REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 168 OF 2008

LEONARD NYONGESA …………………………. DEFENDANT/APPELLANT

V E R S U S

DERRICK NGULA RIGHA ………………………. PLAINTIFF/RESPONDENT

JUDGEMENT

1. The Respondent's case before the Magistrate's Court was for a claim for general and special damages which resulted from a motor vehicle accident. The Respondent on 14th September 2007 was a pedestrian along Mikindani Kwa Shee Road near the junction at Mikindani Plaza. In his pleadings before the Magistrate's Court the Respondent stated that the Appellants authorized the driver so negligently drove motor vehicle Reg. No. KAU 615C causing the vehicle to veer off the road and as a consequence that vehicle rammed into the Respondent. As a result of that accident the Respondent pleaded that he suffered serious injuries.

2. The learned trial Magistrate after receiving the evidence of the parties found the Appellant liable for the accident 100%. The Appellant being aggrieved by that finding has filed this appeal.

3. This being the first appeal I am obligated to reconsider the lower Court evidence assess it make my own conclusion remembering that I neither saw nor heard the witnesses. See the case **Selle -Vs- Associated Motor Boat Company Ltd [1968]E.A. 123**.

4. PW1 a Doctor in evidence before the Magistrate's Court stated that on 20th July 2008 he examined the Respondent. The Respondent had a previous history of road traffic accident. He had suffered a fracture of the left tibia fabula. He was able to confirm that fracture from the X-rays that were provided. The Respondent was hospitalized from 14th September to 21st September 2007. He was operated upon. In the opinion of the Doctor the Respondent had suffered serious injuries. PW1 produced in evidence two receipts for the payment that he received from the Respondent. One was for Kshs. 2,000/- for the medical report that he had prepared. The other was for Kshs. 3,000/- for his attendance before the Magistrate's Court.

5. On being cross examined PW1 stated as follows-

   "I never treated patient initially. Plaintiff will require further treatments for removal of

the plates. Kshs. 200,000/- is the estimate given by Dr. Ambeva – the surgeon. Kshs. 200,000/- is an estimate. The plates may be removed or not depending on doctor's opinion if the patient reacts to the material used. In this case, Dr. Ambeva who did the operation recommended their removal. In this case treating doctor's opinion is that removal was necessary."

6. PW2 was a traffic Policeman. Although he was not the investigating officer of the subject accident he said that the file had been passed on to him because the investigating officer was on annual leave. He said that the information in the police file showed that there had been an accident involving motor vehicle Reg. No. KAU 615C. The file also showed that the Respondent was a pedestrian. The information in the file also showed that the authorized driver of the Appellant whilst driving along Mikindani road saw a group of people crossing that road. She heard a bang and on looking noticed the Respondent had been knocked. That driver took the Respondent to hospital and paid Kshs. 30,000/- towards his treatment. PW2 was satisfied having read the investigation file that the Appellant's authorized driver was to blame for the accident.

7. The Respondent, that is PW3, stated that he was off the road when the motor vehicle KAU 615C while at a high speed veered off the road and hit him. At that time he said that he was on the pavement having finished crossing the road when the accident occurred. According to him that motor vehicle was unstable and although he tried to avoid being hit he was however hit by it. He said that the motor vehicle failed to reduce its speed even though the driver was approaching the junction. On colliding with him the Appellant's driver drove him to Aga Khan Hospital. He was admitted in hospital for seven days. The doctor recommended surgical removal of the plate that had been put on his foot. The estimated costs for that removal was Kshs. 200,000/-. He also said that he had paid Kshs. 398,800/- for treatment. He said that he was not negligent and he reiterated that he was off the road when he was hit by the vehicle. He blamed the Appellant's authorized driver for the accident.

8. On being cross examined he said that he was not in the company of anyone known to him at the time of the accident.

9. The Appellants evidence was given by his authorized driver DW1. DW1 stated that on 14th September 2007 at about 7.00pm she was driving the vehicle Reg. No. KAU 615C. She said that she was driving below 20mph. On approaching the junction she saw people crossing and she hooted. She heard a bang on the left side of the car and noted a young man seated. He had been hit. She and the Appellant took that person to hospital.

10. On being cross examined she stated that as at the date of the accident

she had only been driving for 2/3 months. At that time she was holding an interim drivers license. On further cross examination she stated as follows-

> ***"Its true Plaintiff was hit by the motor vehicle I was driving. We took him to hospital. He fractured his leg. I did not see Plaintiff as I drove. I had seen several people walking. Plaintiff was on the side of the road."***

11. The learned Trial Magistrate found the Appellant 100% liable for the

accident. In that judgment the learned Magistrate had this to say-

> ***"It is clear from the evidence that the Plaintiff*** (the Respondent) ***was off the road and was hit not on the road but off the road. Liability in the premises is wholly on the Defendant*** (Appellant) ***at a 100%."***

12. The learned Magistrate awarded Kshs. 250,000/- for general

damages, Kshs. 200,000/- for future treatment and Kshs. 329,321/- in special damages.

13. The Appellant has filed this appeal against that judgment and has presented the following grounds-

> ***"1. The learned trial Magistrate erred in law and fact in finding the Defendant 100% liable in essence failing to consider the weighty evidence adduced by the defence, particularly detailing facts that clearly pointed to the Plaintiff's negligence that wholly or substantially contributed to the occurrence of the accident which was the subject matter of the proceedings in the aforementioned suit.***

> ***The learned trial Magistrate erred both in fact and in law in not appreciating the basic principles applicable in awarding special damages and costs of future medical expenses both which were not strictly proved.***

The learned trial Magistrate erred fact and in law in awarding excessive special damages without strict proof thereof and failed to consider the Defendant's evidence that a big portion of the special damages which included medical expenses had been paid for by the Defendant and such were not recoverable by the Plaintiff.

The learned trial Magistrate erred in law and fact in awarding an excessive amount under the head costs for future operation without due regard being had as to whether this award was necessary and such necessity was not proved hence this award was unnecessary and not proved."

14. In support of the first ground the Appellant's learned Counsel in

submissions stated that the Appellant's authorized driver could not have been driving at high speed because firstly she was approaching a junction and secondly there were people crossing the road. The Counsel proceeded to say that if she was driving at high speed she could have hit the people that were crossing. The learned Counsel submitted that the Appellants driver was travelling below 20mph. It was on the basis of that submission that the Appellant seeks the Court to find that he was not 100% liable and that the Respondent contributed the accident by failing to take heed of the car and the hooting.

15. The Respondent submitted in respect of the first ground of appeal that the learned trial Magistrate cannot be faulted. Reference was made of the evidence of the Appellant's witness DW1. This is where DW1 accepted under cross examination that it was the car that she was driving that hit the Respondent.

16. As correctly submitted by the Respondent the evidence adduced in the lower Court clearly showed that the Appellant was 100% liable for the accident. PW2 the traffic officer stated that on reading the traffic case file he was satisfied that the Appellant's authorized driver was liable. PW3 the Respondent after giving evidence in chief about the speed of the vehicle stated that the vehicle hit him whilst he was on the pavement. He said that the car veered off the road. He was not subjected to cross examination about the manner in which the Appellant's driver was driving.There was also no question about the estimated speed of the car. The Respondent was not even questioned about whether he was on or off the road when he was hit. Indeed it was not until the Appellant's witness DW1 gave evidence that she stated that she was driving at a speed below 20mph. The fact that the issue of speed was not put to the Respondent when being cross examined means that the evidence by DW1 was an afterthought. The learned trial Magistrate quite lightly in my view ignored the evidence on the speed given by the Appellant's witness. DW1 did infact in cross examination accept that she had not seen the Respondent as she drove and also confirmed that the Respondent was on the side of the road at the time of the accident.

17. In my view the trial Magistrate rightly found the Appellant 100% liable for the accident and

accordingly ground one is hereby rejected.

18. On the second ground the Appellants argument is in three folds.Firstly, that the trial Magistrate should have deducted Kshs. 30,000/- from the Respondent's claim in special damages being the money that the Appellant paid for the Respondents treatment. Secondly, that there was no sufficient proof of future medical expenses of Kshs. 200,000/. Thirdly, that the Respondent's claim for special damages should have been rejected because the Respondent's receipts lacked evidence of payment of stamp duty.

19. The first argument was not supported by evidence before Court. It was PW2 the traffic police officer who stated that the Appellant on taking the Respondent to hospital paid for the Respondent Kshs. 30,000/- towards the Respondent's medical care. There was no receipt produced to prove this payment. Even the Appellants own witness DW1 did not allude to such payment. The traffic police officer's evidence was insufficient to rely upon for the purpose of deducting that amount from the Respondent's claim of special damages. It is important to remember that the traffic police officer was relaying evidence that that been recorded by another officer who had investigated that accident. I therefore find that the trial Magistrate did not erre in failing to deduct that amount.

20. The award of Kshs. 200,000/- being future medical expense was supported by the evidence of the Doctor PW1 and by the Respondent.The Appellant did not offer any contradictory evidence that the Respondent was not required to undergo future medical treatment. As a result of the accident, the Respondent was fitted with a plate which was to enable the fracture on his leg to heal. In the opinion of the Surgeon who operated upon him, the Respondent needed that plate to be removed in the future. If the Appellant wished for the Court to find otherwise he needed to adduce evidence in that regard showing that such future operation was not necessary. The burden of proof as stated in Section 107(1) of the Evidence Act Cap 80 provides as follows-

> ***“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

21. The third submission related to the provisions of the Stamp duty Act Cap 480. I need to state from the outset that it is only some receipts produced by the Respondent in evidence that did not have the stamp of duty paid. The Respondent's claim for special damages was in total for Kshs. 329,321/-. The receipts that have stamp representing duty that is paid are for Kshs. 325,371/-. What is the law on this issue? Section 19(1) of Cap 480 provides as follows-

> ***“1. Subject to the provisions of Subsection (3) of this Section and to the provisions of Sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except-***

a. ***in criminal proceedings; and***
b. ***in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.”***

22. The provisions of that Section make it clear that no document which is chargeable to stamp duty shall be received in evidence except in the case of the prescribed exception that is pursuant to Criminal Proceedings or if produced by the collector to recover duty unless stamp duty has been charged on it. Section 19(1) however is not absolute. It is subject to Section 19(3) and Sections 20 and 21-

> ***“(3) Upon the production to any Court (other than a criminal Court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions-***

a. ***If the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;***

b. ***In any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under Section 20 or of obtaining a Certificate under Section 21;***

c. ***In all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the Court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence."***

The High Court considered the exception in Section 19(3) in the case of **Surgipharm Ltd v Aksher Pharmacy Ltd & Another [2004]e KLR** and held as follows:

"My further understanding is that under Section 19(3) if any unstamped (sic) is produced before it, the Court is empowered to take note of the omission or insufficiency of the stamp duty and is impelled to take any of the following three courses of actions:

(i) If the document is liable to be stamped by a person specified in the Schedule and the time for stamping has expired the instrument shall be impounded and, unless the document has been produced to a collector, shall forthwith be forwarded to a collector.

(ii) The person tendering the instrument shall be give a reasonable opportunity of applying to a collector for leave to stamp the instrument out of time under Section 20 or the collector's certificate under Section 21 of the Stamp Duty Act, that the instrument has been duly stamped,

(iii) In all other cases the instrument is receivable in evidence upon payment of the amount of the unpaid duty and of penalty which is then remitted to the collector with the instrument after the instrument has been admitted in evidence.

The answer to the first issue herein is that an instrument which is liable to stamp duty may indeed be stamped out of time, and may be received in evidence." (emphasis mine)

The above decision clearly shows that an instrument for which the law requires stamp duty to be paid is not necessarily inadmissible in Court; the same may be admitted provided the stamp duty is assessed and paid together with any penalty arising therefrom.

Section 20 of the Stamp Duty Act provides as follows-

"(1) Where an instrument is chargeable with stamp duty under this Act and should have been stamped before a certain event or before the expiration of a certain period, but has not been so stamped, a collector may give leave for the stamping of the instrument if he is satisfied-

a. ***that the omission or neglect to stamp duly did not arise from any intention to evade payment of stamp duty or otherwise to defraud; and***

b. ***that the circumstances of the case are such as to justify leave being given."***

In the case of **Darshan Shah v Roopman (K) Limited & 3 Others [2005]eKLR**, the High Court

considered the exception under Section 20 of the Stamp Duty Act and held as follows-

> ***"Under the Stamp Duty Act Section 19, in civil cases only, a party wishing to claim expenses paid to him under the Special damages claim and on proof of such claim must have complied with the Stamp Duty Act. The revenue stamp on such receipt should have been issued. Where this has not been complied with by the person issuing the said receipt, Section 20 requires that such person do proceed to the collector of stamp duty to assess the penalty required to be paid for failing to comply."***

The Court then went ahead to award special damages of Kshs. 552,243.75/- in a further judgment after the Plaintiff's advocates had submitted the relevant receipts for stamp duty assessment.

23. The position, therefore, is that a receipt for which payment of stamp duty is required under the Stamp Duty Act is admissible in evidence on condition that the person issuing the same takes it for stamp duty assessment before the court can attach any probative value to it. In my opinion, if that is not done, the court cannot award any damages based on such a receipt.

24. It follows that the only amount that will be reduced from the amount awarded by the Magistrate's Court as special damages is Kshs. 3,950/-.The Respondent's special damages will therefore be at Kshs. 325,371/-.

25. The upshot of the above is that the appeal is dismissed with costs to the Respondent save that the special damages awarded to the Respondent by the trial Court are adjusted to be Ksh. 325,371/-.

Dated and delivered at Mombasa this 20th day of September, 2013.

MARY KASANGO

JUDGE