



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL APPEAL NO. 19 OF 2011.

NICHOLAS TARUS KIBET ::::::::::::::: APPELLANT.

VERSUS

TEKMAN CO. LTD. ::::::::::::::: RESPONDENT.

J U D G M E N T.

1. This appeal arises from the decision of the Principal Magistrate in Kitale SPMCC No. 81 of 2009, in which the appellant, **Nicholas Tarus Kibet**, had sued the respondent, **Tekman Co. Ltd**, for damages and loss arising from a road traffic accident which occurred on 18th May, 2007, along the Kanyarkwat Farm Suam road involving a motor vehicle Reg. No. KAN 567 J Mercedes Benz lorry belonging to the respondent and which was at the material time being driven by its driver, agent, servant or employee and in which the appellant was a lawful passenger.
2. The appellant suffered bodily injuries as a result of the accident and filed the present suit claiming general and special damages against the respondent together with costs of the suit and interest. He averred that the motor vehicle aforementioned was so negligently, recklessly and carelessly driven by the respondent's driver such that it caused the accident thereby occasioning injuries to him. The respondent denied the claim and averred that the material vehicle was not its property neither did the accident occurred nor caused by its negligence. It's contention was that if any accident occurred, then it was wholly caused or contributed to by the appellant's negligence.
3. After a full trial of the case, the learned principal Magistrate found for the respondent and dismissed the appellant's case with costs. In so doing, the Learned Principal Magistrate found for the respondent and dismissed the appellant's case with costs. In so doing, Learned Principal Magistrate made findings to the effect that negligence was not proved against the respondent neither was the respondent's ownership of the material vehicle. Further, vicarious liability against the respondent was never established by the appellant. In sum, the trial court held that liability against the respondent was not established for an award of damages to the appellant. However, the court noted that had liability been established, the appellant would have been awarded a sum of Ksh. 300,000/= general damages for pain, suffering and loss of amenities.
4. Being dissatisfied with the decision of the trial court, the appellant preferred this appeal on the basis of the grounds contained in the memorandum of appeal filed herein on 5th April, 2011. these were argued by way of written submissions filed by the appellant on 5th November, 2014 through the firm of **Omondi & Company Advocates**.

The respondent opposed the appeal and filed its written submissions in that regard on 9th December, 2014, through the firm of **Kiarie & Co. Advocates**.

5. Having considered the appeal in the light of the rival submissions, it was this court's duty to re-

visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, this court considered the evidence adduced by the appellant and his witnesses viz; **Dr. Samwel Aluda (PW2)** and **Cpl. Isaac Situma (PW3)**. Also considered was the respondent's evidence through its transport officer, **Festus Njoroge Mwangi (DW1)**.

6. From the pleadings and the evidence, the issues arising for determination were firstly, whether the accident was caused by the respondent's through the negligent acts or omissions of its driver and secondly, whether the appellant was entitled to damages from the respondent and to what extent.

Grounds one (1) to five (5) of the appeal are essentially on the aspect of liability while ground six (6) touches on quantum of damages.

7. With regard to liability, the occurrence of the accident and the respondent's ownership of the ill-fated vehicle were factors which were not substantially disputed or disproved by the respondent.

The police abstract (P. Exh. 2) dated 28th November, 2008, was sufficient enough to establish the respondent's ownership of the vehicle as compared to the record of motor vehicle from the Registrar of motor vehicles (D. Exh. 1 (a)) which showed that ownership of the vehicle changed to a firm known as New Rafiki Machinery & Motor Sales as from the 27th September, 2010, long after the occurrence of the accident on 18th May, 2007. The record does not show ownership as at the time of the accident. The vehicle could have changed hands severally between the date of the accident and the 27th September, 2010, when the record was issued.

8. The police abstract (P. Exh. 2) was thus the better option in establishing ownership of the vehicle as at the time of the accident. It was therefore an error for the learned trial magistrate to find that ownership of the vehicle was not proved against the respondent by the available documentary evidence.

On negligence, there was uncontroverted evidence from the appellant (**PW2**) that he was a passenger in the vehicle at the time of the accident and that it was being driven carelessly when it overturned thereby causing him to suffer injuries.

9. The vehicle could not have overturned unless its driver was negligent and/or reckless in the manner of driving. The appellant, being a passenger without any control of the vehicle, could not have contributed to the accident in any way., His alleged contribution as per the respondent's statement of defence was not established whatsoever.

The finding by the learned trial magistrate that negligence was not proved vicariously against the respondent was wrong and against the weight of the evidence.

10. The question of liability should clearly have been determined in favour of the appellant by the trial court on the basis of the cogent evidence by the appellant in support thereof.

It is thus the finding of this court that the respondent was by the negligent acts and/or omissions of its driver fully, liable for the loss and damages occasioned to the appellant as a result of the material accident. The appellant was therefore entitled to both general and special damages from the respondent and in that regard, he produced a medical report and a police abstract establishing claimed special damages in the sum of Ksh. 1,700/=.

11. As for general damages, the medical report by Dr. Aluda (PW2), indicated that the appellant suffered traumatic "amputation of the right thumb, right middle finger and right ring finger. These were said to be severe injuries from which the appellant recovered with occasional pains in the affected areas and permanent scars. Disability of the right hand was expected.

The learned trial magistrate guided by one of the authorities cited by the parties was of the view that such injuries would attract a sum of Ksh. 300,000/=.

12. In this court's opinion that amount of Ksh. 300,000/= was reasonable and would suffice as adequate compensation in terms of general damages for pain, suffering and loss of amenities.

In the upshot, this appeal succeeds to the extent that the judgment of the lower court be and is hereby quashed, set aside and replaced with a judgment in favour of the appellant in total sum of Ksh. 301,700/= together with costs and interest.

The appellant is entitled to the costs of the appeal and the costs in the lower court.

13. In conclusion, the court did consider the submissions by the respondent that the appeal was incompetent for want of a certified decree but found that the argument cannot stand as it hinges on procedural technicality rather than substance, whereas, the Constitution of Kenya, 2010, behoves upon courts to administer justice without undue regard to procedural technicalities (see, Article 159 (2) (d) of the Constitution)

[Delivered and signed this 17th day of February, 2015.]

J.R. KARANJA.

JUDGE.