REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 206 OF 2015

RIFT VALLEY RAILWAYS (K) LIMITED.....APPELLANT

VERSUS

IRENE WANGUI GACHUHI.....RESPONDENT

(Being an appeal from the Judgment of Hon R Oganyo (Mrs), Chief Magistrate (CM) at the Chief Magistrate's Court at Milimani in Civil Case No 3245 of 2008 delivered 8th April 2015)

JUDGMENT

INTRODUCTION

1.In her decision of 8th April 2015, the Learned Trial Magistrate, Hon R Oganyo (Mrs), Chief Magistrate (CM), found the Appellant wholly liable for the injuries the Respondent herein sustained. She entered judgment in favour of the Respondent in the sum of Kshs 2,412,040/= made up as follows:-

General damages	**Kshs 1,300,000/=**
Future medical expenses	**Kshs 1,050,000/=**
Special damages	**Kshs 57,040/=**
Witness court attendance Costs	**Kshs 5,000/=**
	Kshs 2,412,040/=

Plus costs and interest at court rates.

2. Being dissatisfied with the said judgment, on 7th May 2015, the Appellant filed its Memorandum of Appeal of even date. It relied on five (5) Grounds of Appeal.

3. The Appellant's Written Submissions were dated 20th August 2018 and filed on 23rd August 2018 while those of the Respondents were dated 4th October 2018 and filed on 5th October 2018.

4. When the matter came before the court on 8th October 2018, the parties requested it to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

7. Having looked at the parties' respective submissions, it was evident that the issues that had been placed before this court for determination were:-

1. Whether or not the Learned Trial Magistrate arrived at a correct apportionment of liability between the Appellant and the Respondent; and

2. Whether or not there was any justification for the Learned Trial Magistrate to have awarded the Appellant future medical expenses.

8. Notably, the Appellant abandoned the ground of appeal regarding whether or not the Learned Trial Magistrate had awarded general damages that were manifestly excessive to warrant interference by court. It did not also challenge the award of Special Damages and the witness expenses of Dr Kiama Wangai (hereinafter referred to as "PW 1").

9. The court therefore looked at the said issues under the distinct and separate headings shown herein below.

I. <u>LIABILITY</u>

10. Grounds of Appeal No (1) and (4) were dealt with under this head as they were related.

11. The Appellant submitted that he who alleges must prove and that the Respondent ought to have offered more proof and not just a statement on how she sustained the injuries. It pointed out that the Learned Trial Magistrate did in fact observe that the Police Abstract Report did not assist her during trial because it did not say who between the Appellant and the Respondent was to blame for the accident in which the Respondent sustained serious injuries.

12. It therefore objected to the Learned Trial Magistrate's decision in which she relied on the Respondent's evidence and not what its witnesses had adduced in court merely because the Respondent had stated that the Appellant's driver, Joanes Odoro Oduma (hereinafter referred to as "DW 2"), had started moving Appellant's Train Registration No AOY Locomotive No 4733 (hereinafter referred to as "the train") before she had boarded it yet its witnesses were categorical that the Respondent had attempted to board the train before it was due for boarding.

13. It relied on the cases of **Mumbi M'Nabea vs David M Wachira [2016] eKLR** and **BWK vs EK & Another [2017] eKLR** to advance its argument that a court cannot choose the evidence of one (1) party over the other without supporting evidence because in such a situation, the issue of liability can only be decided on a balance of probability.

14. It urged this court to dismiss the case on the ground that the Respondent had failed to discharge her burden of proof. It added that in the event the court was to apportion liability, then the same should be apportioned at 70% - 30% between it and the Respondent respectively.

15. On her part, the Respondent submitted that the Appellant did not narrate how the accident occurred or adduce evidence that she tried to board the train before boarding time. She pointed out that the Appellant did not call the Foreman whose duty was to allow passengers to board the train. She also added that because no passenger was arrested for flouting the instructions for boarding, then she could not then have been to blame in any way.

16. It was her submission that the incident occurred at 5.00 pm as was corroborated by the Police Abstract Report and it was therefore not correct that the incident occurred at 4.30 pm as had been contended by the Appellant's witnesses.

17. She averred that she discharged her burden of proof far as the Appellant's negligence was concerned and urged this court not to disturb the apportionment of liability as had been arrived at by the Learned Trial Magistrate.

18. It was an undisputed fact of this case that on 11th September 2007, the Respondent was injured as she was in the process of boarding the

train. She was run over her left leg. What was in contention was whether or not she was boarding the subject train before it was due for boarding as the Appellant had contended or if the train started moving before she had fully boarded the train as she had stated, as a result of which she sustained the injuries.

19. Notably, according to the Respondent, she boarded the train when it was stationary. She denied that she moved beyond the yellow line without permission. She was also emphatic that she never saw this yellow line or any warning signs at the Railway Station or any other person who was in-charge and only saw those people who sold her the train ticket.

20. Amos Njoroge Nduati (hereinafter referred to as "DW 1") worked at the Appellant's Company as a Station Foreman. He stated that his duties entailed informing passengers when the train was about to leave. He was categorical that despite hooting from the train driver, passengers who would number about three thousand (3000) normally became very unruly and disobeyed instructions. His evidence was that on the material date at about 4.30 pm, the train was being ushered to the station for passengers to board.

21. He stated that normally there would be an officer at the station whose duty was to ensure that all passengers had a train ticket but he was not sure if that officer was there on the material date. He added that no one would check when passengers boarded the train

22. His evidence was that on the material day, he was on duty to announce to passengers to board the train. He was also emphatic that there was a yellow line that passengers must never cross before the train comes to a halt. His testimony was that the Respondent was probably injured during the pushing and shoving of passengers as they attempted to board the train. He said that he heard noises but he did not see her fall. He was therefore emphatic that she was the author of her own misfortune.

23. DW 2 was the driver of the train on the material date. He averred that there were security officers patrolling to ensure that no passenger flouted the Rules. He testified that he was the one who moved the train from the washing bay to the platform so that passengers could board. He stated that as he was moving the train, he heard people screaming. He came out of the train to check what was going on.

24. Notably, both DW 1 and DW 2 were at the scene at the material time. They gave different accounts from that of the Respondent. They were both categorical that the time for boarding the train had not reached. On the other hand, the Respondent was categorical that DW 2 started moving the train before she had fully boarded the train. Evidently, this was a case of one party's word against the other. The

Respondent did not call any independent witness to corroborate her evidence. This court thus agreed with the Appellant's submissions that in such a situation, the case had to be decided on a balance of probabilities.

25. It was evident that the Respondent was not arrested for flouting any Rule for boarding the train. If as the Appellant wanted this court to accept its assertions that passengers normally became unruly and disobeyed instructions, then it was this court's considered opinion that it ought to have ensured that there were enough security officers to prevent passengers rushing to board the train before it could come to a complete stop.

26. Having about three thousand (3000) passengers on a platform without an adequate number of security officers to manage the unruly behavior of passengers as was alluded to by DW 1 was evidence of negligence on the Appellant's part as it was truly a recipe for disaster waiting to happen. If it was a normal occurrence, steps should and ought to have been taken to nip such behavior in the bud.

27. As the Respondent did not call any independent witness to corroborate her case and the Police Abstract Report was not conclusive as to who was liable for the incident, she could not have escaped liability entirely. The fact that she stated that the train was not full seemed to suggest that part of the three thousand (3000) passengers was still expected to board the train before it could depart. She did not testify that she was the last passenger to board the train which could then have pointed to DW 2's negligence in moving the train before she had boarded the same.

28. Accordingly, bearing into consideration the facts of this case, this court came to the conclusion that apportionment of liability at 60%-40% against the Appellant and the Respondent respectively was fair and reasonable in the circumstances of the case herein.

29. In the premises foregoing, Grounds of Appeal Nos (1) and (4) were partly successful and the same are hereby allowed.

II. <u>FUTURE MEDICAL EXPENSES</u>

30. Grounds of Appeal No (3) and (5) were dealt with together.

31. The Appellant argued that a court has no power to award what is not pleaded in the Plaint. It relied on the cases of **Caltex Oil (Kenya) Ltd vs Rono Ltd [2010] eKLR**, **Galaxy Paints Company Ltd vs Falcon Guards Ltd [2002] 2 EA 385** and **Kenya Bus Services Ltd vs Gituma [2004] 1 EA 91** where the common thread was that any award must flow from the pleadings.

32. It was therefore its submissions that PW 1's testimony on the issue costs of prosthesis did not qualify the Respondent for an entitlement of an award of future medical expenses and that the sum of Kshs 1,050,000/= ought to be set aside.

33. On her part, the Respondent submitted that PW 1 had put permanent functional disability at sixty (60%) per cent, that she had testified that she was initially given a limb for free but that she bought the second one for Kshs 120,000/= and that PW 1 had recommended the replacement of the prosthesis at an estimated cost of Kshs 50,000/= to Kshs 70,000/= every three (3) years.

34. It was reasonable to expect that the Respondent, who was amputee, was entitled to prosthesis. The Appellant did not call any doctor to controvert PW 1's evidence that the Respondent would require a prosthesis costing between Kshs 50,000/= Kshs 80,000/= every three (3) years. PW 1's evidence in this regard therefore remained unrebutted and uncontroverted.

35. Having said so, this court wholly concurred with the Appellant's submissions that the Learned Trial Magistrate erred when she awarded the Respondent Future Medical Expenses because the same was not pleaded in her Plaint or Amended Plaint. Indeed, as parties are bound by pleadings, courts cannot award any claim that is outside of what is contained in such a pleading.

36. It is important to point out that the Respondent amended her Plaint dated 27th May 2008 and filed on 4th June 2008 on 1st November 2018. This was to include the claim for Special Damages. As PW 1's Medical Legal Report was dated 21st May 2008, the Respondent ought to have included the claim for Future Medical Expenses by the time she filed her Amended Plaint. It would be completely unjust for the Respondent to benefit for her omission to include her claim for Future Medical Expenses whether the same was due to negligence or oversight on her part or that of her advocates.

37. The fact that PW 1 opined that she would require a prosthesis as aforesaid did not entitle her to be awarded the said claim for Future Medical Expenses. It had to be specifically pleaded. This court therefore came to the firm conclusion that the Learned Trial Magistrate applied the wrong principles in awarding the Respondent Future Medical Expenses and consequently, the said claim in the sum of Kshs 1,050,000/= for Future Medical Expenses had no legal basis and ought to be set aside.

38. In the premises foregoing, Grounds of Appeal Nos (3) and (5) were merited and hereby allowed.

DISPOSITION

39. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 7th May 2015 was partly successful. The effect of this was that the judgment entered in favour of the Respondent against the Appellant for Kshs 2,412,040/= is hereby set aside and/or vacated.

40. Instead, this court replaced the same with an order that judgment be and is hereby entered in favour of the Respondent against the Appellant for Kshs 817,224/= made up as follows:-

General Damages	**Kshs 1,300,000/=**
Special Damages	**Kshs 57,040/=**
Witness costs for Court attendance	**Kshs 5,000/=**
	Kshs 1,362,040/=

Less 40% Contributory negligence **Kshs 544,816/=**

Kshs 817,224/=

Plus costs and interest and court rates from date of judgment till payment in full.

41. Each party will bear its own costs of this Appeal.

42. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **18th** day of **December** 2018

J. KAMAU

JUDGE