REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 259 OF 2005

PRIME BANK LIMITED.....APPELLANT

-V E R S U S –

JOSEPHAT OGONA ESIGE.....RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Milimani SRM Hon. Cherono, Esq dated 5th April 2005 in CMCC no. 9753 of 2002)

JUDGEMENT

1. Josephat Ogona Esige, the respondent herein instituted a suit against Prime Bank Limited the appellant herein, for damages arising from injuries sustained from a road traffic accident on 27th day of October, 2001. In a plaint dated 4th December 2007, the respondent stated that on the said date along River Side Drive, Nairobi, he was lawfully cycling on the said road when the appellant driving the motor vehicle registration no. KAC 456L Opel Astra drove it so negligently, dangerously and recklessly that he caused an accident where the respondent sustained injuries.

2. The car belonged to Prime Bank Limited which at trial was the 1st defendant and was being driven by Peter Guothe Kamondo the 2nd defendant. The respondent has attributed the said accident to the negligence on the part of the 2nd defendant. The appellant entered appearance and denied all singular allegations of negligence and injuries sustained by the respondent. It even denied the ownership of the offending motor vehicle. The respondent requested the court on 2nd May 2003 to enter interlocutory judgment against the 2nd defendant who had failed to enter appearance. The issue of liability as to the negligence of the accident came to rest. The trial court magistrate then went ahead to assess the quantum payable.

3. After the said accident, the respondent was taken to Viparoa Medical Centre for 2 weeks. He was treated by stitching of cot wounds under local anesthesia and x-rays showed fractures and dislocation, several dressing sessions, anti biotics and analgerics, bed rest and immobilization of fracture in plaster casts The respondent sustained the following injuries; fracture on the right forearm, dislocation to the elbow, dislocation of the right knee joint, bruises on teh right knee, left arm aback and right thigh; deep cut would on parietal scalp, deep cut wound on the right puma end; cracked upper left central incisor tooth and blunt trauma left thumb. A summary discharge from Vipawa royal Medical Services was produced dated 10/1/01 confirming the injuries sustained by the respondent. The medical report by Mr. Moses Kinuthia was also produced as plaintiff exhibit no. 1. The police abstract also produced and marked as Pexhibit no. 2 confirms the occurrence of the said accident. Judgment was entered by the learned Senior Resident Magistrate E. C. Cherono (Mr) on the 5th April 2005, for the respondent and against the appellant in the sum of ksh.550,000/= general damages for pain and suffering and loss of

amenities, ksh.44,350/= special damages for medical report and medical expenses and ksh.50,000/= for future medical expenses all adding up to ksh.644,350/= plus interest thereon at court rate from the date of judgment till payment in full. The appellant being aggrieved preferred this appeal.

4. On appeal, the appellant put forward the following grounds in its memorandum;

1. The learned magistrate erred in entering judgment against both the appellant and the 2nd defendant jointly and severally as prayed in the plaint without any liability having been established as against the appellant.

2. The learned magistrate erred in holding that as interlocutory judgment had been entered against the 2nd defendant the issue of liability as to negligence of r the accident in respect of the entire case, including the case against the appellant, came to a rest.

3. The learned magistrate erred in holding that the only issue left for determination was the assessment of quantum of damages.

4. The learned magistrate erred in treating the trial as a formal proof hearing when liability as against the appellant had neither been proved nor established.

5. The learned magistrate erred in failing to rule in his ruling delivered don 1st September 2004 that the oral evidence of plaintiff witness number 1 Dr. Moses Kinuthia (hereinafter called PW1) relating to the history of the plaintiffs alleged injuries and the alleged treatment received by the plaintiff was hearsay an inadmissible under the provisions of Section 63 of the Evidence Act Chapter 80 of the Laws of Kenya.

6. The learned magistrate erred in failing to uphold the appellant's objection to the adduction by PW1 of oral evidence relating to the history of the plaintiff's alleged injuries and the alleged treatment received by the plaintiff.

7. The learned magistrate erred in his ruling delivered on 3rd September 2004 in failing to rule that that part of PW1's medical report produced as plaintiff exhibit 1 (hereinafter called PE1) as appeared between the headings 'History of injuries" and "Presenting Complaints" contravened Section 35 of the Evidence Act Cap 80 and was inadmissible in evidence.

8. The learned magistrate erred in failing to uphold the appellant's objection to the adduction into evidence by PW1 of that part of PE1 as appears between the headings "History of injuries" and "Presenting Complaints.

9. The learned magistrate erred in admitting of PE1 as appears between the headings "History of injuries" and "Presenting Complaints.

10. The learned magistrate erred in failing to strike out the respondent's purported verifying affidavit, plaint and suit for failure to comply with Sections 34 and 35 of the Advocates Act Chapter 16 of the Laws of Kenya and Order VI rule 1(2) of the Civil Procedure Rules.

11. The learned magistrate exhibited an open bias in favour of the respondent and against the appellant by firstly refusing to allow the respondent's application for an adjournment of the hearing on 8th October 2004 and immediately thereafter on the same day accommodating and indulging the respondent whose first witness (PW1) had not concluded his evidence by allowing the respondent to step down PW1 who was absent from court at that time and commence the evidence of the respondent's second witness despite the appellant's strong objections to the same.

12. The learned magistrate erred in failing to correctly record the proceedings.

13. The learned magistrate erred in telling the appellant's counsel that he, the trial magistrate, would not record the appellant's counsel's objection to the stepping down of PW1 and that he would go to the High Court on appeal if he wanted, thereby forcing the appellant's counsel to walk out of court as the trial magistrate had exhibited a clear intention not to record the appellant's counsel participation in the trial.

14. The learned magistrate erred in proceeding with and concluding the trial in the absence of the appellant's counsel.

15. The learned magistrate erred in conducting the trial in a manner which denied the appellant it's right to be heard and to defend itself;

16. The learned magistrate erred in holding that the plaintiff had proved his case of a balance of probability.

17. The learned magistrate erred in awarding general damages of kshs.550,000/= which are excessive and unjustified in the circumstances.

18. The learned magistrate erred in awarding future medical expenses at ksh.50,000/= and special damages at ksh.444,350/= when the same had not been proved.

5. Learned counsels appearing in this matter entered a consent to have the appeal disposed of by written submissions.

6. I have already enumerated the 19 grounds of appeal the appellant put forward in its memorandum. Though the appellant put forward 19 grounds of appeal, I am of the opinion that those grounds can be summarised to two grounds namely;

i. Whether the learned magistrate erred in law and fact in his award on liability.

ii. Whether the learned magistrate erred in law and fact in his award for general damages for pain suffering and loss of amenities.

7. On the first ground as to whether or not the learned trial magistrate erred in finding the defendant's wholly liable the appellant's submission that his grounds of appeal revolve around the issue on liability and its apportionment, and only grounds 18 and 19 relate to the award on general damages.

8. The appellant is saying that as the owner of the accident car KAC 456L and the 2nd defendant as the driver of the said car when the accident occurred. The appellant and 2nd defendant in the judgment rendered on 4th May 2003, found both of them 100% liable. The appellant has argued that it is trite law that a decision on liability or apportionment is a finding of fact. The circumstances under which an appellate court can interfere with the trial court's finding of fact were crystallized by the Court of Appeal in **Ephantus Mwangi & Another –vs- Duncan Mwangi Wambugu CA 77 of 1982** where Kneller JA stated;

"A member of an appellate court is not bound to accept the learned judge's finding of fact, if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (v) if the impression based on the demeanor of a witness, is inconsistent with the evidence in the case generally."

9. The appellant further relied on the case of **Mwansokoni -vs- Kenya Bus Services Limited CA no. 35 of 1985** where Hancox JA stated that an appellate court would disturb a finding of fact

"Only when the finding of fact is challenged on appeal is based on no evidence, or no misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did."

10. It is the appellant's submission that this honourable court ought to disturb the trial court's finding on liability at 100% against the appellant because evidence on this issue was not taken in totality.

11. The case against the appellant was premised on vicarious liability (paragraph 5 of the plaint, page 8 of the record). That allegation was denied by the appellant in paragraph 6 of its defence (Page 13 of the record.)

This appeal is found to be without merit. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 22nd day of September, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent