REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CIVIL APPEAL NO. 78 OF 2014

WEST KEYA SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

DAVID LUKA SHIRANDULA.....RESPONDENT

(Appeal from the Judgment of Hon. M.L. Nabibya Ag SRM in Butali Civil suit No.181 of 2009 delivered on 10.7.2014)

JUDGMENT

1. The plaintiff/respondent was awarded Khs.350,000/- in general damages and Kshs.5000 in special damages in the lower court after he was injured in a road traffic accident while working for the defendant/appellant. The defendant/appellant was dissatisfied with the decision of the lower court and appealed against the said award.

The evidence for the plaintiff/respondent was that he was employed as a tractor driver by the defendant/appellant. That on the 18th January, 2009 he was in the cause of work of transporting cane while driving a tractor reg. No.KAQ 893 J which was hauling a trailer Reg. No.ZA 7937 along West Kenya-Lukume road when on the second trip the front wheel of the tractor disconnected from the tractor. He was thrown off the tractor and was injured. He was taken for treatment at Kakamega Central Nursing home where he was treated for 4 days. He was also treated at Malava District Hospital. He reported the accident at Kabras police station and was issued with a P3 form and a police abstract was subsequently filled. He was later examined by Dr. Andai on 1.10.2009 who prepared a medical report. He blamed the defendant/appellant for failing to maintain the tractor in a good mechanical condition. He sued for general damages. The court found the appellant 100% liable for the accident and awarded him the above stated sum.

The grounds of appeal are as set out in the memorandum of appeal.

2. According to the medical report the respondent had sustained the following injuries:

1. *Fractures of 2 ribs on the right side*
2. *Blunt injury to the right thigh*
3. *Blunt injury to the right ankle*
4. *Bruises to both elbows*
5. *Blunt Injury to the right knee*

Submissions for appellant:

The advocates for the appellant, E.K. Owinyi Advocates, challenged the judgment of the trial court on grounds of law and quantum.

The law:

3. The advocates submitted that the magistrate shifted the burden of proof from the respondent to the appellant in holding that the appellant had not adduced any evidence to contradict the respondent's evidence that tyres of the tractor came off and he was thrown off the tractor. That the respondent did not call any witness to prove that the accident occurred due to poorly maintained wheels. Neither did he provide any documentation or inspection report to show that the motor vehicle had some pre-accident defects. That it is the respondent who was better placed to know whether or not the motor vehicle was in a good working condition than the appellant as he had used the vehicle to transport cane on the first trip. The respondent should therefore have informed the appellant of any defect. Therefore that the respondent has failed to prove his case to the required standard. That he did not prove that the appellant was 100% liable for the accident. That the finding on liability must be set aside and the suit dismissed with costs. The advocate relied on the holding in the case of *Treadsetters Tyres Limited vs John Wekesa Wepukhulu* (2010) eKLR .

Quantum:

4. The advocate submitted that the trial magistrate made an award in respect of damages that was inordinately high in the circumstances that it represented an entirely erroneous estimate *vis a vis* the respondent's claim. That they still maintain their submission in the lower court that a award of Khs.100,000/= is adequate compensation and that considering the current change of times and inflation an award of Ksh.180,000/= would be sufficient. They relied on the following authorities:-

- *Boniface Waiti & another vs Michael Kariuki Kamau (2009)* eKLR where the court awarded Kshs.85,000/=in general damages for an appellant who had sustained soft tissue injuries.

- *Odinga Jacktone Ouma vs Moureen Achieng Odera (2016)* eKLR where the court reduced an award of Ksh.400,000/= to Kshs.180,000/= for a respondent who had sustained a head injury (concussion), cut wound on the right mandible, neck, muscle confusion, chest pain on the left side and lacerations, cut wound on the right shoulder blade region, multiple lacerations over the left shoulder and upper arm, cut wound and lacerations over right forearm, painful swollen 4th left finger, fracture of the first and second ribs, shoulder dislocation on the left and a fracture on the left metatarsal.

Submissions for respondent:

On Liability:

5. The Advocates for the respondent Kulecho, Musomba & Company Advocates submitted that the appellant has not demonstrated that the trial magistrate factored in irrelevant facts which she ought not to have or she failed to factor in relevant facts. That a police abstract was produced that proved that a tractor was involved in the accident. That the appellant in their submissions in the lower court did not submit on contributory negligence and it cannot now raise a new ground that it never raised in the lower court. That the respondent did not contribute to the occurrence of the accident because it was the defendant's duty to ensure that the vehicle was in good working condition.

On quantum:

6. The advocates relied on the case of *Catherine W. Kingori & 3 others vs Gibson Theuri Gichobi, Nyeri High Court Civil Case No.320 of 1998* where the plaintiffs were awarded between Kshs.100,000/- to Kshs.300,000/- in general damages for soft tissue injuries. The advocates further submitted that the

authorities cited by appellants in the lower court were more than 15 years old. That the authority that they relied on was 29 years old. That in the circumstances the award of Kshs.350,000/= cannot be said to be inordinately high or not commensurate with contemporary awards.

Determination:

7. It is the duty of the first appellate Court to re-evaluate the evidence that was before the lower court and determine whether the decision is to stand or not. A Court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown to have acted on wrong principles - *See Ephantus Mwangi & Geofrey Nguyo Ngatia Vs Duncan Wambugu (1982-88)* IKAR 278.

The appeal is on the issues of liability and on quantum.

Liability:

8. The trial magistrate found the appellant 100% liable for the accident on the basis that there was uncontroverted evidence that the wheel of the vehicle came off thereby causing the respondent to be thrown off the vehicle where upon he was injured.

The Magistrate stated that the respondent did not contribute to the occurrence of the accident because it was the duty of the employer to ensure that the vehicle was in good working condition.

It was contended on behalf of the appellant that the respondent did not prove that the cause of the accident was the act of the wheel coming off the vehicle. That there was no inspection report produced in court to prove so. That the burden of proof was on the respondent to prove the case.

9. On the question of burden of proof I am guided by the judgment of Ibrahim J (as he then was) in *Treadsetters Tyres Ltd -versus- John Wekesa Wepukhulu (*supra*)* where the learned Judge quoted *Charlesworth & Percy on Negligence, 9th Edition at P.387* thus:

> *"In an action for negligence as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior (?) and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred"*

10. In that case the driver of the vehicle was alleging that the steering wheel broke off thereby leading to the accident. There was no inspection report provided to prove the cause of the accident. Ibrahim J. held that:

> *"In the absence of the inspection report and proof of breaking of the steering wheel or in any other defect, the court is entitled to infer that the accident was related to the driving of the vehicle by the plaintiff himself."*

The judge further held that:

> *"…… there was no material before the court, for the court to require the respondent to rebut the allegations. The necessary evidentiary threshold to shift the burden of proof was not attained in this case …....."*

The judge consequently held that there was no proof of a broken steering wheel which could have led or caused the accident.

11. In a similar relevant case in *Badar Hardwares Limited -vs- James Amwomo Oiko, Voi High court*

Civil Appeal No. 16 of 2015 (2017) eKLR where the respondent was alleging that the steering wheel of the vehicle he was driving locked itself but the respondent did not produce an inspection report to prove the cause of the accident, Kamau J. held that the respondent had not discharged his burden of proof in failing to provide documentary evidence to support his contention that the motor vehicle had mechanical fault.

> ***Section 108*** of the Evidence Act places the burden of proof on the person who alleges a particular fact. It was held in the case of ***Kirugi & Another vs Kabiya & £ others*** (1987) KLRE 342 that the burden of proof was always on the plaintiff to probe his case on a balance of probabilities even if the case was heard on formal proof.

12. In the present case, the respondent did not produce an inspection report to prove that it is the wheel that disconnected from the motor vehicle. It was only his word that the wheel had come off the vehicle. *Section 108* of the Evidence Act states that the burden of proof in a suit lies on that person who would fail if no evidence were given on either side.

13. I find that the respondent had not discharged his burden of proof so as to shift the burden to the appellant. It is the respondent's case that should fail. The trial Magistrate in this case failed to address herself properly on the question of burden proof and therefore acted on the wrong principles of law. She ought not to have made a finding in favour of the respondent on liability.

Quantum:

14. The Court of Appeal in *Bashir Ahmed Butt vs Uwais Ahmed Khan* (1982-88) KAR set out the parameters under which an appellate court will interfere with an award in general damages when it held that:

> *"An appellate court will not disturb an award for general 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……."*

15. The advocate for the respondent had made submissions in support of Kshs.650,000.00/= while the advocates for the appellant had supported an award of Kshs.100,000/=. In this appeal, the advocate for the appellant has proposed that the court increases the award to Kshs.180,000/=.

16. The trial magistrate awarded the respondent Kshs.350,000/= but she did not give reasons as to how she arrived at that figure. The authority relied on by the advocates for the respondent both at the lower court and in this court did not include skeletal injuries as in the case under consideration. In my view the authority quoted by the said advocates is too general in its award as to be relevant. I hold the view that authorities submitted by advocates should involve injuries that are comparable to the injuries at hand so as to assist the court in arriving at a reasonable award.

17. On the other hand the authorities relied on by the advocates for the appellant in the lower court were for awards made more than 24 years ago. Where advocates quote very old authorities in cases for award of general damages, it poses a challenge to courts as to how much inflation to factor in the case as judicial officers are not experts in matters concerning inflation.

18. In this appeal the advocates for the appellants relied on the award in the case of *Odinga Jackton Ouma vs Moureen Achieng Odera* **(**supra**).** I find the award in the case to be more appropriate. The injuries in that case included soft tissue injuries, fractures to two ribs and left metatarsal and left shoulder dislocation. In this case the respondent had sustained soft tissue injuries and fractures of two ribs. The award in this case by the trial court was inordinately high as to represent an erroneous estimate. Had this appeal not succeeded on liability, I would have reduced the award to Kshs.180,000/=.

However, since the respondent did not prove the issue of liability, the appeal is allowed. The judgment of

the lower court is thereby set aside and the suit dismissed with costs to the appellant.

Delivered , dated and signed at Kakamega this 21st day of September, 2017.

J. NJAGI

JUDGE

In the presence of:

Miss Atieno - for Appellant

Miss Wambani H/B Kulecho - for Respondent

George - Court clerk

Appellant - Absent

Respondent - Absent

14 days right of Appeal