



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 415 OF 2006**

**COAST BROADWAY CO. LTD.....APPELLANT**

**VERSUS**

**ELIZABETH ALAKA ACHEBI.....RESPONDENT**

*(Appeal from the original judgment and decree of Hon. E.C. Cherono in Milimani Commercial Courts  
SPMCC No. 5535 of 2005 delivered on 26<sup>th</sup> May, 2006)*

**JUDGMENT**

1. The Respondent filed SPMCC No. 5535 of 2006 seeking recovery of damages from a road traffic accident alleged to have occurred on 11<sup>th</sup> December, 2004 along Mombasa-Nairobi road. It was the Respondent's case that on the material day she was on board motor vehicle registration number KAM 114Z ("**the vehicle**"). That the said motor vehicle which was driven carelessly by the Appellant's driver overturned as a result of which she sustained a fracture of the right shoulder and bruises on her right knee. She attributed negligence to the Appellant's driver.
2. The Appellant in its statement of defence denied the Respondent's claim, particularly, ownership of the motor vehicle, negligence and the damages alleged to have been suffered by the Respondent.
3. At the trial, Dr. Washington Wokabi (PW1) confirmed the Respondent's injuries as stated in the Plea. He stated that in examining the Respondent he relied on x-rays and treatment documents of the Respondent. He stated that for the dislocation, the Respondent was treated by reduction of the shoulder and the wounds were dressed. That when he examined the Respondent three (3) months later, she complained of pain on the shoulder and inability to use her limb for domestic chores. He stated that the Respondent was unable to alleviate her arm above her head. His opinion was that such pain may persist for a long time and sometime permanently. He stated that the Respondent's use of her limb was going to be affected to a great extent. He placed the disability at 18%. He produced a medical report dated 14<sup>th</sup> February, 2005, a summary and receipt for KShs. 7,000/= as P. Exhibit 1(a),(b) and (c).
4. The Respondent (PW2), produced a certificate of search (P. Exhibit 2) in proof of ownership of the vehicle. It was her testimony that the vehicle was driven at a high speed yet the condition of the road was bad. That on reaching between Sultan Hamud and Emali, the vehicle rolled severally. She was taken to Emali for treatment and she received subsequent treatment in Kakamega in a private clinic by the name Lady Tharau Hospital. She stated that she reported the matter to Sultan Hamud Police Station where she was issued with a P3 Form and Police Abstract at KShs. 200/=. A receipt thereof was produced as P. Exhibit 3 and 4. It was the Respondent's testimony that she incurred treatment cost of KShs. 30,826/= at Lady Tharau Hospital wherein she had paid a deposit of KShs. 3,500/=. She specifically stated that the money was paid by her husband's employer and produced an invoice thereto as P. Exhibit 6. She

lamented that she had not fully recovered from the injuries.

5. Dr. R.P. Shah (DW1) testified that he examined the Respondent on 14<sup>th</sup> September, 2005. He stated that from the Respondent's x-rays, there was no indication that she had sustained a fracture neither was there a dislocation. He however confirmed that if there was a dislocation which was reduced, then such dislocation would not be shown in an x-ray. He stated that while Dr. Wokabi talked of a dislocation of the shoulder, the discharge summary indicated dislocation of acromi-clavicular joint which is smaller and much less important. He stated that he ordered for an x-ray film on the date of examination; that if there was dislocation of acromi-clavicular joint, it could show unless it had been replaced by an open operation. On cross-examination, DW1 admitted that there are fractures that are too small that one can easily miss to detect. He further admitted that an x-ray taken six months after an accident or rather a fracture is of a poor quality. While so admitting, he stated that he had ordered for an x-ray to be done on the Respondent a year after the accident.

6. The trial court heard the matter and found the Appellant 100% liable and awarded the Respondent Kshs. 300,000/= as general damages and Kshs. 2,200/= as special damages.

7. Aggrieved by the said judgement the Appellant filed this appeal on the following grounds:-

***i. THAT the learned trial magistrate erred in law and in fact in holding the appellant fully liable in the absence of any specific pleading and evidence that it was the owner of the accident vehicle as at the time of the occurrence of the accident forming the Respondent's cause of action.***

***ii. THAT the learned trial magistrate erred in law and in fact in holding the appellant fully liable in the absence of any evidence that the accident motor vehicle was under its control or that of its agents.***

***iii. THAT the learned trial magistrate erred in law and in fact by misapplying the law of evidence while evaluating the evidence relevant to issue of negligence adduced during trial thus arriving at the conclusion that the appellant was liable.***

***iv. THAT the learned trial magistrate erred in law and in fact in failing to consider that the respondent had proved injuries that had not been pleaded in her pleadings and as such the claim for compensation in general damages for pain, suffering and loss of amenities should have been rejected since a litigant cannot in law depart from his pleadings by proving what has not been pleaded without first seeking to amend his pleadings.***

***v. THAT in the alternative, the learned trial magistrate erred in law and in fact in failing to consider or have sufficient regard to the medical evidence tendered during trial as to the injuries sustained by the Respondent thus awarding kshs.300,000 in general damages which represents an entirely erroneous estimate.***

***vi. THAT in the further alternative, the learned trial magistrate erred in law and in fact in failing to consider or have sufficient regard to the submissions filed on behalf of the appellant on the issue of liability as well as the judicial authorities cited on the issue of quantum of general damages thus awarding kshs.300,000 which is manifestly excessive.***

***vii. THAT the learned trial magistrate erred in law in awarding special damages at kshs.2,200 which the same had not been specifically pleaded.***

8. The Appellant contended that evidence as to ownership of the vehicle differed. It was stated that the Police Abstract produced indicated that the owner of the vehicle was Coast Bus while the copy of record from the Registrar of Motor Vehicles showed the owner to be Coast Broadway Co. Ltd. (copy of record as at June 3, 2005). The Appellant therefore thereby submitted that negligence was not sufficiently proved.

9. On quantum, it was argued that the veracity of the contents in the medical report by Dr. Wakabi was doubtful. Further that the Plaintiff was bound by her pleadings. That having pleaded that she had a fracture, she could not depart from the claim and produce evidence that she had a dislocation and not a fracture.

10. It was further argued that the award by the trial court was excessive. Placing reliance on **Civil Appeal No. 48 of 2009 Timsales (K) Limited v. Wilson Makokha Murefu**, it was argued that the award to the Respondent did not reflect the correct estimate of the injuries she suffered.

11. The Respondent on the other hand submitted that the copy of record produced was conclusive evidence of ownership. She contended that the Appellant had failed to produce evidence to the contrary challenging that evidence. It was contended that the Respondent filed an amended plaint reflecting the Appellant as the owner of the vehicle; that the Appellant did not call any evidence to controvert her claim as to liability and the court cannot be called upon to fill that gap. As regards quantum, it was the Respondent's case that the medical reports were primary evidence as they were produced by their makers. Each of the doctors explained why certain injuries disappear due to healing and that there was no departure from the pleadings. The Respondent submitted on the award of damages that considering the 18% incapacity with future possibility of developing periathritis, the award ought to be enhanced to Kshs. 400,000/=. The Respondent cited **Jaldessa Diba t/a Dikus Transporters & Hussein Hassan v. Joseph Mbithi (2013) e KLR** and **Patrick Kinoti Miguna v. Peter Mburunga G. Muthamia (2014) eKLR**.

12. This being a first appeal, this court is under an obligation to re-evaluate the facts afresh and come to its own independent findings and conclusions as was observed in **Selle v. Associated Motor Boat Company & Others (1968) E.A. 123**.

13. The Respondent produced a copy of records which revealed that the Appellant was the registered owner of the motor vehicle. It is noteworthy that the Respondent amended its Plaint to the effect that the Appellant was the owner of the vehicle. It was incumbent upon the Appellant to prove that it was not the registered owner of the vehicle at the material time. Under Section 8 of the Traffic Act, Cap 403 Laws of Kenya, the Appellant is deemed to be the owner unless he proved the contrary. There was no contrary evidence that was tendered to rebut that evidence. Section 9 of the Traffic Act requires that the Appellant informs the Registrar of the change of ownership within 7 days. There was no proof that the motor vehicle had changed ownership and the Respondent's evidence as to the ownership of the motor vehicle remained unchallenged. Accordingly, I find, as did the lower court, that on a balance of probability the Respondent had proved that the Appellant was the owner of the vehicle at the material time and therefore vicariously liable to the Respondent for damages suffered.

14. On the issue of liability, the Respondent gave evidence on how the accident occurred. On the other hand, the Appellant's driver was not availed in court to explain what action he took to avoid the accident or to explain exactly what caused the accident and who was to blame for the same. Such failure has been discussed by this court in several occasions that in law when a party who has in his possession vital evidence chooses not to give that evidence, it is presumed that that evidence will be to his detriment if tendered. I am satisfied that the Respondent had established that the accident was occasioned by the sole responsibility of the appellant's driver. In the premises, the appeal on liability is refused.

15. On quantum, I have read the medical report by Dr. Wokabi (PW1), it indicates that the Respondent suffered a dislocation of the right shoulder joint. This is not in line with the allegation as to injuries in the Plaint. The Respondent was examined on 8<sup>th</sup> February, 2005 and the Plaint was filed on 24<sup>th</sup> May, 2005. Such is a discrepancy that ought to have been dealt with by way of an amendment. The question that arises is whether such a lapse negates the Respondent's claim as to injury. I do not think so. This court is under duty not to be quick in dispensing of claims on technicalities. Both the Appellant's and the Respondent's Doctors were of the opinion that the Respondent suffered a dislocation. I am of the view that dismissing the claim on damages on such account as that would not be in the interest of justice. Both Doctors agree that the Respondent suffered a dislocation and not a fracture as pleaded. The court also found that the Respondent suffered a dislocation and not a fracture and awarded her Kshs.300,000/= as damages. The court gave reasons why it agreed with Dr. Wokabi and not Dr. R.P Shah. The trial court

saw the two witnesses testify and I have no reason to disturb its finding.

16. The jurisdiction of this court on appeal on issues of quantum is very clear that it must be shown that in assessing damages the trial court took into account an irrelevant factor or that the amount awarded is so inordinately low or so inordinately high as to amount to an erroneous estimate of damages. See **Kemfrom Africa Ltd t/a Meru Express Services (1976) & Anor Vs Lubia & Anor 1978 KLR 3**. The Appellant has not met this threshold. I see no reason to disturb the trial court's judgment.

17. In the premises the appeal is without merit and the same is hereby dismissed with costs.

Dated, Signed and Delivered at Nairobi this 22<sup>nd</sup> day of May, 2015.

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**A. MABEYA**

**JUDGE**