REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 103 OF 2016

WAKIM SODAS LIMITED……..……APPELLANT

VERSUS

SAMMY ARITOS…….RESPONENT

(*Being An Appeal from the Judgment and Decree of the Resident Magistrate at Thika Honourable C. Muchoki dated 04/11/14 in CMCC Case No. 289 of 2014*)

BETWEEN

SAMMY ARITOS…….PLAINTIFF

VERSUS

WAKIM SODAS LIMITED……..…DEFENDANT

JUDGMENT

1. The Respondent herein approached the Chief Magistrate's Court in Thika *vide* a Plaint dated 16/04/2014 claiming compensation for injuries he claims he sustained when a vehicle driven by a servant of the Appellant was driven so negligently that it hit him as he was lawfully crossing the Kiambu-Ruiru Road on 24/08/2013.

2. The Appellant filed a Defence denying any liability for the accident. The Appellant denied that the Motor Vehicle was involved in any accident. In the alternative, the Appellant pleaded that the Respondent was solely to blame for the accident and that, therefore, he deserved no compensation whatsoever.

3. The Learned Christine Muchoki heard and concluded the trial and entered judgment on 05/11/2014.

4. The Learned Trial Magistrate found that the Respondent had proved her case on a balance of probabilities and awarded her compensation of Kshs. 400,000/= as general damages and Kshs. 56,470/= as special damages. She assessed liability at 85%:15% ratio in favour of the Respondent.

5. The Appellant is aggrieved by that decision and has appealed to this Court. Through his advocate, the Appellant filed a Memorandum of Appeal which, in essence, listed two grounds of appeal. The first ground of appeal challenges the Learned Magistrate's findings on liability while the second ground of appeal challenges the Learned Magistrate's findings on assessment of damages.

6. The Respondent has opposed the Appeal and urges the Court to dismiss it. Indeed, the Respondent has gone one up and urged the Court to enhance the damages from Kshs. 400,000/= to Kshs. 900,000/=.

However, the Respondent did not file a cross-appeal.

7. The parties filed Written Submissions pursuant to the Court directions given on 16/05/2017. Neither party deemed it necessary to orally highlight their Written Submissions.

8. I have read and considered the respective arguments in those submissions.

9. As a first appellate court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

> *I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

10. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

> *It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.*
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> *"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."*

11. The appropriate standard of review established in these cases can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

12. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000:

O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resourt v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

13. With the above principles in mind, I will now proceed to deal with the appeal.

14. The Respondent's case was founded on the alleged negligence of the Appellant. The Appellant testified at the trial that on 24/08/2013, he left his place of work at Kamiti and took a *matatu* to his home in Ruiru. The matatu stopped at a stage popularly known as Prisons. It was around 9:00pm. He alighted. He needed to cross the road to get to his home. As he crossed the road, the Respondent says that a motor vehicle driven by the Appellant's servant came speeding and hit him. He momentarily lost consciousness. He was then taken to Ruiru Sub-district Hospital before he was referred to Thika Level 5 Hospital where he was admitted.

15. It is undisputed that the Respondent suffered a fracture on his 4th left rib and a compound fracture of the left tibia/fibular lower third. The Medical Record by Dr. Karanja which was admitted into evidence without contestation showed that the Respondent was initially attended at Ruiru Sub-District Hospital where first aid was administered. He was then referred to Thika Level 5 Hospital where he was admitted until 02/10/2013. The wound got worse after his discharge from hospital necessitating a further re-admission between 25/10/2013 and 11/12/2013. It was also not contested that he has needed constant medical treatment from these injuries even after leaving hospital.

16. The Respondent was the only witness who testified for the Plaintiff in the lower Court.

17. Similarly, the Appellant called one witness also – the driver of the motor vehicle on that the fateful day: Martin Kimani Karanja. Mr. Karanja testified that on the material day and time, he was driving the motor vehicle from Ruiru towards Kiambu. In the general area called Hilton, Mr. Karanja testified that he saw two *matatus* stopped by the side of the road dropping off passengers. All of a sudden, Mr. Karanja says, the Respondent emerged from behind one of the *matatus* attempting to hurriedly cross the road. Mr. Karanja testified that he engaged the brakes but it was too late. He hit the Respondent. He was unable to swerve since had he done so he would have hit the two motor vehicles which had stopped on the other side of the road. He admitted that he was driving at a speed of about 60 KM/H. Mr. Karanja insisted that had the Respondent maintained a proper outlook and crossed the road from the front of the *matatu* rather than from behind, the accident would not have occurred as he would have been able to see him from far and taken appropriate action to avoid the accident.

18. Based on this evidence, the Learned Trial Magistrate reached her conclusion on liability by reasoning as follows:

Having looked at the evidence, I note the following:

1) The accident occurred at night hence it was dark.

2) The accident occurred at a bus stop where matatus were picking up and dropping passengers.

3) The Defendant/driver testified that he was driving at a speed of 60Km/h. This is a clear indication that the Defendant/Driver was driving at a speed higher than what was expected while approaching a bus stop.

4) The Plaintiff did not tell the Court what measures he took to ensure his own safety. I therefore find that he contributed to the occurrence of the accident.

Taking the above into consideration, I proceed to apportion liability at 85:15 in favour of the Plaintiff.

19. On appeal, the Appellant complains that:

The Learned Magistrate misdirected herself in treating the evidence and submissions on liability superficially and consequently arriving on the same by:

a. The Learned Magistrate erred in law and in fact in finding the Appellant wholly liable against the weight of evidence.

b. The Learned Magistrate erred in law and in fact by failing to apportion liability between the Respondent and the Appellant.

c. The Learned Magistrate erred in law and in fact by failing to take into consideration the contribution of the Respondent towards the causing of the accident and only attributing 15% liability to him.

20. The Appellant urges the Court to revise the apportionment of liability and make a finding that the Respondent was the author of his own misfortune and hold him 100% liable. In urging this position, the Appellant has placed heavy reliance on case law and the Highway Code.

21. The Appellant has cited ***Patrick Mutie Kamau & Another v Judy Wambui Ndurumo [1997] eKLR*** for the proposition that a pedestrian owes a duty to other highway users to move with due care. The Appellant argues that the Respondent failed to act with due care. In particular, the Appellant insists that the Respondent did not observe the provisions of Part 1 of the Highway Code which at Regulation 6 and 7 provides as follows:

6. Before you cross the road, stop at the curb, look right, look left and right again. Do not cross until the road is clear, then cross at right angles, keeping careful look-out all the time. If there is a refuge, stop on it and look again. On one way traffic road, stop and look towards oncoming traffic before you cross.

7. Do not cross unless you have a clear view of the road both ways. Take extra care near stationary vehicles or other obstructions, and whenever your view is limited

22. The Appellant relied on the ***Patrick Mutie Kamau Case*** as well as ***Julius Omolo Ochanda v Nicholas Wanjohi Thuo [2007] eKLR***. In the latter case, the Learned Justice Okwengu followed the holding in the ***Patrick Mutie Kamau case*** and held as follows:

On the other hand, the evidence before the trial magistrate was not sufficient to establish any of the

particulars of negligence which were alleged by the Respondent against the 1st Appellant. It is true that the 1st Appellant had a lethal machine (vehicle), under his control and that the Appellant's vehicle was involved in a collision with the Respondent. However, given the circumstances of the accident, in particular the fact that the Respondent suddenly ran across the road, onto the path of the Appellant's vehicle which was travelling on the main highway, it is difficult to lay any blame on the 1st Appellant. As was held by the Court of Appeal in ***Patrick Mutie Kamau & Another v Judy Wambui Ndurumo [1997] eKLR****, a pedestrian owes a duty to other highway users to move with due care and follow the provisions of the Highway Code. Clearly, the accident was caused by the Respondent running suddenly across the road without due regard to his own safety and that of others.*

23. In the ***Julius Omolo Ochanda Case***, the Learned Judge reversed the Trial Court's finding on liability and entered judgment dismissing the suit in its entirety. In three other cases cited by the Appellant – ***Peter Okello Omedi v Clement Ochieng' [2006] eKLR, Jane Muthoni Nyaga v Nicholas Wanjohi Thus & Another [2010] eKLR*** and ***Peter Mwenja Kariithi & Another v Isaiah Owili Kiburo [2014] eKLR*** – the Court split liability evenly (50%:50%) on account of a pedestrian failing to be adequately vigilant while crossing the road. In all these cases, the Plaintiffs had failed to make sure that the road was clear before attempting to cross and the Courts found them contributorily negligent in the accidents that ensued.

24. On his part, the Respondent's Counsel insists that the accident was the sole responsibility of the Appellant's servant. According to the Respondent, the evidence shows that he was on the right side of the road when he was hit – a clear indication that the Appellant's driver had left his side of the road in a bid to overtake another vehicle hence hitting the Respondent while the Appellant's driver was on the wrong side of the road.

25. In my view, the Respondent's version of events sounds implausible. On cross-examination, the Respondent admits that he did not see the vehicle because "it came from behind." Since it is common between the parties that the Motor Vehicle was headed towards Kiambu while the Respondent had just alighted from a *matatu* that was heading towards Ruiru, it is not plausible that the Appellant's motor vehicle came from behind as the Respondent was crossing the road. What is more likely than not is that the Appellant's driver's version of the events is the more accurate one: the Respondent was crossing the road from behind the stationary *matatu* he had just alighted from. This would explain both why he did not see the Appellant's motor vehicle and why the Appellant's driver did not see him. It also seems more likely that the Appellant's driver's assertion that the Respondent hurriedly emerged from behind the stationary *matatu* is the correct version because the evidence on record shows that even the people who were together with the plaintiff had still not alighted from the *matatu* when the Respondent tried to cross the road. This means the plaintiff was hasty. Moreso, he crossed the road from behind the *matatu*, that way he could not see if the road was clear.

26. What, then, this means is that the Respondent suddenly emerged from behind the stationary matatu and onto the left side of the road and onto the path of the Appellant's vehicle. This was in disregard of the Highway Code as well as his own safety and that of other road users. It is noteworthy that the Respondent ***does not*** testify that he stopped to look right, left and then right again as the Highway Code instructs.

27. However, I am not persuaded by the Appellant that this means that the Respondent should bear 100% liability for this particular accident. Here, the Appellant's driver admits to driving at a speed of

60. KM/hr in an area that is heavily populated and where he had observed two *matatus* dropping and picking up passengers. Moreover, this was at 9:00pm in the night. All these factors should have counseled for more care on the part of the Appellant's driver.

The speed with which he was driving was excessive in the circumstances. He must share some blame for the accident. It is for this reason that I am persuaded to go with the three decisions that the Appellant cited where the Courts found it fair to split the liability at 50%:50% between the Plaintiff and the Defendant. This is warranted here by the circumstances.

28. In regard to quantum, the general principle applicable is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence (see ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another*** **[1982-88] 1 KAR 727,** ***Peter M. Kariuki v Attorney General*** **CA Civil Appeal No. 79 of 2012 [2014]eKLR** and ***Bashir Ahmed Butt v Uwais Ahmed Khan*** **[1982-88] KAR 5).**

29. The Appellant submitted that the trial magistrate relied on an authority where the award was high because the injuries were more serious. I have perused the judgment and the trial magistrate did not specifically state the authority she relied upon. On the other hand the Respondent submitted that the award was very minimal and sought the same to be enhanced. In the lower Court, the Respondent submitted that an award of Ksh. 900,000/= would have been the appropriate compensation while the Appellant submitted that the nature of the injuries called for compensation for Ksh. 150,000/=. The Trial Magistrate awarded the plaintiff Kshs. 400,000/=.

30. I have looked at the parties' submissions in the lower Court.

The Appellant relied primarily on ***Isaac Mwenda Micheni v Mutegi Murango (HCCC No. 335 of 2004)***. In that case, the Plaintiff had suffered compound fracture of the left tibia and fibula, cut right supra patella right knee and multiple cuts. The Court awarded Kshs. 150,000 as compensation. The judgment was delivered on 07/12/2004. On appeal, the Appellant has cited two more comparable cases: ***Mulwa Musyoka v Wadia Construction [2004] eKLR*** a judgment delivered on 10/02/2004 where a similar sum was awarded and ***S.D.V. Transami K Ltd v Scholastica Nyambura [2012] eKLR*** where Kshs. 250,000 was awarded.

31. All the three cases cited by the Appellants are easily distinguishable on at least four fronts:

a. First, these cases are fairly dated. Two of the cases were decided more than thirteen years ago.

b. Second, all three cases are distinguishable because they are marked by one major injury – fracture of the tibia and fibula. In the instant case, in addition to the compound fracture of the tibia and fibula, the Respondent also had a fracture of the 4th rib on his left side.

c. Third, the injuries here appear to have been a lot more intense and severe necessitating admission of the Appellant at Thika Level 5 Hospital from 24/08/2013 until 02/10/2013 and then again between 25/10/2013 and 11/12/2013.

d. Fourth, the pain and discomfort continue long term and they have affected the quality of life and even the nature of occupation that the Respondent can take.

32. Given these factors, I am not persuaded that court's estimate of general damages is "so inordinately high or low as to represent an entirely erroneous estimate." *See* ***Butt –vs- Khan, Nairobi Civil Appeal NO. 40 of 1977***). For the High Court to interfere with a lower Court's estimate of general damages, "it must be shown that the (court) 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." (*See* ***Butt – vs- Khan, Nairobi Civil Appeal NO. 40 of 1977***).

33. In regard to special damages the law is quite clear on the head of damages called **special damages.** Special Damages must be both **pleaded and proved,** before they can be awarded by the Court. Suffice it to quote from the decision of our Court of Appeal in ***HahnV. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716***, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:

Special damages must not only be specifically claimed (pleaded) but also strictly proved….for they are not the direct natural or probable consequence of the act complained of and may not be

inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

34. Our decisional law is quite clear now that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. See ***Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR***; ***Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR; Sanya Hassan v Soma Properties Ltd.***

35. Consequently, our case law seems quite clear that a party must produce actual receipts in order to meet the test of specifically proving special damages and that a pro forma invoice will not suffice. In this case, the Respondent only produced a pro forma invoice of Kshs. 53,970/= being an invoice from Thika Level 5 Hospital. No receipt was produced to demonstrate that the sum was actually paid. This sum should, therefore, not have been awarded by the Trial Court. The only special damages that were proved was Kshs. 2,000/- for the medical report. These are the only special damages that are merited.

36. In the upshot the appeal partly succeeds. The award for general damages awarded is affirmed as being Ksh. 400,000/=. However, liability will now be apportioned at 50%:50%. The award of Ksh. 53,970/= as part of special damages is set aside. Only Kshs. 2,000/= will be awarded as special damages.

37. The practical outcome, then, shall be that the Appellant shall pay to the Respondent kshs. 201,000/=.

38. Since the appeal has succeeded in part, each party to bear its own costs in the appeal.

39. Orders accordingly.

Dated and delivered at Kiambu this 28th day of September, 2017.

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JOEL NGUGI

JUDGE