**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 115 OF 2015**

**INTER DUNIA COMPANY LIMITED .....1st APPELLANT**

**JANET NDUTA NGIGE .....2ND PLAINTIFF**

***VERSUS***

**DAUDI VELE.....RESPONDENT**

*(Being an appeal from the Sentence of Principal Magistrate's Court at Kithimani delivered by* ***Honourable M. A. O. OPANGA (Senior Resident Magistrate)*** *on 17TH July, 2014 in* ***KITHIMANI P.M.CC CASE NO. 38 OF 2012)***

**JUDGMENT OF THE COURT**

1. The Appeal arises from the Judgment delivered by Hon. M. A. O. Opanga (Senior Residents Magistrate) sitting at Kithimani Law Courts on the 17th July, 2014 vide **Kithimani PMCC. No. 38 of 2012**.

2. After a full trial the trial court held that the Appellants was liable for an accident that occurred on the 17/04/2011along Thika – Garissa road involving Motor vehicle KBN 849 P and in which the Respondent was a fare paying passenger and awarded the Respondent general damages in the sum of Kshs.560,000/= and special damages of Kshs.130,177/= plus costs of the suit and interest thereon.

3. Being aggrieved by that decision the Appellants preferred an Appeal to this court. In the Memorandum of appeal the Appellant faulted the learned trial Magistrate for holding the Appellants 100% liable for the accident without basis, failing to appreciate the Appellant's defence evidence, in admitting the Respondent's medical report without any justification, in awarding excessive damages without any legal or evidential justification and further awarding future medical expenses that had not been pleased and proved.

4. The Appellant's further faulted the learned trial magistrate for failing to appreciate the long established principle of stare decisis, failing to appreciate that the Respondent's evidence was presented by incompetent witnesses and further failed to appreciate the legal position that there could be no liability without fault. The Appellants now urge this court to set aside or vary the trial court's judgment.

5. This being a first Appeal, this Court is enjoined to reconsider the evidence that was tendered before the trial court, evaluate it and draw its own conclusions. This court should however bear in mind that it has neither seen nor heard the witnesses and should therefore make due allowance in that respect. See **SELE =VS= ASSOCIATED MOTOR BOAT COMPANY [1968] EA 123.**

6. **The Respondent's Case**

The Respondent testified that on the 17/04/2011 he was travelling from Kitui to Mombasa and was a fare paying passenger in the Appellant's motor vehicle KBN 849 P. He stated that the said vehicle was begin driven at high speed and that the said vehicle was driven at high speed and that the driver tried to overtake at a corner while there was an oncoming motor vehicle and which forced him to apply emergency brakes which made the vehicle to lose control and to have a tyre burst. The vehicle rolled severally. The Respondent stated that he sustained injuries and was rushed to Thika Level Five Hospital for treatment and later sought treatment from other medical facilities. He blamed the driver for the accident as he was driving at an excessive high speed. The Respondent called the Investigating officer who confirmed that indeed the Respondent had been a victim of the accident and there had been a tyre burst. A doctor testified for the Respondent and confirmed injuries on the head, chest, left knee and back and that the Respondent would require a sum of Kshs.250,000/= as costs for future medication.

7. **The Appellant's case:**

The Appellant's called the driver of the ill fated motor vehicle registration KBN 849 P Toyota Matatu who testified that on the 17/4/2011 he was travelling from Kitui and had 14 passengers on board and on reaching Kilimambogo there was a tyre burst and the vehicle landed in a ditch. He further stated that he was then driving at a speed of 40 – 30 Km ph but then the vehicle rolled severally. The Appellant's driver seemed to blame the accident on the tyre for which he should not be blamed as it was beyond his control.

8.In holding that the Appellants driver was wholly to blame for the occurrence of the accident, the learned trial Magistrate stated:-

> ***"..... the driver was unable to control the vehicle due to the excessive speed it was driven and the motor vehicle rolled severally. The fact that the motor vehicle rolled severally is confirmed by the Defendant's own statement which he disowned in his evidence. I would find the Plaintiffs' account of the accident believable and hold the Defendant's driver 100% liable."***

9. It was the above reasoning of the learned trial Magistrate which provoked the Appellants to file the present Appeal.

10. Parties filed written submissions herein which I have carefully considered. I find the following issues necessary for determination:

> ***(1) Whether the Respondent had been a passenger in the Appellant's motor vehicle registration number KBN 849 P and whether he sustained injuries.***
>
> ***(2) Whether the Appellants driver was to blame for the accident.***
>
> ***(3) Whether the medical reports in respect of the Respondent were admissible in evidence.***
>
> ***(4) Whether the awards of damages by the trial court were excessive.***

11. As regards the first issue the Respondent in his evidence before the trial court stated that he had been a passenger in the Appellant's motor vehicle registration number KBN 849 P on the material date and that after the accident he sought treatment at Thika Level Five Hospital and reported to Gituamba Police Station the following day where he was issued with a P.3 form after recording his statement. The Appellant's driver maintained that the Respondent had not been a passenger since after the accident he was able to see twelve of the passengers who had minor injuries and whose names were picked up by the police officer at the scene of the accident. Indeed the investigating officer testified as Respondent's witness number three and confirmed that indeed the Respondent had been a victim of the accident. The said investigating officer stated that he found only twelve (12) passengers and further admitted that other passengers could have been been rushed to hospital. Indeed the Appellant's driver stated that he had 14

passengers when he started the journey from Kitui and after the accident only twelve were available. It is therefore highly likely that the Respondent might have been one of those who had been assisted by good Samaritans to hospital. The investigating officer was quite categorical that the Respondent was a victim of the accident. Hence I am satisfied by the evidence on record that indeed the Plaintiff had been a passenger in the Appellant's ill-fated motor vehicle on the material date.

12. As regards the second issue it was the evidence of the Respondent that prior to the accident, the Appellant's driver was driving at an excessively high speed and was then overtaking another vehicle at a corner when he faced an oncoming vehicle and that he had applied emergency brakes but the vehicle lost control and rolled severally. On the other hand the Appellant's driver maintained that he was driving at a speed of between 40 -30 kilometers per hour when a tyre burst occurred forcing the vehicle to land in a ditch. The Appellant's driver further maintained that the tyres were fairly new and had been replaced a few days prior. It would seem the Appellant's driver was suggesting that the accident was inevitable and thus an act of God so to speak. If that was so from the point of view of the Appellant's driver then he was under obligation to show that something happened over which he had no control and the effect of which could not have been avoided by the greatest care and skill. The Appellant's driver was therefore under a duty to show that there was no negligence care and skill. The Appellant's driver was therefore under a duty to show that there was no negligence on his part. I note from the evidence of the Appellant's driver that he was at the time driving at a speed of 30 – 40 Kph and that the vehicle had just been fitted with new tyres. If that was the case then I find he should have been in a position to control the vehicle as the speed was low. Again there was no evidence on the part of the Appellant regarding any inspection report on the tyres after the accident or even proof that they had been recently fitted. The Appellant on being cross – examined admitted that he had been over speeding and hence the vehicle rolled as per his statement filed in court. This then seems to reinforce the Respondent's version that the Appellant's driver was at the time over speeding and overtaking another vehicle at a corner and lost control and it rolled severally. It is therefore quite clear that a properly maintained, managed and controlled vehicle cannot just veer off a road unless there was some negligence on the part of its owners or servants or agents. Consequently I am unable to fault the trial magistrate in holding the Appellants solely liable for the accident. Indeed the Appellant's driver admitted that the passengers were not responsible for the accident and therefore the Respondent having been one of them could not be said to have contributed to the accident in any way. I find the Appellant's driver was to blame for the accident. The Respondent had stated that the driver applied emergency brakes while at high speed and hence the accident. The driver admitted that one should not apply emergency brakes in the event of a tyre burst. It is highly likely that the driver on seeing the oncoming vehicle had applied the emergency brakes which then led to the accident.

13. As regards the third issue, it is noted that the Respondent was examined by his doctor's who appear to have prepared two medical reports dated 25/11/2012. Apparently the Appellants were served with the earlier medical report and during the hearing of the Respondent's case, the second medical report was admitted by the trial court despite objection by the Appellant's counsel. The trial court stated as follows on page 34 of the record of Appeal:-

> "***The Plaintiff's counsel did not serve the Defendant with the new medical report they wish to produce now but the same is in line with the amended plaint that was filed. The defence objection is noted. The witness may produce the medical report but the same will be subject to challenge by defence at the defence hearing and submissions. To cut on expenses."***

14. A perusal of the record of appeal shows that the Respondent's case had proceeded substantially and had been cross-examined by appellants counsel as regards the medical report dated 25/11/2011. It seems the Respondent subsequently filed an amended plaint and introduced or pleaded new injuries even after his evidence had already been received. The Appellant therefore did not have the benefit of the medical report dated 22/11/2012. It is clear that the Respondent had stolen a match from the Appellant and outfoxed them and it was not proper for the trial court to allow the contested document to be admitted on some spurious reason that it was meant to cut expenses and that the same could be contested during defence hearing and submissions. There was no way the Appellant could attack the document during defence stage since it was not their document anyway. Indeed the said new medical report introduced

more injuries and an issue of future medical expenses which was a clear departure from the initial medical report dated 25/11/2011. The production of the new medical report without the same having been served upon the Appellant and after reception of the Respondent's evidence was clearly erroneous on the part of the trial court as it ambushed the Appellant and thus denied it a fair trial. The trial court was only to admit the earlier medical report but not the second one. The trial court therefore considered an irrelevant matter which it ought not to have done so.

15. As regards the fourth issue, award of damages is a discretionary matter for a trial court and that the principles have been well settled in the case of **BUTT =VS= KHAN [1981] KLR 389** where it was held:-

> "***An Appellant Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge 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.....***"

16. On the issue of quantum of general and special damages the Appellant's counsel submitted that the trial court made awards without any legal or evidential justification. On the other hand counsel for the Respondent submitted that the awards be upheld. I have perused the record of appeal and note that the Respondent's counsel had proposed the sum of Kshs.400,000/= as general damages and had relied on the case of **MARTIN MUGI & 3 OTHERS =VS= ATTRONEY GENERAL - NBI HCCC NO. 791 OF 1999** where a Plaintiff with similar injuries as the Respondent was awarded general damages of Kshs.300,000/=. A further case of **SARINA SULEIMAN OMAR =VS= COMBONI MISSIONARIES AND ANOTHER - MOMBASA HCCC NO. 105 OF 1996** where the Plaintiff was awarded Kshs.250,000/=. The trial Court had awarded the Respondent general damages of Kshs.360,000/= plus a further sum of Kshs.200,000/= being for future medical expenses plus special damages of 130, 177/=. I note the Respondent was first treated at Thika Level Hospital before he sought treatment in other health facilities and was finally examined by Dr. Kimuyu on 25/11/2011 where the injuries noted included blunt head and neck injury with headache, blunt chest injury, cut wound on left knees and blunt back injury and that the said doctor noted that he was clinically stable with mild lumbar sacral tenderness on movement.

She formed the opinion that the Respondent suffered multiple soft tissue injuries after the road accident and has not fully recovered and is on analgesics on and off. The doctor recommended back physiotherapy with nerve stimulation. From the above diagnosis it would appear that the Respondent injuries were not severe. The general damages awarded by the trial court of Kshs.360,000/= were reasonable. The other sum for future medical expenses ought not to have been made since the trial court ought not to have considered the second medical report and therefore that sum is hereby disallowed. As for special damages the same were specifically pleaded and proved by production of receipts.

17. In the result the Appellant's Appeal partly succeeds. The lower court's judgment is set aside and is substituted with the following:-

1. Liability against Appellant 100%

*(i) General damages .....Kshs.360,000.00*

*(ii) Special damages .....Kshs.130,177.00*

*Total .....**Kshs. 497,177.00***

18. As the Appeal has partly succeeded, the Appellant shall bear three quarters of the costs in both the trial court as well as before this court.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **24TH** day of **JULY**, 2017.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Mburu - for Respondent

C/A: Kituva