No. 2947

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 33 OF 2011

HENRY BINYA OYALA …….... APPELLANT

-VERSUS-

SABERA O. ITIRA ……...……. RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Kisii, Hon. Njeri Thuku in CMCC No. 625 of 2009 dated 21st January, 2011)

The appellant filed a suit in the Chief Magistrate's court at Kisii seeking the following reliefs:-

- **Special damages**
- **General damages for pain, suffering and loss of amenities**
- **Costs of and incidental to the suit.**
- **Interest.**

The appellant's suit stemmed from a road traffic accident which occurred on or about 22nd June, 2009 along Kisii-Nyamataro road. Apparently, the appellant was travelling as a passenger in motor vehicle registration number KBG 215A owned by the respondent. It was the appellant's contention that as he travelled along in the said motor vehicle and upon reaching Marani junction, or thereabouts, the respondent's driver, servant, or agent negligently drove, managed and or controlled the said motor vehicle that he caused or permitted the same to violently overturn and or get out of control as a consequence, the appellant suffered injury, loss and damage. The appellant further averred that the respondent should be held vicariously liable for the tortious act and or omission perpetrated on him by his driver, servant and or agent aforesaid. The particulars of negligence he attributed to the respondent and or his driver, servant, or agent were that he failed to keep any or any proper look out or to have any sufficient regard for other road users, failed to control the said motor vehicle in good time so as to ensure that the motor vehicle did not overturn, failed to head the presence of traffic on the said road, failed to exercise any or any proper or effective control of the said motor vehicle, drove at a speed that was excessive in the circumstances, drove without due care and attention, failed to heed the condition of the road and drove a defective motor vehicle. The appellant further pleaded that as a result of the accident, the respondent's driver was arraigned in court and fined kshs. 2,000/= for the offence of careless driving and carrying excess passengers vide **Kisii Traffic Case No. 2104 of 2009**.

Following the accident, the appellant sustained personal injuries which were accompanied by pain and suffering. He sustained the following injuries though:-

- **Contusion and abrasions on the right arm.**
- **Compound fracture of the radius bone.**
- **Swelling of the right ankle joint.**

He also suffered special damages in the total sum of kshs. 8,700/= in the form of police abstract, medical report and doctor's attendance charges as well as treatment expenses.

The respondent denied the appellant's allegations that he was the proprietor of the motor vehicle. He further denied that he was to blame in anyway for the alleged accident and the resultant loss and damage alleged to have been sustained by the appellant. All the particulars of negligence attributed to him were denied. In the alternative, the respondent contended that the alleged accident and injuries allegedly ensuing therefrom were the natural consequences of the appellant's own negligence. In any event the accident was inevitable in the circumstances and or that it was an act of God.

However before the suit could proceed to trial, parties on 2rd May, 2010, entered a consent in these terms:-

"…1. Judgment be entered in favour of the plaintiff against the defendant on liability in the ratio of 80:20%.

2. The matter to be fixed for assessment of damages on 24th May, 2010…".

The appellant testified during the hearing on assessment of damages that he was a passenger in the respondent's motor vehicle travelling from Kisii to Sirare on 22nd June, 2009 when the accident occurred. The respondent's driver was careless and that is what caused the accident. As they were going downhill, passengers shouted at him because of speed. The driver then suddenly applied emergency brakes and the vehicle overturned and rolled. He passed out and when he came to he found his arm broken. He had sustained two fractures, right heel was sprained, ankle dislocated and had bruises all over the body. He was treated at Kisii Level 5 for the injuries. His arm was put in a plaster which was removed after a month. He later reported the accident at Kisii Police Station and was issued with a P3 form and police abstract which were subsequently filled. He was thereafter examined by **Dr. Ajuoga** who prepared a medical report. He claimed that the injuries he sustained made him unable to work like he used to in the past. The appellant having produced outpatient treatment card, P3 form, police abstract, medical report and a receipt as exhibit then closed his case.

The respondent called no witnesses in support of his defence. However a second medical report on the appellant prepared at the instance and request of the respondent was tendered in evidence by consent of the parties and the respondent then closed his case.

However, in a surprise turn of events, the learned magistrate in a judgment delivered on 21st January, 2011 struck out the appellant's suit holding thus ***"…In the case before this court, the defendant did file his defence and thus it was necessary for the plaintiff to prove his injuries by calling the doctor. The standard of proof in civil cases is on the balance of probability, thus the plaintiff was to prove his injuries by calling Dr. Ajuoga who prepared the report but he did not. As held by the Court of Appeal in Mailanyi, this court cannot award damages to injuries which have not been proved…"***.

This holding triggered this appeal and rightly so in my view, since in arriving at the above conclusion the learned magistrate grossly misdirected herself. Anyhow, the grounds of appeal are that:-

"1. The learned trial magistrate erred in law and in fact in failing to adopt the consent of parties entered into 29th April, 2010 as Judgment of the court as regards liability in terms that the defendant/respondent shoulders 80% liability and the plaintiff/appellant 20%.

2. The learned trial magistrate erred in law and in fact in failing to find that since Medical reports of Dr. Ajuoga and Dr. Cheruiyot were produced by consent of parties then conditions of section 35 of the

Evidence Act were waived.

3. The learned trial magistrate erred in law and in fact in misinterpreting and failing to appreciate that the judgment namely Kisii Civil Appeal No. 23 of 2003 – Kenya Breweries Ltd –vs- Abraham Lien and also Mohammed Musa & Anor –vs- Peter Mailany Civil Appeal No. 243 of 1998 (Njeri) U.R were findings premised upon a situation where the respondent proceeded ex-parte which demands the calling of expert witnesses unlike the case at hand.

4. The learned trial magistrate erred in law and in fact in failing to appreciate that treatment notes and P3 form of the appellant were exhibited as plaintiff's exhibit No. 1 and 2 and the respondent had an opportunity of cross examining the plaintiff/appellant on the same and that the appellant/plaintiff had proved his injuries on a balance of probability.

5. The learned trial magistrate erred in law and in fact in ignoring the consent on liability entered into by parties.

6. The learned trial magistrate erred in law in failing to assess damages payable to the appellant when she had been invited to do so by parties as is discernable submissions by both parties.

7. The learned trial magistrate erred in law and in fact in coming to a conclusion that the plaintiff failed to prove the injuries he sustained yet there was vest, material before the court in proof that the plaintiff suffered the said injuries from the fact of a consent on liability, treatment notes and the plaintiff's own evidence, the defendant's exhibit D"1" apart from Dr. Ajuoga's medical reports.

8. The learned trial magistrate erred in law and in fact by ignoring and failing to consider the vest evidence before her which would have assisted her in making a finding and assessing damages payable to the appellant.

9. The learned trial magistrate erred in law and in fact in failing to appreciate that the plaintiff pleaded and proved special damages of kshs. 6,500/= and gave the same a wide breath while considering extraneous and irrelevant material.

10. The learned trial magistrate erred in law and in fact in failing to award costs and interest when there was a finding (premised on consent) on liability…".

By a consent letter dated 17th June, 2011 and filed in court on 29th June, 2011 the parties agreed amongst other directions that the appeal be canvassed by way of written submissions. Subsequently, the parties filed and exchanged written submissions with authorities which I have carefully read and considered.

From the submissions of counsel, they are all in agreement that in the event that I overturn the decision of the learned magistrate and proceed to award damages, the same should attract interest from the date of this judgment. Secondly, they have agreed that the respondent should not be condemned to pay costs of this appeal. Thirdly, the issue of liability remains as consented upon in the trial court.

In striking out the suit on account of the fact that the appellant did not call evidence by way of **Dr. Ajuoga** testifying, the learned magistrate gravely erred. Upon parties settling by consent the issue of liability, all that the court was being called upon to do was to assess the damages payable. There are many ways of proving injuries sustained in an accident. The evidence of the doctor who examined the victim and or prepared the medical report regarding the nature and extent of such injuries is not mandatory. As I said in the case of **Ben Ocharo & Others –vs- Kenya Farmers Co-operative Society, Kisii HCCA No. 91 of 2006 (UR)**, ***"…In my judgment, the primary source of information about injuries sustained in an accident if at all is by the victim himself. He will tell the story. Next in line will be, if there were witnesses to the accident. There may also be people who have an intimate knowledge of the injured person who have lived or worked with him for a reasonably long time who may also have useful information to give about the injuries and his condition. Of course then there are the medical records starting with the treatment notes through to medical reports prepared by medical personnel who***

examined them. However, the information from the victim is valuable and is complimentary to the doctor's report. Therefore whereas initial treatment records are no doubt of tremendous value they are not the only ones, to prove injuries sustained in a road traffic accident as the learned magistrate tended to think. Such injuries can be proved by word of mouth by the victim himself. Accordingly, a victim's own statement with regard to the injuries should not be easily dismissed merely on the grounds that it was not matched by initial treatment from the hospital. It is worthy reiterating what Ringera J. (as he then was) said in the case of Peterson Gutu Ondieki –vs- Daniel Njigua Gichohi, HCCC No. 4018 of 1990 (UR). He held that non-production of a medical report was not necessarily fatal to a plaintiff case. That the injuries sustained can be established through oral evidence of the victim…"

In this case, the appellant testified as to the nature and extent of the injuries he sustained in the accident and was cross-examined by counsel for the respondent. Again following the accident the appellant was issued with P3 form by Kisii Police Station which was later filled by the medical officer of Health, Kisii on 24th August, 2009. The medical officer of health stated in the P3 form that the appellant had sustained a fracture of the right radius and assessed the degree of injury as grievious harm. The P3 form was tendered in evidence. It is instructive that the appellant was not cross-examined on the same. Then there was the police abstract form which too was tendered in evidence. It concluded that the appellant sustained injuries in the accident classified as harm. Finally, the reports by **Dr. Ajuoga** and that of **Dr. Cheruiyot** were admitted in evidence by the consent of the parties. It is instructive again, that the report by **Dr. Cheruiyot** was at the instance and request of the respondent. That being the case, it was not necessary that the appellant avails **Dr. Ajuoga** to testify in order to prove the injuries sustained by the appellant.

In my view, the learned magistrate misconstrued the ratio ***decidendi*** in **Kisii HCCA No. 23 of 2003, Kenya Breweries Limited –vs- Abraham Cain (UR)**. In this case the defendant did not attend court during the hearing and the plaintiff merely tendered in evidence medical reports without calling the doctors who authored them. Nor were the reports produced by consent of the parties as was the case here. Parties having consented to the two medical reports being introduced in evidence, it was not open to the learned magistrate to disregard them and insist on the appellant availing **Dr. Ajuoga**. Again, even if the learned magistrate had been right in that regard, there were pieces of medical evidence on record upon which she should have proceeded to assess the damages payable to the appellant. The conclusion by the trial magistrate therefore that since the respondent filed a defence denying blame then the consent on liability entered by counsels and adopted by court on 3rd May, 2010 was of little relevance if the doctors were never called to testify was clearly erroneous, wrong in law and in fact. In any case, the appellant had not asked in his submissions that the appellant's suit be dismissed on that account. Courts should be wary of striking out suits on issues not canvassed before it. That draconian act has the effect of denying a party justice on a ground that he could perfectly have an answer to if it had been pleaded and canvassed before hand.

Again, having struck out the suit, the learned magistrate was duty bound to assess damages she would otherwise have awarded the appellant in the event that she had found in his favour. This is an elementary requirement of law. See **Mordekai Mwanga –vs- Bhogal's Garage Ltd, C. A No. 124 of 1993 (UR)**. Simply put, the principle is that a trial court in a claim for damages, is required to assess the damages it would otherwise have awarded even if it proceeds to dismiss the claim.

On the whole, the learned magistrate erred in striking out the suit and also failing to assess the damages she would have awarded had the appellant been successful. The appeal must therefore be allowed on that basis.

So what appropriate general damages are awardable to the appellant? The governing principle in accident compensation claims is that a claimant ought to be compensated for his injuries. However, a claim arising out of an accident is not to be treated as a windfall to be taken advantage of by the claimant. See **George Kiptoo Williams –vs- William Sang & Another (2004) eKLR**. From the two medical reports, it is common ground that the appellant sustained a fracture of the right radius and related but secondary soft tissue injuries. In **Dr. Ajuoga's** opinion the appellant suffered a lot in the form of pain, infections and mental torture. The affected arm is deformed at the site of the fracture and can easily cause bone infection

called ***"osteomyelitis" which can lead to pathological fractures"***. However, to **Dr. Cheruiyot**, the appellant ***"…had closed fracture of the right radius which has healed well…".*** There appears to be some conflicting pieces of evidence in the two reports. The only explanation is perhaps the time frame with regard to when the two reports were compiled. Whereas **Dr. Ajuoga** examined the appellant on 2nd September, 2009, about 3 months after the accident, **Dr. Cheruiyot** did so on 8th September, 2010, a year plus after the accident. Anyhow the basic injury remains the fracture of the right radius.

In his submissions before the trial court, the appellant urged the court to award him kshs. 500,000/= on the authority of **Jane Munguti –vs- Simon Peter Mwangi & Another, MSA HCCC No. 910 of 1991 (UR)**. He has reiterated and maintained the same position before me in this appeal. On the other hand the respondent offered kshs. 100,000/= less contribution. He was fortified in this offer by the cases of **Samuel Mungai Njau –vs- Wanainchi Sanitary & Hardware Ltd NBI HCCC No. 870 of 2002 (UR)** and **Isaac Mwenda –vs- Mutegi Murango NBI HCCC No. 335 of 2004 (UR)**. I note however, that in all the authorities cited, they were all decided over ten years ago. Regard must therefore be had on the incidence of inflation since. I also note in some of those authorities that, the injuries sustained were more serious compared to those sustained herein by the appellant. This is with particular regard to the authority cited by the respondent. With regard to those by the appellant, though the injuries were serious, nonetheless I think the awards were low, and since those decisions are not binding on me, I will leave it at that.

Doing the best I can, and considering the injuries that the appellant sustained I will award him kshs. 200,000/= as general damages for pain, suffering and loss of amenities. Special damages pleaded in the plaint were proved as required. Accordingly the appellant is entitled to a judgment in the sum of kshs. 6,500/= on that account.

In the end, I allow the appeal and set aside the judgment and decree of the learned magistrate striking out the suit. In substitution I enter judgment against the respondent and in favour of the appellant in the terms following:

-	Liability 80:20% in favour of the appellant	
-	Special damages	6,500.00
-	General damages	200,000.00
Less 20% contribution		41,300.00
Total		**165,200.00**

- Costs of the suit in the subordinate court to the appellant
- No order as to costs in this appeal.
- Interest to accrue on the decretal sum from the date of this judgment.

Judgment dated, signed and **delivered** at Kisii this 23rd day of September, 2011.

ASIKE-MAKHANDIA
JUDGE