REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.22 OF 2009

KENYA BUS SERVICE LTD.....APPELLANT

VERSUS

FRANCIS MALOBA BALANYA.....RESPONDENT

(Being an appeal from the Judgment of Hon. W. Nyarima, (SPM) in Kericho CM CC No.209 of 2005 dated 25th May 2009)

JUDGMENT

1. This appeal arises out of the decision of Hon. W. Nyarima, SPM dated 28th May 2009 in Kericho Senior Principal Magistrate's Court Case No. 209 of 2005. The plaintiff/respondent (hereafter **"respondent"**) had lodged a claim against the defendant/appellant (hereafter **"appellant")** seeking damages for injuries suffered as a result of a road traffic accident which occurred on 14th March 2005 along the Nakuru-Kericho road in the appellant's motor vehicle registration number KAP 995N. In the said decision, the Honourable Magistrate found in favour of the respondent and made an award in general damages of Kshs.350,000/-, special damages of Kshs.3,000/- costs and interest thereon.

2. Dissatisfied with the decision of the trial court, the appellant filed the present appeal in which it raises the following grounds:

> ***1. The learned trial magistrate erred by arriving at a finding on liability, which was not supported by evidence.***
>
> ***2. The respondent's case was not proved on balance of probability as is required by law.***
>
> ***3. The respondent's injuries, the basis of which assessment of damages was made were not proved or verified as per onus on the part of the plaintiff.***
>
> ***4. That the trial magistrate erred in law in awarding exaggerated damages for loss of earnings when the same was not proved.***
>
> ***5. The learned trial magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.***

3. The appellant prayed that the court should set aside the decision of the trial court on both quantum and liability and make a proper finding, make such further as may be just, and allow the appeal with costs.

4. The parties agreed to canvass the appeal by way of written submissions, which they both elected not to

highlight.

5. In its submissions dated 28th March 2017, the appellant argued that the respondent had failed to adduce any evidence to establish that he was in the appellant's bus at the time of the accident. In its view, the trial magistrate had erred in taking into account evidence that was not before it, and had therefore made an erroneous finding on liability.

6. On the issue of quantum, the appellant relied on the decision in **Kemfro Africa Limited t/a Express & Another –vs-A.M. Lubia** on the principles to be applied when an appellate court considers whether or not to interfere with an award of damages, which lies within the discretion of the trial court. According to the appellant, the trial court left out a relevant factor, that the respondent's medical treatment had been paid by his employer. He was therefore not entitled to any amount in damages.

7. It was finally argued on behalf of the appellant that the respondent had sustained soft tissue injuries. Consequently, the award of Kshs.350,000/- was manifestly excessive, and the court should reduce it to Kshs.50,000/-.

8. In submissions for the respondent, it was contended that the appellant had not tendered any evidence before the trial court to controvert the respondent's evidence. The respondent had been injured while travelling in the appellant's vehicle, which had been involved in an accident, and that the accident would not have occurred if the driver of the appellant's vehicle had not been negligent. It was therefore submitted, in reliance on the decision in **Embu Public Road Services Ltd vs Riimi (1968) EA 22**, that the doctrine of *res ipsa loquitor* applied to the circumstances of this case.

9. With respect to quantum, it was submitted on behalf of the respondent that the amount awarded by the trial court was adequate compensation taking into account the injuries suffered as well as inflation. It was also observed that the appellant had not filed any submissions before the trial court. Its contention that the quantum of damages was inordinately high was therefore, in the respondent's view, baseless.

10. I have considered the appellant's grounds of appeal and its written submissions, as well as the submissions by the respondent. I have also read the record of the trial court, the evidence adduced before it, and the judgment arrived at.

11. As the first appellate court, I am under a duty to evaluate the evidence adduced before the trial court and reach my own conclusion. In doing this, I bear in mind that I have not had the advantage, which the trial court has had, of seeing and hearing the witnesses-see **Selle – vs – Associated Motor Boat Co. Ltd (1968) EA 123**.

12. The evidence adduced by the respondent before the trial court was that he was a fare paying passenger in the respondent's motor vehicle KAP 995N travelling from Nairobi to Vihiga on the 14th of March 2005. He was sitting next to the driver. At Kipkelion junction, the driver said that he needed to speed up. They came to some road bumps and the vehicle skidded and rolled. The respondent sustained injuries to his right knee, back, right ribs, chest and left ear. He produced in evidence an official search indicating that the vehicle KAP 995N was registered in the name of the appellant. He also produced a police abstract with respect to the accident, his treatment chit, and a medical report, all of which were produced by consent of the parties on 5th April 2007.

13. The appellant did not call any witnesses. The record indicates that on 26th June 2007 and 28th September 2007, the appellant was granted adjournments, and the defence hearing fixed for 28th November 2007. There was no appearance for the appellant on 28th November 2007, and the defence case was marked as closed.

14. I note from the judgment of the trial court that the Magistrate analysed the evidence before it, which consisted of the petitioner's testimony and his documents only, which I have set out above. That evidence was not controverted by the appellant. Indeed, the appellant did not appear in court when it was required

to tender its evidence, nor did it file any submissions.

15. In my view, given the evidence before it, the trial court properly arrived at the conclusion that the appellant was solely responsible for the accident. The evidence before the court was that the vehicle owned by the appellant, in which the respondent was travelling as a fare paying passenger, overturned as a result of the negligence of the appellant's driver. Nothing before me contradicts this evidence, and I can find no basis for interfering with the decision of the trial magistrate on this point.

16. With respect to quantum, I note that the appellant argues that since the respondent's medical expenses were paid by his employer, he is not entitled to damages. However, from my reading of the judgment of the trial court, it did not make an award in respect of the medical expenses, which are in the nature of special damages. It made an award of special damages of Kshs.3,000/- which were proved by production of a receipt and general damages in respect of pain and suffering and loss of amenities of Kshs.350,000/-.

17. It has been well established that an appellate court will only interfere with an award in damages only in limited circumstances. It was stated in **Bashir Ahmed Butt vs Uwais Ahmed Khan**, by **M. Akmal Khan [1982 – 88] 1 KAR 1** that:

> ***"An appellate 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…"***

18. In the present case, I am not satisfied that the award in damages arrived at by the trial court was so inordinately high as to warrant interference by this court. I take cognizance of the fact that the petitioner sustained, according to the medical report by Dr. Stephen Oketch, blunt injury to both lower limbs, torn medial collateral ligament of the right knee, blunt injuries to the lower back and chest, and perforation of the left eardrum. The report indicated that he had osteoarthritis and instability, lower back spondylosis and perforated eardrum with impaired hearing. The extent of permanent incapacity was estimated at 40%. No medical evidence was tendered by the appellant to counter the petitioner's evidence. In the circumstances, I am satisfied that the trial court properly exercised its discretion in arriving at the award of Kshs.350,000/-.

19. I accordingly find no merit in this appeal. It is hereby dismissed with costs to the respondent.

Dated, Delivered and Signed at Kericho this 20th day of September 2017.

MUMBI NGUGI

JUDGE