REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL APPEAL NO. 59 OF 2011.

SILVANCE OJWANG ODERO :::::::::::::::::::: APPELLANT.

VERSUS

ELDORET EXPRESS CO. LTD.)

ENOCK KIPTOO)::::::::::::::::::::::::::::::::RESPONDENTS.

J U D G M E N T.

The appellant, **Silvance Ojwang Odero,** preferred this appeal following his dissatisfaction with the decision and judgment of the Principal Magistrate at Kapenguria in SRMCC No. 21 of 2008 in which he had sued the first respondent, **Eldoret Express Co. Ltd.**, and the second respondent, **Enock Kiptoo**, for damages arising from a road traffic accident which occurred on the 26th August, 2007 along the Makutano-Lodwar road involving motor vehicle Reg. No. KAT 974U belonging to the first respondent and driven at the time by the second respondent and in which vehicle the appellant was travelling as an authorized passenger.

The appellant averred that the second defendant drove the said vehicle in a careless and negligent manner such that it veered off the road and overturned thereby causing bodily injuries to the appellant.

The appellant relied on the doctrine of **"res-ipsa-loquitor"** and averred that the second respondent was charged and convicted of a traffic offence in traffic case No. 62 of 2007 at Kapenguria. He prayed for special damages and general damages for pain, suffering and loss of amenities against the respondents jointly and severally.

The respondent filed a statement of defence in which the allegations made against them by the appellant in his plaint were denied and in particular that the first respondent was the registered owner of the material vehicle, that the second respondent was the authorized driver of the vehicle and that the appellant was a lawful passenger in the vehicle.

The respondents contended that if the accident occurred, then it was due to inevitable circumstances and not due to their negligence or that it was caused solely and/or substantially contributed to by the negligence of the appellant.

The respondents therefore prayed for the dismissal of the appellant's suit with costs.

The evidence adduced at the trial by both parties was considered by the Learned trial magistrate who arrived at the conclusion that the appellant's case had not been proved against the respondents on a balance of probabilities. Consequently, the suit was dismissed and the parties ordered to bear own costs.

It is against that dismissal order that this appeal was filed on the basis of the grounds in the memorandum of appeal dated 24th August, 2011.

At the hearing of the appeal, the appellant was represented by Learned Counsel, **M/s Maritim**, while the respondents were represented by the Learned counsel, **Mr. Rotich**.

Both counsels agreed to present written submissions and on the 28th April, 2014, the appellant filed his submissions while the respondents did likewise on 3rd June, 2014.

This is a first appeal and in that regard, the duty of this court is to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Accordingly, the evidence by the appellant (PW1) and his four witnesses namely, **Grace Akinyi Ojwang (PW2), Dr. Mbute Joel (PW3)**, **P.C. Paul Muchiri Mburu (PW4)** and **Dr. Donald Mogoi (PW5),** was considered by this court alongside the evidence adduced by the respondents through their witnesses, **Sgt. Damian Mwandau (DW1)**, Linus Ligale (DW2), **Joachim Getwambu Oreko (DW3)**, **Bernard Bundotich (DW4)**, and **Sgt. Stephen Karanja Ngugi (DW5).**

In this court's opinion, the basic issue arising for determination was whether the accident was caused by the respondent's negligence and if so, whether the appellant was entitled to damages and to what extent.

The occurrence of the accident and the ownership of the material motor vehicle were factors which were not substantially disputed and so was the appellant's presence in the motor vehicle at the material time of the accident. Indeed, there was sufficient evidence from the appellant and his wife (PW2) establishing that they were authorized passengers in the vehicle. This was further established by the evidence of P.C. Mburu (PW4) which also confirmed the occurrence of the accident and the first respondent's ownership of the ill-fated vehicle.

With regard to culpability, the particulars of negligence attributed to the second respondent as the driver of the vehicle included that he drove at a speed and without due care and attention such that he permitted the vehicle to veer off the road and overturn.

The evidence by P.C. Mburu (PW4) indicated that the accident was caused by animals being driven on the road by unknown persons and that the change preferred against the second respondent in a traffic case was that of contravening the road service licence conditions instead of careless driving. He (PW4) indicated that the second respondent was accordingly charged because he was not supposed to drive to Lodwar.

He (PW4) thus implied that it was the animals and not the second respondent to blame for the accident.

However, it is obvious that the mere presence of the animals on the road could not by itself have caused the accident. There must have been an element of recklessness or careless which caused the vehicle to veer off the road and overturn. Most likely than not, the driver of the vehicle was driving without proper lookout and in a reckless manner thereby failing to notice the animals on the road at the right time. He appeared to have suddenly noticed the animals and in an attempt to avoid a collision with them swerved or veered off the road causing the vehicle to overturn. This is explained by the fact that the accident as per the evidence of P.C. Mburu (PW4) occurred near a corner after the same had been negotiated by the driver. It is also instructive to note that the driver was not familiar with the road as established by the fact that he was not lawfully authorized to drive to Lodwar.

Both the appellant (PW7) and his wife (PW2) indicated that the vehicle was being driven at a high speed prior to the accident.

They did not have to see the speedometer to know that the vehicle was at a high speed. In any event, their evidence with regard to high speed was not controverted and did establish on a balance of probabilities

that high speed was a contributing factor in the occurrence of the accident since it is generally accepted as an element of recklessness.

It is for the foregoing reasons that this court must depart from the findings of the Learned trial magistrate regarding culpability and hold that the accident was caused by the second respondent's negligence in the manner of driving the first respondent's vehicle recklessly and without proper lookout. Indeed, accidents don't just happen, the appellant provided credible and proven facts which justified his reliance on the doctrine of "**res-ipsa-loquitor"**. He was thus entitled to damages from the respondents for the injuries and loss he suffered as a result of the accident.

With regard to special damages, the appellant was entitled to a sum of Ksh. 5,700/= for the medical report, police abstract and search certificate as proved by production of necessary receipts and documents.

As for general damages for pain, suffering and loss of amenities, the evidence by Dr. Mogoi (PW5), indicated that the appellant suffered injuries on the chest, the lumber sacral regio and the shoulders which were severe but expected to heal with time without permanent disability.

At the trial, Learned counsel for the appellant proposed a sum of Ksh. 150,000/= in general damages while placing reliance on High Court decisions in **Abednego Kyalo Vs. Eliud Kioko & Another Mks HCCC No. 42 of 1995**, **John Njuguna Mungai Vs. Poseidon Investment Co. Ltd. NBI HCCC No. 4801 of 1989** and **Joseph Otiende Vs. Hager Bishon Singh & Sons NBI HCCC 972 of 1997.**

These are the same authorities which have been used in this appeal.

Learned counsel for the respondents proposed at the trial a sum of Ksh. 40,000/=, general damages and relied on High Court decisions in **Moses Gerald Odongo Vs. Julius Birundu Mokaya KSI HCCC 32 of 2002** and **Victor N. Magara Vs. Douglas Ojwang Omachi & Another NBI HCCC No. 671 of 2000.**

Having taken into consideration the foregoing authorities and noted that the appellant suffered minor injuries which did not lead to any permanent incapacity, this court is of the view that a sum of Ksh. 80,000/= would suffice as adequate compensation in terms of general damages for pain, suffering and loss of amenities.

In the end result, this appeal is allowed to the extent that the judgment of the trial court dismissing the appellant's suit is hereby set aside and substituted with judgment for the appellant against the respondents severally and/or jointly in the total sum of Ksh. 85,700/= together with costs and interest.

The appellant shall be entitled to the costs of the appeal.

Ordered accordingly.

[Delivered and signed this 17th day of June, 2014.]

J.R. KARANJA.

JUDGE.