



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL APPEAL NO. 72 OF 2013.

CROWN BUS SERVICES LTD :::::::::::::::::::::::::::::::::::APPELLANT.

VERSUS

GEOFFREY MUKOTO AWEKI ::::::::::::::::::::::::::::::::::: RESPONDENT.

J U D G M E N T.

1. The respondent filed plaint dated 25th July, 2012 in PM's Court Vihiga in CC No. 69 of 2012 seeking special damages Ksh. 54,523/= General damages, costs and interest.
2. Along with plaint, the plaintiff/respondent lodged bundle of documents containing verifying affidavit, witness statements, list of witnesses, list and bundle of documents to be relied on. He further lodged a supplementary list of documents on 26th November, 2012. All above was in line with the provisions of Order 11 of the CPR 2010.
3. The defendant filed Memo of Appearance, Statement of Defence together with lists of witnesses and documents all dated 13th August, 2012. The defendant denied the plaintiff's claim.
4. The case was set down for hearing on 23rd January, 2013 when plaintiff testified and was cross examined by the defence.

PLAINTIFF'S CASE

5. The plaintiff's case was that he was a fare paying passenger of defendant Motor vehicle KBJ 941 R Travelling from Nairobi to Kakamega. He was allocated a seat with defective seatbelt and thus when the motor vehicle hit a bump due to negligence driving he was thrown in front seat and as a result sustained fractured ribs. He blamed appellant driver for the accident.
6. The defendant did not call any evidence to rebut the circumstances leading to the occasioning of the accident nor the injuries inflicted and the expenses incurred in the medical treatment.
7. The plaintiff relied on his bundle of documents without the defendant objecting to the same reliance on admissibility. There was no challenge as to the status of the documents contained in the bundle; nor indications as to the need of the calling of the maker for cross examination or to produce the same.
8. After closure of the plaintiff' case, the defendant opted to close case without calling a witness. The parties agreed to put submissions which they did and exchanged.
9. After analyzing the evidence and parties submissions, the trial magistrate rendered the verdict awarding

plaintiff Ksh. 263,618.40 for general and special damages. The appellant being aggrieved by the said decision lodged an appeal via a memo dated 3rd July, 2013.

10. The memo raised 5 grounds but compressed into 3 major grounds as set out in appellant's submissions namely:-

(i) The court relied on document which were not produced in court as exhibits;

(ii) The Court awarded special damages in respect of expenses not personally incurred by the respondent;

(iii) The Court awarded General damages which were inordinately high.

11. This being the 1st appeal, the duty of the court is to evaluate and review the evidence adduced to enable court reach a conclusion whether the trial court was justified and erred in arriving at a decision it made.

12. The court will only rely on that evidence on record as it is, and will not in any way interfere with it.

13. The court also will not ordinarily interfere with the judgment of the trial court unless the findings are based on no evidence or on a misapprehension of the evidence or, the trial court acted on wrong principles in reaching its findings see **Mwangi vs. Wambugu [1984] KLR 453.**

14. The appellant in the submissions faults the trial court for relying on documents which were not produced in their original form and referring same omission as a mere technicality. He submits that the absence of production for the documents to support plaintiff's claim there could be no award on damages on the alleged injuries.

15. The appellant relies on section 12 of Evidence Act Cap 80 which stipulates that:-

“In suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.”

16. He also relies on Section 67 of the same Act which is to the effect that:-

“Documents must be proved by primary evidence except in cases herein after mentioned.”

17. Further the appellant contends that, documents were not certified as true copies of the originals in terms of Section 35 (2) of Cap 80 Laws of Kenya. The appellant submits that the fact that it never raised an objection to the documents did not Ipso Facto serve as an admission of the same. He relied on the case of **MUSA & ANOTHER VS. MAILANYI & ANOTHER C.A. 243/98.** Also **NKU HCC 50/98 MWANGI VS. WOODVENTURE LTD & OTHERS.**

18. Further the appellant submitted that the admission of the same documents was erroneous as same was not in conformity with order 14 Rules (1) and (2) of the CPR 2010 in that they were not marked for identification nor produced by their makers. Further the appellant argued that, the special damages were not proved.

19. The receipts relied on were copies filed in the court in the bundles of documents. They were not certified as true copies of the originals. Further out of Ksh. 54,523/= pleaded, Ksh. 43,738/= was admitted by the plaintiff to have been settled by the insurance thus not personally incurred by him.

20. Finally the appellant submitted that, the general damages awarded were excessive and would only have been justifiable had respondent proved his case within the standard of prove required of him. It is submitted that, on the award of damages, the appellant had relied on case of **ELD HCC 85/02 Eastern Produce Ltd vs. Ngetich** of similar injuries to the instant case where an award of Ksh. 150,000/= was

rendered yet the trial court awarded double the amount Ksh. 300,000/=. The appellant thus seeks the court to allow the appeal with costs.

21. In rejoinder, the respondent opposed appeal. The respondent submits that the appellant's submissions are misleading. During the hearing as demonstrated by the record, the plaintiff testified and relied on the documents filed a long side with the plaint. The appellant via its advocate cross examined the plaintiff on his testimony.

22. He submits that reliance with documents during the hearing amounted to production of the bundle of the documents. Unlike a pre-2010 CPR Procedure where during trial exhibits were produced document by document.

23. The new legal and constitutional dispensation under CPR 2010 and 2010 Constitution, emphasis is pegged on overriding objective which is to facilitate just, expeditious, proportional and affordable resolution of civil disputes see **S1A & 1B CPA 2010 Cap 21**. The aforesaid is in tune with Article 159 in that court's authority is to be exercised without undue regard to procedural technicalities.

24. The respondent submits that, the appellant did not call evidence to negate plaintiff's case nor oppose the production or reliance of the plaintiff's documents. He relied on the case of **Timsales Ltd. Vs. Ndungu C.A. 102/05**. He agrees with the trial court which overruled appellant submissions on raising mere technicalities. Further the belated citing of section 35, 65 (1) and 67 of Cap 80 which precede the CPA and CPR 2010 on the same breath the cited authorities were pre-2010 Constitution which has changed the mode of litigation by laying much emphasis on substantial justice not technicalities.

25. On award of special damages proved the respondent submit that the amount was pleaded and specific receipts were filed and relied on during trial.

26. On settlement of Ksh. 43,738/= by the insurance, the respondent submit that the expenses was incurred by the respondent not the insurance. On General damages, the respondent submit that the appellant cited **SHAMALLA VS. KAREGA BUS SERVICE HCC 2048/1994** where court awarded Ksh. 150,000/= on similar injuries however the case is very old and new trends as well a inflation/value of money has affected the financial circumstances of quantum awardable. The respondent thus prayed for the dismissal of the appeal with costs.

27. After review and evaluating the evidence on record and the parties submissions, the court makes its findings hereunder.

28. On the first ground that the original documents were not produced as documents, the court takes judicial notice that in advent of the new legal and Constitutional dispensation ushered in by CPA and CPR 2010 and the Constitution of Kenya, 2010, the emphasis was to expedite settlement of dispute in fair and affordable mode without being held into Bondage of Legal technicalities.

29. The provisions of the CPA opened up a practice of filing of pleadings together with all bundles of documents of which a set is served on the other side to enable the other side to decide on what to object to or to indicate the need for the maker to be called.

30. The process of pretrial conference and question are were and are intended to shorten the process of the trial so that once matter is set down for hearing issues of objection to the productions of the documents and calling of the maker will have been thrashed out.

31. In the instant case the plaintiff filed medical reports, receipts, police abstract, inter alia. The documents though in form of copies were served upon the defendant.

32. There is no evidence or even allegations that the defendant ever questioned the same documents upon service, during pre-trial conference or even during the trial. The same were relied on by the plaintiff without any objection by the defence.

33. The appellant is thus estopped by its inaction from raising the same issues during submissions when it let the same be produced without a query. I agree with the trial magistrate that the technicality being raised could not and is not valid. It is an afterthought and totally unjustified.

34. The provisions of Article 10 (2) (b) of the Constitution enjoin the court when applying or interpreting the law to be guided by the national values and principles of governance of justice and equity *inter alia*.

35. It is unjust for the appellant to raise the technicalities in submissions after passing all the stages it could have raised the objections. The court thus rejects the same submissions and the grounds covered by same submissions.

36. In any event the provisions cited and authorities relied on are to be read with alterations, adaptations, modifications to be in conformity with Constitution 2010 as provided by Schedule 6 Rule 7. This is because they preceded The Constitution 2010.

37. The same holding covers the issue on produced receipts. The same were not objected to during the trial and thus cannot be faulted at post trial stage. The marking and identifying the exhibits is an exercise for convenience.

38. In the instant matter, the bundle had been numbered and paged documents and is easy to locate the documents relied on. Failure to specifically marked as exhibit of every document and receipt is a technicality which does not go to the root of the case. It cannot defeat substantial justice see Art. 159 (2) (c).

39. On the settlement of Ksh. 43,738/= by the insurance, the court finds merit in that argument. The special damages are amount specifically expended by the claimant. In this case the amount was expended by the insurance.

40. Nowhere has it been shown that the insurance has sought to recover the same from the plaintiff. The court therefore allows the same to be deducted from the amount awarded in the special damages. On quantum, the court notes that the cited case of **KAREGA BUS SERVICE** supra was determined way back in 1994. The instant case was determined in 2013; 19 years apart.

41. The award of Ksh. 300,000/= was a reflection of loss of money value due to inflation which court can take judicial notice of. There was no element of prove that the same was inordinately high as alleged by the appellant.

42. In the premise the court makes the following orders.

(1) The liability is upheld as per trial court judgment;

(2) The special damages are reduced by Ksh. 43,738/= i.e.

Ksh. 54,523/=

- Ksh. 43,738/=

Ksh. 10,785/=

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(3) The award of general damages is upheld;

(4) The appellant is to get 10% of the appeal costs.

Orders accordingly

SIGNED, DATED and DELIVERED at KAKAMEGA this 12TH day of OCTOBER,2016.

C. KARIUKI.

JUDGE.

In the presence of:-

..... **for the Appellant.**

..... **for the Respondent.**

..... **Court Assistant.**