



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 96 OF 2016**

**CLEOPHAS SHIMANYULA.....APPELLANT**

**VERSUS**

**MOHAMED SALAT.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree Hon. M. Agutu (RM) in*

*Kisumu CMCC NO. 310 of 2012 delivered on 21<sup>st</sup> July, 2016)*

**JUDGEMENT**

1.

the Appellant and that the holding by the Court that Appellant was vicariously liable was therefore erroneous.

8. To support the 3<sup>rd</sup> ground of Appeal, it was submitted that this suit was time-barred since the cause of action in this case arose on 23.10.07 and the suit was filed on 18.7.12 which was outside the 3 years limitation period.

9. The Appellant faults the learned trial Magistrate for not considering the authorities provided by the defence and thereby giving an award that was excessive holds the view that having proved that he was an employee of the Respondent and

### **Respondent's Submissions**

10. Respondent holds the view that Respondent had proved that Appellant owned the accident Motor Vehicle and that he was rightfully held liable for the negligent acts of the driver. It was submitted that contrary to the Appellant's allegations, the letter confirming sale of the accident motor vehicle to the Appellant, the sale-agreement and the charge sheet had been produced as P7, 8 and 9 as shown on the list of Plaintiff's exhibits.

11. The Respondent submits that the Appellant has annexed an order for extension of time to file suit and cannot be heard to deny its existence. Finally, Respondent submitted that the award was commensurate to the injuries sustained.

### **The evidence**

12. This being the first Appeal, it is my duty under Section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial Court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of Law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123.**

13. The duty of the first Appellant Court was explained in the case of **JABANE VS OLENJA [1986] KLR 661**

**“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial Judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi –vs- Duncan Mwangi Wambugu (1982 – 88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982 – 88) 1 KAR 870”**

### **Analysis and Determination**

14. I have perused the entire record of Appeal and considered the Submissions by counsels for both parties. In determining this Appeal, I will endeavour to address each of the grounds of Appeal separately as hereunder.

#### **1) Exhibits which were not produced**

##### **a. Order for extension of time**

15. The Court record and the list of exhibits evidently demonstrate that the order for extension of time to file suit out of time was neither pleaded, alluded to by the Respondent in his testimony nor produced in Court as an exhibit. While conceding that the order had been annexed to the record of Appeal, the Respondent's counsel failed to explain how it got into the Court file.

16. This Court after considering the evidence on record has come to the conclusion that the trial Magistrate's finding that the said order was in the Court file is not supported by the evidence on record and an inference is therefore made that the said order was mischievously sneaked into the Court record after the issue regarding extension of time was raised by the Appellant in his Submission before the trial Court.

##### **b. Sale Agreement**

17. In his testimony at page 108 of the record of Appeal, Respondent stated that his Advocate had received a Sale Agreement and copy of Appellant's ID Card to prove that he had bought the accident Motor Vehicle from Al Hyder. The said Agreement and copy of ID Card were marked for identification but they were not produced as exhibits.

18. From the foregoing, I am in agreement with the Respondent that the holding by the trial Court that the vehicle had been sold to the Appellant was mistaken since it was not supported by the evidence on record.

#### **2. Was the case proved on a balance of probability?**

19. Having found that Respondent did not establish that Appellant was either registered owner or beneficial owner of the accident motor vehicle, I find and hold that there was no nexus between the driver of the accident motor vehicle and the holding by the Court that Appellant was vicariously liable for the action of the said driver was therefore erroneous.

#### **3. Was the claim that was time-barred**

20. Even though I have found that the order for extension of time was mischievously sneaked into the Court record, there is no evidence

that the said order is not authentic. I therefore find that leave to file suit out of time had been granted.

#### **4. Was the award excessive**

21. Although there is evidence that Dr. Okombo testified and produced his report, I have searched through the record and I can't find that report. The P3 form shows that Respondent suffered fracture of right humerus, loss of 3 front teeth and multiple soft tissue injuries to the legs, head, eye, nose and mouth. In his testimony, Dr. Okombo confirmed the fracture of the humerus which he said had healed with a deformity, multiple soft tissue injuries and broken incisor tooth, residual scars. There was no evidence of three missing teeth in Dr. Okombo's testimony.

22. It is the duty of Advocates to cite relevant authorities to guide the trial Court. Respondent did not file Submissions on quantum. The Appellant in his Submissions offered Kshs.350,000/- and relied on **MKS HCCC NO. 359/1995 JANE MULI V JULIUS MUOKI & ANOR** which did not show the injuries suffered by the Plaintiff and **MKS HCCC NO. 192 OF 1997 JANE MUTHEU WAMBUA V ONESMUS WAMBUA MUTISO** where Plaintiff was awarded Kshs.250,000/- for undisplaced fractures of pelvic area and lacerations on the left arm with insignificant scars.

23. The learned Trial Magistrate found that the injuries suffered by the Respondent were comparable to the injuries in the cited cases and awarded general damages in the sum of Kshs.1,100,000/-. With due respect, the learned trial Magistrate did not justify the award of Kshs.1,100,000/- if indeed the injuries in the cases cited by the Appellant were similar to the ones suffered by the Plaintiff.

24. In the case of **NJUGUNA GIKONYO VERSUS KENYA TEA DEVELOPMENT AUTHORITY NBI HCCC 1533 OF 1992**, the Plaintiff sustained fracture of the left humerus, injury to the neck, major injury to the back and soft tissue injuries to both legs and was awarded Kshs.300,000.00 as general damages.

25. In the case of **STEPHEN NGINZA MBANDI VERSUS DISMAS K. KIATINE AND 2 OTHERS Nairobi HCCC No. 138 of 1987**, Plaintiff suffered fracture of the left humerus. He was unconscious on admission to hospital. The fracture did not unite hence an operation for open reduction internal fixation and bone grafting was recommended at a cost of Kshs.40,000.00. He was awarded Kshs.200,000.00 as damages for pain suffering and loss of amenities.

26. In the case of **BONIFACE WAITI & ELLEN WAITHERA V MICHAEL KARIUKI KAMAU [2007] eKLR**, the 2<sup>nd</sup> Plaintiff was awarded Kshs.295,000/- for multiple injuries including fracture of humerus that had healed with an angulated deformity.

27. The context in which the compensation for the Respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past. (See **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR**) The authorities cited above are old and considering the lapse of time, I find that an award of Kshs.500,000/- would have sufficed in this case.

#### **Decision**

28. From the foregoing analysis, I have come to the conclusion that the Respondent's case was not proved on a balance of probability and ought to have been dismissed. In the result the Appeal is allowed to the extent that the order in favor of the Respondent is set aside and substituted with an order dismissing the Respondent's case.

Appellant shall have costs of the Appeal and of proceedings in the lower Court.

**DATED AND DELIVERED ON THIS 12<sup>th</sup> DAY OF April 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open Court in the presence of**

**Court Assistants: Felix & Caroline**

**Appellant: N/A**

**For the Client: N/A**