REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 95 OF 2013

ALLOY STEEL CASTING LIMITED.....APPELLANT

-V E R S U S –

F M M (Minor suing through his mother

and next friend, F W.....RESPONDENT

(Being an appeal from the judgement of the Hon. D. Ole Keiwua (Mr) PM delivered on 15th February 2013 in, Milimani Commercial Court, Nairobi Civil Suit NO. 253 of 2008)

JUDGEMENT

1. F W K, the mother and next friend of F M M, the respondent herein, filed a compensatory suit against Alloy Steel Casting Ltd, the appellant for the injuries allegedly sustained by the respondent in a road traffic accident caused by the appellant's motor vehicle registration no. KAV 638. The respondent averred that on 9th May 2007, he was riding a bicycle along Embu-Makutano road when the appellant's motor vehicle registration no. KAV 638S while being recklessly driven hit him thus inflicting the alleged injuries. The respondent stated he suffered laceration to the right arm and multiple facial and scalp lacerations associated with depressed fracture of the right occipital bone and temporal-occipital brain contusion. The suit proceeded for hearing giving rise to the judgment delivered on 15.02.2013 by Hon. Ole Keiwa in which the respondent was awarded ksh.500,000/= as general damages and ksh.1,600/= as special damage. The appellant was dissatisfied with the aforesaid decision hence this appeal.

2. On appeal the appellant put forward the following grounds in his memorandum of appeal.

> ***1. THAT the learned magistrate erred in law and in fact in finding that the appellants driver was 100% liable for the accident which gave rise to the suit in the subordinate court in the face of overwhelming evidence to the contrary.***
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> ***2. THAT the learned magistrate erred in law and in fact in finding that the appellant's motor vehicle registration number KAV 638S was the one which caused the accident when the only evidence tendered by the respondent as to the identity of the motor vehicle which caused the accident the subject of the suit at the subordinate court was a police abstract which contained contradictory information which ws not resolved by any other corroboratory or extricating evidence.***
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> ***3. THAT the learned magistrate erred in law and in fact in finding that the appellant was vicariously liable for the accident which gave rise to the suit at the subordinate court.***

4. THAT the learned magistrate erred in law and in fact in totally disregarding the evidence tendered by the appellant together with the submissions of the appellant together with the submissions of the appellant in the suit at the subordinate court thereby reaching the flawed decision.

5. THAT the learned magistrate erred in law and in fact in failing to apply the correct principles for assessment of damages leading to an award of general damages which is excessive, unreasonable and manifestly unfair.

6. THAT the learned magistrate erred in law and in fact in finding that the respondent had proved his case on a balance of probabilities.

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have further taken into account the rival submissions. I have already given the background of the case that was before the trial court hence I do not intend to reproduce it here. The appellant chose to argue grounds 1, 2 and 4 together. It is submitted that trial magistrate misapprehended the evidence presented before him and acted on wrong principles thus falling into error in law and on facts. The appellant pointed out that the police abstract had indicated that the accident involved motor vehicle registration no. KAV 639S but the trial magistrate stated that the middle registration no. KAV 639S must have been an error and proceeded to hold motor vehicle registration no. KAV 638S as the motor vehicle which must have hit the respondent and held the driver 100% liable and the owner vicariously liable. The appellant pointed out that the police abstract indicated the name of the owner of the motor vehicle registration no. KAV 638S as Kenya Network for Dissemination of Agricultural Technologies. It is the appellant's submission that the learned trial magistrate made a sweeping statement stating that the middle registration no. KAV 639S must have been an error without laying a basis, in the absence of any other evidence. It is said that the trial magistrate failed to establish why he thought it was motor vehicle registration no. KAV 638S which was inserted correctly on the police abstract and why he thought motor registration no. KAV 639S was inserted by error and not the other way round. The appellant further argued that it was able to tender evidence showing that motor vehicle registration no. KAV 638S was insured by General Accident Insurance Co. Ltd and issued in the name of the appellant and that at the time of the accident, the motor vehicle had not left the appellant's premises hence it was not driven along Embu-Makutano Road.

4. The respondent was of the contrary view that there was sufficient evidence that the suit motor vehicle was clearly enumerated as KAV 638S and the policy holder names the insured as the appellant. The respondent also contested the appellant's assertion that motor vehicle registration no. KAV 638S never left the appellant's premises on the fateful day arguing that a similar submission was made before and rejected by the trial court. The respondent further argued that the appellant's evidence as to whether or not the motor vehicle left the premises cannot be relied upon since the movement register is a self made document by the appellant.

5. I have re-evaluated the evidence tendered before the trial court over the issue in question. There is no dispute that the police abstract presented in evidence by the respondent indicated that the motor vehicle involved in the accident was KAV 639S. The driver is named as Titus Kimathi Musyoka and is insured by cooperative Insurance Co. Ltd. The same police abstract also states in the middle the registration number of the motor vehicle involved in the accident as KAV 638S make Toyota Pickup. A copy of the log book indicates that the owner of KAV 638S is the appellant herein.

6. In his judgment, Hon. Ole Keiwa, noted that the motor vehicle registration numbers KAV 639S and KAV 638S were mentioned in the police abstract. He concluded that the middle registration no. KAV 639S was inserted in error. It is clear from that judgment that the trial magistrate came to this conclusion after considering the evidence tendered.

7. I have on my part critically examined the material placed before the trial court. In his written submissions, the respondent submits that the correct registration number of the motor vehicle involved in the accident is KAV 638S and that motor vehicle registration no. KAV 639S was inserted by mistake of

human error. I have also looked at the appellant's submissions made before the trial court. It is clear that the issue was hotly contested. It is pointed out that KAV 638S was issued by General Accident Insurance Company Ltd which is contrary to what is stated in the police abstract which states that the insurer was Cooperative Insurance Co. Ltd. It was also pointed out that the policy holder was Kenya Network for Dissemination of Agricultural Technologies. There was also an argument on the distinction of the two motor vehicles. It is said that KAV 638S was not a Toyota but an Isuzu while KAV 639S was a Toyota pickup. The appellant further denied that its driver was called Titus Kimathi Musyoka. It would appear the learned principal magistrate did not put serious attention to the contents of the police abstract. In my humble view, and on the basis of the issues I have identified hereinabove, it cannot be said that the insertion of KAV 639S in the police abstract form was a mere human error. There is more to it than it appears. The record shows that the ownership, the insurers, the driver and the model of the motor vehicles do not agree. It is therefore difficult to say who is liable. Had the learned principal magistrate given serious attention to the issue he would have come with a different conclusion. I find that the parties actually invited the court to determine the issue but the same was given a casual attention. In the circumstances of this appeal I think there is need to give the parties a second chance to have the issue sorted out once and for all by ordering for a retrial.

8. The other ground which was ably argued on appeal is the question on quantum. The appellant is of the view that the award of ksh.500,000 on general damages is excessive, unreasonable and manifestly unjust. It is pointed out that the authorities submitted and relied upon by the parties indicates that the nature of injuries the respondent suffered could attract an award of less than ksh.360,000/=. The respondent urged this court not to interfere with the award given on general damages. It is argued that the sum awarded was more than the respondent should have been awarded.

9. I have on my part reconsidered the material placed before the trial court on quantum. The record shows that the respondent had asked for an award of ksh.1,500,000/= for general damages. The respondent submitted the following authorities:

> **Nairobi H.C.C.C no. 1128 of 1993 Leah Kamunya =vs= KBC** where this court awarded the plaintiff ksh.200,000/= for less severe injuries.
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> **Meru H.C.C.C no. 83 of 2002 F.G =vs= John Mwangi and Anothe**r in which this court made an award of ksh.1,800,000/= for *inter alia* a fracture of the neck, head injury, fracture of the middle shaft of the femur.
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> **Nakuru H.C.C.C no. 171 of 2001 Charles Ndungu Nderitu =vs= Patrick Nyangei Paul & two** others where this court awarded ksh.1,800,000/= for fractures on both legs, bruises and on the head.

10. The appellant had submitted that in the event that the respondent succeeded in establishing liability that he would only be entitled to ksh.350,000/= for general damages. The appellant cited the case of **Bhupinder Singh Bhanra =vs= Joel Tuwei Koech (2008) eKLR** where the plaintiff was awarded ksh.170,000 for dislocation of the left should joint lacerations to the left elbow knee and swollen scalp.

The appellant also cited the case of **Monica Kori Ndunda =vs= Malindi Taxis Ltd (1997) eKLR** where this court made an award of ksh.450,000/= for a depressed fracture of the left frontal region of the head, blunt injuries of the left ear and left eye, neck and left leg.

11. The learned principal magistrate took into account the case law cited by both sides and came to the conclusion that the case which is relevant to this case is the case of **Monica Kori Ndunda =vs= Malindi Taxis Ltd (1997) eKLR** and proceeded to award ksh.500,000/=. With respect, I am convinced that the learned principal magistrate applied the correct principles in assessing damages therefore he cannot be faulted.

12. In the end the appeal as against liability succeeds while the appeal against quantum is dismissed.

13. For the avoidance of doubt, the consequence is that the order making the appellant wholly liable is set

aside. In the circumstances of this case a fair order to issue which I hereby, do is to order for a fresh trial before another magistrate of competent jurisdiction other than Hon. Ole Keiwa on priority basis.

14. In the unique circumstances of this case, I order that each party meets its own costs of the appeal and suit.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent