REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 645 OF 2012

SIMON KARUKU MWANGI.....1ST APPELLANT

GLADYS WANJIKU MWANGI.....2ND APPELLANT

-VERSUS-

NETSOL KENYA LIMITED.....1ST RESPONDENT

MARTIN NYAMAL KAVUNA.....2ND RESPONDENT

(Being an appeal from the decision and decreee of the Chief Magistrate's Court Nairobi – Milimani Commercial Courts CMCC No.5635 of 2010 delivered by Hon. P. W. Wasike (RM) on 2nd November 2012)

JUDGEMENT

BACKGROUND:

1. The appeal herein arises from the judgment of Honourable P.W. Wasike (RM) in NRB CMCC No. 5635 of 2010 delivered on the 2nd November 2012. The appellants herein were the plaintiffs in the said lower court matter. The 1st appellant sued the defendants/respondents for injuries he sustained while the 2nd appellant claim was for material damage arising out of the damage caused to her motor vehicle registration number KBD 024W.

2. On 2nd November, 2012 the court delivered its judgment and awarded the 1st appellant Kshs.500,000/= as general damages (subject to apportionment of liability of 100%) for a compound fracture of the right tibia, compound fracture of the right fibula and a permanent disability assessed of 15%.

3. The 2nd appellant material damage claim for Kshs.162,050/= was dismissed for alleged failure to prove ownership of the said motor vehicle KBD 024W.

4. The appellants being dissatisfied with award on the general damages, being inordinately low and dismissal of material damage claim for failure to prove ownership of the motor vehicle KBD 024W respectively lodged this appeal.

APPELLANTS' GROUNDS OF APPEAL:

(1) That the learned magistrate misdirected himself on the evidence and the applicable law.

(2) That the learned magistrate error is not considering the submissions made by the appellants' counsel on both the material and general damages payable.

(3) That the learned magistrate erred in apportioning liability without any basis whereas the appellants' evidence was overwhelming and controverted by the defence.

(4) That the learned magistrate erred in failing to award the material damages despite the evidence adduced in court by the 2nd appellants.

(5) That the learned magistrate erred in refusing to award the material damages which were pleaded and proved in court.

(6) That the learned magistrate erred in making a finding that the 2nd appellant had not proved ownership of motor vehicle registration number KBD 024W whereas she produced a logbook in her name.

(7) That the learned magistrate erred in now looking at the second page of the logbook which had the name of the 2nd appellants as the owner of motor vehicle KBD 024W.

(8) That the learned magistrate erred in failing to take judicial notice that the logbook is good proof of the ownership.

(9) That the learned magistrate erred in not taking into account the evidence by the 1st appellants that the motor vehicle registration number KBD 024W belonged to the 2nd appellants.

(10) That the learned magistrate erred in refusing to award the loss of user damages whereas the evidence and proof thereof was tendered in court.

(11) That the learned magistrate erred in not taking judicial notice that the matatu lost business for the number of days it was undergoing repairs.

(12) That the learned magistrate failed to consider and appreciate the nature of the material damages claim.

(13) That the learned magistrate erred in awarding general damages which were manifestly low and which were not commensurate with the serious injuries sustained.

(14) That the learned magistrate erred in not taking into account the cited authorities in the submissions filed by the appellants.

5. The parties were directed to file submissions to canvass appeal.

APPELLANTS' SUBMISSIONS:

6. The appeal is premised on 14 grounds. The appellant submits that the grounds can be collapsed into two issues:

i. Whether the award of general damages of Kshs.500,000/= awarded by the trial court was inordinately low taking into account the injuries sustained by the appellants?

ii. Whether the 2nd appellant proved ownership of motor vehicle registration number KBD 024W? If so, is she entitled to an award of Kshs.162,050/= being the costs she incurred in carrying out the repairs.

7. It is the appellants' submissions that the general damages awarded to the 1st appellant were manifestly low since he sustained compound fracture of the right tibia, compound fracture of the right fibula and permanent disability assessed of 15%.

8. The evidence adduced by the 1st appellant in the subordinate court was that the said leg had shortened due to the injuries he sustained.

9. The sum awarded herein was manifestly low. The authorities cited by the appellants were in the range of Kshs.1,000,000/=. In the case of ***Kornelius Kweya Ebichet vs C & P Shoe Industries Limited [2008] eKLR,*** the court awarded Kshs.1,000,000/= as general damages for similar injuries as those sustained by the 1st appellant.

10. It is the 1st appellant submission that an award of Kshs.1,000,000/= would be reasonable under this heading taking into account that the 1st appellant was left with 15% permanent disability and a shortened lower limb.

11. The 2nd appellant was the beneficial owner of motor vehicle registration number KBD 024W which was being driven by her brother the 1st appellant/appellants. The court made an erroneous finding that the 2nd appellant had not proved ownership of motor vehicle registration number KBD O24W.

12. The 2nd appellant produced two logbooks which had two pages. The 1st page showed the name of the previous owner whereas the 2nd page indicated the appellant's name after the transfer.

13. The contention of the learned magistrate was that the copy of the logbook produced as exhibit number 8 did not indicate the 2nd appellant as the owner. The court completely failed to look at the contents of the 2nd page of the same logbook clearly showing the 2nd appellant's name as the owner of motor vehicle KBD 024W at the material time of the accident.

14. Moreover, the 2nd appellant produced a number of documents during trial. These documents include the police abstract, the repaid receipts/invoices, the motor vehicle assessment report which were all in her name and in respect of motor vehicle registration number KBD O24W.

15. It is the 2nd appellant's submission that assuming that the logbook was in a different name the court ought to have evaluated the evidence adduced as wholly in determining who was the owner of motor vehicle registration number KBD 024W. The 1st appellant confirmed to the court that the 2nd appellant/appellants was her employer and the owner of motor vehicle registration number KBD 024W.

16. The ownership of a motor vehicle is not only predicated on the logbook or copy of records but also from the evidence adduced by a party. The court in the case of ***Nancy Ayemba Ngaira vs Abdi Ali [2010] eKLR*** held as follows:

> **"And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership; beneficial ownership; possessory ownership. A person who enjoys such other categories of ownership, may for practice purpose, be much more relevant that the person whose name appears in the certificate of registration."**

17. It is the 2nd appellant's submission that during trial the respondent did not challenge the 2nd appellant on the ownership of motor vehicle KBD 024W. Therefore, there was no basis for the trial magistrate in dismissing the 2nd appellant's claim for material damage.

18. The Court of Appeal in the case of ***Wellington Nganga Muthiora vs Akamba Public Road Services & Another [2010] eKLR*** held as follows:

> **"Where a police abstract was produced and there was no evidence adduced by a respondents to rebut it and not even cross examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards or probability and or beyond reasonable doubt as is in criminal cases. However, where it is challenged by evidence or in cross examination the appellants would need to produce certificate from the registrar of motor vehicles or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive in the absence of proof to the contrary."**

19. It was held in the case of ***Charles Nyambuto Mageto vs Peter Njuguna Njathi [2012] eKLR:***

> **"From the interpretation of section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership need to necessarily produce a logbook or a certificate of registration. The courts recognise that there are various forms of ownership, that is to pay actual, possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the police abstract report even as held in the Thuranira and Mageto cases (Supra) that the police abstract report is not, on its own, proof ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the police abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership."**

20. It is the 2nd appellant's submission that the respondents did not contest the ownership of the subject motor vehicle registration number KBD 024W as they did not call any evidence to contradict the 2nd appellant contention that she was the owner of the subject motor vehicle.

RESPONDENTS' SUBMISSIONS:

21. The 2nd appellant in the plaint pleaded that she was the registered owner of KBD 042W. Further, in her evidence, the 2nd appellant testified and maintained that she was the registered owner of the motor vehicle KBD 024. She produced a copy of a logbook as exhibit 8 before the trial court.

22. The copy of the logbook produced in court bore the name of Hassan Said Boboo and not the name of the 2nd appellant. Guided by the above findings the court proceeded to disallow the entire claim on material damage as the 2nd appellant did not proof the fact of ownership. The copy of the logbook was left out of the record of appeal.

23. The issue of beneficial ownership was only raised in the submission in the instant appeal. It was neither pleaded nor evidence tendered before the trial court in support of the same.

24. The respondents submitted that the issue of beneficial ownership being sought to be introduced in the instant appeal was not pleaded before the trial court. This fact is confirmed by the findings of the trial court. Respondents therefore urge the court to uphold the trial court's finding that ownership was never proved and the entire claim be dismissed.

25. The respondents submitted that the rest of the issues being raised should not be addressed for the reason that the 2nd appellant failed to prove that she was the registered owner of the motor vehicle KBD 024W.

26. It is trite law that loss of user damages is special damages which must be specifically pleaded and proved. In the instant case, the appellants gave conflicting figures on the amount they used to make and the same was never strictly pleaded.

27. The Court of Appeal in the case of ***David Bagaine vs Martin Bundi [1997] eKLR,*** considered the issue of loss of user and held:

> **"We must and ought to make it clear that damages claimed under the title, "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It cannot in the circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can." The damages as pointed out earlier by use must be strictly proved. Having so erred, the learned judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously**

erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent's lorry could have been repaired plus some period that may have been required to assess the repair costs."

28. It is the respondents' submission that the upshot of the foregoing paragraphs can be as follows; that the appellants claim for material damages was disallowed as the 2nd appellant failed to prove that she was the registered owner of motor vehicle KBD 024W; and that in any event, the claim for material damages was never proved as the makers of the documents sought to be produced in support were never called and the claim was not pleaded and proven to the required standard.

29. The appellants fault the trial court for not considering their submissions. In the lower court, as evidenced by their submissions, they sought for an award of Kshs.800,000/=. They have since turned around and now seek Kshs.1,000,000/= as general damages. This new figure was never raised before the trial court in the submissions. The respondents urge the court not to reject the appellants' invitation as this was never considered in the trial court.

30. The principles guiding an appellate court in determining whether to interfere with an award of general damages are well settled. In ***Butt vs Khan [1981] KLR 349,*** **Law, J.A** observed that:

"An appellate court will not disturb and award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

31. Lastly, the respondents submitted that court in its determination made an award of Kshs.500,000/=. This award, in light of the parties' positions was neither inordinately high or low but within the reasonable limits and commensurate to the nature of the injuries suffered.

EVIDENCE ADDUCED:

Appellants' Evidence:

32. The appellants no1 blames the motor vehicle registration number KBB 148M because it knocked the car he was driving in on his side, the left lane and that he could not avoid the accident as there was pavement on his side.

33. He produced two medical reports by Dr. Wokabi dated 25/5/2010 and another by Dr. Wambugu dated 17/5/2011 which were produced by consent without calling the makers as appellants exhibits 7(a) and (b) respectively while the receipt for preparation of medical report by Dr. Wambugu was produced as appellants exhibit 7(c) respectively.

34. The 1st appellants testified that his leg has shortened and that he feels pain when driving and it swells when he drives. He testified that the vehicle he was driving was owned by the 2nd appellants. That the motor vehicle registration No. KBD 024W was a business vehicle for matatu which he used to take home about Kshs.3,000/= per day after deducting expenses.

35. In cross examination the appellants stated that the respondents motor vehicle registration No. KBB 148M was moving fast although he cannot tell the exact speed. That he could not avoid the accident because in front there was a minibus, while on his left side there was a pavement.

36. On injuries he stated that he is now applying liniment but not attending any hospital medication. That he no longer works due to the pain. He stated that the vehicle does not operate through the month as it goes for repairs after 14 days that is twice per month. That he usually hands over Kshs.3,000/= per day after deducting between Kshs.2,800/= to Kshs.2,000/= on expenses of fuel per day. He clarified that the medical reports by Dr. Wokabi indicate he was 15% disability due to the accident.

37. The 2nd appellants also gave sworn testimony and testified that the motor vehicle registration No. KBD 024W was owned by her and it was a matatu for public service passenger business and that the 1st appellants was her driver. She produced a copy of logbook as appellants exhibit 8. She confirmed that she is aware of the occurrence of the accident herein on the day as testified by 1st appellants although she did not witness the accident. She produced a bundle of photographs to show the extent of the damages of the motor vehicle. That the value of the damage was assessed at Kshs.162,050/= and she produced a copy of assessment report as appellants exhibit 10 and fee note for the same as appellants exhibit 11. She testified that the vehicle stayed at police station from 6th – 15th December and at Ziwani Jua Kali Engineering Works from 15/12/2010. She produced two receipts for payment of repairs as appellants's exhibit 2. The towing charges to and from police to garage Kshs.4,200/= one way and that she paid for the police abstract Kshs.200/=.

38. She further testified that as a matatu business vehicle she used to get about Kshs.3,000/= per day although she did not have records for income. That it took three weeks to repair the vehicle and she lost Kshs.60,000/= as income and which she claims together with interest.

39. In cross examination she said that although it is a matatu business vehicle she has no record but she confirmed that she gets at least Kshs.3,000/= and on good day it could go to Kshs.4,000/=. That the motor vehicle at that time was new and was not breaking down frequently.

Defence Evidence:

40. The respondents elected not to call any witnesses and closed their case.

ISSUES:

41. After going through the pleadings, evidence on records and the submissions, I find the issues are; whether there was bias for apportioning liability 90% ;10% in appellants favour? Whether the award of general damages of Kshs.500,000/= awarded by the trial court was inordinately low taking into account the injuries sustained by the appellants?

42. Whether the 2nd appellant proved ownership of motor vehicle registration number KBD 024W? If so, is she entitled to an award of Kshs.162,050/= being the costs she incurred in carrying out the repairs.

ANALYSIS AND DETERMINATION:

43. On liability The appellant no1 blamed the motor vehicle registration number KBB 148M because it knocked the car he was driving in on his side, the left lane and that he could not avoid the accident as there was pavement on his side.

44. The respondents elected not to call any witnesses and closed their case. Thus the pw1 testimony was unrebutted .The trial court just plucked figures in the air and set them as the liability ratios. The court finds the apportionment set by trial court was against weight of the unrebutted pw1 testimony thus same is set aside and respondents are 100% liable.

45. There was no evidence to controvert the testimony and evidence that the 2nd respondent was the authorized driver of the 1st respondents who was the registered owner as per the search record at KRA. Thus the 2nd respondent was negligent, and the 1st respondents who was the owner of the motor vehicle was vicariously liable for this negligence as the 2nd respondents was the agent, servant or employee of the 1st respondents.

46. Similarly the ownership of the subject motor vehicle No. KBD 024W the court found that appellants' exhibit 8 showed that the owner of the motor vehicle was Hassan Said Baboo. I have re-looked at the same exhibit 8 and I agree with the appellant s that the 2nd appellant produced two logbooks which had two pages. The 1st page showed the name of the previous owner whereas the 2nd page indicated the appellant's name after the transfer.

47. The contention of the learned magistrate was that the copy of the logbook produced as exhibit number 8 did not indicate the 2nd appellant as the owner. The court completely failed to look at the contents of the 2nd page of the same logbook clearly showing the 2nd appellant's name as the owner of motor vehicle KBD 024W at the material time of the accident.

48. Moreover, the 2nd appellant produced a number of documents during trial. These documents include the police abstract, the repaid receipts/invoices, motor vehicle assessment report which were all in her name and in respect of motor vehicle registration number KBD O24W.

49. There were receipts for towing, and repair charges and motor vehicle assessment report all in the name of the 2nd appellants.

50. Since her caim is liquidated and police abstract fees of Kshs.200/= as pleaded and proved as well motor vehicle search fee of Kshs.500/=. Kshs.166,050/= on repair charges the same is awarded being a total of Ksh. 166,750/=.

51. The appellants in their testimonies conceded that they had no record whatsoever to proof that the motor vehicle was doing matatu business and the income that they were receiving per day. I am guided by the authority of The Court of Appeal in the case of ***David Bagaine vs Martin Bundi [1997] eKLR,*** considered the issue of loss of user and held:

> **"We must and ought to make it clear that damages claimed under the title, "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It cannot in the circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can." The damages as pointed out earlier by use must be strictly proved. Having so erred, the learned judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent's lorry could have been repaired plus some period that may have been required to assess the repair costs."**

52. See ***also Galaxy Paints Co. Ltd vs Falcon Guards Ltd EALR [2002] 2ER 385.***

53. On the first appellant award of Ksh. 500,000/=, it is contended that same was inordinately low in view of the gravity of the injuries sustained. In ***Butt vs Khan [1981] KLR 349, Law,*** **J.A** observed that:

> ***"An appellate court will not disturb and award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

54. The appellants submitted for Kshs.800,000/= citing two authorities:

> i) ***Nairobi HCCC No. 1152 of 2002 Kornelius Kweya Ebichet vs C & P Shoe Industries*** (unreported) where the appellants sustained blunt trauma forehead and compound fracture tibia and fibula bones and had pain life morbidity, non-union and chronic osteomyelitis of left tibia hone and loss of bonny tissue resulting in abdominal body movement, **Sitati J** awarded Kshs.1,000,000/=

on October 2008.

ii) ***Nakuru HCCC No. 123 of 2002 Nancy Wamaitha vs John Mukristo & Another*** (unreported) where the appellants sustained cut wounds on the scalp and compound fractures of the tibia and fibula on both legs. Was also confined to wheel chair and crutches and walking came. **Koome J** (as she then was) awarded Kshs.600,000/= for general damages for pain and suffering.

55. The respondents on their part have sought to rely on the two medical reports produced in evidence and have submitted that Kshs.90,000/= should be adequate compensation for pain and suffering. They have cited and produced the following authorities:

i) ***HCCC No. 265 of 2004 Kinyanjui Wanyoike vs Jonathan Muturi Choga [2004] eKLR*** where appellants suffered interrochesteric fracture of the right femur and was awarded Kshs.100,000/= as general damages for pain and suffering by **Angawa J** on 9/12/2004.

ii) ***HCCC No. 1304 of 2004 Arkipo Odhiambo vs Kenya Bus Service Ltd [2005] eKLR*** where appellants who suffered fracture of right femur (thigh pelvis) was awarded kshs.150,000/= by **Angawa J** on 6/7/2005.

iii) ***HCCC No. 1321 of 1997 Mulwa Musyoka vs Wadia Construction*** (unreported) where the appellants suffered bruises on face and healed injury, fractures mid shaff femur and mid shaff left tibia and was awarded Kshs.150,000/= by **Angawa J** on 10/2/2004.

56. The two medical reports produced in evidence generally when read together indicate that he appellants sustained compound fracture of the right tibia and fibula and was immobilized in plaster cast. The medical report by Dr. Wokabi was done on 25/5/2010 while that of Dr. Wambugu was done on 17/5/2011 almost a year apart. Dr. Wokabi's opinion was that the fractures had clinically united however the leg was swollen and he experienced pain and the leg was shortened by 3cm and that this will cause functional permanent disability of 15%. That he will be able to resume his work as a driver in near future.

57. Dr. Wambugu on his part while confirming that factures had healed also noted the shortening and the limping gait and that the 1st appellants requires a shoe heel rise to obviate this. He further opined that the 1st appellants is predisposed to early onset of osteoarthritic changes across the knee joint and he assessed permanent incapacitation at 12%.

58. Looking at the injuries in the cases cited by both sides I observe that the appellants has cited authorities although of similar injuries but of more serious magnitude. The respondents have on their part cited authorities that are of less serious nature and I have to distill them and strike a reasonable balance.

59. I have therefore considered the nature of the injuries, and the peculiar nature of the injuries including the permanent disability at an average of 13.5% the shortening of the leg by 3cm leading to limping gait, and the likelihood of developing osteoarthritic changes at knee joint and have also considered all the cited authorities and their age as well as the inflationary trend of the Kenya Shillings.

60. I am of the view that the trial court award of Kshs.500,000/= was inordinately low as compensation for general damages in the circumstances. I therefore enhance the award to Kshs. 650,000/.

61. Thus the final orders are;

i. Liability 100% against respondents.

ii. General damages for injuries sustained/pain and suffering by the appellant No 1 Ksh. 650,000/=.

iii. Material damage award for appellant No 2 Ksh. 166,750/=.

iv. Costs of the lower court and of the appeal to the appellants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE