REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 15 OF 2017

AMALGAMATED LOGISTIC INTERNATIONAL LTD.......1ST APPELLANT

DENNIS NTWIGA..2ND APPELLANT

VERSUS

MILKA WAIRIMU KIRUKU...RESPONDENT

(Being an appeal from the Judgment of Hon. D. N. Musyoka (Mr.), Principal Magistrate Delivered on 13/9/2016 in Kikuyu SRMC Case No. 218 of 2011)

JUDGMENT

1. By a Plaint dated 21/09/2011, the Respondent herein sued the Appellants claiming compensation for injuries allegedly sustained on 5th December, 2010 when she was travelling along the Nairobi-Limuru Road in motor vehicle registration number KAZ 084F as a lawful passenger when the 2nd appellant so negligently drove motor vehicle/Trailer registration number KBJ 015Y /ZC8935 causing it to hit motor vehicle registration number KAZ 084F from behind and as a result the respondent sustained personal injuries. The Plaint claimed that the 1st Appellant was vicariously liable for the negligence of the 2nd Appellant who was said to be the driver, servant and/or agent.

2. The Appellants filed their Defence denying any liability for the accident. In particular, the Appellants averred that if at all any accident occurred, the same was wholly occasioned by reasons of negligence of both the respondent and the driver of motor vehicle registration number KAZ 084F.

3. The matter proceeded to a full hearing. At the conclusion of the trial, the Honourable Trial Magistrate found the Appellants 100% liable for the accident jointly and severally. On quantum, the Honourable Trial Magistrate entered judgment as follows:

a. General damages	Kshs.	200,000/ =
b. Special damages	Kshs.	3,700/=
Total	Kshs.	203,700/=

4. The Appellants are dissatisfied with the lower Court's judgment and have preferred the present Appeal. In their Memorandum of Appeal, they have listed six grounds of appeal as follows:

a) THAT the Learned Magistrate erred in law and in fact in assessing damages at Ksh. 203,700/= and finding the Defendants 100% liable for the accident in total disregard of the evidence and testimony adduced in court thereby arriving at a wrong conclusion.

b) THAT the Learned Magistrate reached a wrong decision in Law and in fact contrary to the weight of evidence before him.

c) THAT the Learned Magistrate erred in Law and fact in failing to consider and mis-appreciating the pleadings, evidence, submissions and case law by the Defendants and thereby arrived at a wrong conclusion of Law.

d) THAT the Learned Magistrate erred in law and practice in awarding a manifestly excessive quantum of damages which was not commensurate with the nature of injuries suffered and/or loss proved.

e) THAT the Learned Magistrate erred in law and fact in failing to be guided by similar relevant authorities and case law in assessing quantum and therefore arriving at a wrong conclusion.

f) THAT the Learned Magistrate erred in law and in fact by misdirecting himself and acting on a wrong principal of Law in assessing liability.

5. The Court directed the parties to canvass the appeal by way of written submissions thereafter followed by oral highlighting.

6. In their advocate's written submissions, the Appellants clustered the grounds into two: Ground 1, 2, 3 and 6 and Ground 4 and 5.

7. The Respondent has opposed the Appeal stating that it is unmerited and that it is only brought to delay the enjoyment of the fruits of the judgment by the Respondent.

8. I have read and considered the respective arguments in those submissions.

9. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123*** in the following terms:

*I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

10. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

11. The appropriate standard of review established in these cases can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

12. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

13. With the above principles in mind, I will now proceed to deal with the appeal.

14. The Respondent's case was founded on the alleged negligence of the Appellants. As such, she was by law required to establish on a

balance of probabilities that:

a. The Appellants owed her a duty of care;

b. The Appellants breached that duty, and;

c. That she suffered injury as a result of that breach.

15. The Respondent's case, as it emerged from the Respondent's witnesses was that on 5/12/2010, the Respondent was travelling in motor vehicle registration number KAZ 084F, a Toyata Saloon car ("Toyota Saloon") on the way to Nairobi on Limuru-Nairobi Road. The Toyota Saloon was being driven by PW6 who is also the husband to the Respondent. The Respondent; PW6 who was driving the Toyata Saloon; and PW5 who was another passenger in the Toyota Saloon, gave very similar evidence about what happened on that day: On reaching the Zambezi area, the Toyota Saloon had a slow puncture and as PW6 slowed down in order to park on the side of the road to attend to it, the Toyota Saloon was hit from behind by motor vehicle registration number KBJ 015Y/ZD 8935 (the "Prime Mover Truck"). Due to the impact of the collision, the Toyota Saloon careened on to the left, outer lane and then rolled twice before landing on the road. The Toyota Saloon was so badly damaged it was written off. One of the passengers – a minor aged 3 years old – was killed; another minor – a girl – got paralyzed from the waist due to the accident. The Respondent sustained a cut injury on the leg and injuries on the chest, back and ankle. She was rushed to Kikuyu Hospital together with the other victims of the accident.

16. PW6, the driver of the Toyota Saloon was quite categorical that the driver of the prime mover was on the wrong as he did not keep a distance and was over speeding.

17. PW2 produced the inspection report which showed that the Prime Mover Truck's front bumper and side was dented and crushed.

18. PW3 produced the medical report. He stated that the respondent sustained blunt injury on the chest, lower back and a cut wound on the right ankle joint.

19. The Appellants called three witnesses. DW1 was PC Somo Abdullahi of Kikuyu Police Station. He was called to produce the Police Occurrence Book and investigations diaries. He was not the Investigating Officer. According to the documents he produced, though, the Investigating Officer had concluded that the accident was caused by a tyre burst of the Toyota Saloon. According to the Police Abstract which was also produced as an exhibit, the Toyota Saloon was, therefore, the Cause of the accident.

20. DW2 is an Investigator with Canter Strike Limited and was hired by the 1st Appellant's insurers. He investigated the accident and came to the opinion that it was the Toyota Saloon that caused the accident when it rammed on the trailer and then, according to him, veered to the left side of the trailer and rolled. He admitted on cross-examination that he did nont visit the scene but compiled his report from the Police documents and interviews with the Investigating Officer and the 2nd Appellant.

21. The 2nd appellant testified as DW3. He was the turn boy in the Prime Mover Truck. He testified that the Prime Mover Truck was heading towards Nairobi on the Limuru-Nairobi Road when, on reaching Zambezi, the Toyota Saloon which was heading in the same direction had a tyre burst and hit the Prime Mover Truck from behind. He was adamant on cross-examination that it was the fault of the driver of the Toyota Saloon that the accident occurred.

22. In disposing off the issue of liability, the Learned Trial Magistrate found thus-:

> "*According to the evidence of PW4 and PW5 –they denied the suggestion that the small car hit the truck from the rear. The testimony of PW5 was consistent and looking at the sketch plan, it supports the narrative given by PW5 that the small car was thrown off, the truck passed on and stopped ahead. It was also the evidence of the inspector that the small car was completely written off. PW5 told the court that he was hit on the rear right side and on the 2nd side were sitted two children, Monicah and Emmanuel who took the greatest impact as one died on the spot whereas the other one was paralyzed.*
>
> *There was also the theory of a tyre burst of the small car but the inspection report shows that the cars left tyres and rims were damaged. The Plaintiff's witness testimonies that the car had a puncture and not a tyre burst seems to be plausible.*
>
> *The Plaintiff's evidence was consistent as to what caused the accident that the truck hit the small car from the rear. I therefore find the defendants 100% liable for the accident.*

23. The Appellants argue that the Learned Trial Magistrate erred in finding them 100% liable for the accident and disregarded the evidence and testimony adduced in court.

24. On my part, I have now re-evaluated the evidence on record as I am required to do. I have come to the conclusion that the Learned Trial Magistrate was correct in finding the 1st Appellant 100% liable for the accident. I will discuss the position of the 2nd Appellant below.

25. From the evidence on record, I have come to the conclusion that the Learned Trial Magistrate was justified in believing the version of the accident presented by the Respondent as the more probable one. That version suggests that the driver of the Toyota Saloon, upon realizing he had suffered a puncture, slowed down and indicated that he would be pulling over. However, the driver of the Prime Mover Truck seemed to have been driving too fast to react quickly. He therefore ended up ramming into the Toyota Saloon causing the accident.

26. There are four reasons why I have found the Respondent's narrative more plausible compared to the Appellant's. First, the unmistakable

and unchallenged evidence presented showed that the Prime Mover Truck had damages on its front bumper and on the left side. The Inspection Report showed as much. Additionally, the Motor Vehicle Inspector who testified at the Inquest regarding the accident whose proceedings were produced as evidence in the trial was clear that the front bumper left side of the Prime Mover Truck had been "hit and scratched." Given that this was the damage to the Prime Mover Truck, it is implausible that the accident occurred when the Toyota Saloon had a tyre burst and hit the rear wheels of the Prime Mover Truck. There is no explanation why the Toyota Saloon would hit the Prime Mover Truck on its rear tyres and then it gets damage on its front bumper.

27. Second, it is instructive that two previous Courts reached the conclusion that the narrative of the Respondent was the more believable one: the Court that conducted the inquest into the accident heard all the witnesses and concluded that the driver of the Prime Mover Truck was to blame for the accident. The Learned Magistrate recommended that the driver of the Prime Mover Truck be charged with a criminal offence. The Learned Magistrate made this conclusion even after hearing from the Investigating Officer who testified before her. The Learned Trial Magistrate in the impugned judgment reached the same conclusion.

28. Third, while the driver of the Toyota Saloon and two of the occupants of the Motor Vehicle gave consistent evidence at the trial and were cross examined, the driver of the Prime Mover Truck was not called as a witness. It cannot only be assumed that his evidence was adverse to the interests of the Appellant.

29. Fourth, DW1 was not the Investigating Officer in the case. He could, therefore, not be cross-examined usefully on the investigations. The Investigating Officer, Zedekiah Mbori, whose testimony was tested by a different Judicial Officer and found not to be credible, was not available to give evidence and be cross-examined.

30. There is one other matter that came up on appeal that I wish to address. The Appellants complain that it was improper for the Learned Trial Magistrate to have found the 1st Appellant vicariously liable for the accident as the owner of the Prime Mover Truck yet the driver was not sued.

31. The Respondent says that it was improper for the Appellants to raise the issue on appeal since it travels outside their grounds of appeal.

32. While this specific issue was not raised in a distinct ground of appeal, I do think that the grounds of appeal covering liability adequately implicates the question. Hence, in part because this Court is exercising *de novo* review, I consider the question a fair one for resolution on appeal.

33. First, evidence that was adduced at the trial tended to show that the 2nd Appellant was a turn boy of the Prime Mover Truck. Indeed, his testimony to that effect was not seriously contested. Neither was that testimony contested at the Inquest. Indeed, at the Inquest, the Learned Magistrate expressed frustration that the driver of the Prime Mover had not been called to testify.

34. Given this, it was improper for the Learned Trial Magistrate to have found the 2nd Appellant jointly and severally liable to the Respondent for the injuries suffered. The 2nd Appellant was not the driver of the Prime Mover Truck and did not, therefore, cause the accident. He is not liable and should not have been found to be liable.

35. Where does leave liability against the 1st Appellant? The 1st Appellant was sued on the doctrine of vicarious liability. It was sued as the owner of the Prime Mover Truck which was being driven by its authorized driver or agent.

36. In ***Stephen Njoroge Thuo v Hellen Muhiu [2017] eKLR (Kiambu Civil Suit No. 199 of 2016)***, I had the following to say about this kind of argument:

> *There is also an interesting argument that the Appellant made in Ground 2 in its Memorandum of Appeal. It is to the effect that the Learned Magistrate erred in Law and in fact by failing to take into account that the driver who allegedly drove the accident motor vehicle Reg No. KAG 172X was not made a party to the suit and accordingly no liability would attach to the Defendant vicariously without making the driver a co-Defendant. The argument is interesting but ultimately futile. A Master can be found liable vicariously for the negligence of his Servant even where the Servant himself is not sued. The doctrine of respondeat superior under which such a suit is brought does not require the servant who caused the tort to be a party to the suit. The doctrine allows a third party (the employer, Principal or Master) to be held liable for the negligence of an employee, agent or servant even if the third party was not there when the injury occurred and did not cause the injury as long as the Plaintiff can demonstrate that the injury occurred while the employee, agent or servant was acting within the scope of his employment or was authorized or the actions were so connected with an authorized act that it can be considered a mode even though an improper mode of performing the act. A Plaintiff can, therefore, sue the employer, principal or master directly under the doctrine as long as they can prove all the elements.*

37. I would follow the same reasoning here. Even after absolving the 2nd Appellant from blame in the accident and finding that he is not liable, liability can still be found against the 1st Appellant even where the driver of the Prime Mover Truck was not enjoined as a party to the suit.

38. I will now turn to the quantum.

39.The Appellants argue that the Learned Trial Magistrate erred in awarding a manifestly excessive quantum of damages and failing to be guided by similar relevant authorities.

40. General damages awarded at the lower court can only be interfered with if it is "*so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the (court) 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*." (*See* ***Butt –vs- Khan, Nairobi Civil Appeal NO. 40***

of 1977).

41. In the circumstances I do not find the award of Kshs. 200,000/= inordinately low or high as to warrant any interference. See ***Dickson Ndungu Kirembe & another v Theresa Atieno & 4 others [2014] eKLR*** where Muchelule J reduced an award of Ksh. 350,000/= to Ksh. 200,000/= for the 2nd Respondent for similar injuries.

42. In the end therefore, the Appeal has failed except to the extent that the finding of liability against the 2nd Appellant is hereby set aside. Instead, there will an entry of judgment against the 1st Appellant solely at 100%. The appeal against the assessment of damages lacks merit and is dismissed.

43. Since the Appeal has succeeded in part, I will direct that each party to bear its own costs on appeal. For avoidance of doubt, the 1st Appellant will pay the Lower Courts costs to the Respondent.

44. Orders accordingly.

Delivered at Kiambu this 2nd day of August, 2018.

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JOEL NGUGI

JUDGE