REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 76 OF 2014

FLORENCE ATIENO NYANYIMBI.....APPELLANT/RESPONDENT

VERSUS

JOSEPH KIOI KARIUKI.....1ST RESPONDENT/APPLICANT

WILSON KIPKOSGEI MAINA.....2ND RESPONDENT

LOCHAB BROTHERS LTD.....3RD RESPONDENT

EQUATOR BOTTLES.....4TH RESPONDENT

(Being an appeal from the judgment of Honorable Brenda Bartoo Principal Magistrate

delivered on 16th May, 2014 in eldoret CMCC No. 882 of 2003)

JUDGMENT

The appellant filed an appeal vide a memorandum of appeal that was filed on 9th June 2014. The appeal was based on various grounds. These include that the trial court erred in failing to consider the evidence in totality at arriving at the decision; the trial court erred in failing to award special damages that were proved and that the general damages were too low. The appellant also based the appeal on the ground that the trial court erred in exonerating the second and third respondents from blame.

APPELLANT'S CASE

There are no submissions on record for the appellant.

3RD RESPONDENT'S CASE

There are submissions on record for the 3rd respondent that appear to have been filed on two separate occasions but upon further perusal it is as a result of an error on the part of the 4th respondents' advocates.

As per the record of appeal, the 3rd respondent, Lochab Brothers Ltd (2nd defendant), was represented by Nyaundi Tuiyott & Co advocates who filed submissions on 19th June 2019. The 4th Respondent (3rd defendant), Equator Bottlers, was represented by the firm of Archer and Wilcox & Co. Advocates.

It submitted that it is a cardinal rule of evidence that he who alleges must prove. In her testimony the appellant conceded during cross examination, that she had not witnessed the initial accident.

The police abstract was silent on the role played by the 2nd and 3rd defendants and it does not mention the role the other motor vehicle, a tractor Reg. No. KAA 949Y played.

In giving its judgment the trial court found that the 1st defendant's driver had failed to take precaution of other road users and rammed into another vehicle which had already been involved in an accident and that since he was driving from behind, the 1st defendant's driver ought to have taken adequate precaution by maintaining a safe distance so as to avoid an accident and hence the appellant failed to prove the

allegations.

In their submissions to the trial court the appellant overlooked the essence of having an eye witness or the police investigator appearing as a witness to shade light on what really transpired. It is not enough to produce the abstract and leave to the court to come to conclusive determination of the issue.

The trial magistrate stated that the abstract did not specify any mistake committed by the 2nd and 3rd defendants, meaning they did not contribute to the accident.

It relied on the case of Kenya Tea Development Authority v Andrew Mokaya HCCA No. 174 of 2006 on the burden of proof.

Not every injury is as a result of someone's negligence. An injury per se is not sufficient to hold someone liable. the appellant should have proven they were injured as a result of the 2nd and 3rd defendant's negligence. The trial magistrate after considering both parties' submissions and authorities relied upon dismissed the case against the 2nd and 3rd defendants with costs.

The decision of the trial court was reasonable, fair and should be upheld.

4TH RESPONDENT'S CASE

The 4th respondent filed submissions on 11th October 2019. It averred that the appellant failed to produce a motor vehicle search for motor vehicle registration No. KAJ 803U, said to belong to the 4th respondent. The appellant had to prove that a) the defendant owes the plaintiff a duty of care, b) the defendant breached that duty of care, c) the plaintiff has suffered loss and damage due to the said breach, as per the case of ***jimmy Paul Semenye v Aga Khan Health Service T/A The Aga Khan Hospital & 2 others (2006) eKLR.***

There can be no liability without fault against the defendant. the 1st respondent or his driver did not enter appearance or file a defence. The police abstract produced as PExh 10 does not disclose any role of the respondent in the accident. The appellant testimony ought to have been corroborated by the 1st respondent or his driver against the respondent.

The appellant pleaded particulars of negligence in the plaint dated 4th June 2003. However, the court of appeal in ***Statpack Industries v James Mbithi Munyao*** held that the plaintiff must adduce evidence which on a balance of probability, a connection between the two may be drawn and that an injury per se is not sufficient to hold someone liable for the same. The appellant was unable to establish a causal link between the respondent and the accident hence no duty of care was breached.

The 1st respondent failed to enter appearance hence the appellant's evidence remained uncontroverted. The trial magistrate considered the police abstract which did not blame the other respondents hence the magistrate did not find any reason to apportion liability against the 2nd and 3rd respondents.

The appellant testified that she did not witness the accident involving the second and third respondents. The learned magistrate observed that since the 1st respondent was driving motor vehicle KAD 968S from behind, he ought to have taken adequate precaution and kept a safe distance as per page 123 of the record of appeal.

The trial magistrate considered the testimony of the appellant and Dr. Aluda in respect to the injuries sustained by the appellant and the authorities relied upon by the appellant established more severe injuries hence were not comparable.

The court was only required to determine who was to blame for the accident and contribution and the damages awardable. The police abstract indicated no role in the accident on the part of the 2nd and 3rd respondents. The trial magistrate also considered that the 1st respondent had not entered appearance or filed defense to controvert the appellant's claims. As a result, the trial court found the 1st respondent 100% liable and awarded damages after analysing the evidence.

The appellant pleaded special damages at paragraph 6 of the plaint at page 9 of the record of appeal. The appellant only pleaded kshs. 1500 for the medical report and the receipt was marked as MFI7(b). The respondent submitted that as per the case of ***Nyaga Mwige vs Austin Kiguta & others (2015) EKLR;*** until a document marked for identification is formally produced, it is of very little if any, evidential value. However, on 21st February 2013, Dr. Aluda testified and produced a receipt as Exhibit 7(b) but it is not clear in the proceedings at page 107, line 3 of the record of appeal whether it was the same receipt for kshs. 1,500 marked as MFI7(b) or a receipt for court attendance. It cited the case of ***Delta Haulage Services Ltd. V Complast Industries Limited & Another (2015) eKLR*** where it was held that a claim for special damages must be strictly pleaded and proven.

As per the doctor's testimony the appellant suffered severe soft tissue injuries with no incapacity. There was no causal link between the respondent and the accident. As per the case of ***Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja (1982-88) 1 KAR*** comparable injuries should attract comparable awards. It also cited the case of ***KEMFO Africa T/A Meru Express & Another v A.M. Lubi & Another (No.2) (1987) KLR 30*** on the principles of disturbing an award for quantum of damages. At page 48 of the record of appeal the appellant submitted that kshs. 350,000/- was an adequate award for general damages for pain and suffering relying on the case of ***Mutuku Musyoka v Nicodemus Mumo & 2 others Mombasa 198 of 1987 contained at pg. 50*** of the appeal. The principle in awards for damages is that comparable injuries attract comparable compensation and the case cited by the appellant did not have comparable injuries to the ones in this case.

The respondent submitted that the judgment was in compliance with *order 21 rule* 4 and *5* of the *Civil Procedure Rules.* As per page 112 line

3 of the record of appeal the trial court was guided by the contents of the abstract in determining apportionment of liability. The burden of proof was on the appellant to prove her case on a balance of probabilities. The respondent relied on the doctrine of res ipsa loquitur as the only exception to the rule on burden of proof.

The 1st respondent did not enter appearance or file a defence or testify to buttress the appellant's testimony or controvert the 3rd respondent's claims of contribution against the 1st respondent.

The court should dismiss the appeal with costs to the 3rd respondent.

ISSUES FOR DETERMINATION

a. Whether the award for general damages was too low

b. Whether the trial court erred in failing to award special damages

c. Whether the trial court erred in dismissing the claim against the 2nd and 3rd respondents

WHETHER THE AWARD FOR DAMAGES WERE INORDINATELY LOW

In ***Mbogo and Another v Shah [1968] EA 93*** the court held: -

> **".....I think it is well settled that this Court will not interfere which an appellate court should interfere in the exercise of the discretion of a judge with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself, or because it has acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

In ***Kemfo Africa limited t/a Meru Express Services (1976) & Another V Lubia & Another, (1987) KLR 30*****,** the same court expressed itself as follows:

> ***"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 to be that; it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of 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…".***

In the case of ***TAYAB -V- KINAU [1983] KLR,114 at 115*** the court of Appeal observed: -

> **8.(a) The money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.**

The injures that were sustained in the case upon which the appellant relied upon were more severe than those that she sustained. She relied on the case of ***James Oraro Machuka v Julius Nyabuti Ogeto HCCC 2048/99*** where the plaintiff's injuries were more severe than those sustained by the appellant in this suit. I find that the trial magistrate exercised her discretion judiciously.

WHETHER THE TRIAL COURT ERRED IN FAILING TO AWARD SPECIAL DAMAGES

The trial court found that special damages of kshs. 1,500 were not proven by the appellant. The doctor produced a receipt as exhibit 7a and b for kshs. 1,500. As per the plaint the expenses were from the medical report prepared by the doctor.

In ***Douglas Odhiambo Apel & Anor Vs Telkom Kenya Ltd,*** the Court of Appeal held that: -

> ***"..... a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court..... unless a consent is entered into for a specific sum, then it behoves the claiming party to produce evidence to prove the special damages claimed.....***
>
> ***Submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the Plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur."***

In ***Delta Haulage Services Ltd v Complast Industries Limited & another [2015] eKLR*** the court held;

> ***…a claim for special damages must not only be pleaded, but must be strictly proved.***

As per the record of appeal, at page 105 it is not clear whether the receipt produced was that for the medical report or court attendance. The plaintiff's

list of documents does not contain a receipt for the medical report. I am inclined to agree with the respondent that the appellant failed to prove special damages thus the trial court did not err in not awarding the same.

WHETHER THE JUDGMENT DOES NOT CONFORM WITH THE REQUIREMENTS OF JUDGMENT

The appellant did not state in what ways the judgment failed to conform to the requirements of a judgment.

Order 21 rule 4 of the *Civil Procedure Rules* provides;

> ***"Judgments in defended suits shall contain a concise statement of the case, the points for determina*tion, the *decision thereon, and the reasons for such decision."***

A perusal of the judgment in the lower court file indicates that it was in overall compliance with *Order 21, Rule 4* and *5* of the *Civil Procedure Rules.*

WHETHER THE TRIAL COURT ERRED IN DISMISING THE SUIT AGAINST THE 2ND AND 3RD RESPONDENTS

The burden of proof was on the appellant to prove her case against the respondents on a balance of probabilities. The police abstract was silent on the role of the 3rd and 4th respondents in the accident. Further, the appellant testified that she did not witness the accident involving the 3rd and 4th respondents. In Statpack Industries v James Mbithi Munyao Nairobi HC Civil Appeal No. 152 of 2003 the court stated as follows:-

> ***"Coming now to the more important issue of 'causation', it is trite law that the burden of proof of any fact of allegations on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable."***

The appellant failed to prove negligence on the part of the 3rd and 4th Respondents. Further, she failed to prove if there was any causal link

between her injuries and the 3rd and 4th respondents. In the premises the trial court did not err in dismissing the case against the 2nd and 3rd defendants.

Given the foregoing considerations, I do find the appeal unmerited and it fails on all grounds with costs to the 3rd and 4th defendants.

S.M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **26th** day of **November, 2019**

In the presence of:

Miss Mwiruri holding brief for Mr. Chepkwony for the appellant

Miss Mibei holding brief for Mr. Maganga for the respondent

Ms Abigael – Court assistant