REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 9 OF 2011

MULWA KAVUO.....APPELLANT

VERSUS

DAVISON NTHENGE.....RESPONDENT

(Being an Appeal from the Judgement by Hon. Mungai (Senior Principal Magistrate in CMCC No. 1385 of 2009 - Davison Nthenge =Vs= Mulwa Kavuo at Machakos Chief Magistrate's Court

delivered on 14/01/2011)

JUDGEMENT

1. The Appeal herein arises from the Judgement of Hon. Mungai S.P.M. delivered on 14/1/2011 vide **Machakos CMCC No. 1385 of 2009.** The said trial Magistrate held the Appellant 100% liable in damages for an accident that took place on the 3/06/2009 involving the Appellant's motor vehicle registration KAN 291 Z and the Respondent's Motor vehicle registration KAC 053T and awarded the Respondent a total sum of Kshs.207,200/= which comprised special damages, general damages and loss of vehicle.

2. The Appellant was aggrieved by the judgement of the trial Magistrate and raised the following grounds of appeal:-

i) THAT the learned trial Magistrate erred in law and fact in finding the Appellant 100% liable.

ii) THAT the learned trial magistrate erred in law and in fact by awarding damages to the Respondent under the head of loss of motor vehicle when he had not proved ownership of the same.

iii) THAT the learned trial magistrate erred in law and in fact in failing to find that the Respondent had not proved his case on quantum of damages against the Appellant on balance of probabilities.

iv) THAT the learned trial magistrate erred in law and in fact in failing to consider adequately or at all the submissions by the Appellant and in particular the authorities cited on quantum of damages.

v) That the learned trial magistrate erred in law and in fact in making an award for damages that was inordinately high and excessive in the circumstances.

vi) That the learned trial magistrate erred in law and in fact in taking into account extraneous

matters which were outside the pleadings.

3. The Appellant thus prays for an order that the Appeal herein be allowed and the Respondent's claim be dismissed with costs.

4. Learned Counsels for the parties herein agreed to canvass the appeal by way of written submissions.

Appellants submissions:

It was submitted for the Appellant that the trial court made an error when finding the Appellant 100% liable for the accident yet the accident took place at night in the middle of the road for which both drivers should have jointly shouldered the blame. It was further submitted that the trial court went into error when it awarded damages for loss of vehicle yet the Respondent did not avail proof of ownership. It was also submitted for the Appellant that the general damages of Kshs.80,000/= were inordinately high for soft tissue injuries and that a sum of Kshs.40,000/= would have been adequate. The case of **Sokoro Saw Mills Ltd =Vs.= Grace Nduta Ndungu [2006] eKLR** was relied upon.

Respondent's submissions:

It was submitted for the Respondent that the trial court correctly held the Appellant 100% liable for the accident and the subsequent injuries sustained since the Appellant was duly charged and convicted for the offence of careless driving vide **Traffic Case No.2052 of 2009**.

It was also submitted for the Respondent that the trial court properly analyzed the case upon the evidence of the Respondent, the motor vehicle loss assessor and the exhibits produced and came up with the judgement. It was also submitted that the issue of ownership of the damaged vehicle was properly established with the production of a police abstract which was not challenged by the Appellant and the case of Joel Muga Opija =Vs= East African Sea food limited [2015] eKLR was relied upon.

Finally it was submitted for the Respondent that the trial court did not consider extraneous matters when awarding damages and that the awards were reasonable in the circumstances.

5. As this is the first appellate Court, its duty is to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion bearing in mind that it did not have the advantage of hearing and seeing the witnesses testify but to give an allowance for that (see **SELE & ANOTHER =VS= ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123.**

It was the evidence of the Respondent that he was driving his motor vehicle registration Number KAC 053T along Kangundo – Machakos road when the Appellant who was driving motor vehicle KAN 291 Z hit and knocked motor vehicle KAC 053 T as a result of which he (Respondent) sustained injuries on the head, upper lip, lower jaw, shoulder and back. He received treatment at Machakos General Hospital and later examined by Dr. Kimuyu and Ndeiya who prepared a medical report. The Respondent further stated that he caused his damaged vehicle to be assessed and that the loss assessor declared it a write off and put the loss at Kshs.120,000/= after factoring salvage value of Kshs.30,000/=. The Respondent further stated that the Appellant was convicted and fined Kshs.2,000/= vide traffic case Number 2052 of 2009. The Respondent produced the treatment notes, P.3 Form, medical report, police abstract, copy of records as exhibits and he also called the loss assessor Daniel Muturi Mbugua (PW.2) who produced the assessment report. The Respondent blamed the Appellant wholly for the accident. The Appellant herein testified as the only witness for the defence at the lower court. It was his case that the Respondent was to blame for the accident since he was driving with full lights and in the middle of the road and which blinded him. He further stated that even though he pleaded guilty to a charge of careless driving, he did so as he did not want to waste time coming to court as he was a teacher but the fact remained that the Respondent was to blame for the accident. The Appellant further stated the Respondent was well known in the area as a taxi operator and who had colluded with the police to have him be held responsible for the accident.

6. I have considered the evidence adduced by the parties before the trial court and the submissions

presented herein by the learned counsels. It is not in dispute that indeed an accident occurred on the 3/06/2009 involving the Respondent's Motor vehicle registration No. KAC 053 T and the Appellant motor vehicle registration No. KAN 291 Z along Machakos – Kangundo road. It is also not in dispute that the Appellant was charged with an offence of careless driving vide **Machakos Traffic Case No. 2052 of 2009** wherein he pleaded guilty and fined Kshs.2,000/=. It is also not in dispute that as a result of the collision of the two vehicles, the Respondent's motor vehicle registration No. KAC 053T was extensively damaged. It is also not in dispute that the Respondent sustained injuries as a result of the accident. This being the position I find the following issues necessary for determination:-

(1) Whether the learned trial magistrate erred in law and fact in finding the Appellant to be 100% liable for the accident.

(2) Whether the award of Kshs.207,200/= was inordinately high.

7. As regards the first issue, it is noted that the Respondent blamed the Appellant for the accident for driving motor vehicle onto his lawful lane and knocking his motor vehicle registration number KAC 053 T. The Respondent did produce before the trial court a police abstract which indicated that the Appellant was subsequently charged with an offence of careless driving vide **Traffic Case No.2952 of 2009** wherein he was fined Kshs.2000/= on his own plea of guilt. The Appellant indeed confirmed in his evidence that he was charged with a traffic offence and fined but maintained that his reasons for pleading guilty was due to the fact that he did not want to be delayed with the case as he was a teacher. Even though the Appellant claimed that he was not to blame for the accident, I am convinced that the police officers who visited the scene and prepared the police abstract had concluded that the Appellant was to blame for the accident. The Appellant's counsel has submitted that the accident had taken place in the middle of the road and thus both drivers should have shared liability. A further submission is that the Respondent who had been a taxi operator had colluded with the police to have the Appellant solely blamed for the accident. All these issues raised by the Appellant might have had some basis but the fact he did not challenge the conclusion of the police investigation and a production of the police abstract and further by his own plea of guilt and paying a fine of Kshs.2,000/= and admitting to the offence of careless driving vide **Traffic Case no. 2052 of 2009** put paid to any claim for innocence on the part of the Appellant as regards the question of who caused the accident. The conviction of the Appellant in the traffic case was still in force even at the time of the hearing of the case herein and to date the Appellant has not appealed against it. The Appellant had of his own violation and free will pleaded guilty to the charges of careless driving and therefore the said conviction ipso facto connoted admissions of negligence to the occurrences of the accident. The evidence and exhibits confirmed that indeed the Appellant is the one who had caused the accident and was to shoulder responsibility at 100%. Hence the trial magistrate did not err in finding the Appellant liable at 100% for the accident.

8. As regards the second issue, it is trite law that an appellate court will not disturb the award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate and further it must be shown that the trial judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low. I note that the Appellant's counsel does not appear to have any issue with the special damages of Kshs.7,200/=. The Appellant's contention is to do with the award of general damages for injuries sustained and the loss of motor vehicle. The trial magistrate awarded general damages for injuries at Kshs.80,000/= and further awarded Kshs.120,000/= for loss of motor vehicle. Starting with the injuries, the Respondent had testified and stated that he had sustained injuries on the head, forehead upper hip, lower jaw and shoulder and was examined by both doctors Kimuyu and Deya who formed the opinion that they were soft tissue in nature. The Appellants' Counsel had submitted before the trial court a sum of kshs.20,000/= as general damages and relied on the case of **Esther W. Nderitu = Vs= Francis Githinji & Another Nairobi HCCC No. 2498 of 1988** while the Respondent's Counsel had proposed the sum of Kshs.400,000/= and relied on the cases of **Beatrice Omwenga = Vs Attorney General – Kisumu HCCC No. 88 of 2003** and **Sister Margaret W. Chege =Vs= Ruth Nyambura – Eldoret HCCA. No. 48 of 2005**. Looking at all those cases it was apparent that the one cited by the Appellant was relevant as the injuries were almost similar to those of the Respondent and thus the learned trial magistrate rightly relied on the same and rejected those relied upon by the Respondent's Counsel. The learned trial Magistrate considered the age of the

decided authority and came up with an award of Kshs.80,000/=. Learned Counsel for the Appellant has in this appeal proposed the sum of Kshs.40,000/= as general damages and relied on the case of **SOKORO SAW MILLS LTD =VS= GRACE NDUTA NDUNGU [2006] eKLR** where a sum of Kshs.30,000/= was awarded for soft injuries on hip joint and back. It is noted that the Respondent's injuries are more or less the same as they were soft tissue in nature. However since the authority had been decided much earlier, I find the issue of inflation has to be factored. Indeed the learned trial magistrate considered the age of the authority, I find the sum of Kshs.80,000/= awarded by the learned trial magistrate was quite reasonable in the circumstances and ought not to be disturbed.

As regards the remaining award on loss of motor vehicle, it is noted that the Respondent had pleaded for the sum of kshs.120,000/= vide his amended plaint dated 24/08/2010 being in respect for loss of motor vehicle. The Respondent called Daniel Muturi Mbugua a motor vehicle loss assessor who declared the accident vehicle as a write off as it was uneconomical to repair in that the costs of repair was put at kshs.154,100/= whereas the pre-accident value was at Kshs.150,000/= while the salvage value was Kshs.30,000/=. The said witness produced the loss assessment report. The Appellant's counsel has faulted the trial magistrate for awarding the sum of Kshs.120,000/= for loss of vehicle yet the Respondent had failed to prove ownership of the damaged vehicle. The Respondent in his evidence had relied upon the police abstract which contained all the details regarding the identities of the owners of the vehicles involved in the accident. Respondent's counsel has submitted that the production of the police abstract was sufficient to establish the ownership of the vehicle in view of the fact that the said document was not challenged by the Appellant. He relied on the case of **Joel Muga Opija =Vs= East African Sea food Limited [2013] eKLR.** Indeed the Respondent did not produce the copy of records or the logbook of the vehicle but then the Appellant did not challenge the contents on the police abstract and its production as an exhibit. The Respondent had stated on re-examination that he had the logbook but was yet to effect transfer of ownership. I find that the Respondent was probably the beneficial owner of the vehicle and therefore had some degree of ownership and thus locus standi to maintain suit against a tort feasor. I am therefore persuaded by the decision in Joel Muga Opija (supra) where the court held as follows:-

> "***We 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, its contents cannot be later denied."***

The trial magistrate had ruled that from the police abstract the Respondent was indicated as the owner of the vehicle and further that the Insurance details were indicated thereon. The Learned trial magistrate further held that the Appellant did not challenge the evidence or rebut it in any way and on the balance he was satisfied that the Respondent had proved on balance of probabilities that he was the owner of the vehicle. Under those circumstances and in view of the above findings, I am unable to fault the learned trial magistrate. The Respondent's case had been proved to the required standard of proof and that the findings and awards by the trial magistrate were properly arrived at. I find there were no extraneous matters taken up by the trial court and that the awards were quite reasonable in the circumstances.

9. In the result it is the finding of this court that the appeal herein lacks merit. The same is ordered dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Machakos this 16th day of January, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Muia for Nguli for the Appellant

Muumbi for the Respondent

Kituva: Court Assistant