



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 283 OF 2017**

**RIFT VALLEY RAILWAYS.....APPELLANT**

**VERSUS**

**PETER MATHENGE GITHIGARO.....RESPONDENT**

**(Being an Appeal from the whole of the judgment and decree of Honorable Usui**

**Senior Principal Magistrate in CMCC No. 2134 of 2012 delivered on the 26<sup>th</sup> May, 2017)**

**JUDGMENT**

1. The Respondent instituted this suit vide a plaint dated 26<sup>th</sup> April, 2012. The Respondent's claim was for damages sustained while he was travelling in the Appellant's train when a rogue passenger sprayed a corrosive chemical through the ventilation in the train's roof. The Respondent blamed the injuries on the Appellant's negligence.
2. The Appellant filed a defence and admitted the occurrence of the incident but denied any negligence on its part. In the alternative the Appellant blamed the incident as wholly or substantially contributed to by the Respondent's negligence and/or the criminal acting of one Fredrick Rachar Ooko. The Appellant further relied on the doctrine of *Res Ipsa loquitor* and *volenti non fit injuria*.
3. The Respondent filed a reply to the defence, denied the contents of the defence and reiterated the contents of the plaint.
4. After hearing the case, the trial court entered judgment in favour of the Respondent against the Appellant as follows:
  - (a) Liability 100%
  - (b) Pain and suffering Ksh.250,000/=
  - (c) Special damages Ksh.1500/=
  - (d) Costs and interest
5. The Appellant was dissatisfied with the said judgment and filed the Appeal herein. The Appellant raised 8 grounds of Appeal in the Memorandum of Appeal. These grounds can however be condensed into two grounds as follows:
  - (a) Whether the judgment was against the weight of the evidence.
  - (b) Whether the award of general damages was excessive.
6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

**“An 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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)".

7. The Respondent (PW1) testified that he was seated inside the train when some people who were on the roof top of the train poured the corrosive substance inside the train and he was injured on the face and neck and shirt damaged. The Respondent did not know the person who poured the substance. He blamed the Appellant for not having control over the people who sat at the roof top. That he was treated at Kenyatta National Hospital and the matter was also reported to the police and a P3 Form issued.

8. The Appellant's witness DW1 Benjamin Lutta Watifwa blamed the incident on hooligans who had boarded the train. He further stated that the perpetrator of the attack was arrested and subsequently charged with a criminal offence. DW1's further evidence was that he was also a victim of the attack and stated that there were police officers who were concerned with security matters. He did not know who failed to do their work. His further evidence was that he was aware that some people ride on the train's roof top to avoid paying the fare.

9. From the foregoing, the occurrence of the incident is not denied. There is no evidence in support of the allegations of any negligence on the part of the Respondent. The Respondent's evidence established that he was a passenger in the train and was injured.

10. The Appellant was in control of the train and as such was responsible for the safety of the passengers allowed to board the train. This establishes a duty on the part of the Appellant to any passenger who is permitted to use the train. There is no way a passenger can have control over the train or passengers in it.

11. Section 2(1) and (3) of the Occupiers' Liability Act, Cap 34 Laws of Kenya provides as follows:

(1) The rules enacted by sections 3 and 4 of this Act shall have effect, in place the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the **state of the premises or to things done or omitted to be done on them.**

3) **The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate—**

**(a) the obligations of a person occupying or having control over any fixed or movable structure, including any vessel, vehicle or aircraft; and**

**(b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.**

12. As to whether the duty was breached, the answer to this is yes. I say so because the Appellant allowed passengers on top of its train which in any case was a risk to their lives. Secondly, the Appellant allowed passengers with a dangerous chemical substance to board its train thereby endangering the lives of others including the Respondent. The Appellant had a duty to ensure that passengers boarding the train were checked to ensure they were not in possession of the illegal substance. In this case the Appellant breached the duty of care to its passengers. Consequently, I agree with the trial court's finding that the Appellant was 100% liable.

13. According to the evidence of Dr. Cypranus Okoth Okere (PW2) the Respondent sustained chemical burns on the left side of his neck, scalp and the left side of the abdomen. The Respondent healed from the soft tissue injuries without any permanent incapacity.

14. On the question of damages, the following principles were set out by the Court of Appeal in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia* (1982 –88) 1 KAR 727, thus;

**“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”**

15. The trial court awarded Kshs. 250,000 for pain and suffering. The Appellant proposes damages of Kshs. 50,000 as adequate compensation. The Respondent maintains that the award of the trial court should not be interfered.

16. The Appellant relied on *Eldoret High Court Civil Appeal No. 76 of 2012: Eastern Produce (K) Limited v Gilbert Muhunzi Makotsi* wherein the High Court on Appeal set aside an award of Ksh.130,000/= made by the trial court and substituted with Ksh.70,000/= and *Eldoret High Court Civil Appeal No. 5 of 2013: Eastern Produce (K) Limited* wherein the court on Appeal set aside the trial court award of Ksh.120,000/= and substituted with Ksh.50,000/=

17. The Respondent cited the case of Samson *Odiwuor Obonyo v Insight Management Consultants Limited* (2017) eKLR and *Wycliff C. Ndiema v Pan Africa Chemicals Ltd* (2016) eKLR wherein courts awarded Ksh. 200,000/= and Ksh. 300,000/= respectively in special damages for acid burns sustained.

18. I do not find that the trial court considered any wrong principles. The award herein is reasonable and within the range of comparable awards.

19. This Appeal is without merit and is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF NOV., 2021**

**B. THURANIRA JADEN**

**JUDGE**