REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Appeal 106 of 2009

KEN-KNIT (K) LIMITED.....APPELLANT

versus

ENOS NGIGI.....RESPONDENT

{Being an appeal from the judgment & decree of the Senior Resident Magistrate, Ms A.B. Mong'are, dated 6th July, 2009 in Eldoret Chief Magistrate's Court in Civil Case No. 24 of 2007]

JUDGMENT

This appeal is from the judgment and decree of the learned Senior Resident Magistrate, **Ms Mong'are**, dated 6th July, 2009 in Eldoret Chief Magistrate's Court Civil Case No. 24 of 2007.

The appellant, **Ken-Knit (K) Limited**, was the defendant and the respondent, **Enos Ngigi** was the plaintiff. The learned Senior Resident Magistrate awarded the respondent Kshs 400,000/= general damages and Kshs 2,000/= special damages for injuries sustained by the respondent in a road traffic accident on the basis of 100% liability. That decision triggered this appeal.

The respondent pleaded that on or about 30th July, 2006, he was lawfully walking on the verge of the road along Eldoret-Kitale road when the appellant's driver, servant, employee, and / or agent so negligently drove motor vehicle registration number KAQ 463 U (hereinafter "**the said vehicle**") causing it to knock down the respondent as a result of which he sustained severe injuries, loss and damage. Particulars of negligence and injuries were pleaded and so were particulars of special damages.

In the particulars of negligence, the respondent averred, *inter alia*, that the appellant's driver, servant and / or agent failed to drive, manage and or otherwise control the said vehicle so as to avoid causing the accident.

In the written statement of defence delivered by the appellant, it denied ownership of the said vehicle and any negligence on its part. It also denied that an accident occurred on 30th July, 2006. In the alternative, it averred that if an accident occurred as alleged, then the same was wholly and / or substantially caused by the respondent due to his negligence particulars whereof it pleaded.

In its appeal to this court, the appellant has raised seven (7) grounds of appeal. The grounds however, revolve around the following issues:-

. Failure to prove negligence;

. Failure to prove the accident;

. Taking into account extraneous matters and applying wrong principles in awarding damages.

The respondent's case before the learned Senior Resident Magistrate was that on the 30th July, 2007, he was walking home along Kitale/Eldoret road when he was knocked down by a vehicle. He lost consciousness and when he came to found himself in hospital where he was told that he had been hit by a motor vehicle by a police officer. He blamed the driver of the motor vehicle which hit him because he did not hoot and that he knocked him as he walked on the side of the road. He was later examined by Dr. **Samuel Aluda** who prepared a medical report of his injuries. The said doctor testified before the learned Senior Resident magistrate and stated that the respondent had sustained brain concussion, blunt trauma to the scalp, blunt trauma to the abdomen, and swollen and tender right leg which had a compound fracture. The doctor produced his report of those injuries. He further opined that at the time of his testimony, the respondent could have healed.

Salima Maina Kinywa, (P.W.2) testified that he witnessed the accident which, according to him, occurred on 30th July, 2006. As he waited to cross the road, the said motor vehicle knocked down the respondent who was a pedestrian on the side of the road. He blamed the driver of the said vehicle for over-speeding and not hooting.

Before closing his case, the respondent produced, among other documents a discharge summary from Moi Teaching and Referral hospital (P.Ex. 4), P.3 form, (P.Ex. 6), Police Abstract (P.Ex. 7) and a copy of registration particulars in respect of the said motor vehicle. (P.Ex.8)

The appellant's case at the trial was presented through **Haron Muhinya**, (D.W.1), its driver. He testified that on the 30th July, 2007, he was assigned the duty of collecting and dropping the appellant's staff. He reported at 6.00 p.m. of that date and performed his duties using the said vehicle upto 11.30 p.m. During the entire period, no accident took place.

At the close of the appellant's case, a medical report prepared by **Dr. Lodhia** was produced by consent.

The learned Senior Resident Magistrate found the respondent's version of the events more believable than the version presented by the appellant's witness. She concluded that the appellant's driver knocked down the respondent while he was lawfully walking off the road and was (the appellant) 100% liable. The learned Senor Resident Magistrate further found that the respondent had severe injuries which included a compound fracture of the right tibia and fibula which had resulted in permanent disability of 5%. She also considered that the respondent would develop arthritis in the affected leg. On the basis of those findings, she awarded the respondent the sums stated above.

When the appeal came up for hearing before me on 20th March, 2012, counsel for the appellant submitted that the respondent failed to prove negligence against the appellant and that his testimony did not support the particulars he had alleged. On quantum, counsel submitted that Kshs 400,000/= awarded as general damages was excessive especially as the same was made on the basis that the respondent's leg had been shortened which fact was not proved. In counsel's view, a factor which should not have been considered was taken into account in awarding the said damages.

On his part, counsel for the respondent submitted that negligence was proved since the respondent was hit off the road and called an eye witness who corroborated his testimony. In the premises, according to counsel, there was basis for finding the appellant 100% liable. On quantum, counsel submitted that the award of general damages was deserved given the injuries suffered by the respondent.

This is a first appeal. It is therefore by way of a retrial. I musk, accordingly, reconsider the evidence, re-evaluate the same and draw my own conclusion, bearing in mind that, I have neither seen nor heard the witnesses testify and must give allowance for that. (See **Selle and Another –vrs- Associated Motor**

Boat Company Limited and Others [1968] E.A. 123). It is also trite that I am not necessarily bound to follow the trial Court's findings of fact if it appears that the court failed to take into account particulars pertinent circumstances or if the impression based upon the demeanor of witnesses is inconsistent with the evidence adduced (See **Abdul Hameed Saif -vrs- Ali Mohammed Shoran [1955] 22 EACA 270**). I also keep in mind the principle enunciated in **Peters –vrs- Sunday Post Ltd [1958] E.A 424**. Which was expressed at page 1429 as follows:-

"It is a strong thing for an appellate court to differ from the finding on question of fact of the judge Who tried the case and who has had the advantage of seeing and hearing the witnesses. But the jurisdiction (to review the evidence) should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

On the above principles, this court can only interfere with the trial court's findings of fact if the findings were based on no evidence or on a misapprehension of the evidence or if it is shown clearly that the trial court acted on wrong principles in reaching those findings. (See **Ephantus Mwangi & Another –vs- Wambugu [1983] 842 KAR 100**).

The learned Senior Resident Magistrate did not expressly make a finding on the disparity between the date of the accident as pleaded, i.e. 30th July, 2006 and the date as orally testified in court i.e. 30th July, 2007. His conclusion in favour of the respondent however, suggests that he considered the disparity as a minor slip or error. There was basis for that conclusion in view of the documents the respondent produced at the trial such as the police abstract and the P.3 form.

The Abstract from police on A Road Accident indicated the date of the accident as 30th July, 2006. The P.3 also indicated that the respondent was issued with the same on the same date.

The respondent also called P.W.2 who was an eye witness to the accident. He testified that the accident involving the said vehicle occurred on 30th July, 2006. In those premises, like the learned Senior Resident Magistrate, I have come to the conclusion that the disparity in the date was a minor slip and the trial court was entitled to consider the disparity alongside the rest of the testimony adduced by the respondent. Having made that finding, the respondent's case was really not challenged by the appellant. I say so, because its witness, D.W.4, testified about what he did on 30th July, 2007. There was no rebuttal evidence against the respondent's case regarding the accident which occurred on 30th July, 2006.

On liability, the learned Senior Resident Magistrate stated as follows:-

"In my view, because the plaintiff alleged he was walking off the road and there is an eye-witness who saw him being knocked, I believe he was injured. I further believe the plaintiff because the police summoned the defendant's driver and had him (make) his statement. The abstract too confirm(s) an accident occurred. The defendant's denial is a mere denial. His allegations are unsupported. I hence find that the defendant's driver knocked the plaintiff while he was lawfully walking off the road."

The learned Senior Resident Magistrate's findings were not based on whim. They were based on the evidence of both the respondent, his witness and the documentary evidence adduced before him which evidence, I have referred to above. On that evidence, the learned Senior Resident Magistrate had basis upon which she made findings on liability. There is, in the premises, no basis upon which I should interfere with those findings.

On quantum, the learned Senor Resident Magistrate found as follows:-

"I have carefully considered the medical reports. The plaintiff suffered 5% permanent disability. His leg grew slightly shorter. The plaintiff's
advocates submits for a sum of Kshs 450,000/=. I have considered the authorities relied on, the plaintiff seriously injured. The defendant never submitted. The plaintiff is allowed (sic) a sum of

Kshs 400,000/= as general damages, special damages Kshs 2,000/= which amount is proved."

The medical reports considered by the learned Senior Resident Magistrate included the one prepared by Dr. **V.V. Lodhia**, produced by the appellant with the consent of the respondent. The said doctor concluded that the respondent had healed with slight shortening of the leg. The respondent had, among other injuries sustained compound fractures of the right tibia and fibula. The same doctor assessed permanent disability suffered by the respondent at 5%.

It is evident therefore that the learned Senior Resident Magistrate considered the injuries suffered by the respondent and the only submissions made to her which were on behalf of the respondent before coming to her conclusion. I do not find that in doing so, she applied wrong principles. I also do not detect consideration of a factor which ought not to have been considered or failure to consider a factor which should have been considered. Lastly, I am unable to find that the sum of Kshs 400,000/= awarded to the respondent as general damages for pain and suffering was too high as to amount to an erroneous estimate of the damages. I cannot therefore intervene.

In the end, I find no merit in this appeal which I now dismiss with costs.

Judgment accordingly.

DATED AND DELIVERD AT ELDORET THIS 8TH DAY OF MAY, 2012.

F. AZANGALALA
JUDGE.

Read in the presence of:-

Mr. Cherutich holding brief for **Nyairo** for the appellant and **Kiplimo** holding brief for **Gicheru** for the respondent.

F. AZANGALALA
JUDGE