REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 10 OF 2011

KADZORA KARISA .....APPELLANT

VERSUS

M.A BAYUSUF & SONS LTD.....RESPONDENT

JUDGEMENT

1. The Appellant, KADZORA KARISA was the plaintiff in RMCC NO. 53 of 2010, at Mariakani Law Courts where he filed a suit against the Respondent, M.A BAYUSUF & SONS LIMITED seeking to be paid damages on account of injuries he alleged to have sustained when he was involved in a road traffic accident involving the defendant/respondent's motor-vehicle Registration No. KAG 837L on the 20th November, 2009.

2. The Appellant averred that accident in which he sustained injuries was caused by the negligence of the Respondent, its authorized driver, servant and/or agent in the manner in which he drove the said motor-vehicle. The Appellant particularized the particulars of negligence of the driver of the said motor-vehicle. Of importance to the appeal, is that the Appellant pleaded that the Respondent's driver drove the motor-vehicle carelessly and negligently that he failed to manage or control it to avoid the accident.

3. The Respondent filed a statement of defence on 26th May, 2010 in which he denied the allegations by the Appellant that he was a lawful passenger aboard its motor-vehicle Registration No. KAG 837L which was recklessly and carelessly driven causing it to roll and as a consequence, he sustained injuries.

4. The Respondent denied the particulars of negligence and injuries and special damages as set out by the Appellant in his plaint. He then averred that if the said accident occurred, then it was caused and or contributed to by the Appellant. The Respondent particularized the particulars of negligence on the part of the Appellant. The Respondent then urged the court to dismiss the Appellant's suit with costs.

5. After hearing the evidence that was adduced during the trial before the lower court, the trial magistrate found that the Appellant was a passenger on the lorry belonging to the Respondent and sustained injuries when the said lorry was involved in a road traffic accident on 20th November, 2009. And on 18th January, 2011 held that the Respondent was 100% liable for the accident and awarded him damages of Kshs100,00/= for pain and suffering, Kshs3,480/= as special damages together with costs and interest.

6. The Appellant(plaintiff) was aggrieved by the judgment and award on general damages. He preferred the appeal herein in which he set out three(3) grounds namely:

> **(a) That the learned trial magistrate erred in law and in fact by failing to consider the respective parties submissions in making the award of general damages.**
>
> **(b) That the learned trial magistrate erred in law and in fact in awarding a sum of Kshs100,000/= which was inordinately low to amount to an erroneous estimate of damages.**
>
> **(c) That the learned trial magistrate erred in law and in fact in failing to take relevant factors into consideration apportioning liability equally against the weight of evidence and the injuries sustained.**

7. Counsel for both parties agreed to dispose of the appeal by way of written submissions and on 18th September, 2018, they highlighted their submissions.

8. M/s Wanjala, counsel for the Appellant indicated that the Appellant was relying on his written submission dated 2nd May, 2017 and filed

on 5th May, 2017. She submitted that the Appellant in his submissions before the trial court proposed an award of Kshs300,000/= as general damages while his Respondent proposed a sum of Kshs.160,000/=. That the learned trial magistrate then awarded the appellant Kshs100,000/= and in faulting this finding, the appellant submitted that the trial magistrate did not give reasons why it made an award less than the amount proposed by the respondent, which would be an award for soft tissue injuries. She also submitted that the award of general damages of Kshs100,000/= for the nature of injuries the appellant sustained was inordinately low. Lastly, she submitted that the plaintiff testified that he could not straighten his hand and hence could not continue with his work but these facts were never taken into consideration by the trial magistrate in making his award. The appellant's counsel then invited the court to interfere with the said award.

9. In response, the Respondent's counsel submitted that the injuries suffered by the appellant were soft tissue injuries. And that while parties are the best custodians and protectors of their own rights, it will be noted that a trial magistrate is not bound to their submissions but goes by discretionary powers. He also submitted tht the appellant's counsel has not pointed out which irrelevant factors the trial magistrate took into account in making the award in dispute. Finally, the Respondent's counsel submitted that in view of the soft tissue injuries the appellant suffered, the award of Kshs100,000/= was commensurate, fair and just, hence not erroneous.

10. As a first appellate court, its duty was restated by the Court of Appeal in the case of **JOSPEH MUNG'ATHIA V- COUNTY COUNCIL OF MERU & ANOTHER, A.A CIVIL APPEAL NO. 146 OF 2002 (NYERI**) at page 11of its judgment that:

> " In law, this matter coming as a first appeal, we have a duty to consider both matters of fact and of law. On facts, we are duty bound on first appeal to analyze the evidence afresh, evaluate it and arrive at our own independent conclusion, but always bearing in mind that the trial court had the advantage of seeing the witnesses, hearing the witnesses and seeing their demeanour and making allowance for the same. In the case of **MWANGI –V- WAMBUGU (1948),** at page 461, Kneller, J.A (as he was then) stated:
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> "this is a first (and only) appeal so this court is obliged to reconsider the evidence, assess it and make appropriate conclusion about it, remembering we have not seen or heard the witnesses and making some allowance for this: **SELLE AND ANOTHER VRS ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS (1968) E.A 123-126 (CA-2) AND WILLIAM DIAMONDS LTD VRS BROWN (1970) E.A 1, 12 CA – T.**

11. I have re-evaluated the evidence that was adduced before the trial magistrate's court and considered the submissions made by both Appellant and respondent together with the cited authorities and the law with regard to the grounds of appeal that were set out in the memorandum of appeal.

12. On the outset, I first, wish to dispose of ground no. 3 of the memorandum of appeal where the trial magistrate was faulted for failing to take into consideration relevant factors in opportioning liability equally against the weight of the evidence and injuries sustained. In absolving the Appellant of any blame arising from the accident, the trial magistrate, after reviewing the evidence had this to say:

> **"The fact that he was a passenger in the lorry, he did not have any control over the lorry nor could he have contributed to the occurrence of the same. The driver of the said vehicle therefore owed the plaintiff a duty of care. The owner also owed him the duty to ensure that the lorry was in good driving conditions. The accident having been caused by the mistake not of the plaintiff, I hold the defendant 100% liable for the accident".**

13. Clearly, the finding has not apportioned liability equally as between the Appellant and Respondent. The proposal to opportion liability equally among the parties was made by the Respondent in their submissions filed before the trial court, which the trial magistrate found in the contrary.

14. I have perused the record of proceedings and it shows that no witness was called by the Respondent to controvert what the Appellant had testified before court in support of his case. I therefore dismiss ground Number 3 of the memorandum of appeal for being frivolous as the same is not founded on the record before the court.

15. I proceed to consider and discuss ground number 1 and 2 of the memorandum of appeal as one. At page 8 of her judgment (page 70 of the record of appeal) the trial magistrate alluded to the injuries the Appellant sustained as discerned from the record. She correctly restated the injuries as recorded by the doctor as being:

(i) Dislocation of the left elbow;

(ii) A cut on the head;

(iii) A blunt injury to the neck;

(iv) A bruise to the left knee arising out of the above accident.

16. I have gleaned through the exhibits referred to as P3 form, Exhibit P1, treatment notes and Doctor Ajoni Adede's medical report and find that the trial magistrate actually referred to them as evidence tendered before her. This is therefore a finding of fact and I proceed to dismiss ground 1 of the memorandum of appeal.

17. The next consideration is whether the award of Kshs100,000/= as general damages was inordinately low to amount to an erroneous estimate of damages. The courts have established principles to guide an appellate court when asked to interfere with an award of damages of the lower court. There principles were propounded long ago and courts sitting on appeal have refined them from time to time as new matters arise before them. In the case of **ALI VRS NYAMDU t/a SISERA (1990)KLR 534** at page 538, the Court of Appeal approved the

principles stated in the case of **LUKENYA RANCHING AND FARMING COOPERATIVES SOCIETY LTD –VRS- KAVOLOTO (1970) E.A 414,** when it stated as follows:

> ***"The principles which apply under this head are not in doubt when the assessment of damages be by a judge or jury, the Appellate Court is not justified in substituting a figure of its own for that award below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the Appellate Court can properly intervene, it must be satisfied that either the judge, in assessing the damages, must have applied a wrong principle of law (as by taking into account irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded was so inordinately low or so inordinately high that it must be a wholly erroneously estimate of the damages…."***

18. The Appellant's attack is that the learned magistrate awarded a figure below what was proposed by the Defendant and that to do so, must give reasons. Having regard to the principles that guide the assessment of damage, I have not come across any that states that the Defendant is the bench mark who sets the lowest minimum a court can award and not go below it. I find the reason fallacious as it is clear from what I have laid out as relevant matters being those pleaded and supported by oral and documentary evidence. The reasoning on the contrary is hence rejected.

19. The Respondent has submitted that infact the Appellant relied on authorities that were not available and consequently made it difficult for them to respond. They however, agreed on the principles to be followed as the same. The respondent has cited several authorities for example **MOMBASA MAIZE MILLERS LTD VRS W/M (2016) eKLR; ZIPHORA WAMBUI WAMBARRA AND 17 OTHERS – VRS- GACHURU KIOGORA & 2 OTHERS (2004) eKLR & JOSEPHINE AGWENYI –VRS- SAMWEL OCHILLO (2010) eKLR.** A reading through all these authorities reveals that none of them support the formula that the Defendant sets the lower limit a court can go in awarding damages and so it should strike the middle ground. This is the first time such a suggestion has come up in a case.

20. The one principle which has matured over time is that of comparison of awards over the last five years and how the same may have been affected by inflation. The Appellant has supplied authorities which refer to different injuries. In the case of **DEVKI STEEL MILLS LTD – VRS- JAMES MAKAU KISULU CIVIL APPEAL NO. 191 of 2008 (MKS),** where the injuries were on the pelvis and severe soft tissue injuries. In the case of **AKAMBA PUBLIC SERVICE –VRS- BETTY MUTISO (MKD),** the injuries were widespread soft tissue injuries. Save for the principles profounded therein, these authorities were not helpful to the Appellant's case.

21. In my view, the trial court considered relevant factors and reached a fair and just estimate of damages. I am therefore reluctant to interfere with the same.

22. The upshot of the matter is that the appeal fails and the same is thus dismissed with no orders as to costs.

The Plaintiff shall have the costs and interest as ordered by the lower court.

It is so ordered.

Judgment DELIVERED, SIGNED and DATED this 20th day of December, 2018.

D. CHEPKWONY

JUDGE