REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 22 OF 2020

KAJIADO ARID LANDS DEVELOPMENT

ORGANISATION……..……...….1ST APPELLANT

SUCCOS HOSPITAL……..……..…….2ND APPELLANT

YOHANAS KISOSO……..……..……..3RD APPELLANT

VERSUS

TIMOTHY SAMUEL NDIEMA…….....……..RESPONDENT

(Appeal from the judgment and decree of (Hon. B. Cheloti, SRM) dated 25th February, 2020 in CMCC No. 632 of 2015 at the Chief Magistrate's Court Kajiado)

JUDGMENT

1. The respondent filed an amended plaint before the Chief Magistrate's Court, at Kajiado dated 18th December 2015, claiming general damages and special damages of **Kshs. 1, 704,751,** for injuries he sustained in a road accident on 1st May 2014 along Kitengela–Namanga road involving motor vehicle registration number KAV 453 K. The vehicle was owned by the 1st appellant and was being driven by the 3rd appellant an employee of the 2nd appellant hospital. The respondent attributed the accident to the negligence of the 3rd Appellant.

2. The appellants filed a joint amended defence dated 15th January 2016, denying negligence. They attributed the accident to the respondent's negligence that he jumped on to the road. They also denied particulars of special damages and sought dismissal of the suit with costs.

3. **Hon. Chesang, (RM),** heard the respondent's case on 23rd May 2017, while **Hon Cheloti, (SRM),** heard the appellants' case on 27th August 2019. In a judgment delivered on 25th February, 2020, the trial magistrate held the appellants wholly for accident and awarded the respondent general damages of Kshs. 850,000 and special damages of Kshs. 1,704,751, costs of the suit and interest at courts rates of 10% from the date of judgment.

4. The appellants were aggrieved with that judgment and filed a memorandum of appeal dated 30th June, 2020, raising the following grounds, namely:

(a) ***THAT the learned trial magistrate erred in law and facts by failing to properly scrutinize and evaluate the evidence tendered by the Appellants and correctly relate the same to the case law cited in court and thereby failed to arrive at a fair and reasonable assessment on the issue of liability, Quantum and compensation to the Respondent.***

(b) ***THAT the learned trial magistrate erred in law and fact in deciding the case against the weight of the evidence on record and apportioning liability at 100% against the Appellants.***

(c) ***THAT the trial magistrate erred in law and fact in awarding Kshs. 1,704,751/- as special damages as pleaded yet the same were not proved in court as the said is excessively high and also in failing to find that the amount pleaded had not been proved by the Respondent as having been spent relating to the injuries allegedly sustained and pleaded in the plaint as a result of the alleged accident as the nature of injuries sustained by the Respondent did not warrant and match such treatment and expenditure.***

(d) ***THAT the learned trial magistrate erred in law and fact by holding the Appellants liable without any proof or evidence of negligence on the part of the Respondent.***

(e) ***THAT the learned trial magistrate erred both in law and fact by making an award on liability which was against the weight of the evidence before the court and was without any consideration to the submissions of the Appellants.***

(f) ***THAT the learned trial magistrate erred in law and fact in failing to appreciate sufficiently or at all the judicial nature of the case that was before him finding the Appellants liable merely because of the occurrence of the accident and that the injuries sustained and not because of any proved fault or negligence on the part of the Appellant.***

(g) ***THAT the trial magistrate erred in law and fact in apportioning liability by failing to take into consideration the documents and exhibits on record placing culpability on the part of the Respondent more particularly in regard to the manner in which the accident occurred, the state of the Respondent and the fact that the Appellants motor vehicle was an ambulance on emergency call.***

(h) ***That the trial magistrate erred in law and fact in failing to properly take into account the proper legal principles regarding liability where a motor vehicle is an ambulance in line or duty vis a vis other road users while considering the judgment awards in cases of similar nature.***

(i) ***THAT the trial magistrate erred in law and fact in awarding Kshs. 850,000/- as general damages as the same is excessively high and also failing to find that the nature of injuries sustained by the Respondent did not warrant such an award.***

(j) ***THAT the magistrate erred both in law and fact in making an award on quantum which is too high and was not supported by any oral or documentary evidence, any relevant authorities, guided by the doctrine of precedent, case law of similar facts and guided by the laws of natural justice and or commensurate with the injuries suffered by the Plaintiff.***

(k) ***THAT the award on general damages and special damages was against the weight of the evidence before the court and was without any consideration to the pleadings, the evidence before court and the submissions of the defence/ Appellants counsel whilst failing to take into account the amounts claimed by the Respondent did not relate to injuries as per the medical reports produced in court.***

5. Parties agreed to dispose of this appeal through written submissions.

6. The appellants submitted through their submissions dated 5th February, 2021 and filed on 8th February, 2021, that the trial court erred in holding them wholly liable for the accident**.** According to the appellants,

liability is a finding of fact which should be proved. They relied on ***Oluoch Eric Gogo v Universal Corporation Limited*** [2015] eKLR and ***Mwana Sokoni v Kenya Bus Service Limited*** (CA 35 of 1985), on grounds upon which an appellate court should disturb a finding of fact.

7. The appellants further argued that the trial court disregarded their evidence by (DW1), the clinical officer, that the respondent was drunk. They relied on ***Michael Kariuki Muhu v Charles Wachira Kariuki & another*** [2015] eKLR where the appellant's appeal was dismissed as he was drunk at the time of the accident. They also faulted the trial court for disregarding the 3rd appellant's evidence. It was the appellants' case that the respondent disregarded section 42 of the Traffic Act and rule 83 of the Traffic Rules**.** Section 42(5) exempts ambulances and some other vehicles from observing speed limits while rule 83 requires drivers to give way to an ambulance with a siren on.

8. The appellants submitted that the police abstract was only marked for identification and was not produced as an exhibit. They relied on ***Green Palms Investments Ltd v Kenya Pipeline Company Ltd Mombasa*** (HCCC No. 90 of 2003) on the consequences that befalls a party who fails to call a witness or adduce evidence in his favour**.** They maintained that the trial magistrate failed to analyze the issue of causation and relied on ***Statpack Industries v James Mbithi Munyao*** **(Civil Appeal Case No. 152 of 2013).** They therefore argued that the respondent did not discharge the burden of proof and the suit should have been dismissed with costs for failure to prove liability.

9. The appellant submitted in the alternative, that this court should apportion liability to the respondent at 80% should it find the respondent had proved his case as he was drunk while attempting to cross the road, and should have also exercised caution as a road user. They relied on ***Patrick Mutie Kimau & another v Judy Wambui Ndurumo*** [1997] eKLR to support their argument.

10. Regarding quantum of damages**,** the appellants submitted that the trial court awarded the respondent inordinately high and excessive damages. They also faulted the trial magistrate for applying wrong principles in assessing quantum of damages. They relied on ***Kenya Tea Development Agency V Augustine Gori Makori*** [2014] eKLR and ***KEMFRO Africa Ltd t/a Merua Express(1976) and Another v Lubia and Another (No. 2)*** **[1985] eKLR** on the principles to be observed in awarding and assessing quantum of damages.

11. The appellants again relied on ***Butt v Khan*** [1977] eKLR for the argument that an appellate court disturb an award only where it is inordinately high or low so as to represent an erroneous estimate. They further relied on ***Joseph Musee Mua v Julius Mbogo Mugi & 3 others*** [2013] eKLR; ***Osman Mohammed & Another v Saluro Bundit Mohammed*** (Civil Appeal No. 30 of 1997) and ***Rahima Tayab & Others v Anna Mary Kinanu*** **(Civil Appeal No. 29 of 1982 [1983] KLR 114;** to buttress their argument that damages should represent a fair compensation but should not be excessive. They argued that general damages of Kshs. 850,000 were not commensurate with the injuries the respondent sustained and the decisions cited.

12. In the appellants' view, the injuries the respondent suffered, namely; splenic laceration (grave iv) with a fracture of the overlying ribs and subcutaneous injuries could not attract such a high award. They also argued that the respondent did not produce the medical report or call a doctor to testify in support of the injuries he allegedly sustained, thus he failed to meet the threshold under sections 109 and 112 of the Evidence Act. They relied on ***Kenneth Nyaga Mwige v Austin Kiguta & 2 others*** [2015] eKLR*;* ***Agnes Moraa Omiti v KAPI Limited*** [2018] eKLR and ***Peter Migiro v Valley Bakery Limited*** [2015] eKLR, for the argument that documents that were only marked for identification but not produced are of no evidential value.

13. The appellants suggested an award of Kshs. 400,000 as sufficient compensation. They relied on ***Hashi Mohamud & another v Elijah Mwita Wantora*** [2020] eKLR and ***Francis Ochieng & another v Alice Kajimba*** [2015] eKLR (Migori Civil Appeal No. 23 of 2015).

14. Regarding special damages, the appellants submitted that special damages must be specifically pleaded and proved. They relied on ***David Bagine v Martin Bundi***. (Nairobi Civil Appeal No. 283 of

1996). They further argued that there was no nexus between the amount of money used and claimed and the minor injuries sustained in the accident.

15. The appellant refuted medical expenses claimed for removal of the colon, acute pancreatitis, pneumonia, glucose intolerance, parasternal abscess as the CT scan for 2nd May, 2014 indicated that the small and large intestines were in order. Further, the colostomy procedures and removal of the colon were done 6 months after the accident and had no connection with the accident. Similarly, those injuries were not pleaded and, therefore, any expenses incurred could not be claimed.

16. The appellants urge this court to disregard the receipts, allow the appeal and set aside the decision of the trial magistrate on liability and quantum. They also urged for costs.

17. The respondent's submissions were dated16th February, 2021 and filed on even day. On liability, he argued that he was hit by the vehicle that was being driven 3rd appellant and that the police abstract confirmed occurrence of the accident. He also submitted that although DW1 claimed that he was drunk at time of the accident, he was not examined on that day but a day after the accident and DW1 did not have clinical expertise to measure intoxication.

18. He contended that the 3rd appellant's claim that he was drunk could not be substantiated, thus liability fell on the 3rd appellant and 1st and 2nd appellants were vicariously liable. He urged the court to uphold the 100% liability attributed to the appellants.

19. Regarding special damages, he submitted that the medical reports and treatment notes prove that he was injured and treated. He also argued that receipts were produced for the amount of **Kshs. 1,701,251** and were undisputed by the appellants. The respondent contended that the colostomy was performed on him as a result of the blunt abdominal trauma occasioned by the accident which required treatment which was done. He therefore argued that special damages were proved.

20. With regard to general damages, the respondent argued that although he had submitted for an awarded of Kshs. 1,000,000, the trial court awarded him Kshs 850,000. He relied on ***James Njenga v Coast Bus (Mombasa Limited)*** [2016] eKLR; ***Arrow Car Ltd v Bimomo & 2 Others*** [2004] 2 KLR and ***Joshua Mwaniki Nduati v Samuel Muchiri Njuguna*** [2005] eKLR to support his argument that the award was proper. He prayed that the appeal be dismissed with costs.

21. I have considered this appeal, submissions by parties and the decisions relied on. I have also considered the trial court's record and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reassess the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

22. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] e KLR, the Court of Appeal held that;

> ***[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.***

23. In ***Peters v Sunday Post Ltd*** [1958] EA 424, the Court held that;

> ***Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.***

24. Similarly, in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] eKLR, the court stated with regard to the duty of the first appellate court;

> ***This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.***

25. The respondent testified adopting his witness statement dated 13th October 2015, that on the material day, he was lawfully crossing Kitengela–Namanga road near Equity Bank road when the driver of the motor vehicle negligently drove the vehicle causing it to lose control and knocked him down. He lost consciousness and found himself at Saitoti dispensary with injuries. He learnt that he was taken to hospital by a police officer. He was later transferred to Shalom Hospital and later to German Medical Centre for specialized treatment because his injuries were serious. A scan showed that he had three broken ribs, injury on the spleen, cracked teeth, bruises on both hands, knees and face. He blamed the driver of the motor vehicle for the accident. While testifying in court, he produced the documents on his list of documents as PEX1-8, excluding documents 1 and 5. Document 1 was the medical report by **Dr. Mwenda K. Ndibo** while document 5 was the police abstract. He stated that although he had healed, he was still not strong enough.

26. DW1 Geoffrey Wagura, a clinical officer at Kitengela Sub-County Hospital, produced a referral report dated 2nd May, 2014, indicating that the patient (respondent) had been hit by a motor vehicle along Kajiado–Namanga road and he was drunk. He confirmed the respondent was handed over to him from the initial clinical officer and according to clinical observation, he was drunk. However, no tests were done.

27. DW2 Yohanna Kisoso (3rd appellant), testified, also adopting his witness statement dated 2nd November, 2015, that on 1st May 2014 at about 8.00pm, he was ferrying a semi-conscious patient to Kenyatta National Hospital(KNH) and on reaching Kitengela town near Nomads Hotel, he noticed a pedestrian who was staggering aiming to cross to the left side, of the road. The person again changed and attempted to pass between his vehicle and the one front him while still staggering. He was hit on the left side by the ambulance. The 3rd appellant reported the matter at a nearby road block. The police at the road block advised him to take the patient he was carrying to KNH first and return later. He blamed the respondent who appeared drunk for the accident.

28. After considering the evidence, the trial court found the 3rd appellant, driver of the motor vehicle, wholly liable for the accident. The trial court stated:

> ***The 3rd Defendant as a driver is expected to be prudent while driving, be vigilant and have ability to control and stop the motor vehicle in the event an accident. Court finds the Defendants liable arising from the 3rd Defendant's inability to take prudent measures to prevent the accident from taking place…***

29. The trial court then awarded the respondent Kshs. 850,000 for general damages which the appellants argue should not have been awarded and in any case, the award was excessive given the injuries the respondent had sustained.

30. I have considered the respective parties' arguments in this appeal. Two issues arise for determination. First, who between the 3rd appellant and the respondent was to blame for the accident and, depending on the answer to the first issue, whether the award was inordinately high.

31. The appellants' argument was that the 3rd appellant was driving an ambulance ferrying a semi-conscious patient to **KNH** at about 8pm. At the time the respondent who appeared drunk attempted to cross the road while staggering and was involved in the accident. According to the appellants, the respondent failed to observe traffic regulations that require other road users to give way to ambulances. The respondent on his part denied that he was drunk and argued that the vehicle was being driven in a negligent and careless manner thereby causing the accident.

32. The trial court in its judgment did not resolve the issue of whether the 3rd appellant was driving an ambulance and, if so, whether he was negligent and, therefore, liable for the accident. The evidence on record from the appellants was that the 3rd appellant was driving an ambulance rushing a sick patient to hospital, a fact the respondent did not deny. That ambulance belonged to the 1st appellant and was being driven by the 3rd appellant an employee of the 2nd appellant hospital, a fact that the respondent did not also dispute.

33. Section 42 imposes speed limits on the road users. Subsection (5) provides that:

> ***The provisions of this section or of this or any other Act, imposing a speed limit on motor vehicles, shall not apply to any vehicle on an occasion when it is being used for fire brigade, ambulance or police purposes, if the observance of such provisions would be likely to hinder the use of the vehicle for the purpose for which it is being used on that occasion.***

34. Rule 83 of the Traffic Rules places every road user on caution and requires drivers of motor vehicles (also pedestrians if crossing a road) to give way to a category of vehicles including ambulances. Section 42(5) of the Act exempts that category of vehicles (including ambulances) from observing speed limits when being used for that purpose. The respondent did not deny that the 3rd appellant was ferrying a patient to hospital and, therefore, the ambulance was being used for the purpose for which speed limit is not regulated for it. In that regard, the respondent failed to observe the requirement to give the ambulance way resulting into the accident. For that reason, the respondent was to blame for the accident and not the 3rd appellant who was on the road because of a medical emergency.

35. The trial court fell into error when it blamed the 3rd appellant for the accident yet he was driving the ambulance rushing a patient to hospital. The reason why ambulances are exempted from speed limit on such occasions is because they are supposed to assist in saving life and, at such critical moments, they do not have to worry about speed but the concern is to save life.

36. Having found that the respondent was to blame for the accident, the matter should have rested there. However, for completeness of this appeal, it is important to say something about quantum. Regarding quantum, the appellants argued that the amount awarded were inordinately high; that the appellant did not prove that he sustained injuries since he did not produce a medical report and that special damages were also not proved. In their view, the injuries pleaded could not attract such a sum for treatment.

37. I have considered the arguments by both parties on this issue, perused the plaint and evidence on record. The respondent pleaded that he sustained splenic laceration (grave iv) with a fracture of the overlying ribs and subcutaneous injuries. In his evidence, he testified that he suffered more serious injuries though they were not contained in the plaint. It was on the basis of those injuries that the trial court made the award.

38. It is strite law that parties are bound by their pleadings. The appellant pleaded injuries that he said he sustained. He amended his plaint but did not amend the injuries he had pleaded earlier. He also did not produce a medical report to support the injuries he said he sustained. Although one can prove injuries through other evidence, a medical report is necessary to show the extent of the injuries and the effect they may have had on the person. It is on such evidence that a court assesses the award to make.

39. Although one can prove that an accident occurred through other evidence and not necessarily a police abstract, the extent of injuries and their effect on the party should be supported by medical evidence. The trial court therefore fell into error for failing to address its mind on this aspect of the case, thus made an award that was neither supported by the injuries pleaded nor by medical evidence.

40. For the injuries pleaded and in the absence of a medical report to assist the court on the extent of the injuries and the likely effect they had on the respondent, this court would have reduced the awarded for pain and suffering from Kshs, 850,0000 to Kshs. 350,000.

41. Regarding special damages, the appellants argued that special damages must not only be pleaded but must also be strictly proved. The law is clear that special damages should be specifically pleaded and strictly proved. (See ***Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited*** [2016] eKLR.

42. The record shows that the respondent pleaded special damages of **Kshs. 1,704,751** in his amended plaint dated 18th December 2015. During the hearing, he produced documents in his list of documents filed together with the original plaint dated 13th October 2015 except documents 1 and 5. Document 1 was the medical report by Dr. Mwende K. Ndibo dated 21st September, 2015 while document 2 was the police abstract. Although the respondent filed a supplementary list of documents dated 30th September 2016, It was not referred to during the hearing and the documents were not produced as exhibits. That list contained medical expenses at KNH, Matter Hospital, Nairobi Hospital and German Medical Centre.

43. In that regard, the appellants were right that the amount of special damages had not only to be pleaded they were also to be strictly proved. His original list of documents did not contain receipts for treatment except a receipt for medical report from Dr. Mwenda Ndibo for Kshs. 3,000 only.

44. The respondent having not produced the receipts for medical expenses in his supplementary list of documents he failed to prove special damages he had pleaded. He would only have been entitled to the amount in his original list of documents that were produced in court.

45. Having considered the appeal and perused the record, the conclusion I come to is that the appellants' appeal has merit and is for allowing. Consequently, this appeal is allowed, the trial court's judgment and decree dated 25th February 2020 set aside and replaced with an order dismissing the respondent's suit before the trial court.

46. Given that the respondent suffered injuries, each party shall bear their own costs before the trial court and in this appeal.

47. Orders accordingly.

Dated, Signed and Delivered at Kajiado this 2nd day of July 2021.

E C MWITA

JUDGE