No.270

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 188 OF 2008

BETWEEN

HUSSEIN DAIRY LIMITED ……..……. APPELLANT

AND

JOSEPH MOSE OKERO ……..…….. RESPONDENT

(Being an appeal from the judgment and Decree of Mr. Were, Esq., SRM, in Keroka SRMCC No. 237 of 2007 dated and delivered on 30th September 2008)

JUDGMENT

1. The Appellant herein, *HUSSEIN DIARY LIMITED* was the Defendant in the case in the lower court. The Respondent filed suit against the appellant seeking to be paid both special and general damages, costs of and incidental to the suit, interest and such other relief as the court would deem fit and just to grant. The Respondent's claim was in respect of a road traffic accident which allegedly took place along the verge of Kisii-Keroka road near Daraja Moja involving the Respondent and the appellant's m/v **Reg. No. KAX 308 Z/ZC 0032**. The Respondent alleged that on or about 30th August 2007, while the Respondent walked along the said road, the Appellant's driver, servant, and/or agent so negligently drove, managed and/or controlled the Appellant's m/v stated above that he caused it to knock down the Respondent and by reason of the said accident, the Respondent suffered loss and damage. The Respondent held the Appellant's driver, servant and/or agent either personally liable in negligence or vicariously liable for the tortuous acts and/or omissions of its driver, servant and/or agent. Particulars of negligence against the Appellant were set out in paragraph 4 of the plaint.

2. The Appellant filed defence on the 8th November 2007 in which it denied the allegations of negligence made against it, and also denied that the Respondent was walking along the said road on the material day as alleged or at all. The Appellant did not admit the injuries allegedly suffered by the Respondent, and also denied particulars of injuries allegedly suffered by the Respondent. In the alternative, the Appellant averred that if the alleged accident occurred at all, which was denied, then the said accident occurred as a result of the Respondent's negligence in that the Respondent suddenly and suicidally dashed onto the path way of **M/V Registration No. KAX 308Z/Z0032**; crossed the road when it was extremely risky to do so and for being generally negligent. The Appellant asked the trial court to dismiss the Respondent's suit with costs.

3. In his defence dated 4th December 2007 and filed in court on 6th December 2007, the Respondent joined issue with the Appellant in its defence and further denied each and every allegation of negligence attributed to him.

4. Briefly, the facts of this case were that on the 30th August 2008, the Respondent JOSEPH MOSE OKERO was walking on the road from Kisii to Keroka when he was hit by the Appellant's m/v. He said he was walking on the left side of the road facing Kisii. He said the collision occurred off the road. As a result of the collision, the Respondent was injured on the head, chest, right hand arm, the right leg on the hip and bruises on the forearm.

5. After the accident, the Respondent was rushed to Kisii District Hospital for treatment and was admitted for a day. Later the matter was reported to Kisii police station from where the Respondent was issued with a P3 form – **P. Exhibit 2**.

6. Later the Respondent was treated by Dr. Ajuoga who was paid Kshs.6500/=. The Respondent also carried out a search with the Registrar of M/Vs. Dr. Ajuoga's medical report and the receipt for Kshs.6500/= were produced as **P. Exhibit 3**.

7. According to Dr. Ajuoga's report, the Respondent suffered the following injuries:-

- *Bruises on the occipital region;*

- *Cerebral concussion;*
- *Bruises on both shoulders;*
- *Bruises on the right arm;*
- *Bruises on the right leg;*
- *Chest contusion.*

8. The case was heard by the trial court and after carefully considering all the evidence that was before it, the trial court entered judgment for the Respondent in the sum of Kshs.120,000/= as general damages for pain suffering and loss of amenities and the sum of Kshs.6500/= as special damages plus costs and interest at court rates. Liability was apportioned 90:10% in favour of the Respondent.

9. The Appellant was aggrieved by the judgment of the trial court and brought this appeal before this court on the following grounds:-

1. The Learned Trial Magistrate erred in both law and infact when having made a finding that the Respondent had not seen the offending motor vehicle before the accident occurred, he still went ahead and held that the Respondent had proved negligence against the Appellant.

2. The Learned Trial Magistrate erred in both law and infact when having found as a fact that immediately after the alleged accident the Respondent was thrown to the ground and that he was not able to see the motor vehicle that had hit him he still went ahead and held that the Respondent had proved negligence against the Appellant on account of excessive speed.

3. The Learned Trial Magistrate erred in both law and infact when having held correctly that the Respondent did not show what efforts he made to avoid the accident, he still held that the Appellant was 90% liable for the alleged accident and in awarding only a token 10% contribution against the Respondent.

4. The Learned Trial Magistrate erred in both law and infact when he failed to notice that the injuries which the Respondent alleged to have suffered in the circumstances which he alleged at the trial did not agree with the circumstances of the accident.

5. The Learned Trial Magistrate erred in both law and infact when he failed to hold that the Respondent had failed to prove negligence against the Appellant and that the Respondent's story in the Court below was a wholly made up tabulation and simply did not lie at all.

6. The Learned Trial Magistrate erred in both law and infact when he awarded to the Respondent as general damages for pain suffering and loss of amenities, the sum of Kshs.120,000/= which amount is

manifestly excessive and high in the circumstances and constituted an erroneous estimate of the alleged damages.

10. The Appellant therefore prayed that the appeal be allowed with costs and that the Respondent's suit in the court below be dismissed with costs to the Appellant; or

in the alternative, this court do evaluate the evidence afresh with a view to reducing the award of damages and increasing the Respondent's liability for the accident.

11. This is a first appeal. Being a first appeal, this court is obliged to rehear the case and to make its own findings in the matter after reconsidering and evaluating the evidence afresh. In cases such as **Peters –vs.- Sunday Post Ltd. [1958] EA 424** and **Selle & another –vs.- Associated Motor Boat Co. Ltd. & others**, it was held that the first appellate court is entitled to a reappraisal of the evidence and drawing of its own conclusions from it and interfere with the trial court's findings if the judge failed to take into account particular circumstances or based his impression on demeanour of witnesses which was inconsistent with the evidence. While doing so the first appellate court must exercise this jurisdiction with caution remembering that it lacks the privilege of seeing

and hearing witnesses who gave evidence during the trial and can therefore not purport to appreciate who of the witnesses was telling the truth and who of them was not. This is particularly so on the question of fact and in **Daniel Ng'ang'a Kanyi –vs.- Sosphinat Company Ltd. & another – Civil Appeal No. 52 of 1999**, the Court of Appeal stated that it is usually a strong thing for an appellate court to differ, from the finding, on question of facts, of the trial judge who had the advantage of seeing and hearing the witnesses.

12. It is with the above principles in mind that I venture into deciding this appeal. From the grounds of appeal and the submissions made by counsel in support of the parties' respective positions in this appeal, the issues that arise for determination are these:

a) Was the assessment of damages so excessive that this court must interfere; and

b) Was the assessment of liability at 90:10% in favour of the plaintiff realistic in the circumstances of this case.

13. After carefully considering the evidence that was placed before the lower court, I am of the considered view that there is no case to warrant an interference with the findings of the trial court. I shall first deal with the issue of liability. In his evidence to the court, the Respondent stated that the Appellant's M/V hit him as he walked about 2 metres off the left side of the road towards Kisii. The Appellant's M/V went off the road to where he was and hit him. Out of the same accident, two other persons lost their lives. He also said that the Appellant's M/V also ploughed into a number of Nissan Mutatus that were stationary a head of it. The Appellant did not call any witnesses to rebut the evidence given by the Respondent on how the accident occurred. It is trite law that he who alleges must prove. The Appellant alleged in its defence that the Respondent dashed across the road, but called no evidence to support such an allegation. So, the Appellant's averments in the Statement of Defence remained mere allegations without a base to stand on. In the case of **Malindi Car Hire Ltd. & another –vs.- Karisa Kazungu Ziro – Civil appeal Number 39 of 1993**, the Court of Appeal sitting at Mombasa held that where the Appellant's vehicle collided with the Respondent who was crossing the road, the burden is upon the Appellant to produce the sketch plan of the scene of the accident to determine the point of impact. In the instant case, it was incumbent upon the Appellant to adduce such evidence as sketch-map to show the exact point of impact so as to confirm or prove to the court that indeed the collision occurred inside the road and not off the road as alleged by the Respondent. In light of the above, I think that the apportionment of liability as between the Respondent and the Appellant was fair and just. It will therefore remain undisturbed on this appeal.

14. Now is the more troublesome issue of the measure of damages. Should this court interfere

with the same? The principles governing this aspect of the appeal were dismissed in the case of **Mohammed Jabane –vs.- Highstone Tongoi Olenja – Civil Appeal No. 2 of 1986 [1986] 1 KAR 982** where the Court of Appeal stated that the correct approach in assessing damages is:-

i) Each case depends on its own facts;
ii) Awards should not be excessive for the sake of those who have to pay premiums, medical fees or taxes (the body politic);
iii)comparable injuries should attract comparable awards;
iv)Inflation should be taken into account; and
v) Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or is so inordinately high or low as to be an entirely erroneous estimate for an appropriate level, leave it alone.

15. In the instant case, the injuries suffered by the Respondent were set out in Dr. Ajuoga's Medical Report dated 20th September 2007 which were classified as soft tissue injuries that were healing well with no permanent disability anticipated. The trial court assessed general damages of sKshs.120,000/= for pain, suffering and loss of amenities. For the kind of injuries sustained by the Respondent, and compared with the authorities relied upon by the Appellant, most of which were decided nearly ten years before the instant case was decided, the award of Kshs.120,000/= was very modest.

16. In the circumstances, and for the reasons above given, I find no merit in this appeal. The same is dismissed with costs to the Respondent.

17. It is so ordered.

Dated and delivered at Kisii this 04th day of November, 2011

RUTH NEKOYE SITATI
JUDGE.
In the presence of:
Mr. Ochoki for Okongo (present) for Appellant
Mr. Ogweno (present) for Respondent
Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.