REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 29 OF 2015

ACTORS DELTA HAULIAGE SERVICES LTD.....APPELLANT

-VERSUS-

JAMES NJOGU CHEGE.....1ST RESPONDENT

HUSSEIN IBRAHIM.....2ND RESPONDENT

TOM MUTEITHIA.....3RD RESPONDENT

JOSEPH KIMANI GITHINJI.....4TH RESPONDENT

(Being an appeal from the judgment and decree of Hon. H.M. Nyagah (CM) delivered 17th February 2015 in Molo SPMCC No.164 of 2010 between Jame Njogu Chege -VS- Hussein Ibrahim and Actors Haulage Services Ltd)

JUDGEMENT

1. On the 17th April 2007 three vehicles were involved in an accident along the Nakuru-Kericho road.

Motor vehicle Registration Number KAR 332 J trailer ZC 1113 is alleged to have been registered in the Appellant's name and driven by its driver, the 2nd Respondent.

Motor vehicle Registration Number KAS 042S, Toyota Hiace was being driven by 1st Respondent. Motor vehicles registration No.KAS 352Y was the property of the 1st Third party and was being driven by the 2nd third party, now the 3rd and 4th Respondents.

2. The 1st Respondent James Njogu Chege was the plaintiff in the trial court case. He sued the Respondent and the Appellant alleging negligence in the manner their vehicle registration number KAR 332J trailer ZC 1113 was being driven that it collided with their vehicle Registration number KAS 043S(a *matatu*) and from which accident he sustained injuries.

3. The Appellant and 2nd Respondent took out 3rd party proceedings against the driver and owner of the 3rd vehicle Registration Number KAS 352Y that also collided with the other two seeking indemnity and/or contribution in full or extent as the court may decide in respect of the special and general damages, costs and interest as was stated in the plaint.

The defences denied the claim in their respective defences and pleaded contributory negligence against each other.

4. The trial court heard the case to determine liability between the three parties as per directions taken before it.

5. The plaintiff (now 1st Respondent) testified but the defendants (2nd, 3rd and 4th Respondents) called no evidence.

Judgment was delivered on the 17th February 2015 in favour of the 1st Respondent against the Appellant and 2nd Respondent and awarded him Kshs.2,000,000/= in general damages and Kshs.2,500/= special damages plus costs and interest. He exonerated the 3rd and 4th Respondents from any blame.

6. The appellant being dissatisfied with the said judgment filed this appeal faulting the trial Magistrates findings on both liability and *quantum* of damages.

Several issues arise from the parties submissions on the grounds of appeal as filed by the Appellant. These are:

1. Ownership of motor vehicle Registration Number KAR 332J Trailer ZC 1113(Ground 3).

2. Apportionment of liability between the three vehicles, if any and if so, to what extent to each of the vehicles. (Grounds 1, 2, 4, 5, 6

3. Quantum of damages (Grounds 7 and 8).

7. At the commencement of the hearing of the appeal, directions were taken that parties file written submissions to dispose off the Appeal but only the appellant and the 1st Respondent filed their respective submissions.

This is the first appellate court. It is obligated to re-evaluate and reconsider the evidence adduced before the trial court, and come up with its own findings and conclusions both on liability and *quantum* of damages- **Selle -vs- Associated Motor Boat Co. (1968) EA 123** as well as **Mwanasokoni --vs- KBS and Others (1982-88) I KAR 278**.

While doing so, I must be guided that I am not bound to follow the trial courts findings of fact if it appears either that the trial Magistrate clearly failed to take into account the particular circumstances or probabilities and materially failed to evaluate the evidence or if the impression based on the demeanor of witness is inconsistent with the evidence in the case generally. (See above decisions).

8. I have considered the parties pleadings and their evidence. It is my duty therefore to reconsider and re-evaluate the same *vis-a-viz* the appellants grounds of appeal and the trial courts judgment.

9. THE 1ST RESPONDENT'S CASE

He testified as PW1. His evidence was that he was the driver of motor vehicle registration **KAS 042S a *matatu* being an employee of the owner, Mwalimu Githinji.** That he saw a canter and stopped for it to pass, on a slight descent at a bus stage where he had stopped to pick a passenger.

That a vehicle that was in front of a lorry collided with the Canter then the Lorry came towards his vehicle and collided with it while stationary causing him to lose consciousness, and was taken to Nakuru Provincial Hospital and later to Kenyatta National Hospital for treatment.

10. He later reported the accident at Londiani police station and was issued with a police abstract – PEXT 8 and P3 form – PExt 9. His evidence was that the lorry was to blame as it hit his vehicle on its right lane (side) while it was stationary at a bus stage. He exonerated the Canter vehicle from blame.

11. On cross examination, he stated that he had stopped at a bus stage off the road when the lorry came in a *zig-zag* manner and hit his vehicle, and could not tell the speed of the lorry, and denied that he was overtaking the Canter that was ahead and that did not come into contact with him. He did not know whether anybody was charged for a traffic offence. Shown a sketchplan of the scene, he reiterated that his vehicle was hit by the lorry after it hit the Canter, and lost control.

12. PW2 was a police officer. CPL Benjamin Otieno from Londiani police station. He was not the investigating officer but had with him the police file in respect of the accident. Reading from the file, it was his statement that the investigating officer found that the driver of the lorry registration No. KAR 332J trailer ZC 1113 highly contributed to the accident and the recommendation was that he should be charged for causing death by dangerous driving, that the driver was over speeding downhill and was driving in a *zig-zag* manner and lost control of his vehicle and hit motor vehicle KAS 351Y first then hit KAS 042S, which had stopped at a bus stage.

He produced the investigation diary and findings (PExt 10) and also the police abstract PExt 9 and P3 Form-PExt 8.

That is the 1st Respondent's evidence on liability. I will come to his evidence on his injuries later in this judgment.

THE 1ST AND 2ND RESPONDENT'S CASE

Proceedings in Kericho Traffic Case No. 662/07 were produced as the 1st and 2nd Respondents evidence.

The 2nd Respondent and Appellants cases were closed without neither calling any evidence save the traffic case file.

Upon the above evidence and submissions, the trial court rendered its findings and conclusions, as follows:

"I have considered the evidence, and submissions by counsel on the issue of causation of the material accident."

13. In his judgment, the trial Magistrate made findings that failure to file a reply to defence does not constitute an admission of negligence as there was a joinder of issue pursuant to provisions of **Order 2 rule 12 (1) of the Civil Procedure Rules.** That was in respect of the fact that the 1st Respondent did not file a reply to the appellants defence. He further made findings that the 3rd Respondent (then 2nd Defendant) was sued as both the registered owner and/or beneficiary of the lorry and concluded that the details of ownership of the said lorry as appears on the police abstract was sufficient proof of who the beneficial owner was.

14. Commenting on the findings in the **Traffic Case No. 662 of 2007** where the 2nd respondent was acquitted of the charge of causing death by dangerous driving, it was his finding that the acquittal did not bar the 1st Respondent from bringing a civil suit against him. He then concluded that the 1st defendant, now the appellant was wholly to blame for the accident. I have stated the issues that arise for determination (Paragraph 6 above), thus

Ownership of motor vehicle registration number KAR 332J *Trailer ZC 1113.*

15. The 1st Respondent did not provide motor vehicle Records for the above vehicle. The appellant denied being the registered owner or the beneficial owner in its defence. It was therefore incumbent upon the 1st Respondent to prove ownership. He produced the police abstract that stated ownership as the appellant.

16. I have however noted that the driver of the vehicle the 2nd Respondent, Hussein Ibrahim recorded a statement that was filed on the 22nd February 2011 and which he adopted, and was admitted as evidence. He therein admitted having been an employee of the Appellant and the employer being the owner of the vehicle. The police abstract too stated the Appellant as the owner.

In **Kericho Traffic case No. 662/2007** produced by consent of all parties, the lorry is described as being owned by the appellant and being driven by the 2nd respondent at the material time. These facts were not controverted or challenged by the appellant and other respondents.

17. It is trite that where ownership of a vehicle is denied, the person asserting such ought to produce a logbook or records to show the ownership. See **Nbi HCC No. 1566 of 1997 Kangutu Mbithi -vs- Henkel Kenya Ltd & Another.**

It is also trite that there are other ways of proving ownership. These are actual possession and beneficial ownership, all of which may be proved orally or by documents such as police abstract. However a police abstract on its own, cannot be an acceptable proof of ownership.

This was held in **Thuranira Karauri -vs- Agnes Ncheche, Civil Appeal No. 192 of 1996** and **Charles Nyambote Mageto -vs- Peter Njuguna Njathi (2013) e KLR**. Once all evidence, oral and documentary is taken together, it points to a party being the owner of the vehicle, it may then lead the court to conclude that on a balance of probability, the vehicle belongs to. The person alleged it belongs to the driver of the vehicle admitted that the vehicle belonged to his employer, the appellant.

I am satisfied that ownership of the lorry was adequately proved. It is also instructive to note that none of the respondents and the appellant called any evidence. As such, though denied in their statement of defence, such denials remained as such and the 1st Respondent's evidence including that of ownership remained unchallenged, and therefore uncontroverted. See **Section 107 and 109 of the Evidence Act**.

18. **APPORTIONMENT OF LIABILITY BETWEEN THE THREE VEHICLES**

The 1st Respondent is the only one who adduced evidence before the trial court. The appellant did not. To that extent, the 1st Respondent's evidence as to how the accident happened remains unchallenged. The same was battressed by the investigators and police file record that was produced by consent by all parties. The trial magistrate made a finding that other than the 2nd respondent being the driver of the lorry, there was no evidence that any other vehicle contributed to the accident.

Under **Section 107 and 109 of the Evidence Act,** a party who alleges ought to prove its allegations. The appellant failed to tender any evidence to prove its allegations of negligence against the 1st Respondent. I have re-evaluated the evidence as tendered as well as the investigation diary. There is sufficient evidence that the Appellants driver, the 2nd respondent was the cause of the accident. It is on record that the only vehicle that came into contact with it, and hit the 1st respondents vehicle was the appellant's lorry. No contrary evidence was lead.

19. I have considered authorities cited by the appellant in its submissions particularly **Kiema Muthuku -vs- Kenya Cargo Handling Services Ltd e KLR** as well as **Florence Rebecca Kalume -vs- Coastline Bus Safaris & Another (1966) e KLR** where Waki J stated:

"Several acts of negligence have been alleged against the respective drivers of motor vehicles.

These particulars must be proved before the court is called upon to find fault with the said driver. I am not entitled to infer negligence where none is proved."

20. Once again, the drivers of the other two vehicles failed to prove any negligence against the 1st Respondent as none testified. The appellant cannot blame other drivers when it failed to adduce any evidence to controvert and challenge the 1st Respondent's evidence. I cannot be called upon to infer such negligence without proof. See the above holding in **Florence Rebecca Kalume Case**(Supra) and **Timsales Ltd -vs- Harun Wafula Wamalwa Nakuru HCA No. 95 of 1995**. It is trite that a case is determined on the basis of the pleadings, issues of facts and the law and that the burden of proof lies with the plaintiff and the decree of proof on a balance of probabilities.

In **D.T. Dobie & Company (K) Ltd -vs- Wanyonyi Wafula Chebukati (2014) e KLR** the court held that statements in a defence if evidence is not tendered to support the same remain as mere statements.

21. I agree with the trial courts findings that there is nothing on record to show that the other drivers contributed to the accident.

Submissions by a party cannot be substituted for evidence. Ordinarily submissions are meant to support pleadings and evidence and not vice

versa.

There being no evidence adduced by the other drivers to controvert the 1st respondents evidence, I can only arrive at the finding that the appellant's vehicle driven by its driver the 2nd Respondent was the sole cause of the accident.

I find no basis whatsoever upon which the respondents vehicles could be held to have contributed to the accident as no such evidence was adduced.

I therefore find the appeal meritless in respect of liability, issues No. 1 and 2.

22. ***QUANTUM* OF DAMAGES**

I have considered the injuries sustained by the 1st Respondent as stated in the Medical report and records produced by consent of parties before the trial court. They are serious. The appellant however is of the opinion that the sum of Kshs.2,000,000/= awarded in general damages are excessive.

They are stated as:

- **Bilateral comminuted fractures of the frontal bones involving the frontal sinuses.**
- **Bilateral pneumocephalus**
- **Nasal bone fracture.**

23. A 50% permanent incapacitation was assessed by Dr. Kiamba in his medical report dated 16th December 2009. He stated that the 1st respondent had sustained severe head injury with leakage of the celebrospinal fluid with complaints of headaches, convulsions and loss of memory and weakness to the left side of the body. A CTC scan had confirmed that the patient had developed epilepsy and was an anti-convulsion, epilepsy being of post traumatic in nature and that the damage to the brain was permanent.

24. The appellant is of the view that the sum awarded of Kshs. 2 Million should be reduced to Kshs.600,000/= on grounds that there is no proof of recent treatment.

It is worth to note that the appellant did not seek a second medical report or a re-examination of the 1st respondent by its doctors for comparison purposes of the injuries as stated by Dr. Kiamba. It is therefore save to state that the nature and extent of the injuries are not under attack.

25. I think it is too late to raise the issue at this late stage, on appeal.

I have considered the case **Simon Mutisya Kavii -vs- Simon Kigutu Mwangi** cited by the appellant. Judgment was delivered in March 2013 by **Hon. Mwongo, J.** A 25% incapacitation was given.

The injuries in the said case are stated as fracture to the left leg bones, post trauma arthritis, shortening(permanent) of the left leg, stiffness at the knee, temporary incapacitation from extensive burns and wounds of the left lower leg.

I do not see any relevance or comparability in the injuries in the two cases. A 25% incapacitation was awarded as opposed to the 50% awarded in the instant case. The injuries sustained by the 1st respondent are more serious with life threatening effects.

26. I have considered the case of **Musinga Mwatete -vs- TAZ Freighters Ltd & Another Mombasa HCCC No. 230/2009** where a sum of Kshs.1.5 Million was awarded to a plaintiff with a 50% incapacitation, and close and comparable injuries.

The 1st respondent at time of examination had already developed epilepsy and had permanent brain damage and weakness of his left side of the body.

I have also considered the following cases where for comparable injuries, the awards ranged between Kshs.1.2 Million to Kshs.2.5Million. **Cosmas Mutiso Muema -vs- Kenya Cargo (Supra) Kshs.2.5 Million** was awarded**.**

Patrick Mbatha Kyengo -vs- Bayusuf Freighters Ltd (2013) e KLR Kshs.1.6 Million was awarded while in **Salome Wakarindi -vs-** Kshs. 1.2 Million was awarded.

27. I have carefully considered the trial court's award said to be excessive.

For a court to interfered with a trial court's assessment of damages, it must be persuaded that in arriving at the said *quantum* the court failed to consider relevant factors or considered irrelevant to ones, and thus arrived at an erroneous estimate of damages. See **Kemfro Africa Ltd t/a Meru Express Service -vs- Lubia & Another (1998) e KLR.**

Having considered such factors, I find that the award of Kshs.2,000,000/= in general damages for pain and suffering to be fair and reasonable, and within the acceptable and applicable legal principles in assessment of damages.

I uphold the said award.

28. In conclusion I find the appeal to be devoid of merit. I proceed to dismiss it with costs to the 1st Respondent.

Dated and Signed this 23rd Day of October 2017.

J.N. MULWA

JUDGE

Delivered this 15th Day of November, 2017.

R. LAGAT KORIR

JUDGE