



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.349 OF 2015

CITY HOPPER LIMITED.....1ST APPELLANT

GACHERU KANYINGI.....2ND APPELLANT

VERSUS

CHRISTOPHER OPIYO OSUGA.....RESPONDENT

(Being an appeal from the ruling of Honourable M.Chesang (Mrs.) Resident Magistrate at Milimani Commercial Courts, CMCC No. 1035 of 2009) dated 1st October, 2015)

JUDGMENT

The plaintiff, who is the Respondent in this Appeal moved the court by way of a plaint dated the 19th day of February 2009, which he later amended on the 19th March, 2012 in which he sought the following orders against the Appellants;

- a. General damages for pain, suffering and loss of amenities.
- b. Special damages of Kshs.7,100/-
- c. Interest on (a) and (b) above from the date of filing the suit until payment in full.
- d. Costs of the suit plus interest.

The cause of action is said to have arisen on or about the 30th day of June, 2007, while the Respondent was boarding motor vehicle registration number KAV 536A and before he could completely get on board the said vehicle, the 2nd Appellant who was the duly authorized driver of the vehicle suddenly accelerated the same, throwing out the Respondent and running over him hence occasioning him severe injuries.

The Respondent averred that the 2nd Appellant was driving the aforesaid vehicle as an authorized agent of the 1st Appellant and therefore, the 1st Appellant is vicariously liable for the negligence on the part of the 2nd Appellant. The particulars of negligence are set out in paragraph 7 of the amended plaint while those of injuries and special damages are set out in paragraphs 8 and 9 of the amended plaint. He prayed for judgment as set out in the amended plaint.

Though the Appellants were granted leave to file an amended defence, none was filed.

The matter came up for hearing on the 11th May 2015 when the Respondent and the second Appellant testified as the only witnesses in support of their respective cases. They both adopted their witness statements.

It was the Respondent's evidence that, at all material times relevant to the case, the first Appellant was the registered owner of motor vehicle, KAV 536A which was being driven by the 2nd Appellant as the authorized driver. That on the 30th day of June, 2007, he was boarding the aforesaid motor vehicle but before he could completely get on board, the 2nd Appellant suddenly accelerated the vehicle as a consequence of which the Respondent was thrown out and was run over his left leg hence suffering severe injuries, suffered loss and damage. He stated that he suffered severe injuries which included wound on the leg, injury to the left knee and ankle, fracture of the left tibia and fibula and generalized body trauma.

That as a result of the accident, he walked on crutches for 2 years and was unable to do simple and ordinary tasks for himself and had to rely on his wife and children for assistance. That, during the time that he was on crutches, he was unable to secure gainful employment as a result

of which, his family suffered economic loss. He still experiences great pain and discomfort on his left leg when he sits or walks for long distance and occasional swelling and tenderness on his left leg as a result of the accident and as a watchman, he is forced to perform his duties while seated so as to ease the pain which is a risk because, he would lose his job if the employer got to know about it. That, he has been left with a huge scar from the degloving injuries which is a constant reminder of the accident.

The 2nd Appellant adopted his witness statement. He stated that he is a driver working with the first Appellant. He denied having caused any accident on the 16th June, 2008 as alleged by the Respondent. He stated that he has never been summoned by the police to record a statement or answer to any charges relating to the alleged statement. It was his evidence that the first Appellant's buses do not ply Woodlands Avenue route where the accident is said to have occurred. He said that he does not know the Respondent and he has never seen him.

In a judgment delivered on the 1st July 2015, the trial court found the 2nd Appellant 100% liable for the accident and awarded the Respondent Kshs.350,000 as general damages. The Appellants being dissatisfied with that judgment, appealed to this court and have listed six (6) grounds of Appeal in the Memorandum of Appeal dated the 22nd July 2015. The grounds can be collapsed into two grounds being that of liability and quantum of damages.

The Appeal was disposed off by way of written submissions which this court has duly considered. In his submissions, Counsel for the Appellants submitted that the evidence adduced by the Respondent did not support the pleadings, in that, he averred that he was walking on the side of the road when the 1st Appellant's motor vehicle veered off the road and knocked him down. Counsel further submitted that this evidence contradicts the witness statement by the Respondent in that, he states that he was boarding the vehicle when the accident occurred and this does not support the particulars of negligence as pleaded in the amended pleadings. Counsel contended that the Respondent put forth two different versions of the accident and that, what he ought to have proved was not proven. The case of **I.E.B.C. & Another Vs. Stephen Mutinda Mule & 3 others Civil Appeal No. 219/2013** was relied on where the High Court cited with approval the Nigerian case of **Adetoum Oladeji (NIG) Ltd. Vs. Nigeria Breweries** in which the court held;

“....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded”.

It was also the Appellants' submissions that, by his pleadings, the Respondent avers that the accident occurred on the 16th June, 2007 but stated in his statement that it occurred on the 30th June, 2007. He contended that the lower court failed to consider this material contradiction and consequently, the learned magistrate erred in law and in fact.

On the part of the Respondent, it is submitted that the Appellants have failed to demonstrate how the court misdirected itself. On production of copies of documents, the Respondent contended that the Appellants did not object to the production of the copies at the hearing and therefore the issue cannot be raised at this stage.

That the account of the accident averred in the amended pleadings filed on 20th March, 2012 and the witness statement by the Respondent are consistent and that from the proceedings, the Appellants have not raised the issue of any inconsistency. The Respondent contends that the allegation that the court misapprehended the evidence before it is baseless, and the same should be disregarded.

The court has perused the pleadings and the record of the proceedings. The Respondent filed an amended pleadings on the 20th April 2012 in which, he explained how the accident occurred. In it, he stated that he was boarding motor vehicle KAV 536A and before he could completely do so, the 2nd Appellant suddenly accelerated the vehicle throwing him out and running over his left leg. The date of the accident is stated as 30th June 2007. It is true that the version on how the accident occurred as stated in the pleadings is different from that in the Amended pleadings in that, the Respondent is said to have been a pedestrian and the date of the accident was given as 16th June, 2008. It is trite that the court is obliged to consider the particulars as set out in the amended pleadings and not the original pleadings and the purpose of an amended pleadings is to correct any errors that may have occurred in the original pleadings.

The court has also perused the witness statement by the Respondent and it's clear that the version as stated in the statement is the same as captured in the amended pleadings and so is the date of the accident which is stated as 30th June, 2007. In his evidence in Chief, the Respondent fully relied on his witness statement as his evidence in chief and therefore, the Appellant's contention that the evidence does not support the pleadings is unfounded and untenable.

On the issue of documents, it is alleged that the Respondent did not produce the original documents to support his claim. In dealing with this contention, the court finds that the matter before the trial court was defended and indeed evidence was tendered by the 2nd Appellant on his own behalf and that of the 1st Appellant. A cursory perusal of the record of proceedings will attest to the fact that no objection was raised by the counsel for the Appellants to the production of copies of those documents. They cannot be heard to complain about what they allowed to go in without any objection. It is too late in the day to mount this as a ground of appeal.

As rightly pointed out by the learned magistrate, the Appellants in their defence dated the 15th April, 2009 alluded to the plaintiff's negligence and also that the accident was inevitable yet the 2nd Appellant turned round in his testimony to deny the occurrence of the accident. This was a glaring discrepancy and a clear case of evidence that does not support the pleadings. Infact, it is the Appellants whose evidence failed to support the pleadings and not the Respondent. This court, however, faults the learned Magistrate for apportioning liability at 80% : 20% when there was no evidence adduced before her to support the apportionment. In view of the foregoing, I find that the 2nd Appellant was 100% to blame for the accident and the 1st Appellant is vicariously liable.

On quantum of damages, the injuries sustained by the Respondent are set out in details, in the medical report that was produced as exhibit 9, before the trial court. According to that report, he sustained compound fracture of the left tibia and fibula and severe degloving injury to the

left leg. He was admitted at Masaba Hospital and later at Kenyatta National Hospital. According to the doctor, the injuries he sustained were grievous harm and they caused him pain, suffering and loss of blood. The doctor show him over a period of 2 years after the accident and he noted that the compound fracture to the left tibia and fibula had resolved. That he has been left with a degloving injury and ugly and permanent scar on the left leg. The doctor assessed total permanent incapacity at about 20%. The Appellants have asked the court to reduce the damages to Kshs.200,000 and have relied on the case of **I.E.B.C. & Another Vs. Stephen Mutinda Mule & 3 others Civil Appeal No. 219/2013**. The Respondent has submitted that the award made by the learned magistrate should not be interfered with. The court notes that the authority cited by the Appellants has no relevance on quantum of damages. The court finds that the amount awarded by the trial magistrate is a bit on the higher side and the same is reduced to Kshs.250,000/-.

The Respondent is awarded the costs of the Appeal together with that of the lower court. General damages shall earn interest from the date of the judgment of the lower court.

Dated, Signed and Delivered at Nairobi this 22nd day of November, 2018

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L. NJUGUNA

JUDGE

In the presence of:-

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For the Appellants

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For the Respondents