REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO 130 OF 2009

NDOLO INVESTMENTS LTD..APPELLANT
-VS-
SURRINDER K. PATTER ....RESPONDENT

J U D G M E N T

1. By a plaint dated 3/6/2004, the plaintiff sued the defendant in the High Court, Eldoret seeking general and special damages arising out of a road traffic accident said to have occurred on the 4/6/2001 at a parking lot at SAPHIRE HOTEL MOMBASA. In the plaint the plaintiff alleged and particularised the 2nd defendants negligence, as an employee of the 1st defendant, alleged to have been engaged in the course and within the scope of his employment with the said 1st defendant. In the plaint, the plaintiff pleaded particles of negligence, particulars of injuries as well as the particulars of special damages in the sum of Kshs.303,975/-.

2. Upon service the service of the plaint upon them, the defendants filed a joint statement of defence in which the description of parties as given by the plaintiff was admitted by the defendant but the employment of the 2nd defendant by the 1st defendant was denied as well as occurrence of the accident, the particulars of injuries, negligence as well as injuries were all denied but an alternative pleading was advanced that if any accident ever occurred then it was wholly caused or substantially contributed to by the negligence on the part of the plaintiff. Particulars of negligence were then pleaded with an addition that the suit was poorly pleaded and incurably defective and that the suit ought to have been filed in the first place at Mombasa and not Eldoret.

3. When the matter came up and was placed before **Gacheche J** on the 11/1/2006, maybe by way of call-over, the same was ordered transferred to the Chief Magistrates Court Mombasa. Pursuant to the order of transfer the matter was placed before L. Mutende Ag. SPM who took evidence from three (3) witnesses on behalf of the plaintiff with the defendant opting not to call a witness.

4. It is therefore accurate to say that as much as the defendant filed a defence that blamed the plaintiff for the causation of the accident no evidence was led on its behalf to support and prove the pleadings. Therefore the evidence at the trial before the trial court must be seen to have been grounded upon the evidence adduced on behalf of the plaintiff only.

5. In her reserved judgement the trial court found the defendant, now Appellant, to have been 100% liable for the accident and assessed general damages at Kshs.1,000,000/- and special damages of Kshs.196,275/-

plus costs and interests thereon. It is that judgement dated 22/6/2009 which has provoked this appeal. The appellant has impugned the judgement on a total of 11 grounds as enumerated in the memorandum of appeal dated 20/7/2009.

The memorandum of Appeal reads:-

> **1. The learned Senior Principal Magistrate erred both in law and fact by finding that the plaintiff was knocked down while off the road at the parking lot.**
>
> **2. The learned Senior Principal Magistrate erred in law and fact while arriving on the judgement on liability by failing to take to account the evidence of the police officer at all.**
>
> **3. The learned Senior Principal Magistrate erred in law and fact by failing to take to account the point of impact as clearly shown on the sketch plan in the police file provided as an exhibit.**
>
> **4. The learned Senior Principal Magistrate erred in law by holding the Appellant vicariously liable.**
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> **5. The learned Senior Principal Magistrate erred in law and fact by finding the Appellant 100% to blame for the accident.**
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> **6. The learned Senior Principal Magistrate erred in law and fact by failing to consider the position of the Respondent's motor vehicle vis a vis the plaintiff.**
>
> **7. The learned Senior Principal Magistrate erred both in law and fact by assessing general damages at Kshs.1,000,000/-.**
>
> **8. The learned Senior Principal Magistrate erred in law by failing to take to full account the submissions of the defence both on liability and quantum of damages thus finding in favour of the Respondent herein.**
>
> **9. The learned Senior Principal Magistrate erred in law and face by failing to consider the awards in decisions made by the High Court for comparable injuries thus gave a very high award.**
>
> **10. The learned Senior Principal Magistrate erred in law and fact by failing to consider that the plaintiff had failed to prove the alleged injury to the clavicle.**
>
> **11. In the circumstances of the matter, the findings of the learned Senior Principal Magistrate are unsupportable by the evidence adduced on the submissions made or by the law.**

6. This being a first appeal my mandate is well cut and settled. I must reassess and reappraise the entire evidence with a view to coming to my own conclusions. In discharging that mandate I warn and remind myself that I do not enjoy the advantage the trial court enjoyed in observing and hearing the witnesses testify. I will equally keep in my mind that this court is not at liberty to reserve the trial court's findings grounded on discretion lightly neither can it interfere with findings of facts unless the same are based on no evidence or short of that the same is a pervasion of the evidence as presented at trial and thus have resulted on an injustice.

<u>Analysis of evidence</u>

7. Of the 3 witnesses who testified only PW 1 and PW 2 were eye witnesses. PW 3 was a police officer and was, in my reading of the record, called purely to produce the police records of the accident as investigating officer had been transferred from, Central police station Mombasa to Isiolo. The gist of his evidence in chief and the cross examination is that the driver was never charged and that the initial report

and the investigations officers comments on the file were to the effect that the plaintiff was knocked as she crossed the road from the left to the right to join the others. To this court the evidence of PW 3 was governed by the provisions of section 147 of the Evidence Act to effect that having been called to produce the police file, he was not liable to cross examination on the authenticity of the contents thereof. This court will thus take the evidence of PW 3 as that of a person called to produce the records of the police on the accident and that it only proved the occurrence of the accident and the persons involved. His evidence to this court, not being evidence of an eye witness cannot be taken to prove how the accident occurred. He was not a witness to the accident.

8. PW 1, the plaintiff, gave evidence that on the material day she was standing at a parking lot next to their vehicle when she was knocked by a motor vehicle KAH 480J and thrown on the side of the road. That the vehicle stopped after hitting her and being unable to stand up, an ambulance was called which took her to hospital at Pandya Memorial Hospital where her thigh was operated upon before seeking further treatment and medical procedures in Nairobi and Eldoret. She blamed the driver of the motor vehicle for causing the accident by hitting her at the parking which was separated from the road by a pavement. She then produced a receipt for Kshs.192,850/- and a search certificate from the Registrar of motor vehicles to show that the motor vehicle was owned by the 1st defendant. She marked for identification police abstract and P3 form both of which were later produced as part of the police file.

9. In cross examination the witness denied attempting to cross the road but that she was knocked while at the parking and preparing to open the back left door. She stressed the fact that having been at the parking, off the road, she did not expect a motor vehicle to hit her there and that she felt safe standing there. She then added that having been taken to Pandya hospital on the 4/6/2001 she was discharged on 14/6/2016.

10. PW 2 was the spouse to the plaintiff and largely reiterated the evidence by PW 1 on how the accident occurred and where it did occur. He went a step further and stated that the pavement that separated the parking from the road was 9 inch from the road. In cross examination he denied any blame on the plaintiff for the accident as there existed a pavement which forms an island between the road and the parking.

11. After the testimony of the three witnesses, parties agreed to produce two medical reports on the plaintiff by consent. The medical reports were produces as follows:-

i) By Dr. Ronald F Kaale Exhibit 5

ii) By Dr. Vladimier Exhibit D1.

12. The summary of the entire evidence led at trial was that the accident indeed occurred at a parking lot separated from the road by a pavement. On injuries sustained, the two medical reports produced by consent agree that the plaintiff suffered fracture of the right femur, and sublavetion of the right clavide, bruises on the right elbow and thigh. Dr. Vladimir is however more explicit that due to long use of walking stick the plaintiff had developed reactive oestrothritis of knee joint and lower lumber spine, there was untreated old dislocation of the steinoclavicular joint which is painful and that the permanent disability was assessed at 5%.

13. Having taken that evidence into account the trial court made a determination on liability and said:-

> **"The alleged contributory negligence of the plaintiff was not supported by any evidence. The 2nd defendant having failed to control the vehicle, veered off the road and hit the plaintiff who was off the road at a parking lot is evidence of some fault on his part he was negligent . The 2nd defendant (sic 1st) is hence vicariously liable for the action of the 2nd defendant. There is no evidence whatsoever that the 2nd defendant did use any skill to avoid causing the accident. He is hence 100% liable for the accident".**

14. I hear the trial court to say that the evidence given in court which was never controverted by the defendant was that the accident occurred at parking. Indeed vehicles are expected to be driven on the road and even when driven into parking lots should be so driven with care and due outlook to other peoples being or likely to be on such road or parking.

15. The Appellant's case as pleaded was that the accident occurred while the Respondent was attempting to cross the road. However, no iota of evidence was led to support that pleading. As it were, pleadings are basically allegations of facts which albeit form the basis of a party's position in a litigation must be proved by evidence.

16. Having been given a chance to prove his defence the Appellant opted not to lead any evidence. In those circumstances, and the evidence by the PW 1 and PW 2 having been found by the trial court as unchallenged and the onus of the Respondent having been to the extent of balance of probabilities, I find as the trial court did that the Appellant was to blame wholly for the accident I therefore, have no basis to interfere with the courts finding that the 2nd Appellant was 100% to blame for which negligent the 1st Appellant was vicariously liable. This finding disposes the grounds 1, 4 & 5 of the Memorandum of Appeal.

17. There are however grounds 2,3 & 6 which fault the trial court for failure to consider the evidence of PW 3 and facts contained in the police file and disclosed by the sketch plans and finding to show the point of impact as well as the position of the vehicle belonging to the Respondent. On those grounds, I find that the evidence of PW 3 was never the evidence of an eye witness. That witness as said before was called to produce the police records and not as a witness. His evidence could therefore not controvert the evidence of the eye witness. Equally the evidence of drawing of the scene in the sketch plan was equally evidence by the person who visited the scene after the event and was at best evidence of opinion. However even if taken as it was presented in court, the witness said at page 19 of the record that it was not possible to determine the point of impact. There was only the initial report which said that the pedestrian was crossing the road from left to right. However, it was in evidence that it was not shown who made that initial report. To this court that is not the type or quality of evidence that could be treated to have controverted or rebutted the otherwise cogant evidence by PW 1 and PW 2. In the end, I find no merits on those grounds which I equally dismiss.

18. That leave the court with grounds on assessment of damages at grounds 7, 8 ,9 ,10 & 11. It is not in doubt that assessment of damages is an exercise in discretion and an appellate court will not interfere unless it be demonstrated that the trial court erred by failure to apply the due principles or took into account irrelevant facts or failed to take into account relevant factors with a consequence that an injustice has been occasioned.

19. In this matter, both medical reports agreed on the injuries the plaintiff suffered. Infact the medical report produced by the Appellant even gave the degree of permanent disability at 51%. The trial court was expected in law to take into account the injuries pleaded and proved and to apply his judicial mind in assessing damages while being guided by binding decisions cited to him. Indeed the trial court did consider the injuries and the decision cited to the court and said:-

> **"Looking at the injuries sustained, they were of a serious nature. The plaintiff had to undergo operations and had to use the aid of walking frame. Taking into consideration the time that has elapsed since the decided case were decided, I find a sum of Kshs.1,000,000/- being sufficient…."**

20. The trial court was asked to be guided by the decisions in:-

> **i) SALIMA RASHID –VS- OBUYA EXPRESS where for imparable injuries the plaintiff was awarded Kshs.350,000/- in the year 2000.**
>
> **ii) Rosemary Bulinda –vs- Peter Kinyanjui Gakumu in which the court awarded Kshs.650,000/- for equally comparable injuries in the year 2003.**

iii) Nur Ahmed Yussuf –vs- Fredrick Kimani & Another where the court awarded Kshs.600,000/- 10th the year 2001.

I have taken time to read those decisions and I am of the view that they were duly taken into account.

21. My reading of the judgement appealed against records no error to justify my interference by that award. To me the finding by the court as disclosed in the above excerpts were in consonance with the law. I therefore find no merit in the entire appeal and I dismiss it with costs to the Respondent.

Dated and delivered at Mombasa this **21st** day of **November 2016**.

HON. P.J.O. OTIENO

JUDGE

21/11/2016