



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO.108 OF 2007

EQUATOR BOTTLERS LIMITED.....APPELLANT

VERSUS

DENNIS KIMORI MECHA.....RESPONDENT

(Being an appeal from the Judgement of Mr. Biwott: SRM in Winam SMCC No.535 of 2005)

JUDGEMENT

This is an appeal from the judgment of the **SRM Winam Court in Civil Case No.535 of 2005**, delivered on the 27th of September, 2007. Being aggrieved by the judgment the appellant (then defendant) Equator Bottlers lodged this appeal as follows:

- 1. The award of general damages awarded by the learned magistrate is excessive and punitive considering the nature of the injuries suffered by the respondent.**
- 2. the learned magistrate erred in law and in fact in awarding general damages for injuries suffered while there was insufficient evidence to support the same;**

3. **the learned magistrate erred in law and infact by ignoring the authorities submitted by the appellatant in his submission when arriving at a judgment in favour of the respondent;**
4. **The learned magistrate erred in law and infact in finding that the appellatant was 90% liable for the injuries of the respondent while it is apparent that the respondent failed to prove any negligence on the part of the appellatant;**
5. **The learned magistrate erred in law and in fact in failing to appreciate that the plaintiff was the sole and/or substantial author of his own misfortune;**
6. **The learned magistrate erred in law and in fact in disbelieving the submission of the appellatant without affording sufficient reasons while believing that of the respondent against the weight of evidence in arriving at his decision;**
7. **The learned magistrate disregarded totally the evidence from the respondent as it emanated from the cross-examination of the plaintiff;**
8. **The learned magistrate disregarded the evidence from the appellatant's witnesses when arriving at a decision on quantum and liability.**

On the grounds set above the appellatant sought to have the judgment set aside and the suit dismissed with costs, in the alternative for this court to find the award and liability excessive and replace the same with an appropriate award and to give costs of the appeal to the appellatant.

At the hearing of the appeal the respondent's counsel was absent. The court proceeded to hear the appeal in his absence having declined to adjourn the suit on account of the age of the appeal.

In his submissions **Mr. Ochuka** for the appellatant argued as follows: that the learned trial magistrate misdirected himself for holding the appellatant 100% liable; the magistrate did not give a reason for arriving at his judgment; and that act of jumping out was negligent even if the driver had not stopped. On the issue of quantum he urged the court to consider injuries were soft tissue. He proposed an award of Kshs.65,000/=.

This is the first appellate court. It has the duty to consider the evidence on record, re-examine, evaluate and analyse the same before arriving at an independent conclusion bearing in mind that the trial court had the benefit of seeing and hearing the witnesses. See **Sella & Another versus Association of Motor Boat Company Limited & Another (1968) G.A. at 123.**

The plaintiff's case arises from an accident that occurred on or about the 26th of July 2005. The plaintiff claims that he boarded motor vehicle registration **No.KAJ 391 K** that belonged to the appellatant who was his employer. He claimed that his employer's driver was negligent in that he drove off before the plaintiff could fully disembark from the same failed to give the plaintiff any warning, or heed his presence; and he failed to maintain or exercise proper or effective control of the said vehicle or have sufficient regard for his passengers.

The plaintiff (**PW2**) stated that he worked for the plaintiff from February 2005 to 26th July, 2005. He did not get a letter of contract. He was paid weekly. On the material day he was on duty up to 11.30 p.m. He boarded the plaintiff's motor vehicle to be taken home. He sat behind the vehicle. He was going to Nyamasaria. He stated further that the driver stopped the vehicle and told them to alight quickly but before he could fully alight the driver drove off as a result he fell down and sustained injuries.

He got injured on his left hand, face and both knees. The motor vehicle did not stop. On 27/5/2004 he went to the Kisumu District hospital for treatment. He blamed the driver for the accident; that he paid Kshs.1,500/= for treatment; and reported the matter to the police and was issued with a P3 form.

PW1 Dr. O. Nyamogo a medical practitioner in Kisumu gave evidence having examined the plaintiff on 9/8/2005. He gave injuries sustained by the plaintiff as follows:

- **bruise on the face;**

- **blunt injury on the throat**

- **dislocation of left wrists;**

- **bruises on both knees;**

He said that he received Kshs.1,500/= for the report. Other than the dislocation the rest he said the others were soft tissue injuries.

The defence adduced evidence as well. **DW1 Charles Okeyo Ongoro** a driver with the appellant stated: that on the material day at about midnight while proceeding to Nyamasaria, there was a jam, he was driving slowly, the door opened and using his side mirror he saw the respondent outside having jumped from a moving bus. He stopped the bus and asked the respondent why he had alighted from a moving bus. The respondent apologized. He informed his boss one **Mr. Omuga** who also spoke to the respondent, who ran from the scene. He stated further that if the respondent did not sustain any injuries if he did, he would have taken him to hospital.

DW2 Willis Omuga stated that he was formally in charge of 2nd shift operation at the appellant's, which shift was between 3 p.m. and 11 p.m. On the material day the plaintiff boarded together with the witness motor vehicle registration No. **KAJ 391 K** going towards Nyamasaria; that the motor vehicle slowed down and before it stopped the plaintiff jumped out. He denied that the driver drove off before the plaintiff had alighted. On cross-examination he said that there was no heavy traffic.

The issues for determination is whether or not the plaintiff was injured when the driver of motor vehicle **KAJ 391 K** started the vehicle before the plaintiff had completely alighted and if so what injuries did he sustain, and whether or not there is an element of contributory, and what is the quantum payable?

The plaintiff's evidence is that when he reached his destination he was hurried by the plaintiff's driver to alight and before he had completely alighted the driver started the vehicle. The defence witnesses gave a contradictory account of the events before the accident. **DW2** the driver said that there was a jam and he drove the vehicle slowly. **DW2** stated there was no jam but the plaintiff jumped out before the vehicle stopped. With the injuries sustained followed by the events culminating in suit I find it difficult to believe that the plaintiff took off from the scene. The plaintiff went to hospital, thereafter obtained a **P3** form and

filed suit. There is consistency in his action. He appears to be a truthful witness. I find the 2 witnesses for the defence dishonest especially due to inconsistencies in their statement. I also find that on the face of the injuries sustained including dislocation of the wrist and the injuries to the knees the plaintiff was tossed off the vehicle.

As the plaintiff was a lawful passenger, alighting at his home from work and having found his version of the evidence true I decline to hold him liable for the accident. I find that the driver of motor vehicle registration No. **KAJ 391 K** was wholly to blame. Indeed he owed the plaintiff the duty of care to see that he safely alighted from the vehicle.

On the issue of quantum it is now settled principle that an appellate court can only interfere with an award when the same is manifestly too low or excessively too high. I do concur with the finding of the magistrate that the proposed award by the appellant's counsel is inordinately low having been awarded in 1993 in the face of the inflation that the country has experienced and the fall of the Kenya shilling. I do also agree that the sum of Kshs.130,000/= is reasonable.

In the circumstances I dismiss the appeal. I make no order as to costs having in mind that the respondent failed to appear in court to defend the appeal.

Dated and delivered this 28th day of June 2011

ALI-ARONI

J U D G E

In the presence of:

.....**counsel for the appellant**

.....**counsel for the respondent**