REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 118 OF 2000

(Being an appeal from the Judgment/Decree of Hon. N. M Kiriba, SRM, Nakuru delivered on 27th September, 2000 in Nakuru CMCC No. 3134 OF 1998)

SIMON HUNGU..... 1ST APPELLANT

VALLEY BAKERY LIMITED.....2ND APPELLANT

VERSUS

VINCENT BARASA WAFULA..... 1ST RESPONDENT

JOHN BAPTIST.....2ND RESPONDENT

JUDGMENT

1. The First Respondent herein filed suit in the lower court against the Appellants and John Baptist, the Second Respondent, seeking general and special damages for injuries sustained by him in an accident which occurred on 15th May 1998 involving motor vehicle Registration No. KAK 196 D and pre-registered motor vehicle No. 7101035. In a judgment delivered on 27th September 2000, the trial court apportioned liability at 50% against the First and Second Appellants and 50% against the Second Respondent. The First Respondent was awarded Kshs. 120,000/= general damages, special damages of Kshs. 2,100/=, costs of the suit and interest.

2. Aggrieved by the decision of the trial Magistrate, the Appellants have now proffered the present appeal seeking to review the decision of the lower court and costs of this appeal on four grounds contained in their Memorandum of Appeal amended on 24th February 2011 that-

(a) the trial magistrate erred in law and fact in finding the First and Second Defendants were 50% liable or liable at all for the accident in the absence of any evidence to that effect;

(b) the trial magistrate erred in law and fact in failing to find the Third Defendant 100% liable in the absence of evidence controverting the First and second Defendants' evidence and that of the Plaintiff laying blame entirely on the third Defendant;

(c) the finding of the trial Magistrate on liability was unreasonable and unsupported by evidence; and

(d) the award on general damages was excessive in the circumstances and not supported by the medical evidence.

3. The Appeal was canvassed by way of written submissions. The Appellants' Counsel's submissions were filed on 24th October 2013 while the first Respondent's submissions in opposition to the Appeal

were filed on 5th December 2013. The second Respondent did not file any documents in response to the appeal although he was served by registered post on 24th March 2011.

4. Firstly it was contended by the First Respondent that the Appeal herein ought to be dismissed for failing to comply with the provisions of Order 42 Rule 12 which requires the Appellant to serve upon the parties a notice of the Registrar notifying the Appellant of the refusal of the Judge to dismiss the appeal summarily; and Rule 13 (1) which mandates the Appellant to cause the appeal to be listed before a judge for directions concerning the appeal generally. The provisions of the said Rules, in my view, are to aid the court in expeditiously determining the matter and are not intended to shut out a party where it is clear, as in the instant case, that there is no prejudice that has been suffered on the other parties by failure to comply with the rules. The typed proceedings of the lower court, pleadings, exhibits and documents produced before it are part of the Record of Appeal filed herein. The grounds upon which the appeal is premised are contained in the Memorandum of Appeal and the issues for determination by this court can be clearly deciphered. The parties agreed to argue the appeal by way of written submissions. I therefore find that the submission by Counsel for the First Respondent to be a mere technicality which does not go to the root of the matter before this court and dismiss it accordingly.

5. The duty of this court as the first appellate court was stated in the case of In **JABANE VS. OLENJA [1986] KLR 661,** where Hancox J.A. stated as follows at p. 664:

"I accept this proposition, so far as it goes, and this court does have power to examine and re-evaluate the evidence and findings of fact of the trial court in order to determine whether the conclusion reached on the evidence should stand – see (Peters vs. Sunday Post [1958] E.A. 424). More recently, this court has held that it will not likely differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR, 278 and Mwana Sokoni vs. Kenya Bus Service (1982-88)1 KAR 870."

6. The Plaintiff *(the First Respondent herein)* was at the time an employee of the second Appellant. On 15th May 1998, he had gone to sell bread in Eldoret and was using the second Appellant's motor vehicle registration number KAK 196 D which was being driven by the First Appellant. On their way back near Mutharu area along the Nakuru-Eldoret Highway, they encountered the second Respondent's motor vehicle pre-registration number 7101035 (NPR 612). PW1 testified that the First Appellant drove to the right side of the road, hit the second Respondent's motor vehicle, came back to the left side of the road, lost control of the vehicle and drove right into a ditch. During cross examination he testified that he saw the second Respondent's vehicle while it was about 10 metres away and he could tell that it was not being driven at high speed. He maintained that it was the second Appellant's vehicle that left its side of the road. After the accident, the second Respondent's vehicle remained on its side of the road. He blamed the First Appellant for the occurrence of the accident.

7. As a result of the accident, the First Respondent sustained injury to the head, soft tissue injuries on the right elbow joint, swelling and laceration of the anterior aspect of the left knee joint and a swelling on the right leg. He was examined by Dr. Wellington K. Kiamba who noted that at the time of examination, the First Respondent had not fully recovered from his injuries. His leg was still swollen and there was pain on execution of movements. This Respondent had minor scars on his forehead and on the anterior aspect. He awarded him temporary disability for 2 months.

8. In their defence dated 29th January 1999 the First and Second Appellants denied the occurrence of the accident or the particulars of negligence attributed to the First Appellant. In the alternative they alleged that if any accident occurred then the same was solely caused by the negligence of the Second Respondent. They called one witness, DW1, an employee of the Second Appellant and who was on the date of the accident, was traveling aboard motor vehicle KAK 196 D. According to him, the accident was caused by the Second Respondent's vehicle which was being driven at a very high speed as a result of which it lost control and hit the Second Appellant's vehicle while on its lawful lane. He denied that the First Appellant was driving at an excessive speed. He did confirm during cross-examination that the

Second Appellant's vehicle rolled into a ditch while the Second Respondent's vehicle remained on the road on the right side of the road. The Second Respondent did not enter appearance or file any defence in the lower court.

9. Firstly it was contended that the First Respondent did not prove the ownership of the vehicle registration number KAK 196 D and instead chose to rely on the Police Abstract which is not conclusive proof of ownership. Counsel relied on the holding of the Court of Appeal at Nyeri in **THURANIRA KARURI Vs. AGNES NCHECHE CA 192 OF 1996** where the court rejecting the submission that the information in the Police Abstract was sufficient proof of ownership, held-

"As the Defendant had denied ownership of the motor vehicle, it was incumbent upon the Plaintiff to place before the judge a certificate of search signed by the Registrar of Motor vehicles showing the registered owner of the lorry."

10. The Plaint and the police abstract both indicated that the Second Appellant was the owner of the motor vehicle. **JOEL MUGA OPIJA Vs. EAST AFRICAN SEA FOOD LIMITED [2013] eKLR -**

"It is noteworthy, that Bosire JA. sat in Thuranira's case (supra), Wandera's case (supra) and in the Lake Flower's case. It would appear that like us, he treated the comments in Thuranira case as obiter. It is clear to us that there has been a move from the rigid position that was pronounced, albeit as obiter, in the Thuranira case. In any case in our view an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."

11. I do note as submitted by Counsel for the Respondent that the allegation of ownership was not specifically denied in the defence nor was it raised in the submissions filed in the lower court. The second Appellant did not cross-examine the Plaintiff on the contents in the abstract as regards ownership or lead any evidence to counter the contents therein. Consequently it is my view that the Plaintiff was able to establish on a balance of probability that the Second Appellant was the owner of the motor vehicle registration KAK 196 D.

12. It was the submission of counsel for the Appellants that the trial court erred in finding the First and Second Appellants 50% liable for the occurrence of the accident whereas the evidence pointed otherwise. Counsel contended that although the accident was as a result of collision of two vehicles and as such the court was entitled to presume that it must have been caused by the negligence of the drivers of both vehicles, the first and second Appellants had led evidence exonerating themselves from blame. Further, the Plaintiff himself testified that the third Defendant's vehicle was being driven at an excessive speed and in a negligent manner. Counsel relied on the holding of Ringera J in the case of **RAPHAEL MWANIKI KIBOI VS JOSEPH NJOGU KINYUA NAIROBI HCCC NO. 3974 OF 1988** where he stated-

"I am entitled under Section 119 of the Evidence Act to presume as a likely fact when two motor vehicles collide on a highway they do so in consequence of the negligence of either one or both of the drivers thereof. I make that presumption here. The third Defendant has however given evidence which rebuts the presumption against him. I am in the premises impelled to find as I do that the collision complained of was wholly caused by the negligence of the First Defendant. The Second Defendant is vicariously liable."

13. In the instant case however, the First Appellant failed to rebut the presumption of negligence on his part. The evidence of PW1 was that it was the Second Appellant's vehicle that encroached into the right

side of the road and collided with the Second Respondent's vehicle. The First Appellant must have been driving the vehicle at such a high speed that after the impact, he was unable to control the vehicle and as a result, it veered off the road and ended up in the ditch. I am satisfied that the First Appellant's negligence caused the accident herein as a result of which the First Respondent sustained the injuries complained of. The Second Respondent was vicariously liable for the actions of the First Respondent who was driving the said vehicle under the instructions of the Second Appellant.

14. Although the Second Respondent (Third Defendant) failed to enter appearance or file any defence, and as such did not in any way challenge the allegations against him, he could not be held 100% liable for the accident where the evidence adduced at the trial suggested otherwise.

15. According to PW1, who saw the Second Respondent's vehicle when it was about 10 metres away, the Second Respondent was not driving the vehicle at an excessive speed or in a zig-zag or negligent manner as suggested by the Appellants. Indeed after the accident the vehicle remained on its right side of the road which fact was confirmed by DW1. Notwithstanding the Second Respondent contributed to the occurrence of the accident. He owed the First Respondent a duty of care to be vigilant and on the look out for other road users such as the Appellant and taken steps by swerving to the left or otherwise to avoid the said accident.

16. From the above analysis, it is clear that the trial magistrate erred in apportioning liability equally whereas it was evident that the First Appellant was largely to blame for the accident. Consequently, I set aside the trial magistrate's judgment on liability and apportion the same at 80% as against the First Appellant and 20% against the Second Respondent for which the Second Appellant is vicariously liable.

17. The Appellants also contended that the award of Kshs. 120,000/= made by the trial magistrate was excessive as the injuries suffered by the Respondent were soft tissue injuries. Relying on the **AFRICAN HIGHLANDS PRODUCE LIMITED Vs. FRANCIS B. MOSOSI HCCA 22 of 2003** where the Plaintiff who had suffered a deep cut wound and bruises on his right leg and had suffered no permanent incapacity save for a scar, was awarded general damages of Kshs. 40,000/=, Counsel submitted that an award of Kshs. 60,000/= would be sufficient.

18. It was appreciated by Counsel for the Appellants and Respondent that award of general damages is discretionary and the appellate court would only interfere on the grounds stated in the case of **BUTLER Vs. BUTLER [1984] KLR 225-**

(a) that the court acted on wrong principles,

(b) that the court has awarded so excessive or so little damages that no reasonable court would,

(c) that the court has taken into consideration matters which it ought not to have considered and in the result, arrived at a wrong decision.

19. Further in determining the award of damages in tort, the court should bear in mind the following principles-

(i) an award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.

(ii) the award should be commensurate to the injuries suffered.

(iii) awards in decided cases are mere guides and each case should be treated on its an facts and merit.

(iv) where awards in decided cases are to be taken into consideration then the issue of an element of inflation has to be taken into consideration.

(v) awards should not be inordinately too high or too low.

(See **BONIFACE WAITI & ANOTHER Vs. MICHAEL KARIUKI KAMAU [2007] eKLR)**

20. The First Respondent in this case sustained bruises on the forehead and a swelling on the head, soft tissue injuries on the right elbow joint, swelling and lacerations on the anterior aspect of the left knee joint and a swelling of the right leg. He was awarded a permanent incapacity of one month. The Plaintiff sought general damages of Kshs. 100,000/= whereas the Appellants were of the view that Kshs. 20,000 would suffice. The trial trial magistrate awarded the First Respondent 120,000/=.

21. This court has taken into consideration the fact that the injuries were minor, they healed completely with no residual disabilities. I am further guided by awards made around the same time the decision was made on similar injuries. In particular the decision cited by the Defendant of **AFRICAN HIGHLANDS PRODUCE LIMITED** (*supra)* wherein the Plaintiff's injury were similar to those sustained by the First Respondent, general damages were awarded at Kshs. 40,000. Similarly in the case of **KAHUNGU & ANOTHER Vs. ONGARO [2004] eKLR** where the plaintiff suffered a cracked left upper molar tooth, bruises on both knees and blunt trauma to the back, general damages were awarded at Kshs. 80,000/=.

22. The injuries suffered by the First Respondent should have attracted a figure less than what was awarded. In this court's view a figure of 100,000 which was sought by the First Respondent's Counsel would have been adequate compensation for the injuries suffered taking into account the element of inflation. The claim of Kshs. 2,100 special damages for the costs of preparation of the medical report and obtaining the Police Abstract was awarded as pleaded and proved. The same is hereby upheld.

23. For the above reasons, I hereby set aside the lower court's judgment and make the following orders-

(a) Liability be and is hereby apportioned at 80% against the First Appellant for which the Second Appellant is vicariously and 20% against the Second Respondent,

(b) I award general damages at Kshs. 100,000/= of which 80,000/= shall be paid by the First and Second Appellants jointly and severally and 20,000/= to be paid by the Second Respondent,

(c) Interest shall be paid at court rates from the date of this judgment to the date of final payment,

(d) as the Appellants have partially succeed on the appeal on damages, they shall have half the costs of this appeal.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 27th day of May, 2014

M. J. ANYARA EMUKULE

JUDGE