



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 3 OF 2019

UCHUMI SUPERMARKET LIMITED.....1ST APPELLANT

EDWIN MUNENE NJERU.....2ND APPELLANT

-VERSUS-

BONIFACE OUMA WERE.....RESPONDENT

(Being an appeal from the judgment of Honourable M.W. Murage (Ms.)

(Senior Resident Magistrate) delivered on 5th December, 2018

in CMCC NO. 3857 OF 2016)

JUDGMENT

1. The respondent herein instituted Civil Suit No. 3857 OF 2016 and sought general and special damages against the 1st and 2nd appellants under the tort of negligence arising out of a road traffic accident which occurred on or about the 22nd day of December, 2015 and involving motor vehicle registration number KYF 726 (“the subject motor vehicle”).
2. The appellants entered appearance and filed their joint statement of defence on 25th October, 2016. In their defence, the 1st and 2nd appellants admitted to owning and driving the subject motor vehicle at all material times but denied the particulars of negligence pleaded by the respondent, alleging that the accident was caused substantially or wholly by negligence on the part of the respondent.
3. At the trial, the respondent testified and called a doctor as an expert witness, whereas the appellants did not call any witnesses.
4. Upon filing of submissions by the respective parties, the trial court rendered judgment in favour of the respondent and against the appellants by awarding the sums of Kshs.2,000,000/=; Kshs.1,512,000/=; Kshs.450,000/= and Kshs.2,550/= on general damages for pain and suffering and loss of amenities, diminished earning capacity, cost of prosthesis and special damages respectively.
5. That decision precipitated the appeal currently before this court. The memorandum of appeal dated 3rd January, 2019 constitutes a total of 10 grounds touching on liability and quantum.
6. The appeal was disposed of by way of written submissions. In their submissions, the appellants contend that the respondent did not prove the particulars of negligence set out in his plaint and further did not call any eye witness to support his evidence.
7. The appellants also faulted the trial court for awarding an excessive sum on general damages and making awards for diminished earning capacity and cost of prosthesis without basis.
8. In reply, the respondent essentially stood in support of the trial court’s findings and urges that the appeal be dismissed with costs.
9. I have carefully considered the rival submissions on record alongside the relevant authorities cited. I have as well re-evaluated the evidence placed before the trial court and the judgment in question. I will address the appeal under the two (2) limbs of liability and quantum.
10. On liability, the respondent adopted his signed witness statement as evidence and stated that on the material day he was walking on the

right side of the pedestrian pavement along Nairobi-Nanyuki Road when the subject motor vehicle being negligently driven by the 2nd appellant and approaching from the opposite side of the road lost control, knocked him down. The respondent also testified that he was hit at a parking spot.

11. Turning to the judgment, the learned trial magistrate reasoned that the respondent had established that the appellants were to blame for the accident, whereas the appellants did not bring any evidence to controvert the respondent's evidence, or to show that the respondent contributed to the accident, and should therefore be found partially liable.

12. Upon my perusal of the police abstract which was tendered as evidence, I note that the matter was listed as pending under investigation and there is no indication as to the results of the investigation.

13. It is not in dispute that the investigating officer named in the police abstract was never called as a witness to shed light on his findings upon investigating the accident.

14. Be that as it may, I note from the pleadings that the respondent pleaded the doctrine of *res ipsa loquitur* which would prove relevant in determining whether there was negligence on the part of the appellants.

15. The above doctrine was aptly discussed in the authority of **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR** with reference to the **East African Court of Appeal's decision in Embu Public Road Services Ltd. v Riimi [1968] EA 22** thus:

“The doctrine of res ipsa loquitur is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control.”

16. From the foregoing, I observed that once pleaded, the *res ipsa loquitur* doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.

17. The respondent having pleaded the doctrine, the burden of proof shifted to the appellants to either disprove the same or to show that the respondent contributed to the accident, but they did not.

18. In the premises, I am satisfied that the learned trial magistrate upon considering all the evidence on record, arrived at a proper finding on liability, which I am not inclined to set aside.

19. On quantum the law is well settled that, in deliberating on whether to interfere with the award of a trial court, an appellate court ought to take into account the following principles portrayed in **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR**:

a) Whether the trial court took into account an irrelevant factor, or

b) Whether the trial court left out of account a relevant factor, or

c) Whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

20. In respect to the award made on damages for pain and suffering and loss of amenities, the respondent suggested a sum of Kshs.2,000,000/= while the appellants suggested the sum of Kshs.750,000/=. The learned trial magistrate in awarding a sum of Kshs.2,000,000/= cited the case of **Kipkoskei Tangus Tesot v Julius Kiprono Tanui [2018] eKLR** where the High Court sitting on appeal revised an award of Kshs.3,903,003/= downwards to a sum of Kshs.2,500,000/= for crash injury of left leg which resulted in amputation at the level of above the knee and fractures of the right tibia and fibula, with 80% permanent disability.

21. The pleadings and medical evidence tendered at the trial are consistent as to the nature of injuries sustained by the respondent, these being: abrasions on the forearms and crush injury to the left leg leading to amputation from the lower shin downwards. These injuries were restated by Dr. Wokabi Washington in his oral evidence, who assessed the permanent incapacity at 40%.

22. In addition to re-evaluating the evidence and material tendered at the trial, and the finding of the learned trial magistrate, I also considered the case of **Abdi Werdi Abdulahi v James Royo Mungatia & another [2019] eKLR** in which the court awarded a sum of Kshs.3,500,000/= to the plaintiff who had sustained various injuries including lower limb amputation with permanent incapacity. I am therefore satisfied that the learned trial magistrate's award under this head is not manifestly excessive.

23. Concerning diminished earning capacity, the learned trial magistrate tabulated the respondent's last known earnings of Kshs.12,000/= and applied a multiplier of 20 on the assumption that the respondent would have continued to work as a conductor until the age of 47 plus the permanent incapacity of 40% , as follows:

12,000 x 20 x 12 x 40/100 = Kshs.1,512,000/=

24. Going by the medical evidence and the oral testimony of Dr. Wokabi, due to his reduced social mobility resulting from the injuries, the respondent was unlikely to ever resume his work as a conductor and would have to seek alternative gainful employment.

25. The respondent produced copies of his pay slips to show that he was at all material times employed by Spice World and earning an estimated gross salary of Kshs.12,000/= which is what was applied as a multiplicand. For the multiplier, the respondent produced a copy of his National Identification Card which shows that he was aged 26 years at the time of the accident. Upon considering the case of **Peter Macharia Elijah (Suing as the administrator of the estate of Kenneth Kinyungu Macharia-Deceased) v Saj Enterprises Limited (Nee Saj Enterprises [2019] eKLR** where the court applied a multiplier of 20 years for a 28-year old and the case of **Mary Wanjiru Maina (Suing as Administrator Ad Litem of the Estate of the late Jane Wanjiru Maina v Lilian W. Macharia & another [2019] eKLR** in which a similar multiplier was applied in the instance of a deceased person aged 25 years, I am satisfied that the learned trial magistrate arrived at a reasonable award under this head.

26. In respect to the final award which is the cost of the prosthesis, the medical evidence and testimony of Dr. Wokabi are consistent that the respondent would require an artificial leg costing about Kshs.150,000/= and which would require replacement after every 8-10 years. This supports the award of Kshs.450,000/= made by the learned trial magistrate which I find to be reasonable and I am therefore not inclined to interfere with.

27. Consequently and for all the foregoing reasons, the appeal is dismissed with costs to the respondent. The judgment of the trial court is hereby upheld.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Weru for the Appellants.

Mr. Gitonga for the Respondent.