REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CIVIL APPEAL NO. 14 OF 2014

BOARD OF GOVERNORS

NEP TECHNICAL TRAINING INSTITUTE ……………….. APPELLANT

V E R S US

ABDIRAHMAN SALAT SIRAT .... RESPONDENT

(From the judgment in original civil suit No. 24 of 2011 at Garissa Chief Magistrates Court - B. J. Ndeda – Ag. SPM)

JUDGMENT

The Respondent sued the appellant in the subordinate court asking for special damages of Kshs 13,100/-, general damages, interest at court rates, and costs of the suit and interest.

The respondent's allegations were that a traffic accident occurred on 31st of July 2011 on the Nairobi Garissa road involving motor vehicle registration No. KBB 173S Isuzu bus driven by the appellants driver. It was alleged that the driver was negligent. It was alleged that following the accident, the respondent suffered injuries and damages., and thus filed the suit.

The appellant filed a statement of defence denying the allegations of negligence and putting the respondent to strict proof thereof.

Before the case was heard however, consent on liability was recorded in which the appellant took 90% with the respondent taking 10% liability.

When the matter came up for hearing for quantum of damages Mr. Washika for the respondent was recorded as stating as follows:-

> ***"We had settled on the issue of liability. We were ready to proceed with quantum. We have consent to record. By consent parties agreed to put the medical report by Dr. Moses Kinuthia and R. P. Shah be produced without calling the makers and be attached to the written submissions. That the matter be mentioned in 2 weeks time to confirm that parties have filed their written submissions".***

Following the above statements from counsel for the respondent, M/s Karanja for the appellant stated as follows:-

> ***"I do confirm that is the position that both medical reports be produced without calling the makers and the same be attached to the written submissions. I request for a date in June.***

However, 14th May 2014 is available subject to the courts diary".

When the matter came for mention on 11th June 2014 Mr. Washika for the respondent stated that both parties had filed submissions and requested for a judgment date and judgment was

delivered on 9th of July 2014 wherein the court awarded special damages of Kshs 3,000/= and general damages of 1 million and cost and interests.

Aggrieved by the decision of trial court on the award of quantum of damages, the appellant filed the present appeal on the following three grounds:-

1. ***That the learned trial magistrate erred in law and in facts in failing to consider the appellant's submissions and authorities attached thereto wherein the plaintiff sustained comparable injuries to the respondent herein while assessing general damages.***
2. ***That the learned trial magistrate erred in law and in fact in awarding an amount in general damages that was manifestly excessive given the nature of the injuries.***
3. ***The learned trial magistrate's award was an erroneous estimates of the damages due in the particular case".***

Parties counsel agreed to file written submissions to the appeal. The appellants counsel filed their submissions on 12th October 2015. The respondents counsel filed their submissions which were erroneously headed ***"appellants submissions"*** on 4th Novermber 2015. Each of the counsel relied on a number of case authorities. Mr Kiluva who held brief for Mr. Chege for the appellant elected not to highlight the written submissions filed and asked for a judgment date.

I have considered the submissions on both sides and the authorities relied upon.

I have to start by stating that this being a first appeal, I am required to reconsider the matter and come to my own conclusions and inferences. I am required to evaluate what is on record and draw my own conclusions. ***See the case of Selle -vs- Associated Motor Boat Company Ltd (1968) EA 123.***

The issue in contention is the quantum of damages. Other than the parties having agreed to a settlement on liability, they also did not tender any evidence through calling of witnesses. They elected instead to admit in evidence the medical reports on both sides by consent to be filed with the written submissions. In the Judgment, the learned magistrate stated that he did not see the medical report of Dr. Shah. The submissions before me are that the said report was submitted to court as part of the written submissions. Counsel for the respondent has argued that such a procedure of filing the report through written submissions was a mistake and that as such even if the report was filed through the written submissions, it could not form the basis of evidence on which the learned magistrate would act.

In ordinary circumstances, a fact cannot be proved through written submissions. Written submissions are meant to clarify or support what has already been tendered in court as evidence. However in our present case the parties counsel recorded a consent which became a contract and bound them, that the said medical reports would be filed during submissions. The respondent's counsel infact in the submissions before the trial court referred to the said medical report and stated as follows:-

> ***" Dr. R. P. Shah on the 15th of August 2013, the Advocate for the defendant referred the plaintiff to Dr. R. P. Shah for a 2nd medical opinion and a medical report was subsequent prepared on 22nd August 2013. When stating the injuries sustained, Dr. Shah solely relied on the discharge summary from Garissa Provincial***
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> ***General Hospital although he was provided with all the documents, x-rays and CT scans stated above. Injuries sustained was stated as fracture of upper part of radius and ulna bones of the left fore arm. Dr. Shah observed in his report prepared in August 2013 that the plaintiff has healed clavicle (collar borne)".***

The counsel went on to analyses the two medical reports.

My understanding is that the respondent's counsel was aware of that report by Dr. Shah. However my perusal of the original file convinces me that, though that report of Dr. Shah was referred to by counsel, it was not part of the documents which were filed by the appellant's counsel in their written submissions.

Since the report of Dr. Shah was attacked seriously by the respondent's counsel and since it was not part of the documents filed it is clear to me that the appellant did not discharge on the balance of probabilities what he meant to prove through the report of Dr. Shah. The Evidence Act (cap. 80) section 107 and 108 are clear that he who alleges must prove. In civil cases, even where the case proceeds to hearing by way of formal proof the burden of proof on the balance of probabilities, applies to every person who wants the court to believe his factual position. – See ***Kirugi & Another –vs- Kabiya & 3 Others (1987) KLR 347.***

In the English case of ***Miller -vs- Minister of Pensions 1947*** cited in the case of ***DT Dobie and Company Ltd -vs- Wanyonyi Wafula Chebukati 2014 EKLR, Denning J.*** stated as follows***:-***

> ***"That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say – we think it is more probable than not – the burden is discharged but, if the probabilities are equal, it is not proved.***
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> ***Thus, proof on a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

Section 107 and 108 of the Evidence Act (cap. 80) clearly emphasizes this fact. Since the magistrate was not able to see the report of Dr. Shah and consider or evaluate its contents, the appellants by their own omission ended up not proving their allegations about the injuries suffered. In my view therefore, the learned magistrate was correct in not taking into account that report of Dr. Shah, as the evidence on that report was not before him. What was before him were views or opinions of counsel, which the magistrate could not verify.

Having resolved that issue, then it means the injuries suffered were those established through the report of Doctor Moses Kinuthia for the respondent.

With regard to the quantum awarded by the trial magistrate, I still have to remind myself that an appellate court should be slow in interfering with an award of damages by a trial court unless the same has been determined on a wrong principle or has not taken into account an important matter or has taken into account irrelevant matters. I rely on the case of ***Butt -vs Khan (1977) 1 KLR1.***

The appellants counsel is basing his arguments on the report of that Dr. Shah, which was not before the trial court and in my view was sufficiently discredited by the respondent's counsel. His case authorities were also based on that report. He suggests a figure of award of Kshs 300,000/= as general damages. The said counsel does not seriously challenge the findings of Dr. Kinuthia. In his submissions he narrates the injuries found by Dr. Kinuthia who also assessed the permanent incapacity at 40%, and compares this to the permanent disability assessment of 25% by Dr. Shah. He gave no reasons at all in his submissions however to disbelieve or to challenge the report of Dr. Kinuthia.

In my view, a mere comparison of one medical report with another report is not the same as challenging a report. If counsel for the appellant wanted to discredit the report of Dr. Kinuthia, he should have given cogent reasons why the injuries listed therein and the total incapacity suffered, should not have been upheld. He did not do so and I cannot speculate for him. That report of Dr. Shah was in any event not before the magistrate.

Having considered the evidence placed before the magistrate and Dr. Shah's report was not part of it, and the authorities cited before the magistrate, I find nothing faulty about the magistrates award of damages. I cannot thus interfere with the exercise of discretion in awarding damages.

To conclude, I find no error on the part of the magistrate in awarding the quantum of damages he awarded, as the magistrate relied and in my opinion correctly, on the report of Dr. Kinuthia which was before him and not discredited. I thus find no merit in the appeal. I dismiss the appeal with costs to the respondent.

Dated and delivered at Garissa this 28th day of January 2016.

GEORGE DULU

JUDGE