REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 94 OF 2009

LUKA MUNGUTI NZUKI……..……...…..APPELLANT

VERSUS

REUBEN MATAVA……1ST RESPONDENT

S.S. MEHTA-SONS…….2ND RESPONDENT

(Being an appeal from the judgment and orders of the Resident Magistrate at Machakos Law Courts delivered by Hon. Okuthe in SPMCC No. 773 of 2000 on 13-5-2009)

JUDGMENT

1. In the suit before the Lower Court, the appellant, LUKA MUNGUTI NZUKI sued the Respondents, REUBEN MUTAVA for damages arising out of a road traffic accident which occurred on 28.2.2000 while the appellant was travelling in motor vehicle Registration No. KAD 301J.The appellant blamed the accident on the negligent manner in which he alleged the said motor vehicle was driven.

2. The claim was denied as per the amended statement of defence dated 23.6.2000. The defence blamed the accident on a tyre burst. In the alternative, the defence blamed the accident on a 3rd party, the driver of motor vehicle registration No. KAG. 625Z.

3. During the hearing of the case the defence instituted third party proceedings.

4. The 3rd party denied the defendants claim through 3rd parties amended defence filed on 1-3.2004. Subsequently, on 3-10-2002 the parties herein agreed to have the issue of liability between the defendants and the 3rd party determined at the hearing of the case.

5. The appellant's (PW1) evidence was that he was a passenger in motor vehicle registration No. KAD 301J matatu (hereinafter matatu). He blamed the accident on the lorry (3rd party's motor vehicle) which started overtaking the car. That the lorry moved to it's right hand side thereby forcing their motor vehicle to swerve off the road into the bushes where it overturned. The appellant explained in his evidence that they were going downhill and approaching a bridge when their motor vehicle swerved to avoid colliding with the lorry. The appellant absolved the driver of the matatu of any negligence.

6. DW1, SAMSON KISHU CHUE, the driver of the matatu testified. His evidence blamed the accident on the lorry which was overtaking a car. The matatu driver stated that he was charged but acquitted. He further stated that he swerved off the road to avoid a head on collision with the lorry. The plaintiff sustained soft tissue injuries in the accident.

7. The third party closed their case without calling any evidence.

8. The lower court found the Appellant had failed to prove his case against the defendant and that consequently, the issue of the defendant's indemnity against the 3rd party did not arise. The trial court then assessed the general damages that it would have awarded if the plaintiff's case was successful at kshs. 100,000/-.

9. The appellant was aggrieved by the said judgment and appealed to this court on grounds hereunder be summarized as follows:-

a. Whether the judgment was against the weight of the evidence.
b. Whether the trial magistrate erred in not apportioning liability between the defendant and the 3rd party.
c. Whether the award of general damage was reasonable.

10. The appeal was canvassed by way of written submissions which I have duly considered.

11. This being the 1st appellate court the court is duty bound to re-evaluate the evidence on record and come to its own findings. (**See Selle-Vs-Associated Boat Company Limited [1968] EA 123).**

12. The appellant's case in his plaint was direct against the matatu in which he was a passenger. The appellant in paragraph No. 4 of the plaint gave the particulars of the matatu driver's negligence. On the other hand the defendants blamed the 3rd party's motor vehicle for causing the accident or substantially contributing to the same. The particulars of the 3rd party's motor vehicle negligence were stated. What is the import of the Appellant's evidence blaming the accident on the 3rd party ad exonerating the defendant? Parties are bound by their pleadings. The Appellant pleaded negligence on the part of the defendant then went ahead to testify on the 3rd party's negligence and laying no blame at all on the defendant. Clearly without any negligence having been established against the defendant, the question of indemnity from the 3rd party did not arise.

13. As stated by the court of Appeal in SAMMY NGIGI MWAURA VS. JOHN MBUGUA KAGAI & ANOTHER 2006 eKLR:

> **"If, as was the position in this case, there was no judgment entered in favour of the plaintiff against the defendant for the very good reason that there was no evidence of any negligence by the defendant or his employee, there could not be any amount in respect of which the defendant could be indemnified by the third party or to which the third party could contribute however negligent the third party or its employee, driver of the lorry may have been".**

14. On quantum, the award of kshs. 100,000/- as general damages is reasonable and within the range of similar awards for similar injuries. As stated by the court of appeal in the case **of Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) L KAR 727 at page 703** that:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.**
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> > **The appellate court can justifiably interefere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

15. With the foregoing, I find no merit in the appeal and dismiss the same with costs.

Dated, signed and delivered at Machakos this 21st day of December, 2015

B.THURANIRA JADEN,

JUDGE.