REPUBLIC OF KENYA

High Court at Meru

Civil Appeal 147 of 2006

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PATRICK MWITI M'IMANENE ……..…….. 1ST APPELLANT

JAPHET MURUNGI MUGUNA).....2ND APPELLANT

VERSUS

KEVIN MUGAMBI NKUNJA …….……..RESPODENT

JUDGEMENT

The respondent was the plaintiff at the trial court. The respondent by his plaint dated 3rd February, 2010 sued the appellants jointly and severally seeking

(a) General damages for pain suffering and loss of amenities.

(b) Special damages of Ksh.1,500/-

(c) Costs and incidentals to the suit

(d) Interest or (a) (b) and (c) above at court rates.

The respondent gave evidence and called one witness. The appellants on their part applied that defence adduced in civil CaseNo.26 of 2010 be adopted as the defence.

I note this appeal is similar to HCCA No.10 of 2011 **PATRICK MWITI M'IMANENE & JAPHET MURUNGI MUGUNA –V- NANCY THAIRORA KANAMPIU**which arose out of the same cause of action and which appeal I heard and delivered judgment on 15th March, 2012. I propose in this appeal as far as is applicable to adopt my earlier judgment.

The respondent in this appeal was on 7.4.2009 travelling in motor vehicle registration No.KBC385 V along Nkubu-Chuka road driven by 1st appellant an employee, 2nd appellant in course of his duties and employment. The vehicle was involved in an accident for which respondent blamed the appellants. The respondent sustained bodily injuries and incurred expenses. The appellants denied liability and negligence attributed to them.

The trial court found liability was duly proved against the appellants and held the 1st appellant wholly liable for causing the accident to the extent of 100 per cent and 2nd appellant was found to be vicariously liable for 1st appellant's act.

The trial court awarded the respondent general damages of Kahs.170,000 for pain, suffering and loss of amenities with special damages of shs.1500/- as specifically pleaded and proved with costs and interest of the suit from the date of judgment.

The appellants listed 6 grounds of appeal in their memorandum of appeal dated 14th January 2011. The grounds of appeal are as follows;

1. That the learned trial magistrate erred in law and fact in finding the appellants liable for the accident whereas negligence was not proved against them.

2. That the learned trial magistrate erred in law and fact in failing to find that the cause of the accident was beyond the control of the appellants and therefore no negligence could be visited on the appellants

3. That learned trial magistrate erred in law and fact in awarding the respondent a sum of kshs.2000,000/- general damages which award is inordinately exclusive considering the injuries sustained by the respondent

4. That the learned trial magistrate erred in law in failing to consider that the injuries sustained by the Respondent were soft tissue injures which had fully healed and thereby arrived at an award that it is inordinately excessive.

5. That the learned trial magistrate erred in law and fact in failing to consider relevant authorities and submissions by the appellants.

6. That the judgment of the learned trial magistrate is against the law and weight of the evidence on record.

That on 29.11.2012 on application by counsel for respondent in absence of Counsel for appellants that the appeal be determined by way of written submissions, this court gave directions that the appeal be determined by way of written submissions, supported by authorities. The appellants and respondent counsel were to file their written submissions by 14th February,2013.

On 14.2.2013 this appeal was set down for judgment on 28th March, 2013.

I have gone through the grounds of appeal and the same can be dividend in two categories. Those dealing with issue of liability and those dealing with the issue of quantum.

Ground 1, 2 and 6 of memorandum of appeal are interrelated as they purported to fault the trial court for finding the appellants liable for the accident.

The respondent in his evidence stated that he boarded motor vehicle registration KBC 385 V at Meru Town travelling to Chogoria to sell fertilizer, but they never got to Chogoria safely. That at the corner of Igoji Teachers College the vehicle was being driven at high speed from Meru all the way. That the driver was not even slowing on bumps and potholes. That the vehicle rolled off the road and it rolled severally. In cross-examination the respondent averred that the vehicle was driven beyond 80Kph. He further stated he did not hear anything before the vehicle fell off the road.

The 1st appellant in his evidence before trial court as can be gathered from proceedings in Civil Case No. 26 of 2010 stated that he is a lorry driver. That on 7.4.2009 he was driving Nissan matatu from Meru to Chuka. That he never got to Chuka because an accident occurred at Igoji Teachers College at the

corner. He averred that he had a tyre burst of the front wheel and the vehicle went into a ditch because he lost control. The 1st appellant said the police said the tyre burst caused the accident. He denied that he was speeding because he was climbing up a hill and it was raining too. The 1st appellant in cross-examination confirmed he was driving motor vehicle registration No. KBC 538V belonging to Japhet Muguna, the 2nd appellant as his driver and with his authority. He said in the defence that 2nd appellant is not the owner of the motor vehicle is wrong as 2nd appellant was the owner of motor vehicle KBC 538V. He admitted in their defence there was no mention that the tyre burst caused an accident. He admitted that they did not in their defence mention that it was raining and the 1st appellant was driving uphill. The 1st appellant admitted in cross-examination that the vehicle was inspected but he had not produced the inspection report. He averred the vehicle landed in a ditch 20 metres from the road.

The respondent in his plaint has specifically set out the particulars of negligence attributed to the appellants. In his evidence he stated that the 1st appellant was driving at an excessive speed all the way from Meru and was not even slowing down at the bumps and potholes. The appellant has denied driving at an excessive speed but has admitted it was a rainy day. He did not deny that the road was slippery. The 1st appellant averred that he was driving at a low speed and up a hill and had tyre burst of the front wheel. That he could not control the vehicle and landed in a ditch 20 metres from the road. The version of how the accident occurred as given by 1st appellant cannot with all due respect be the correct version. If the 1st appellant was driving at low speed as he claimed, on getting a tyre burst a driver of many years, with experience, of 1st appellant would have controlled the vehicle and ensured that it did not land in a ditch 20 metres from the road. The fact that the vehicle landed 20 metres from the road, I believe is because the 1st appellant was driving at an excessive speed and he failed to take sufficient care. The 1st appellant claimed that his vehicle had tyre burst of the front tyre. He did not tell the court whether it was left or right tyre. The police officer said from the file handed over to him by one P.C. Akasa, the record showed that the accident was caused by a tyre burst of rear tyre. This glaring error or omission or contradiction points out that there was no tyre burst. Further the appellants in their defence, they did not blame the accident on tyre burst. Interestingly, the Inspection Report which would have shown the course of accident and more so, indicate that there was a tyre burst and which one was through an omission or deliberate act not produced.

The appellants attempt to raise a defence of a tyre burst is much late in the day and having not been pleaded, in the defence, the appellants cannot be heard to raise a defence of the cause of accident as being a tyre burst.

The respondent referred this court to case of:-

Abdul Halim T/A Tawfique Bus Services vs. Justus Thuranira (*suing as legal representative of the estate of Kithinji M'Irura (deceased) Civil appeal Case No. 305 of 2005 (Nyeri)* in which case the Court of Appeal held: -

"In Kenya bus Services Ltd v. Kawira [2003 2 EA 519, this curt authoritatively stated of accidents such as this one, as follows;

"Buses, when properly maintained, properly serviced and properly driven, do not just run over bridges and plunge into revers without any explanation.'

In that case unlike this one, the doctrine of *reipsaloquitur was pleaded. We, however, think that on the facts and circumstances of this case, it does not matter whether the doctrine was pleaded or not. The evidence adduced by PW2 established negligence on the part of the appellant's driver. If the burst tyre was new, there is no explanation, other than that the tyre burst on hitting the bridge rails, to show why the tyre burst. New tyres do not just burst. It is either they run over a sharp object or surface or upon impact over an obstruction. The appellant, in effect, wants us to infer that because the bus had a burst rear right side tyre after the accident, then the tyre must have been the cause of the accident. With due respect to the appellant, evidence having been adduced to the effect that the bus*

was moving fast, it was incumbent upon the defendant to show, by evidence, that it was not the speed and lack of proper control which were the cause of the accident."

The trial court was convinced that the motor vehicle registration No. KBC 538 V was relatively a very new motor vehicle at the time and ought to have been maintained and serviced so as not to be expected to have a tyre burst or any other mechanical problem since after all no inspection report was tendered before the court to suggest otherwise. In this case I am inclined to state though the appellants had not proved that there was a tyre burst and even if there was a burst tyre, as the vehicle was relatively new, as trial court found and was convinced, in absence of any explanation I am convinced the tyre burst occurred after the vehicle forcefully hit the ditch at high speed or on running over a sharp object or surface when the vehicle lost control.

In the circumstances I do not find any merit on grounds 1, 2 and 6 of memorandum of appeal and the same are dismissed.

The appellants under grounds No. 3, 4 and 5 of the memorandum of appeal faults the trial court in awarding respondents Kshs.170,000/= (though in Memorandum of Appeal it is indicated as Kshs.200,000/-) as general damages which award the appellants aver is inordinately excessive considering the nature of injuries sustained by the respondent.

The respondent as per medical-legal report by P.W1 Dr. John Macharia dated 9.8.2010 produced as exhibit P 1A had sustained the following injuries;

- ***Swollen scalp, right side***
- ***Tender, swollen and bruised left shoulder***
- ***Bruised right knee***
- ***Tender neck***
- ***Tender back***
- ***X-rays showed no fractures***
- ***Complaints of on and off headaches and lower back pain.***

The doctor's opinion was that the respondent's had sustained soft tissue injury which had healed with some residual pains and which pains he was of the opinion were bound to ease with time.

The trial court was referred by the respondent's counsel to the following cases in support of claim for damages.

"(a) <u>CATHERINE WANJIRU KINGORI & 3 OTHERS VS GIBSON THEURI GICHUBI NYER HCCC NO. 320 OF 1998</u>

The 1st plaintiff who had sustained injuries to the left ankle, legs and chest was awarded Kshs. 300,000/=.

(b) <u>ANE NJOKI MURAYE & ANOR. V/s ALICE KIMANI & ANO. NBI HCCC NO. 2886 OF 1995</u>

The 1st Plaintiff who had sustained soft tissue injures to the left shoulder, anterior chest wall and left hip, was awarded general damages of Kshs.150,000/-

(c) <u>HABIBA ABDI MOHAMMED VS PETER MALEVE NAIROBI HCCC NO.950 of 1998</u>

The plaintiff had sustained injures to the left

Arm, head and face. The Court assessed general damages at Kshs.400,000/=

(d) <u>FANNY ESILAKO VS DOROTHY MUCHENE</u>

<u>NAIROBI HCC NO. 642 OF 1999</u>.

The plaintiff had sustained multiple cuts on the left wrist, upper arm, knee, right arm, and ankle and heal

Award Kshs.150,000/=."

The appellants on their part listed two unreported cases but failed also to supply the court with copies of the judgments.

The appellants in the written submissions before this court referred this court to the following authori

1. **<u>ELIAS MONIKA –V- SAID JUMA & ANOTHER HCCC NO. 53 OF 1990 Mombasa,</u>** in which the plaintiff who had sustained soft tissue injuries was awarded Kshs.150,000/- as general damages for pain, suffering and loss of amenities.

<u>2. SAMWEL WAWERU WANGOMBE –V- MOHAMMED ABDI ASMAN & ANOTHER CIVIL APPEAL NO. 8 OF 2008 Embu,</u> in which case the plaintiff was awarded Kshs.40,000/- for bruises on the right upper hand and left hand shoulder and which injuries healed without any permanent incapacity.

In the case of **<u>John Mutisya Ngile –V- Nthambi Paul Mutisya (2006)</u>** eKlr the plaintiff in the above-mentioned case had sustained the following injuries;

"1.Traumatic extraction of upper left incisor tooth

2. Blunt abdominal trauma associated with trauma to the liver and gall bladder

3. Laceration wound (on) perinea region
4. Bruises (on) lower limbs

The court reduced the award of Khs.340,000/= to Khs.200,0000/=

In case of **<u>Kenya bus Services Limited vs Jane Karambu Gituma</u>** Civil Appeal Case No. 241 of 2000. The Court of Appeal stated as follows:-

"In this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low as to represent a wholly erroneous estimate of the damages (see, for example, <u>KASSAM V KAMPALA AERATED WATER CO. LTD[1965]</u> E. A 587, <u>IDI SHABANI V NAIROBI CITY COUNCIL [1982-88]</u> I K.A.R. 681, <u>BUTT V KHAN [1981] K.L.R. 349 and KIMOTHO & OTHERS V VESTERS & ANOTUHER [1988] K.L.R.48).</u>"

I have very carefully considered the respondent's injuries and sum awarded. The authorities referred to me and their age which is between 23 years and 6 years to date and I am satisfied that the sum awarded was no more than should have been awarded. The authorities relied upon by the respondent as I have observed are of similar injuries to those sustained by the respondent. I have taken into account that

inflation has taken a toll on the value of the shilling over the past 15 years. I find the trial court did not act on wrong principle of law or took into account some irrelevant factor or left out of account some relevant ones or adopted wrong approach or misapprehended the facts or made an award which is inordinately high or low as to represent a wholly erroneous estimate of damages.

In view of the foregoing grounds No. 3, 4 and 5 of memorandum of appeal are without merits and according dismissed.

The upshot of the matter is that the appeal is dismissed with costs to the respondent.

Signed, dated and delivered at Meru this 28th day of March, 2013.

J.A. MAKAU
JUDGE

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Delivered in open Court in the presence of

1.Mr. M. Kariuki for the appellant

2. Mr. Omari for the respondent

J. A. MAKAU
JUDGE
Sheriff