REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 107 OF 2016

BETWEEN

MWANAHAMISI OMAR MZEE ALSO KNOWN AS FATUMA MOHAME D

ALI OMAR.....APPELLANT

AND

CHENGO KAHINDI BIRYA ..... 1ST RESPONDENT

BABITO SUPPLIES AND CONTRACTORS LIMITED....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. H. Nyakweba, SPM dated 20th July 2015 at the Chief Magistrates Court in Mombasa in Civil Case No. 518 of 2015)

JUDGMENT

1. This is an appeal against liability and quantum arising from the judgment of the subordinate court apportioning liability equally between the appellant and respondents and awarding the appellant, Kshs. 400,000/- general damages and Kshs. 2,500/- special damages.

2. The fact of the accident was not in dispute. The appellant was a fare paying passenger on board Scania Bus KBN 651N ("the Bus") travelling from Kitale to Mombasa on 23rd December 2015. She stated that at about 5.00am near Masai Village, Maungu along the Nairobi – Mombasa road, the 1st respondent drove motor vehicle registration number KBS 472 Z ZB 9374 ("the Trailer"), owned by the 2nd respondent, so negligently while trying to overtake another vehicle that he hit the Bus and as a result, she sustained injuries for which she filed suit claiming damages. The appellant also pleaded that the 1st respondent was charged and convicted of the offence of careless driving and was fined Kshs. 10,000/- and in default 6 months' imprisonment.

3. In their statement of defence, the respondents denied liability as alleged by the appellant or at all. In the alternative, they pleaded that the accident was inevitable and it was due to circumstances beyond their control. They further pleaded that the accident was caused by or substantially contributed to by the negligence of the driver of the Bus.

4. At the hearing of the suit, the appellant testified as PW 2 and called two witnesses, Dr Ajoni Adede (PW 1) and PC Julius Koech (PW 3). The respondent did not call any witnesses. The trial magistrate considered the evidence and found that both the appellant and respondents were equally liable for the accident and awarded damages as I have set out at the beginning of this judgment.

5. This appeal is against the finding on liability and quantum. I shall deal with the issue of liability first. The gravamen of the appellant's appeal is set out in the memorandum of appeal dated 3rd August 2016. The thrust of the appeal as summarised by Counsel for the appellant, Mr Anyanzwa, is that the trial magistrate erred in appreciating the appellant's evidence which showed that the 1st respondent was to blame for the accident. Counsel for the respondents took the opposite view and submitted that the trial magistrate appreciated the evidence and came to the correct conclusion regarding apportionment of liability.

6. Since determination of liability calls for an appreciation of the evidence that was before the trial court, I am required to bear in mind the principle that it is my duty as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that, and reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

7. PW 2 testified on the material day that she was seated behind the driver in the Bus when the Trailer, in an attempt to overtake another vehicle, hit the Bus. Her case was buttressed by the testimony of PW 3 who produced the Occurrence Book and explained that the Trailer tried to overtake another vehicle when it hit the Bus. The testimony of PW 2 and PW 3 was unchallenged but the trial magistrate in

apportioning liability, accepted that there was a collision but held that other than the fact the Trailer was overtaking, there was no other reason to fault the 1st respondent. He proceeded to find that the Bus driver ought to have acted reasonably by slowing down and driving off the road. Consequently, he found both the Bus driver and 1st respondent equally liable.

8. The trial court findings cannot be supported by the pleadings and evidence. First, the appellant was a fare paying passenger, had no control over the Bus and could not contribute in any way to the accident. Second, as the respondents, in their statement of defence, alleged contributory negligence against the Bus driver, they ought to have complied with **Order 14 rule (1)** of the ***Civil Procedure Rules*** which reads:

> 14(1) where a defendant claims as against any other party to the suit (hereinafter called the third party).
>
> a. That he is entitled to contribution or indemnity . . . He may by leave of the court, issue a notice hereinafter called a third party notice) to that effect . . .

9. If the court permits such party to be joined to the suit, liability between such parties may be determined. As the respondents failed to take out third party proceedings against the Bus driver, they must bear the blame for this accident. I adopt the observations by Kimaru J., in ***Pauline Wangare Mburu v Benedict Raymond Kutondo*** **NKU HCCC No. 210 of 2003 [2005]eKLR** where he stated,

> *[T]he defend*ant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability. [Emphasis mine]

10. In addition, I also note that the 1st respondent was convicted of the offence of careless driving. By reason of **section 47A** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the respondents could not deny that there was negligence on the part of the 1st respondent though it was still open for the court to find contributory negligence against the driver of the Bus (see ***Robinson v Oluoch*** **[1971] EA 376** and ***Queens Cleaners & Dyers Limited v East Africa Community & Others*** **[1972] EA 229**). This point is moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the circumstances.

11. At the end of the day, the appellant's evidence was uncontested. It was that the Trailer crossed into the lane of the Bus while attempting to overtake another vehicle thereby causing the accident. Since the appellant was a fare paying passenger, she could not be blamed. I find the respondents 100% liable.

12. I now turn to the issue of quantum. The general principal upon which this Court, as an appellate court, will interfere with an award of damages was stated in ***Bashir Ahmed Butt v Uwais Ahmed Khan*** **[1982-88] KAR 5** as follows:

> An appellate court will not disturb an 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 ….

13. The appellant's case is that the award of general damages was too low taking into account the injuries sustained, the level of disability and the prevailing awards. The respondent supports the award as reasonable in the circumstances.

14. The injuries sustained by the appellant are not in dispute. According to the plaint she sustained fractures of the right tibia and fibula. The key evidence to support the claim was by PW 1 who produced a medical report dated 24th October 2015 summarising the appellant's injuries and treatment. He noted that after the accident, the appellant was admitted to Mewa Hospital for 3 days and implanted with a metal plate. She was further admitted at Tenwek Hospital for 6 days when the plate was removed. When he examined her, PW 1 noted that she was walking unaided with a limp and that the right leg had a keloid scar and a 12 cm scar on the right ankle joint which was swollen and stiff. His conclusion was as follows;

> a. Six (6%) permanent partial disability due to 1) fractures of the right tibia and right fibula leg bones 2) the fracture sites remain a weak point for life even if the bones unite 3) right ankle stiffness 4) right left disfiguring keloid scar
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> b. The right tibia right fibula leg bones contribute to the tight ankle joint and his is how the joint becomes affected and stiff.
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> c. The metal implant has been removed.

15. Before the trial court, the appellant submitted that the sum of Kshs. 750,000/- was appropriate. The appellant relied on two cases. In ***Masha Kombo v Nicholas Nyange and Another*** **MSA HCCC No. 403 of 1996 (UR)** where the plaintiff was awarded Kshs. 650,000/- in the year 2000 after sustaining a crush injury of the left leg resulting in a fracture of the tibia and fibula and was hospitalised for 3 months. The leg was shortened by 4 cm and permanent disability assessed at 25%. In ***Stephen Wanderai Kamau and Another v Gladys Wanjiku Kungu*** **NKU HCCA No. 81 of 2005 (UR)**, the claimant was awarded Kshs. 600,000/- in 2006. She sustained compound fracture of the left tibia and fibula, extensive skin loss from the knee downwards which required grafting. The leg was 2cm short and permanent disability assessed at 20%.

16. The respondents contended that the sum of Kshs. 250,000/- was reasonable for general damages. They cited the case of ***Zacharia Mwangi Njeru v Joseph Wachira Kanoga*** **NYR HCCA No. 9 of 2012[2014] eKLR** where the respondent sustained a fracture of the tibia and fibula and was awarded Kshs. 400,000/- on appeal in 2014 after reducing the award from Kshs. 800,000/- given by the trial court. The respondent also relied on ***Charles Odhiambo v Omar Transmotors Limited and Another*** **NRB HCCC 155 of 1998[2001] eKLR** where the court awarded the plaintiff Kshs. 100,000/- for the fracture of the tibia and fibula.

17. Having evaluated the injuries sustained by the appellant, I find that they comprise simple fractures of the tibia and fibula. Apart from the permanent disability recognised and assessed by PW 1, I do not see any comparison with the injuries sustained by the claimants in the cases cited by the appellant which show disability to the extent of 20%. The appellant's cases are somewhat dated while those cited by the respondent more recent. Taking all these factors together, I cannot say that the award of Kshs. 400,000/- was inordinately low to invite this court's interference.

18. On the issue of special damages, the trial magistrate disallowed the claim for Kshs. 257,571/- being the costs associated with her treatment evidenced by several receipts produced in evidence. The trial magistrate accepted the submission by the respondents that the receipts placed before the court did not comply with **section 19** of the ***Stamp Duty Act (Chapter 480 of the Laws of Kenya)*** and were therefore not admissible. The relevant provision thereof states as follows;

> **19(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—**
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> **a. in criminal proceedings; and**
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> **b. in civil proceedings by a collector to recover stamp duty, *unless it is duly stamped.***

19. I think the trial magistrate erred for several reasons. First, the objection was raised in the respondents' written submissions rather than at the time the documents were tendered by appellant. In effect the documents were admitted by consent of the parties and could not be rejected by the trial magistrate without giving the appellant an opportunity to respond to the objection. This is particularly in view of the fact that the appellant would be entitled to stamp the documents out of time under **section 20** of the ***Stamp Duty Act*** had the objection been raised. The purpose of the ***Stamp Duty Act*** is to ensure collection of revenue and not necessarily to deprive the party of a cause of action. I hold that such an objection should be raised at the earliest opportunity to enable the party relying on the document comply with the provisions.

20. This same issue was dealt with by the Court of Appeal in ***Stallion Insurance Company Limited v Ignazzio Messina & C S.p.A*** **[2007] eKLR** where the Court approved its previous decision in ***Diamond Trust Bank Kenya Ltd v Jaswinder Singh Enterprises*** **NRB CA Civil Appeal No. 285 of 1998[1999]eKLR** where Owuor JA, with whom Gicheru and Tunoi JJA, agreed, stated as follows:

> The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the Stamp Duty Act (cap 480). In view of my above finding, it suffices to state that sections 19(3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case of **Suderji Nanji Ltd v Bhaloo (1958) EA 762** at page 763 where Law J., (as he then was) quoted with approval the holding in **Bagahat Ram -vs- Raven Chond (2) 1930) A.I.R Lah 854** that:
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> > "before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ……
> >
> > The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in his support of his claim against the 2nd defendant/respondent and he must be given the opportunity".

Although it was the respondent that was relying on the unstamped agreements, there was the offer by the appellant's counsel to be given a chance to have the agreements stamped. This in my view was the correct step in terms of section 19 (3) of the Stamp Duty Act.

21. The decision I have cited accords with the provisions of **Article 159(2)(d)** of the Constitution which requires the court to do substantive justice without undue regard to technicalities. The Constitution also underpins the overriding objective in **sections 1A** and **1B** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** which imposes on the parties and their advocates to assist the court in ensuring substantive justice is achieved. The respondents ought not be permitted to defend their case by way of ambush where full discovery has been made and opportunity given to the parties, at the pre-trial conference, to raise all objections concerning admissibility of documents and other evidence in advance of the hearing. At the end of the day, the appellant proved that she incurred expenses for treatment following her admission to Mewa and Tenwek Hospitals. These documents were admitted without objection. I find and hold that the appellant proved the special damages as pleaded.

22. I allow the appeal and set aside the judgment of the subordinate court. I substitute it with the following:

> a. Judgment be and is hereby entered for the appellant against the respondents jointly and severally on full liability for the sum of Kshs. 400,000/- as general damages and Kshs. 257,571/- special damages.
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> b. Interest on general damages shall accrue from the date of judgment in the subordinate court while interest of special damages shall accrue from the date of filing suit until payment in full.
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> c. The respondent shall bear the costs of the suit in the subordinate court and the costs of this appeal assessed at Kshs. 50,000/- only.

DATED and **DELIVERED** at **MOMBASA** this **29th day of August 2018.**

D.S. MAJANJA

JUDGE

Mr Anyanzwa instructed by Anyanzwa and Company Advocates for the appellant.

Mr Mulama instructed by Miller and Company Advocates for the respondents.