/=. Nairobi Heart Hospital Kshs.84,500/= vide invoice. Karen Hospital he

paid Kshs.439,300/= vide receipts. Dr. Kahugu Kshs.172,050/= vide receipts. Doctor in Kenyatta Kshs.10,530/=. He incurred Kshs.1,250,250/=. He had unpaid balance in Karen Hospital vide demand for Kshs.369,710/=. He made report and paid Kshs.3,000/= vide receipt. There was Dr. Kahugu report the motor vehicle belonged to his uncle. He was with a cousin. His uncle was deceased. The motor vehicle was under his wife Ann Gitau his administrator of his estate vide grants produced. He blamed 2nd appellant.

46. On cross examination he said he said the receipts in court were for treatment. He said he produced invoices. He said he earned Kshs.60,000/= per week. He paid taxes and a student. He said he was in Gitau's motor vehicle but he didn't produce record. His cousin George picked him. He was a member of the family. He dozed off thus the accident. There was a lorry ahead. Something happened he could not explain. It was 6 – 7 am and was misty. They were 4 relatives but he sustained most serious injuries. He had belt. He said in re-examination that he tendered invoices as he had not paid the monies.

ISSUES, ANALYSIS AND DETERMINATION:

47. After going through the evidence on record, pleadings and submissions filed, I find the issues are; ***whether the respondent proved his case on balance of probabilities on liabilities and damages? Was general damages awarded inordinately high? Was special damages specifically proved?***

48. In his testimony, the respondent told the court that on 20/4/2006 he was travelling in the appellant's motor vehicle. Something confused the driver and an accident occurred. He blamed the appellant for the accident. Defence submitted that the respondent did not prove negligence on the part of the driver. The respondent's testimony is that the 2nd appellant was driving when the accident occurred. The appellant did not testify.

49. As it is, the defence filed herein has no evidence to support it. Respondent has pleaded the doctrine of res *ipsa loquitor*. Further the 2nd appellant filed his handwritten statement, wherein he admitted to the following:-

- ***Being the son of Daniel Gitau Muigai (deceased), the registered owner of the suit motor vehicle KVS 273.***
- ***Being the driver and in control of the suit motor vehicle on 20th April 2006 and was accompanied by his cousin – the respondent herein.***
- ***The suit motor vehicle he was driving rammed into the rear of the lorry, thus causing the accident.***

50. The doctrine of res ipsa loquitor applies in the circumstances. Appellant has denied ownership. No records were produced. 2nd appellant was the driver of the motor vehicle. The same facts are stated in the abstract. In the circumstances, the trial court was justified in making a finding that the 2nd appellant was liable for this accident totally. Thus entry of judgement against him at 100%.

51. On proof of ownership, the evidence is contained in the proceedings. During the evidence in chief, in the trial court, the respondent testified the suit motor vehicle was under the wife of the deceased – as his administrator. The respondent produced the Grant of Letters of Administration dated 14th November 2005 which were issued to the 1st appellant as co-administrator. The above facts on the beneficial ownership of the suit motor vehicle were also pleaded in the plaint.

52. On the evidence adduced during the trial the respondent proved the required standard that the 1st appellant was the beneficial, possessory and actual owner of the suit motor vehicle.

53. It is instructive to note that the appellants did not adduce any evidence to controvert the respondent's evidence that the 1st appellant was the beneficial, possessory and actual owner of the suit motor vehicle and the 2nd appellant was her driver and or agent. This fact is submitted by the respondent.

54. **Section 8 of Traffic Act (Cap. 403) Laws of Kenya**, envisage alternative forms of ownership of the suit motor vehicle other than registration on the certificate of ownership. This was also submitted by the respondent. The statutory provisions recognize and provide that if the contrary (to the registered ownership) is proved then the person in whose name the vehicle is registered is deemed not to be the owner of the motor vehicle at the time of the accident.

55. The court restated the judgment in **Nancy Ayemba Ngana vs Abdi Ali HCCA No. 107 of 2008 [2010] eKLR,** where it was held as follows:

> ***"But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is cognizant of the fact that a different person, or different other persons, be the defacto owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given"***

56. She never testified to rebut that piece of evidence thus vicariously liable.

57. On quantum the respondent sustained multiple fractures of the lower jaw, fracture of the nasal bone and fracture of the maxilla. He underwent specialised surgical procedure. He was subsequently re-admitted and internal fixations removed in July, 2006.

58. Dr. Wokabi opined that the specialised maxilla facial surgery he underwent was very successful and it had very good outcome. He has no demonstrable facie deformity or stiffness. Respondent did not submit. Appellant suggested Kshs.500,000/=.

59. The trial court considered the authorities cited, the awards were made in 1989, 1994 with amount ranging from Kshs.100,000/= to Kshs.180,000/= for similar injuries. Taking to consideration of factors such as the inflation and time span, it made an award an award of Kshs.600,000/=.

60. The respondent cites and relied on the authorities of:

> ***Uziel Cohen vs Kenya Power & Lighting Co. Ltd [2010] eKLR*** – Judgment delivered on 23rd February 2010. The respondent in that case suffered similar injuries to the respondent herein of multiple fractures of the mandible and maxilla and loss of teeth. The court awarded Kshs.1,200,000/= as general damages for pain and suffering.

Duncan Kimathi Karagania vs Ngugi David & 3 Others [2016] eKLR – Judgment delivered on 22nd March 2016. The respondent therein suffered among others, commuted fracture of maxilla bilaterally, compound fracture of the mandible, commuted fracture of right humerus, multiple lacerations on the face, hands and forearms. The court awarded Kshs.4,000,000/= for pain and suffering.

61. He urges court to enhance the award. However he never appealed nor lodged a cross-appeal .This court finds that the award was even on the lower side considering the gravity of the injuries thus this court will not interfere with the same.

62. On special damages, the appellants submit that, the trial court found that Kshs.622,680/= only had been proved as there were receipts tendered in evidence totaling to that amount. They submitted that judgment of special damages ought to have been limited to the proven amount of Kshs.622,680/= only and not together with Kshs.751,229.20 stated to be invoiced.

63. The respondent produced receipts totaling to Kshs.622,680/=. He has invoices for Kshs.751,229.20. The trial court held that the said invoices are from the medical facilities where he was treated after the accident. He will still have to pay. He is entitled to the same as well. The facilities have demanded payment of the same.

64. It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See ***National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (UR).*** In the latter case this Court was emphatic that

> ***"… It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract …".***

65. Ksh. 751229.20 was yet to be incurred to fall within recoverable special damages as same had not been paid by the respondent. Thus the court will allow appeal to the extent the said invoiced amount was included in the award and thus same shall be removed from the award.

66. The trial court award of special damages at Kshs.1,373,909/= is thus reduced to Kshs.622,680/=. Thus court makes the following orders;

> **i. Appeal on liability is dismissed.**
>
> **ii. General damages of Ksh. 600,000/= upheld.**
>
> **iii. Special damages reduced to Kshs. 622,680/=.**
>
> ***Total……... Kshs.1,373,909/=***
>
> **iv. Parties to bear their costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2019.

.....

C. KARIUKI

JUDGE