REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 86 OF 2011

SAMSON WAFULA WANYONYI …… APELLANT

VERSUS

NGUGI NJUGUNA T/A GOLDEN EAGLE BUS SERVICES LTD ….. RESPONDENT

(Being an Appeal from the Judgment and Decree of the Resident Magistrate Honourable J. OWITI (RM), in Eldoret CMCC No. 578 of 2010 dated 11/04/2011)

JUDGMENT

1. The appellant was the plaintiff in Eldoret CMCC No. 578 of 2010 while the respondent was the defendant. The appellant instituted a suit against the respondent seeking general and special damages for injuries he allegedly sustained in a road traffic accident on or about 22nd April, 2010 while travelling along Eldoret-Webuye Road aboard motor vehicle Registration No. KBF 664 H Isuzu bus owned by the respondent. The appellant also prayed for costs of the suit.
2. In his plaint dated 24th June, 2010, the appellant averred that the accident was occasioned by the negligence of the defendant (respondent), his servant, agent or driver in the manner in which either of them controlled the bus. The particulars of the defendant's negligence were pleaded in paragraph 5 of the plaint.
3. The appellant also averred that as a result of the accident, he sustained injuries which caused him pain. The injuries were bruises on both legs which were swollen and tender. He claimed special damages in the sum of Kshs.3,200.
4. In his statement of defence dated 14th July, 2010, the defendant denied liability *in toto* and put the plaintiff to strict proof thereof. He pleaded that if the accident occurred, it was not occasioned by his negligence and was due to an inevitable accident or that the appellant by his negligence solely or substantially contributed to its occurrence.
5. After a full trial, the learned trial magistrate rendered her judgment on 11th April, 2011. She found the defendant 100% vicariously liable for the accident but dismissed the suit with costs on grounds that the appellant had failed to prove that he had been injured during the accident.
6. The appellant was dissatisfied with the lower court's decision. He proffered the instant appeal through his memorandum of appeal filed in court on 5th May, 2011. He relied on six grounds of appeal which can be condensed into the following three grounds.

i. That the learned trial magistrate erred in law and in fact in failing to find that the appellant had been injured in the road traffic accident giving rise to the suit.
ii. That the learned trial magistrate erred in law and fact in failing to appreciate the primary evidence presented by the appellant and in dismissing his suit on the basis of hearsay evidence and exhibits which were not adduced in evidence during the trial.
iii. That the learned trial magistrate erred in law and fact in arriving at a decision which was against the

weight of the evidence on record.

7. Parties agreed that the appeal be prosecuted by way of written submissions; those of the appellant were filed on 27th November, 2014 while those of the respondents were filed on 27th January, 2015. The submissions were highlighted before me on 2nd February, 2016.
8. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. As the first appellate court, I am duty bound to re-evaluate and re-assess the evidence presented before the trial court and make my own independent conclusions. In doing so, I should give due allowance to the fact that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses.

9. There is a plethora of case law restating the circumstances in which an appellate court may interfere with findings of fact made by the lower court. It will suffice to cite just two of those authorities. In ***Makube V Nyamoro (1983) KLR 403*** the Court of Appeal held as follows;

> ***"….. A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong legal principles in reaching the findings he did …."***

In ***Kiruga V Kiruga & another (1988) KLR 348***, the same court held interalia as follows;

> ***"…. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed……"***

See also: ***Sumaria & Another vs allied Industrial Limited (2007)2 KLR 1, Mwanasokoni V Kenya Bus Services Ltd (1985) KLR 931; Jabane Vs Olenja (1986) KLR 661.***

10. From the grounds of appeal and the submissions made by the parties, it is clear that the only aspect of the trial court's decision that is faulted by the appellant is the finding that the appellant had failed to prove his claim as he had not proved that he suffered any injury in the road accident in question. The appellant is happy with the trial court's finding on liability and the finding that had he proved his case, an award of Kshs.80,000 in general damages would have been sufficient compensation for his pain, suffering and loss of amenities.

    The only issue therefore that arises for my determination is whether the appellant had proved on a balance of probabilities that he had been injured in the said accident.

11. In order to determine this issue, it is important to revisit the evidence tendered before the trial court regarding the injuries allegedly sustained by the appellant in the said accident. In his evidence, the appellant who testified as PW1 stated that when the accident occurred at 5 a.m on 22nd April, 2010, he was injured on both knees. The right knee was cut. He proceeded to Kimilili District Hospital where he was treated. He also reported the matter at Turbo police station. He was issued with a P3 form which was filled by ***Dr. Aluda*** who subsequently examined him and prepared a medical report.
12. PW3 is the clinical officer who attended to the appellant at Kimilili District Hospital.

    He testified that he personally treated the appellant on 22nd April, 2010. He recalled that the appellant gave him a history of having been involved in a road accident on the same day at 5

a.m and he complained of a painful knee. PW3 noted bruises on the appellant's right legs on the tibula fibula region. He concluded that the appellant had sustained soft tissue injuries. He identified the treatment notes he wrote after examining the appellant which he produced as Pexhbit 2.

13. In cross examination, PW3 testified that the document containing the treatment notes (PExhbit 2) did not have an outpatient number; that a patient is supposed to register at the hospital's registry after receiving treatment in order to be issued with an outpatient number and that outpatient numbers are issued for purposes of identifying the patients; that failure to indicate an outpatient number on a treatment document does not invalidate the document.

14. On 26th April, 2010, four days after the accident, the appellant was examined by PW2 ***Dr. Samuel Aluda***. PW2 testified that on examination, he noted that the appellant's legs were swollen; he had bruises which were fresh but were in the process of healing. He filled the appellant's P3 form and prepared a medical report. He produced the two documents as PExhibit 3 and PExhibit 6 respectively.

15. To counter the appellant's case, the respondent called two witnesses but only one witness (DW2) gave evidence relevant to the issue under consideration. DW2 was a health officer at Kimilili District hospital.

He testified on the procedure which patients are required to follow in accessing treatment at the hospital, the same one that was outlined by PW2. He also testified on how the outpatient and injection registers were compiled. He however admitted that though ideally patients should not be treated before being allocated an outpatient number, accident victims were sometimes registered after treatment was given and some of them would walk away before they were registered. On being shown Pexhibt 2, DW2 admitted that it was an authentic document from Kimilili District Hospital and that though the keeping of registers fell in his docket, he was not the one who had their actual custody nor was he the maker of the entries therein.

16. After analyzing the evidence tendered before the trial court, the learned trial magistrate in her judgment stated interalia as follows:-

" De-3&4 (the outpatient and injection book register) were equally admitted by the plaintiff's counsel. DW2 is a Health Officer in charge of Kimilili district hospital. He stated that a patient cannot be given drugs or injected without an outpatient number. DE-3 & 4 confirms that PW1 was not treated at Kimilili district hospital on 22nd April 2010. The fact that DE-3&4 do not bear the identification stamp of Kimilili district hospital cannot arise at the submission level since the plaintiff admitted their production as exhibits.

PW1 suffered soft tissue injuries on 22nd April 2010. He was not in a critical condition to warrant being treated in disregard of laid down procedures at Kimilili district hospital. PW3 stated that he attended to PW1 at 10.00 a.m at Kimilili district hospital. As at 10.00 a.m the outpatient and injection department were active. The registry section was equally active. If PW1 was attended to at Kimilili district hospital, he would have been issued with an outpatient Number. His name would have appeared in DE-3 & DE 4. Further to the foregoing, if it is true PW1 was attended to at Kimilili district hospital, at 7.00 a.m on 22.4.2010, then it is not PW3 who attended to him. It is worthy to note that PE 5 refers to Samson Wafula Wanyonyi and Samuel Wafula Wanyonyi. It is express on the face of PE-5 that the name Samuel Wafula Wanyonyi was altered to read Samson Wafula Wanyonyi. The alteration thereon was not counter signed or explained by PW4 herein…."

17. I have carefully considered the evidence presented to the trial court, the rival submissions made by the advocates on record and the judgment of the learned trial magistrate. Having done so, I find that the learned trial magistrate based her finding that the appellant had not proved that he was injured during the accident on the fact that his treatment notes did not bear an outpatient number

and his name was missing from the outpatient register and the injection book register. The finding was also based on the trial magistrate's observation that the names in the police abstract (Pexhbit5) had been altered to read *Samson Wafula Wanyonyi* instead of *Samwel Wafula Wanyonyi* and that the said alteration had not been countersigned by the investigating officer.

18. In my view, the fact that the treatment notes did not have an outpatient number does not in itself mean that the appellant did not receive treatment at the hospital. It only means that the appellant did not for some reason follow the prescribed procedure of accessing treatment at the hospital.

    I have looked at Pexht2. It is a patient's record book issued by Kimilili District Hospital. It bears the name of the appellant and a stamp showing that the appellant was seen at the said hospital at 7 a.m on 22nd April, 2010.

    PW3 in his evidence confirmed that he is the one who treated the appellant for a painful knee and bruises on the right tibula-fibula region on the date of the accident and that he is the one who authored the treatment notes.

    It is noteworthy that DW2 in his evidence confirmed that Pexht2 was an authentic document issued by the hospital and that PW3 was one of the clinical officers who worked in the hospital.

19. The learned trial magistrate in her evidence did not address her mind to the weighty and primary evidence adduced by the appellant, PW2 and PW3. PW2 confirmed that he had examined the appellant four days after the accident and found him with bruises on his legs which were in the process of healing. The legs were also swollen. Both PW2 and PW3 testified that the appellant had sustained soft tissue injuries. It is also important to note the evidence given by PW4 under cross examination when he said ***" A P3 form is issued to an injured passenger after verification".*** This in effect means that before he issued the appellant with the P3 form (Pexhibit 3), he had ascertained that he had been injured in the accident.
20. I find that the learned trial magistrate erred in failing to evaluate the evidence adduced before the trial court in its totality. She failed to take into account the evidence presented by the appellant and his witnesses which amounted to primary evidence and instead relied on copies of registers produced by DW2 whose authenticity and veracity was open to question.

21. There was nothing in the registers to show that they emanated from Kimilili District Hospital and DW2 could not vouch for their accuracy since he was not the maker of the documents. The fact that the appellant's name did not appear in the registers though relevant is not prove that he was not treated in the hospital as alleged given that DW2 having not made the entries therein could not confirm that the registers were properly compiled especially given his admission that some patients like accident victims sometimes used to get treatment and disappear before their details were captured in the registers. Besides, the registers amounted to secondary evidence which did not satisfy the requirements of ***Section 68-69*** of the ***Evidence Act*** and were not therefore admissible in evidence. The learned trial magistrate erred in admitting them as evidence during the trial.
22. I also find that the learned trial magistrate erred when she made a finding of fact that at 10 A.M on the date of the accident, the hospital's registry and the outpatient and injection department were active when there was no evidence adduced before the court to support such a finding. In any case, the stamp embossed on Pexhibit 2 showed clearly that the appellant had been treated at 7 am and not at 10 am.

23. I have also keenly looked at the police abstract produced as Pexhibit 5. I find that under the column for injured persons, the appellant's name *Samson Wafula Wanyonyi* appeared. Under the column titled "Names of witnesses, the appellants name does not appear but the name of *Samson Wafula* is listed. Contrary to the finding of the learned trial magistrate, I do not see any alteration on either of the names.
24. In view of the foregoing, I find that the learned trial magistrate erred in failing to properly evaluate the evidence before her which led her to arrive at an erroneous conclusion that the

appellant had not proved his claim against the respondent. The decision was against the weight of the evidence. The standard of proof in civil cases is on a balance of probabilities as opposed to proof beyond reasonable doubt required in criminal cases.

25. In this case, I have come to the conclusion that the evidence of PW1, PW2 and PW3 proved on a balance of probabilities that the appellant had been injured in the accident involving the respondent's vehicle on 22nd April, 2010. I consequently find merit in the appeal and I hereby allow it. I accordingly set aside the learned trial magistrate's finding dismissing the appellant suit with costs and substitute it with a finding that the appellant had proved his case to the required legal standard.

26. On quantum, the appellant indicated that he was satisfied with the proposed award of Kshs.80,000 which the learned trial magistrate indicated she would have awarded him had he proved his case. The proposed award was not contested by the respondent. The learned magistrate in arriving at the proposed award had considered the proposals and the authorities cited by the parties on the issue of quantum.

> I must point out at this point that the trial court did not make any award in this case. There is therefore no judgment on quantum of damages which this court can uphold as suggested by *Mr. Omondi*, learned counsel for the appellant. However, being the first appellate court and having allowed the appeal, nothing stops me from assessing the quantum of damages that would compensate the appellant for the injuries suffered after the accident.

27. That said, I do not find any serious problem with the award that was proposed by the learned trial magistrate except that she clearly failed to appreciate that the plaintiffs in the cases cited before her had suffered multiple soft tissue injuries which were more severe in nature compared to the minor superficial injuries suffered by the appellant which had started healing only after four days. In my view, considering the injuries sustained by the appellant and the authorities that were relied upon by the parties, I find that a sum of Kshs.60,000 would have adequately compensated the appellant for his pain and suffering. I therefore award the appellant a sum of Kshs.60, 000 in general damages. Special damages in the sum of Kshs.3, 200 was pleaded but only Kshs.3, 000 was specifically proved. The appellant is thus awarded Kshs.3, 000 as special damages.

28. In the end, the judgment of the lower court dismissing the appellants suit with costs is hereby set aside and in its place, judgment is entered for the appellant against the respondent in the total sum of Kshs.63,000 together with interest at court rates from the date of this judgment until full payment. The respondent will bear the costs of the suit at the lower court but each party shall bear his cost of the appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 20th day of April, 2016

In the presence of:

Mr. Omondi for the Appellant

Mr. Omboto holding brief for Miss Odhiambo for the Respondent

Naomi Chonde – Court Assistant