REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 99 OF 2010

BETWEEN

OMARI MOTORS GARAGE LTD …..…….. APPELLANT

AND

JOHN OCHIENG OTIENDE …………….. RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. Chepkwony, SPM dated 17th March 2010 at the Senior Principal Magistrates Court at Nyando in Civil Case No. 140 of 2007)

JUDGMENT

1. According to the plaint filed in the subordinate court, on 9th December 2006, the respondent was walking along the Ahero-Katito road when the appellant's driver drove Mercedes Benz lorry registration number KAR 629B negligently lost control and knocked the plaintiff who sustained severe injuries. Although the appellant admitted that the incident took place, it denied its driver knocked down the respondent or that the appellant was injured as alleged or at all and if he was injured, the claim was fraudulent. The appellant also claimed that if indeed the accident took place, then the respondent was the wholly or substantially to blame for the accident. The appellant also pleaded in the alternative that the accident took place as a result of a tyre burst which caused the vehicle to lose control to ram into some nearby kiosks.

2. After trial, the learned trial magistrate apportioned liability at 90:10 against the appellant and awarded Kshs. 150,000/- as special damages. The judgment precipitated this appeal and in its memorandum of appeal dated 4th June 2010, the appellant challenged the judgment on the following grounds;

> *1. The learned magistrate erred in fact and in law in failing to notice and in disregarding the evidence of DW 1 to the effect that there was no contact between the appellant's motor vehicle and the respondent and in failing to find that the respondent's injuries were self-inflicted and did not result from the mishap.*
>
> *2. The learned trial magistrate erred in fact and in law when she failed to return a finding that the accident to the appellant's vehicle, as a self-involving as it were, did not result in any injuries at all and in failing to hold that the respondent was the sole author of his alleged misfortune.*
>
> *3. The learned trial magistrate in the premises erred in fact and in law when he held that the appellant was 90% liable for the allegedly suffered by the respondent and in failing to hold that the respondent's case against the appellant was wholly made up and was not genuine.*

4. The learned trial magistrate erred in fact and in law when he awarded to the respondent against the appellant general damages in the sum of Kshs. 150,000/- which amount is grossly high, manifestly excessive, exaggerated as an award for the basically minor soft tissue injuries which had healed well leaving no level of disability and in doing so arrived at an erroneous estimate of the alleged damages suffered.

5. The learned trial magistrate in the circumstances decided the case against the weight of evidence led at the trial when she failed to dismiss the respondent's suit in the court below with costs.

3. At the hearing of the appeal, counsel for the appellant, Ms Ojwang reiterated the grounds of appeal and submitted that the entire evidence and erred in concluding that the appellant's driver was substantially liable for the accident. Counsel contended that DW 1 testified how the accident took place and that it was as a result of a tyre burst and in the circumstances, the respondent's suit should have been dismissed. Although the respondent's advocates were served with process, they did not attend court hence the matter proceeded in their absence.

4. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**. In order to carry out this task it is necessary to outline the facts emerging at the trial.

5. The respondent (PW 1) testified that on 9th December 2012 at around 10.00am, he was on the way to Katito from his home. He was waiting for a vehicle at the Ahero junction stage when a vehicle lost control and hit him. He stated that he was on the left side of the road towards Katito direction. He became unconscious and found himself in Ahero Sub-district hospital. In cross-examination, he stated that he did not see the accident take place but that he recalled that the vehicle was overspending along the Ahero - Awasi road before getting into the junction although he did not see the vehicle.

6. Dr Were Okombo (PW 2) testified that PW 1 visited his clinic on 14th December 2006. He examined PW 1, who had suffered cut wounds on the head, face, nose, right knee injuries and a left hip joint dislocation. On examination, he identified unhealed bruises on the head and left side of the chest and on the lower abdomen. He classified the injuries as soft tissue injuries. PC Timothy Mazingulu (PW 3), a traffic police officer stationed at Ahero Police Station, produced the police abstract which confirmed that an accident took place on the material date and it involved the respondent, two other pedestrians and the appellant's motor vehicle.

7. Andrew Nyamu Kalenya (DW 1) testified on behalf of the respondent. He recalled that on the material day he was driving the vehicle from Kisumu to Kisii and when he got to the Ahero junction, the vehicle front left tyre burst. He explained that the vehicle started pulling to one side of the road while he tried to control it but it rammed into a tree on the left side of the road facing Kisii from Ahero and stopped. He recalled that he saw people at the stage when he stopped about 25 – 30 metres away. He could not recall hitting anyone but when the vehicle hit the tree he saw people running some were on bicycles while some fell while trying to run for safety because they thought the vehicle would hit them. He was emphatic he did not hit anyone. He denied that he was driving at a high speed and that he did all he could to control the vehicle.

8. Whether the accident took place on the stated date, time and place was not in dispute. The learned magistrate appreciated that the findings hinged on the testimony of PW 1 and DW 1 as there was no other direct witness. Under **section 107** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** he who alleges the existence of a fact must prove it. Thus the burden of proof was on the respondent to prove how the accident in which he was injured occurred. In his plaint, he relied on the doctrine of *res ipsa loquitur* to establish the appellant's negligence. This doctrine was explained by ***Winfield and Jolowicz on Tort (11th Edition, S & M, 1979) at page 99*** as follows;

In order to discharge the burden of proof placed upon him, it is usually necessary for the plaintiff to prove specific acts or omissions on the part of the defendant which qualify as negligent conduct. Sometimes, however, the circumstances are such that the court will be prepared to draw an inference of negligence against the defendant without hearing detailed evidence of what he did or did not do.

9. Thus in the case of ***J.F.A. Ogol v Wilson Murumbu Murithi[1982-88] KAR 859*** where the plaintiff was hit at a pedestrian crossing, Nyarangi JA had this to say:

It is nevertheless clear from the reference to the principle of res ipsa loquitur in paragraph 4 of the plaint that the appellant intended to rely on the circumstances of the accident so as to shift the burden ….. Once it was proved that the appellant was hit while on the pedestrian crossing, an accident blameable on the respondent was disclosed. The burden of proof was then on the respondent to explain and demonstrate that the accident was not due to any fault of his …That is not to say that the respondent had to prove how and why the accident happened. It would suffice if he was able to show that he personally was not negligent even if the accident remained inexplicable.

10. PW 1 stated the he was standing at a bus stage and thereafter found himself unconscious having sustained injuries. PW 3 confirmed that an accident took place on that day and PW 1 was reported to be one of the pedestrians injured on that day. Thus the burden shifted to the appellant to show either that there was no negligence on its part which contributed to the accident, or that there was a probable cause of the accident which did not connote negligence on its part, or that the accident was due to circumstances not within the control of its driver (see ***Msuri Muhhddin v Nazzor bin Seif el Kassaby and Another* [1960] EA 201**).

11. Did the appellant displace the burden of proof on the balance of probabilities? DW 1 stated that the accident was the result of a tyre burst and he did all he could to control the vehicle causing him to hit a tree. DW 1 told the court that the tyres were still new and in good condition and that since he was turning a corner, he was not driving fast. The question this evidence begs is how would a new tyre burst if the lorry was moving slowly? Apart from the testimony of DW 1 there no other evidence of the condition of tyres for example the government vehicle examiners report or the condition of the road. There was absolutely no explanation as to the possible cause of the tyre burst which was consistent with the absence of negligence.

12. The appellant also disclaimed liability on the grounds that DW 1 did not hit anyone. DW 1 admitted that when the vehicle tyre burst with a loud bang, people started running, some were on bicycles and some fell and others collided with one another. The question is one of causation, that is, whether the respondent's injury a natural and probable consequence of the appellant's wrongful act? **As Lord Morris observed in *Hughes v Lord Advocate* [1963] 1 AII ER 705** ;

There can be no doubt in this case that the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were probable. It is sufficient if the accident is of the class that might well be anticipated as one of the reasonable and probable results of the wrongful acts….

Thus the fact the vehicle did not hit the respondent would not absolve the respondent of liability if he was injured in the melee resulting from the scare caused by the tyre burst and the oncoming vehicle.

13. The appellant alleged that the plaintiff's case was fraudulent. This allegation lacked any particulars and was not proved to the standard required of allegations of fraud. The plaintiff's documents were not challenged and nothing was suggested to PW 3 that the claim was fraudulent in nature.

14. The appellant, in paragraph 15 of its defence, stated that the accident that occurred on 9th December 2006 at Ahero-Katito, Kisumu-Kericho junction was, *"a self-involving accident occurred when the near*

side front tyre of the said vehicle ….. burst forcing the driver to lose control of the vehicle which went off the left side of the road and rammed onto some kiosks." DW 1 testified that he rammed into a tree. The appellant's evidence was inconsistent with and a departure from the pleadings and does nothing to absolve the appellant from liability.

15. Finally in considering this situation, I would only quote what the Court of Appeal stated in ***Simon Muchemi Atako & Another v Gordon Osare*** **NRB CA Civil Appeal No. 180 of 2005[2013]eKLR** where it observed in similar circumstances that;

> *In our view, the tyre burst was evidence adduced to show or from which it could be deduced that the respondent was driving at excessive speed, or without due care and attention so that, after the tyre had burst, he was unable to control the vehicle, which eventually overturned. If the respondent had not been driving at excessive speed, even with a tyre burst, he would have controlled the vehicle. There was sufficient evidence on record from which the court could draw the inference that the accident was caused by the negligent driving of the respondent.*

16. After evaluating the evidence, I am satisfied that the respondent proved his case on the balance of probabilities and that the appellant failed to discharge it burden to show that the accident was fortuitous. Since the respondent did not cross-appeal against the apportionment, I affirm the learned magistrates finding on liability.

17. Counsel for the appellant in urging the appeal submitted that the award of Kshs. 150,000/- was inordinately high in light of the soft tissue injuries sustained by the respondent. The general principal upon which this Court, as an appellate court, will interfere with an award of damages was stated in ***Bashir Ahmed Butt v Uwais Ahmed Khan*** **[1982-88] KAR 5** as follows;

> *An appellate court will not disturb an award of damages unless 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 ….*

18. In the subordinate court, the respondent suggested that Kshs. 250,000/- was adequate. He relied on ***Nancy Nyambura Irungu & 3 Others v Michael Njoroge*** **NRB HCCC No. 4303 of 1989 (UR)** and ***Fanny Esilako v Dorothy Muchene*** **NRB HCCC No. 642 of 1991 (UR)** where the plaintiffs were awarded Kshs. 150,000/- for suffering multiple soft tissue injuries. The appellant recommended Kshs. 50,000/- based on ***Peter Thiongó Mbai v Karen Mbugua*** **NRB HCCC No. 485 of 1986 (UR)** and ***Nicholas Kobia Kanampiu v Overseas Company*** **NRB HCCC No. 5832 of 1990 (UR)** where the plaintiffs were awarded Kshs. 16,000/- in the former case and Kshs. 10,000/- in the latter case. In this case PW 2 accepted that the respondent's soft tissue injuries would have healed without any disability. Considering the decisions cited, the nature of injuries and the rate of inflation, I am of the view that the sum of Kshs. 250,000/- was excessive in the circumstances. I therefore award **Kshs. 100,000/-.**

19. In the result appeal is allowed to the extent that award of general damages in the subordinate court is substituted with a judgment in favour of the respondent for the sum of **Kshs. 90,000/-** being Kshs. 100,000/- less 10% contribution with costs thereon. The sum shall accrue interest from the date of the judgment in the subordinate court.

19. Since the appellant succeeded on the issue of quantum, it shall have half the costs of the appeal.

DATED and **DELIVERED** at **KISUMU** this **11th day of August 2016.**

D.S. MAJANJA

<u>JUDGE</u>

Ms Ojwang instructed by Okong'o, Wandago Company Advocates for the appellant.

Odhiambo Ouma and Company Advocates for the respondent.