REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.92 OF 2019

BETWEEN

VEHICLE AND EQUIPMENT LEASING LTD.....APPELLANT

AND

IBRAHIM OTIENO.....RESPONDENT

(Being an Appeal from the judgment in Oyugis Chief Magistrate's CMCC No. 21 of 2017 by Hon. J.P Nandi –Principal Magistrate).

JUDGMENT

1. The appellant herein was the defendant in Oyugis Chief Magistrate's CMCC No. 21 of 2017. This was a claim that arose from a road traffic accident. The plaintiff was a rider of motor cycle registration number KMDA 364Z.The motor cycle collided with motor vehicle GKB 641E and the plaintiff sustained injuries. The learned trial magistrate delivered judgment dated 11th October, 2019 and made an award of Kshs.400,000/= general damages and Kshs.9,050/= special damages in favour of the plaintiff.

2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Mose, Mose & Milimo advocates. They raised grounds of appeal as follows:

a) The learned magistrate erred in law in making a finding of excessive damages against the defendant;

b) The learned magistrate erred in law and fact in holding that the defendant was 100% liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same;

c) The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to general damages of Kshs.400,000/- without concrete documentary evidence;

d) The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of kshs.9,050/- without concrete documentary evidence;

e) The learned magistrate erred in law and fact in failing to appreciate that there could be no liability without fault;

f) The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to pay damages of kshs.409,050/-;

g) The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages;

h) The learned magistrate erred in law and fact in failing to appreciate as follows,

i) That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the excessive award of damages.

j) The learned magistrate erred in law and fact in entering judgment in favour of the plaintiff against the defendant in spite of the plaintiff's miserable failure to establish his case more especially on quantum;

k) The learned magistrate erred in law and fact in failing to appreciate the legal position to be considered. The court award is unsustainable and baseless in the circumstances.

3. The appeal was opposed by the respondent through the firm of Ochoki & Company, Advocates. It was argued that the finding on liability and on quantum of damages was legally sound.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. What emerges from the evidence is that the motor cycle was hit from behind. There are however two versions of how the accident occurred. The respondent contended that they were hit from behind whereas the appellant in his pleading denied that the accident ever occurred. He went on to plead in the alternative by making a general statement that the respondent was reckless without giving particulars.

6. While being cross examined, he contended that the respondent made a U-turn to the right. It was at this point the two vehicles collided.

7. This contention came too late in the day. Parties are bound by their pleadings. In the case of **Global Vehicles Kenya Limited vs. Lenana Road Motors [2015] eKLR** the Court of Appeal stated:

> **Thirdly, pleadings contribute immensely to speedy resolution of dispute and cost-efficient delivery of justice. Because pleadings ensure that the dispute is focused and precisely defined, they not only eliminate ambushes and surprises, but also wastage of time and unnecessary expenses involved in calling witnesses to prove or disprove matters that are not in dispute before the court. It can therefore be argued that pleadings also contribute immensely to the realization of the cardinal constitutional principle that justice shall not be delayed.**

They cited **Thorp vs. Holdsworth (infra)** with approval thus:

> **Jessel M. R. articulated this view very well in THORP V. HOLDSWORTH, (1876) 3 Ch. D, 637 at 639,**
>
> **as follows:**
>
> **"The whole object of pleadings is to bring the parties to an issue and the meaning of the**
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> **rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing."**

8. When a motorist rams into the motorist ahead of him, prima facie he is liable for failure to keep safe distance, unless on a balance of probabilities he can adduce evidence to show that the motorist ahead of him is to blame. The appellant did not discharge this obligation. The learned trial magistrate was therefore right in finding him 100% liable for the accident.

9. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

> **…an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.**

10.The appellant contends that the award of Kshs. 400,000/= general damages was excessive and that only Kshs.6,500/= special damages were proved. The respondent sustained the following injuries:

a) Deep cut wound on the frontal forehead;

b) Bruises and lacerations on the upper lip;

c) Chest contusion;

d) Bruises on the right redial elbow joint;

e) Deep cut wound in lip;

f) Deep cut on the left elbow joint; and

g) Bruises on the medial aspect of the right knee and the lateral aspect of the left knee.

11. The appellant had contended that Kshs.90, 000/= would have been sufficient compensation and relied on the decision in **Eastern Produce (K) Ltd (Savani Estate) vs. Gilbert Muhunzi Makotsi [2013]eKLR,** where the judge observed:

> **I agree with counsel for the Appellant that the Respondent suffered soft tissue injuries which have completely healed. They did not occasion him any permanent disability. They have not prevented him from performing any gainful employment. As such, the award given by the trial court, at the time, was inordinately high in the circumstances.**

This decision was of little help to the trial court for the injuries were not described so as to be of any assistance.

12. I however agree with the appellant that the general damages were excessive. In **Morris vs. Nahashon Muriuki & another [2018] eKLR where** the appellant had tenderness on the chest, was unable to breath well due to trauma and had multiple bruises on the posterior aspect of the chest and had sustained a fracture of the 3rd and 4th right ribs and also a fracture of the right scapula, the appellant was awarded Kshs. 300,000/=.

13. The respondent in this case suffered less severe injuries that amount to soft tissue injuries. I am therefore persuaded to set aside the award on general damages and substitute with an award of Kshs. 250,000/=.

14. My perusal of the record shows that only one receipt of kshs.6500/= was produced. This therefore means that the award of kshs.9,050/= was not proved. I set aside this award and substitute it with that of kshs.6500/= special damages.

15. Since the appeal has succeeded partially, the respondent will pay half of the costs of appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF JUNE, 2021

KIARIE WAWERU KIARIE

JUDGE