



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 376 OF 2013

**(BEING AN APPEAL FROM THE DECREE OF THE SENIOR RESIDENT MAGISTRATE
(CHERUTO C. KIPKORIR) DATED 24TH JUNE, 2013 IN MILIMANI CMCC NO. 45891 OF 2008)**

MILTON L. MILIMU.....APPELLANT

V E R S U S

- 1. COAST BUS SAFARIS LTD**
- 2. COMMERCIAL TRANSPORTERS LIMITED.....RESPONDENT**

JUDGMENT

This is an appeal from the decree of the lower court passed on 24th June, 2013. By that decree the Appellant's (plaintiff's) suit was dismissed with costs. He had claimed general and special damages on account of injuries he had received in a motor accident. His suit was dismissed upon the ground that he did not prove to the required standard that he was a passenger in the 1st Respondent's (1st defendant) motor-vehicle at the time of the accident. The 2nd Respondent was joined in the suit as a 3rd Party.

The parties had entered into a consent on liability which was conditional upon him proving that he was a passenger in the accident motor-vehicle. The Appellant and third party were to shoulder 15% liability each while the 1st Respondent was to bear 70%.

To prove that he was indeed a passenger during the accident, the Appellant produced the ticket issued to him by the 1st Respondent while travelling (Exhibit 1). He also produced a police abstract (Exhibit 9(a)) which shows the particulars of vehicles involved in the accident and confirmed that the Appellant was a passenger aboard the motor-vehicle during the accident. The 1st Respondent (Defendant in lower court) never testified and did not call any witness.

There are eight grounds of appeal in the memorandum which can be paraphrased as follows:-

1. That the learned trial magistrate erred in finding that the plaintiff had not on a balance of probabilities proved that he was a passenger in the Defendant's motor-vehicle.
2. That the trial magistrate erred in law and fact in failing to find that the police abstract is conclusive evidence that the Plaintiff was aboard the accident motor-vehicle.
3. That the learned trial magistrate erred in law in failing to establish that the bus ticket receipt produced by the Plaintiff was sufficient evidence to prove that he was a passenger in the accident motor-vehicle despite the fact that it bore a different name from the Defendant's and did not indicate the motor-vehicle registration number.

I have considered the submissions of the learned counsel for the parties, including the cases cited. In the present case, only the plaintiff gave evidence. No evidence was led for the defence. The defendant filed defence denying, *inter alia*, ownership of the motor vehicle and the fact that the Appellant was a passenger at the time of the accident. The Appellant produced a police abstract of the accident which stated that he was a passenger during the accident and named him as a witness to the accident. The ticket that had been issued by the 1st Respondent was also produced in evidence. His oral testimony that buttressed all these was uncontroverted as the Respondents did not testify or call evidence.

The Court of Appeal has recently pronounced itself on the significance of a police abstract as proof of statements made in the pleadings –

“it is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter, in the Thuranira case. In any case in our view an exhibit is evidence and in this case, the appellant’s evidence.....were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even counter that evidence.....when the abstract is not challenged and is produced in court without any objection, its contents cannot later be denied.”

The Appellant similarly brought to the attention of this court the case of **Eldoret HCCC No. 70 of 2000 Phillip Kipkorir Cheruiyot vs Nebco K. Ltd & Lawrence Ajugi (unreported)** in which it was held -

“He has proved that he was a passenger in the said motor vehicle by the production of the police abstract report which lists him as being one of the passengers who was injured during the said accident. I therefore find the defendants as jointly and severally liable for the said accident”

Therefore, the Appellant’s uncontroverted oral testimony and production of the police abstract in the lower court was enough proof that he was a passenger in the accident motor-vehicle.

I therefore hold that the learned trial magistrate was wrong in holding, that the Appellant had not proved to the required standard that the police evidence in absence to the contrary was conclusive that the Appellant was aboard the accident motor-vehicle owned by the 1st Respondent.

As for the Magistrate’s failure to assess damages she would have awarded had she found for the Appellant, it has been held that it is not an error of law for a Magistrate or any court to fail to assess damages even if it dismisses a running down case.

“I would call this a guideline by the court of appeal to minimize assessment work in the event of the success of the appeal and could be a ground for an order for review. It does not come within the ambit (sic) of the grounds stipulated in Order XLIV of the Civil Procedure Code.”

See **Suleiman Hamed Adow Vs Kamulat Supplies Ltd [2002]eKLR**

It is now incumbent on this court to assess damages that should be awarded to the appellant. From the medical reports produced (Exhibit 7(a), Exhibit 10 and Exhibit 11) the Appellant suffered a fracture to the right clavicle; a fracture of the lateral border of the scapula and multiple cut wound on the forehead, nostril and 4th toe.

The appellant had proposed an award of Kshs. 900,000/- for general damages for pain, suffering and loss of amenities citing comparable awards for similar injuries to those he suffered; Kshs. 100,000/- for future medical expenses as proposed by one of the Doctors who observed him and special damages of Kshs. 160, 771/-.

The Respondents on the other hand proposed Kshs. 300,000/- also citing comparable awards as general damages.

In **Joseph Mavulu Mutua vs Samuel Njoroge Mwangi [2003]eKLR** the plaintiff who had sustained fracture of the right side ribs, fracture of the right clavicle and fracture of the superior and inferior pubic rami of the pelvis and blunt chest injuries was awarded Kshs. 300,000/=. A considerable number of years have gone by since that award was made.

In **Kisumu HCCA 94 and 95 of 2010 John Gitonga Germano and another versus Rispter Paul Ogal** delivered on 30th June 2011, the Appellants had suffered a deep cut wound on the head and occipital region; fracture of the right shoulder; dislocation of the right shoulder; cuts and bruises on the right foot; cut wounds on the groin was awarded Kshs. 180,000/=

In **Mombasa HCCC No. 245 of 1992 Tito Sekeni vs John Kanyili Minguti & Sumra Transporters** the Plaintiff sustained a fracture of both the left and right clavicle, right scapula and 2 ribs. He also lost skin on the right leg and was left with scars. General damages were assessed at Kshs. 400,000/=. This is an old case.

In view of the above decisions, the nature of injuries he sustained (especially because he sustained two fractures and had a metal plate inserted which is still lodged in his shoulder) and the incidence of inflation it would be reasonable to award the appellant Kshs. 600,000/- as general damages for pain, suffering and loss of amenities.

As for future medical expenses, according to the medical report prepared by Dr. Moses Kinuthia on 3rd September 2008 the appellant will require removal of the metallic plates on the right clavicle followed by rehabilitative physiotherapy at an estimated cost of Kshs. 100,000/-. This was not in any way challenged by the Respondents and considering it is an opinion of an expert is awarded as such.

It is trite that special damages must not only be pleaded but must also be strictly proved. Based on the record, the special damages strictly proved by the Appellant amount to **Kshs. 4,280/-**.

In the result the appeal is allowed. The judgment of the lower court is hereby set aside and substituted therefore judgment for the plaintiff in the sum of KShs. 600,000/00 being general damages, cost of future medical expenses in the sum of Kshs. 100,000/- and KShs. 4,280/- being special damages. All the awards will be reduced appropriately according to the contributory negligence agreed in the consent on liability in the lower court.

The general damages will carry interest at court rates from the date of judgment until payment in full while special damages will carry interest from the date of filing suit until payment in full. The Appellant shall have costs both in the court below and of this appeal. There will be orders accordingly.

Dated and delivered at Nairobi this 22nd Day of October, 2015.

A.MBOGHOLI MSAGHA

JUDGE