REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 70 OF 2012

WILSON MAILU.....1ST APPELLANT

FESTUS MUTUA.....2ND APPELLANT

VERSUS

ANN NDUKU KYUNGU.....RESPONDENT

(An Appeal arising out of the judgment of Hon. M.K.N. Nyakundi PM delivered on 24th May 2012 in Kangundo Principal Magistrate's Court Civil Case No. 89 of 2007)

JUDGMENT

Introduction

The Appellants were the original Defendants in Kangundo Principal Magistrate's Court Civil Case No. 89 of 2007, and have appealed against the judgment of the trial Magistrate which was delivered in the said suit on 24th May 2012. The Respondent was the original Plaintiff in the said suit. The learned magistrate in his judgment entered judgment for liability for an accident that occurred on 23rd July 2006 at 100% as against the Appellants, and awarded the Respondent a total award of Kshs 412,530/= as general and special damages.

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 20th June 2012 and filed on 21st June 2012, in appealing against the said judgment. The grounds of appeal raised by the Appellants are as follows:

1. The Magistrate erred in law and fact in his failure to appreciate the Defendant's Defence and not taking the same into consideration.

2. The Magistrate erred in law and fact in finding that the Defendant's driver was negligent in absence of evidence to support that allegation.

3. The Magistrate erred and misdirected herself in awarding excessive general damages of Kshs. 400,000.00 for injuries sustained by the Plaintiff, which amount is excessively high in the circumstances and which amount is an erroneous estimate of the loss/damage suffered by the Respondent.

4. The Magistrate erred in law and fact in heavily relying on the evidence of the Plaintiff and Plaintiff's Doctor, which evidence was exaggerated for purposes of being awarded high amount general damages.

The Appellant is praying that the appeal be allowed, the trial court's judgment on be set aside; the award of damages awarded by the trial Court be reviewed downwards; and that the suit therein be dismissed with costs to the Appellant.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661, Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424.**

I will therefore firstly proceed with a summary of the facts and evidence given in the trial Court. The Respondents instituted the suit in the lower court by filing a Plaint dated 8th June 2007. They claimed therein that on or about 23rd July 2006, the 1st Respondent carelessly and negligently drove, drove, controlled and/or managed motor vehicle registration number KAQ 517A, a Nissan Matatu, such that he caused the same to lose control, veer off the road and land into a trench. Consequently, the Appellant, who was lawfully travelling as a fare paying passenger in the said motor vehicle, sustained serious bodily injuries. Further, that the 2nd Appellant, who was the legal owner of the said motor vehicle, is vicariously liable for the said accident.

The Respondent gave the particulars of carelessness and negligence on the part of the 1st Appellant, and of the injuries he incurred. He sought general damages and special damages of Kshs 12,530/= which were also particularized in the Plaint.

The Appellants filed a defence dated 27th August 2007, wherein they denied that the 1st Appellant was the driver of , and that the 2nd Appellant was the owner of vehicle registration number KAQ 517A. They also denied the allegations of an accident having occurred involving the said motor vehicle, the particulars of carelessness and negligence attributed to the 1st Appellant, and the particulars of injuries suffered by the Respondent. The Appellants stated that if at all the accident in question did occur, the same was caused solely or substantially contributed to by the negligence of the Respondent, and gave particulars thereof.

From the record of the trial court proceedings, the suit proceeded to full hearing on 12th May 2011, and the Respondent called two witnesses while the Appellants did not call any witnesses. The first witness for the Respondent (PW1) was Dr. Caroline Mwangi, a medical doctor at Kangundo District Hospital, who testified that she examined the Respondent on 11th October 2007. PW1 produced a medical report as the Respondent's Exhibit 1.

According to PW1, the Respondent was admitted for 17 days at Kangundo District Hospital after a traffic road accident that occurred on 23rd July 2006, and discharged on 17th August 2006. Further, that she suffered injuries of a cut wound on the right chin and cheek, and frontal fracture of the left tibia and fibula. Lastly, that on examination she had a healed scar on the left chin and cheek, and on the left leg anteriorly with slight oedema on the left ankle, and sustained a compound fracture of the left leg.

The Respondent was the second witness (PW2), and she testified that on 23rd July 2006, she was travelling from Nairobi to Nunguni in motor vehicle registration number KAQ 517A, when it was involved in an accident due to being driven at an excessive speed. Further, that the said vehicle was not involved in any collision, and landed on its side on the road. PW2 stated that as a result, she suffered injuries on her jaw and fractures on the left leg, and was admitted at Kangundo District hospital for a month. She also stated that she reported the accident to Kangundo police. She produced her discharge summary, treatment card, P3 form and police abstract as exhibits. She also produced a bundle of receipts for the medical report, treatment costs and for the police abstract.

According to PW2, she was able to know that the 2nd Appellant was the owner of the said motor vehicle because his name was written on the side of the motor vehicle, and the driver of the motor vehicle also confirmed so.

The Issues and Determination

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellants' Advocates, Mjeni Mwatsama & Company Advocates, filed submissions dated 23rd September 2014. It was urged therein that there was no evidence adduced during trial to prove who was the owner of the motor vehicle registration number KAQ 517 that was involved in the accident. Reliance was placed on the decision in **Simon Hungu & Another vs Vincent Barasa Wafuka & Another, Nakuru HCCA 118 of 2000** that where ownership of a motor vehicle is disputed and the police abstract is challenged, the Plaintiff ought to produce a document from the Registrar of motor vehicles.

Further, that the Plaintiff testified that the said motor vehicle was being driven at excessive speed, yet the said speed was not quantified or the parameters given. In addition, that the cause of the accident was not established in the police abstract produced by the Plaintiff as an exhibit, which abstract indicated that investigations on the accident were pending.

On the issue of quantum of damages, the Appellants submitted that the award of damages by the trial Court was excessive in comparison to the injuries and case law. Reliance was placed on the decision in **Thomas Mwangi Gichuhi & Another vs Peter Ngugi Kamau, Nakuru HCCA No. 216 of 2009** where Kshs 300,000/= was awarded as damages for a fracture of both the tibia and fibula.

The Respondent's Advocates, Mutunga & Company Advocates, filed submissions dated 9th October 2014, wherein it was argued that that the Appellants' defence cannot be taken as their evidence, and that they should have called witnesses to support the averments in the defence. Further, that the Appellants never called any witness in the trial court to rebut the Respondent's evidence which remained uncontroverted.

In this regard it was submitted that the Respondent adduced evidence as to the ownership of the motor vehicle in question, in that she produced a police abstract, and also stated that the 2nd Appellant's name was written on the door of the motor vehicle in question. Further, that she was also informed by the driver of the said motor vehicle who was the 1st Appellant, that the 2nd Appellant was the owner of the motor vehicle.

On the award of damages, the Respondent submitted that the award given by the lower court of Kshs.400,000/- was commensurate with the injuries sustained. Further, that none of the submissions by the Plaintiff or the Defendant in the trial Court were annexed in the record of appeal herein to guide this court on the issues raised by both parties in their respective submissions, which was a fatal omission on the part of the Appellants.

The Respondent relied on various judicial decisions which she had cited in the trial Court including **Jackson Radoli vs Systematic Supplies Co. Ltd., Mombasa HCCC No. 925 of 1991**, where the Plaintiff therein suffered fracture of the left tibia fibula and was awarded Kshs.490,000/= as general damages; and **Ukwala Supermarkets Ltd vs Ronald Chando, Eldoret HCCA NO. 158 of 2009**, where the Plaintiff sustained a compound fracture of right tibia and fibula and was awarded Kshs.400, 000/= as general damages which was subjected to 30% contributory negligence. Further, that in **Kornelius Kweya Ebichet vs C & P Shoe Industries Ltd & Anor, Nairobi HCCC 1152 of 2002** the Plaintiff therein sustained blunt trauma on the forehead, and a compound fracture of the left tibia and fibula and was awarded Kshs. 1,000,000/= general damages.

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants

dispute both the issue of liability and the award of damages. There are three issues raised that require determination. The first is whether the trial Magistrate erred in finding that the 2nd Appellant was the owner of motor vehicle registration number KAQ 517A. Second, whether there was a basis for finding the Appellants 100% liable for the accident that occurred on 23rd July 2006 involving the said motor vehicle. The last issue is whether the damages awarded to the Respondent were justified.

On the first issue, the Respondent had both the legal and evidentiary burden to prove any facts alleged to the standard required, which is on a balance of probabilities. The legal burden of proof on the Respondent is set out in section 107**(1)** of the *Evidence Act (Chapter 80 of the Laws of Kenya),* which provides as follows:

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

In addition, the evidential burden is cast upon a party to prove any particular fact which he desires the court to believe in its existence under **sections 109** of the Evidence *Act* as follows:

> ***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

The position as to proof in civil cases was reiterated in the case of **Kirugi & Anor vs Kabiya & 3 Others [1987] KLR 347,** wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof. Therefore, the burden was upon the Respondent in the first instance to prove the ownership of motor vehicle registration number KAQ 517A.

The Respondent has argued that she discharged this burden by production of a police abstract, which showed that the Appellant was the registered owner of the said motor vehicle. I have perused the police abstract dated 22nd August 2007 produced as an exhibit in the trial Court, and the same indicated that a report was made of an accident that occurred on 23rd July 2007 along the Nairobi –Kangundo Road involving motor vehicle registration number KAQ 517A. The name and address of the owner of the said motor vehicle was shown in the abstract to be Festus Mutua of P.O. Box 4071 Nairobi. The 2nd Appellant herein is one Festus Mutua.

The evidentiary value of a police abstract as regards proof of ownership of a motor vehicle was addressed by the Court of Appeal sitting at Kisumu which held as follows in the case of **Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another,(2010) e KLR**:

> ***"Where a police abstract was produced and there was no evidence adduced by a defendant 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 of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"***

Likewise, in **Ibrahim Wandera vs. P N Mashru Civil Appeal No. 333 of 2003** the Court of Appeal expressed itself as follows:

> **"The learned Judge did not at all make reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it and that means that the respondent was satisfied with the evidence… The police abstract form established ownership of the accident bus and the appellant was properly given judgement by the trial court against the respondent."**

Lastly, I associate myself with the decision of Warsame J. (as he then was) in **Jotham Mugalo vs. Telkom (K) Ltd, Kisumu HCCC No. 166 of 2001** where the learned Judge held as follows:

> **"Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence."**

Therefore, to the extent that evidence of a police abstract showing the Appellant to be the owner of motor vehicle registration number number KAQ 517A was produced by the Respondent during the trial, and was not disproved during cross-examination, I find that the Respondent did discharge her burden of proof in this respect.

On the issue of the Appellants' liability, I have evaluated the evidence given in the trial Court, and note in this regard that the Respondent alleged that the 1st Appellant was driving with excessive speed; he failed to brake, swerve, or stop the motor vehicle; failed to drive with due

and reasonable care; that he drove the motor vehicle carelessly and dangerously; and failed to keep a proper lookout thus causing the accident. The Respondent also relied on the doctrine of *res ipsa loquitor*. This doctrine is applicable where a party claims that the fact of the accident happening speaks for itself. The party must however prove the facts which gave rise to inference of the doctrine.

What then were the facts proved by the Respondent from the evidence presented in the trial Court? Firstly, that the Respondent suffered injuries from an accident involving motor vehicle registration number KAQ 517A in which she was a passenger, which motor vehicle was being driven by the 1st Appellant. Secondly, that the said motor vehicle in the said accident swerved off the road and landed on its side. Thirdly, that the said motor vehicle was owned by the 2nd Appellant.

Do these facts then speak to the allegations of negligence on the part of the Appellants? In my view a reasonable man would answer in the affirmative, particularly in light of the fact that no evidence or explanation was proffered by the Appellants as to why the said motor vehicle swerved from the road and landed on its side, to controvert the Respondent's evidence that it was as a result of being driven in high speed. There was thus sufficient evidence to show on a balance of probability that the Appellants were to blame for the accident. The trial Court therefore did not err in inferring negligence on the Appellants and finding the wholly liable for the accident.

On the last issue of the damages awarded, It is an established principle of law that that the Appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5)**.

The medical report by Dr. Mwangi C.W. dated 11th October 2007 produced by the Respondent as an exhibit in the trial Court demonstrated that she sustained a compound fracture on the left tibia and fibula, and a cut wound on the right cheek/chin which had healed with scars. It noted that the Respondent was still suffering from swelling on the ankle. The Appellants in this respect contest the award of general damages on the ground that it was inordinately high given the said injuries.

The generally accepted legal principles that apply to an award of damages in such circumstances are that a sum should be awarded which is in the nature of a conventional award, in the sense that awards for comparable injuries should be comparable. Further, the amount of the award is influenced by the amounts of awards in previous cases in which the injuries appear to have been comparable, and is adjusted in light of the fall in the value of money since such awards were made. See in this regard Kemp **& Kemp on The Quantum of Damages, Volume 1** at paragraph 1-003. In my view to be comparable the previous cases must have been made at the time or close to the time the injuries were suffered by a claimant, hence the provisions for adjustment.

The judicial decisions cited by both the Appellant and Respondents in my view both show that the award by the trial Court was reasonable, taking into account the injuries suffered by the Respondent, and inflationary trends. Lastly, the special damages awarded were not contested, and were also specifically pleaded and proved by receipts produced in the trial Court.

This appeal is therefore found not to have merit and is dismissed, and the Appellants shall bear the costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 19TH DAY OF FEBRUARY 2018.

P. NYAMWEYA

JUDGE