REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 156 OF 2011

ROYAL STAR LTD

JUMA BARAKA ABDALLA.....APPELLANTS

VERSUS

KIMEU WAMBUA.....….....RESPONDENT

J U D G M E N T

1. The Respondent sued the Appellants claiming general and special damages arising out of a road traffic accident that occurred on **19th April, 2010** at **Mukuyuni** along **Kitui – Machakos** road where the Plaintiff who was driving motor-vehicle registration number **KBC 686G** collided with motor-vehicle **KBL 129D.** As a result of the accident he sustained injuries.

2. Judgment on liability was entered in favour of the Plaintiff against the Defendant in the ratio of **90:10.** On quantum based on the aforestated ratio the trial court awarded the Plaintiff general damages of **Kshs. 90,000/=** and Special damages of **Kshs. 1,530/=** plus costs and interest.

3. Being dissatisfied with the award on quantum of general damages the Appellant appealed on grounds that:

- The judgment did not meet the mandatory requirements of **Order 21 Rules 4 & 5** of the **Civil Procedure Rules 2010** and therefore is a nullity.
- There was no determination whether or not the injuries alleged to have been suffered by the Plaintiff were as a result of the Road Traffic Accident dated **19th April, 2010.**
- There was no strict compliance with **Section 35** of the **Evidence Act** in regard to production of treatment notes.
- Medical report made on the basis of treatment notes date **17th May, 2010** and the **P3 Form** prepared on **20th May, 2010** had no relation with the Road Traffic Accident of **19th April, 2010.**
- Irrelevant issues not supported by evidence were considered.
- The Appellants' case was not considered therefore being denied the right to a fair hearing.

4. The appeal was canvassed by way of written submissions, only the Respondent filed submissions.

5. Being the first appellate court I must re-consider the evidence adduced at trial and come to my own findings and conclusions **(See Selle & Another vs. Associated Motor Boat Co. LTD and Others (1968) EA 123).**

6. It is alleged that the learned trial magistrate failed to comply with **Order 21 Rule (4) & (5)** of the **Civil**

Procedure Rules 2010 which provides thus:

> ***"4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.***
>
> ***5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate decision on each issue."***

7. In the case of **South Nyanza Sugar Co. Ltd V. Omwando Omwando (2011) eKLR** which in persuasive **Makhandia J.** (as he then was) stated thus:

> ***"..... Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of Order 21 rule 4 of the Civil Procedure Rules which provides that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision..... The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and apportionment thereof..... Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it."***

8. This is a case where judgment on liability was entered by consent of both the Respondent and the Appellant. The trial magistrate considered evidence adduced by the Respondent and noted the fact of the Appellant having failed to adduce any evidence. Consequently he came up with one issue for determination. In that regard he stated thus:

> ***"The only issue for the court to determine is the measure of damages payable to the Plaintiff."***

Based on that issue the learned trial magistrate considered evidence adduced by the Doctor who examined the Respondent in respect of injuries sustained. He gave reasons that made him come up with the decision to make the award. In the premises, there was compliance with the law.

9. By dint of the provisions of **Section 63** of the **Evidence Act,** the maker/author of a document should produce it in evidence. However there are exceptions. Documents in civil proceedings can be produced by persons other than makers. This would depend on the circumstances prevailing and in particular to the accuracy of the content. **(Also see Section 35(5) of the Evidence Act).**

10. In the instant case an objection was raised to the production of the treatment card that was issued to the Respondent on the ground that on the face of it, the card lacked various records and that the Plaintiff was not the owner of the same. In his ruling the trial magistrate overruled the objection having found that the treatment card was issued to the Respondent who was competent to produce it. Although the Appellant expressed the intention to appeal against the finding, and was accordingly granted leave to appeal, no such appeal was preferred.

11. Following the accident and treatment received, the Respondent was examined by **Dr. Kimuyu** who opined that he suffered multiple soft tissue injuries and at the time of examination he had not fully recovered. He confirmed the injuries that were sustained by the Respondent namely – Blunt head injury, blunt injury of the chest, blunt injury of the left leg below the knee and a blunt injury on the left shoulder. Her evidence was not challenged. The Appellant tendered no evidence in defence. The learned trial magistrate in reaching his finding based his decision on evidence adduced by the Doctor.

12. After the Respondent closed his case, the Appellants were granted the opportunity of presenting their case but they closed it without calling any evidence. The learned magistrate would therefore not be faulted for allegedly denying the Appellant their constitutional right to a fair hearing.

13. Having re-considered evidence adduced and the fact that the Appellant failed to canvass their appeal, I have absolutely no reason to interfere with the decision of the Lower Court. In the premises, the appeal stands dismissed with costs to the Respondent.

It is so ordered.

Dated at **Kitui** this **19th** day of **January,** 20**16.**

L. N. MUTENDE

JUDGE

Dated, Signed and **Delivered** at **Machakos** this **17th** day of **February,** 20**16.**

P. NYAMWEYA

JUDGE