REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

HCCA NO.115 OF 2009

BETWEEN

MUNICIPAL COUNCIL OF ELDORET.....APPELLANT

AND

THOMAS M. ONANDAH.....RESPONDENT

(Being an appeal from the judgment and decree given on 28/10/2009

by the Hon. T.N. Bosibori in Vihiga PM CC No.68 of 2006)

J U D G M E N T

The Pleadings

1. The respondent in this appeal was the plaintiff in the lower Court. The respondent sued the appellant claiming damages for injuries suffered as a result of a road traffic accident which occurred on 03/12/2005 along the Kima – Kakamega road involving m/v Registration Number KAP 089P. It was the respondent's case as per the plaint dated 22/05/2006 that the appellant's driver, agent or servant drove the above stated motor vehicle so carelessly and recklessly that he lost control of the vehicle which veered off the road and caused the accident as a result of which he was injured. The respondent contended that the appellant owed him a duty of care which was breached. The respondent held the appellant liable in negligence. Particulars of negligence were set out in paragraph 6 of the plaint.

2. The appellant entered appearance and also filed statement of defence and denied ownership of the subject motor vehicle as well as the allegation that the respondent was an employee of the appellant and that he (respondent) was travelling in the said motor vehicle on the day of the alleged accident. The appellant also denied that the alleged accident ever occurred at all and in the alternatives averred that if the accident occurred at all a fact that was denied then the appellant was not vicariously liable in negligence. The appellant prayed that the respondent's suit be dismissed with costs. The respondent filed a reply to defence asking for judgment as prayed in the plaint.

The Evidence

3. The respondent, Thomas Mulunda Onandah testified as PW1 and stated that on 03/12/2005, he and other staff were passengers in the subject motor vehicle which was being driven by Jonathan Kipchumba. They were travelling to Siaya to attend the funeral of a colleague one Collins Ombul Nyabuga. The respondent testified that the m/v was driven at a very high speed and as a result thereof the driver lost

control and the vehicle overturned. One of the passengers died while the respondents and others were injured. The accident occurred along the Standkisa – Kima road at a place called Emusutsi.

4. After the accident the respondent was treated at Kima Mission Hospital where it was established he suffered injury on the chest and suffered 4 fractured ribs. Later the respondent was treated at Moi Teaching and Referral Hospital where he was admitted for one day. Later, he went to Luanda Police Station and recorded his statement. He was issued with a P3 form as well as a Police abstract. Later, the respondent was seen by Dr. Aluda who wrote a medical report. The respondent testified further that at the time of hearing of the case on 28/03/2007, the injuries were yet to heal. He also stated that he was employed as a mechanic by the appellant and that Jonathan Kipchumba was an authorized driver of the appellant. The respondent asked the Court to order the appellant to pay him compensation for the injuries sustained in the accident. The respondent produced various documents in support of his claim against the appellant.

5. PW2 was Dr. Joseph Imbenzi from MTRH. PW2 confirmed that from the hospital records the respondent suffered fractures of the 6^{th}, 7^{th}, 8^{th} and 9^{th} ribs. He produced the respondent's discharge summary and attendance card as PExibits 3 and 4.

6. By consent of the parties the P3 form which had been marked as PMFI 5 and Dr. Aluda's medical report PMFI 7 were produced as PExhibits 5 and 7 respectively. On the 18/02/2009, the parties by consent agreed to have the evidence of PW3 PC Ruto in PMCC No.99 of 2006 adopted as evidence in the lower Court case of this appeal, and consequently the Police abstract and other documents produced therein as PMFI 2 and 8 were produced as PExhibits 6,2 and 8 respectively. The appellant did not call any witnesses.

Judgment of the Trial Court

7. After carefully analyzing all the evidence on record, the learned trial magistrate found the appellant wholly liable for the accident in which the respondent was injured. The Court awarded kshs.200,000/= as general damages for pain, suffering and loss of amenities plus costs and interest. No special damages were awarded as the same were said not to have been proved.

The Appeal

8. Being aggrieved by the whole of the learned trial Court's judgment, the appellant through the firm of M/s Gicheru & Company Advocates filed the Memorandum of Appeal dated 26/11/2009, setting out the following grounds:-

> 1. The learned Magistrate erred in law and fact in delivering judgment ex-parte without notice to the Appellant.
>
> 2. The learned Magistrate erred in law and fact in holding the Appellant 100% liable for causing the accident when there was no evidence to support such an holding. (sic)
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> 3. The learned Magistrate erred in law and fact in failing to find and hold that the evidence tendered by the Respondent before the trial court as regards the registration particulars of the suit motor-vehicle were contradictory to those pleaded.
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> 4. The learned Magistrate erred in law and fact in failing to find and hold that the Respondent was bound by his pleadings and could not put forward a case that was contrary to the pleadings.
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> 5. The learned Magistrate erred in law and fact in failing to find and hold that the Respondent had not proved the ownership of the motor-vehicle pleaded in the Plaint and which was therefore the subject matter of the suit.
>
> 6. The learned Magistrate erred in law and fact in failing to find and hold that the Respondent was

not lawfully travelling in any of the Appellants motor-vehicle on the date of the accident.

7. The learned Magistrate generally erred in law and fact in failing to consider all the facts and the law placed before her in arriving at her Judgment.

8. The learned Magistrate erred in law and fact in making an award of damages that was excessive in the circumstances.

REASONS whereof the appellant prays for orders that:-

a. The judgment delivered by the Hon. T.N Bosibori in Vihiga PMCC No.68 of 2006 – Thomas M. Onandah –vs- Municipal Council of Eldoret be set aside with costs to the appellant.

b. The appellant be awarded the costs of this appeal.

c. STRICTLY WITHOUT PREJUDICE to the foregoing, this Court be pleased to make its own independent assessment on liability and quantum.

9. This is a first appeal, and on this appeal this Court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter only bearing in mind the fact that it does not have the privilege of seeing and hearing the witnesses and to make allowance for that fact. In the now well known case of **Peters –vs- Sunday Post Ltd [1958] EA 424**, the Court of Appeal for Eastern Africa held, *inter alia* that while an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand this jurisdiction is exercised with caution. If there is no evidence to support a particular conclusion of if it is shown that the trial judge has failed to appreciate the weight or bearing of the circumstances admitted or proved or has plainly gone wrong the appellate Court will not hesitate so to decide. Also see Kisumu Court of Appeal Civil Appeal No.228 of 1998 – **Astariko E.A Abuli –vs- Elifas M. Ambaisi** where the Court held that in exercising the jurisdiction to re-assess and re-evaluate the evidence on first appeal it is a very strong thing indeed for the Court to interfere with a trial judge's findings on facts unless the circumstances enumerated in Peter's case (above) are satisfied. A similar view was held by the Court of Appeal in **Geoffrey Kihunya Wanjura –vs- Gichini Kiguta & another** Civil Appeal Number 67 of 1997 where the Court expressed itself thus: "The jurisdiction to the appellate Court to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand should be exercised with caution: and it is not enough that the appellate Court might have come to a different conclusion."

10. As concerns review of damages on appeal, it has been held that "generally speaking, the figure reached by the trial Court is not disturbed on appeal unless it is based on some erroneous principle or it is so low or so excessive that it must have been based on some incorrect reasoning." In other words, an award of general damages should not be interfered with unless the trial Judge has acted on an erroneous principle, or the award is so low or so high as to amount to an entirely erroneous estimate. The reason for this view is that assessment of damages is more like an exercise in discretion and an appellate Court is usually slow to reverse the trial judge on a question of the amount of damages unless it is satisfied that the judge has acted upon a wrong principle of law, or has misapprehended the facts or has for these or other reason made a wholly erroneous estimate of the damage suffered. An appellate Court should therefore take care not to consider what it would have awarded had it heard the case but should only consider whether the trial judge acted on wrong principles. In the case of Butt –vs- Khan – Court of Appeal at Nairobi, Civil Appeal No.40 of 1977, Law JA clearly stated that an appellate Court will only interfere with an award of damages if:-

"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."

11. I entirely agree with the above stated principles and confirm that I shall be guided by the same in

determining the eight complaints raised by the appellant against the judgment of the learned trial Magistrate.

Issues for Determination

12. After carefully reconsidering and evaluating the evidence afresh and after considering afresh the judgment of the learned trial Court in light of the grounds of appeal the following issues arise for determination:-

a. Whether the learned trial Magistrate's finding on liability was well founded.

b. Whether the respondent proved his case against the appellant on a balance of probability, including proof of ownership of the subject motor vehicle.

c. Whether the award of damages was examine in the circumstances

13. The parties canvassed this appeal by way of written submissions, covering each of the issues hereinabove framed. I have carefully considered the submissions together with the authorities cited by each party and I now proceed to consider the issues as framed.

Analysis and Findings

14. Regarding the first issue on liability, I am satisfied that the learned trial Magistrate could not have reached any other conclusion in light of the evidence on record. The respondent was a passenger in the subject motor vehicle. The respondent adduced evidence confirming that he was an employee of the appellant. He also produced evidence to show that the driver of the subject motor vehicle was also an employee of the appellant and that on the material day, the appellant's driver was driving the subject motor vehicle in the course of his employment as a driver and he was on official duty taking members of staff of the appellant to attend the funeral of a colleague who had died. The driver did not testify in this particular case, but he testified as DW1 in PMCC No.99 of 2006 in which he told the Court that he was working for the appellant as a driver of motor vehicle KAN 089P (the respondent pleaded that the motor vehicle was KAP 089P) and that on the material day he was carrying the appellant's staff going for funeral of a fellow staff. He admitted that the motor vehicle he was driving was involved in an accident around Luanda as he tried to negotiate along. He alleged that the steering failed but he did not produce any documentary evidence such as an inspection report to show that indeed the accident occurred as a result of a failed steering. Even if he had availed such evidence, the respondent could not have prevented the accident. The appellant would still have been liable for the accident for allowing a defective motor vehicle to be on the road. The driver stated that the motor vehicle was not well maintained. The driver also testified that the respondent herein was injured in the accident and was taken to Kima Mission Hospital. With all this evidence, I find that the appellant's complaint against the learned trial Magistrate's finding on liability has no basis and I dismiss it altogether.

15. The second issue is whether the appellant proved his case on a balance of probability including proof of ownership of the motor vehicle. The appellant's case is that the respondent did not carry out a search to establish that the motor vehicle which caused the accident in which the respondent was injured belonged to the appellant. Although it is good practice to adduce evidence of official search certificate, ownership of a motor vehicle can be proved by other means, such as the admission of the driver that the motor vehicle in which the respondent was injured belonged to the appellant. The respondent also produced evidence of the police abstract which was admitted by consent and the appellant cannot therefore be heard to be a disputing the fact of ownership of the subject motor vehicle when the fact of ownership was admitted. In the case of **Lake Flowers –vs- Cila F.O Nganga & another – Civil appeal No.2010 of 2006** the Court of Appeal stated among other things that:

"without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver for it was difficult for it to contest the liability blamed against it by the superior Cout and (sic) or attempt to partly or wholly blame the 2nd respondent for the accident on this appeal.

Neither can it deny the ownership of the Matsubishi Canter without any evidence to counter the Police abstract produced by the 1st respondent which shows it to be the owner of that motor vehicle"

16. And in the case of **Samwel Mukunya Kamunge –vs- John Mwangi Kamuru, Nyeri HCCA No.34 of 2002**, Okwengu J, (as she then was) persuasively stated as follows: "it is true that a certificate of search from the Registrar of motor vehicles would have shown who was the registered owner of the motor vehicle according to the records held by the Registrar of motor vehicle. That however is not conclusive proof of actual ownership of the vehicle as Section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often times vehicles change hands but the records are not amended. I find that the trial Magistrate was wrong in holding that only a certificate of search from the Registrar of motor vehicle could prove ownership of the motor vehicle. I find a police abstract report having been produced showing the respondent as the owner of the motor vehicle KAH 264A and evidence having been adduced that letter of demand sent to the respondent elicited no response from him denying ownership of the motor vehicle and the respondent having offered no evidence to contradict the information on the Police abstract report the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the respondent."

17. I entirely agree with the above stated legal position and make a finding that on the basis of the evidence on record, the respondent proved on a balance of probability that the vehicle which caused the accident and in which the respondent was travelling belonged to the appellant. I appreciate the fact that the respondent clearly gave a wrong registration number but the driver of the motor vehicle having admitted that the respondent was one of the passengers in that ill fated vehicle makes the error committed by the respondent as a mere technicality since both the appellant and respondent agreed that the respondent was a passenger in the appellant's vehicle that caused the accident.

18. The final issue for determination is whether the award of kshs.200,000/= as general damages was excessive in the circumstances. The principles to be applied in this regard are already set out hereinabove so that unless the appellant proves that the trial Court acted on wrong principles or misapprehended the law this Court would be slow to interfere with the award.

19. From the record, the respondent suffered fractures of four right anterior ribs namely the 6th, 7th, 8th and 9th ribs in addition to blunt chest trauma. The record also shows that the learned trial Magistrate considered the medical evidence which was admitted by consent of the parties. Dr. Aluda's report under Prognosis and Opinion is to the effect that the injuries sustained were very severe though they had healed. I have carefully considered the case of **William Kiplangat Martim & another –vs- Benson Owenga, Anjere – Civil Appeal No.80 of 1993,** but I do not think that the injuries suffered by the respondent herein are comparable to suffering a swollen right leg and face which had healed without any permanent incapacity in the Anjere case. I have also considered my own judgment in **Kisii HCCA No.113 of 2008 – Nyasingo Tea Factory Limited –vs- James Nyabuti Nyamweya** and note that the case is distinguishable from the instant case in that the evidence adduced before the trial Court in that case did not support the pleadings. In the instant case, and apart from the registration number of the motor vehicle, the whole of the evidence supported the respondent's case against the appellant. In that HCCA No.113 of 2008, I found that the evidence upon which the trial Court reached its decision on liability had no basis in the pleadings. In any event, the respondent in that case was a pedestrian while the respondent in this case was a passenger.

20. In short what I am saying here is that considering the injuries suffered by the respondent and also being satisfied that the trial Court was properly guided in her decision to award the sum of kshs.200,000= and I find no reason to interfere with the same. That ground of appeal therefore fails.

21. There is one other issue worth mentioning before I conclude this judgment and that is the appellant's complaint that judgment was delivered without notice to the appellant. The appellant seems to have abandoned that ground in the submissions but the respondent relying on the provisions of Order 21 Rule 1 of the Civil procedure Rules (CPR) submitted that failure to give notice to parties before delivering the judgment does not render the judgment a nullity. A reading of the rule shows that the requirement for

notice is mandatory with the use of the word “shall”, but the rule does not as submitted by Counsel for the respondent say that a judgment given without notice shall be nullified. It would appear to me that having abandoned that ground of appeal the appellant did not suffer any prejudice by the Court’s failure to give notice for the judgment.

Conclusion

22. The upshot of what I have stated above is that the appellant’s appeal on both liability and quantum is lacking in merit. I accordingly dismiss the same with costs to the respondent.

23. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 28th day of January, 2016.

RUTH N. SITATI

J U D G E

In the presence of:

M/s Gicheru & Co. (absent) for Appellant

Mr. Esikuri (present) for Respondent

Mr. Lagat Court Assistant