REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 20 OF 2018

MAXWELL AUTO TECHS LTD..................................APPELLANT

VERSUS

BONIFACE MUASA WAMBUA........................1ST RESPONDENT

ELIAZARO KIRAGU.......................................2ND RESPONDENT

(Being an appeal from the Judgment of D.W. Mburu (SPM)

delivered on 22nd December 2017 in Nairobi CMCC No. 7496 of 2015.)

JUDGMENT

1. This appeal emanates from the judgment in **CMCC No. 7496 of 2015** wherein **Boniface Muasa Wambua**, (hereafter the 1st Respondent) had sued **Maxwell Auto Techs Limited** (hereafter the Appellant) and **Eliazaro Kiragu** (hereafter the 2nd Respondent) for damages in respect of injuries he allegedly sustained on 27th September 2014, while lawfully travelling as a passenger aboard motor vehicle registration number **KBW 670H** along Jogoo Road, Nairobi. The Appellant was sued in its capacity as the registered owner of the said motor vehicle whereas the 2nd Respondent was averred to be the beneficial owner or authorized driver, servant and or agent of the registered owner. The 1st Respondent had averred that the 2nd Respondent so negligently managed, controlled or drove the motor vehicle that he lost control so that the motor vehicle moved as the 1st Respondent was alighting therefrom, causing him severe injuries, loss, and damage. The 1st Respondent pleaded vicarious liability as against the Appellant.

2. The Appellant filed a statement of defence denying the key averments in the plaint and any liability. Alternatively, the Appellant pleaded contributory negligence against the 1st Respondent. Judgment in default of appearance was entered as against the 2nd Respondent on 28th November, 2016. The suit proceeded to a full hearing during which only the 1st Respondent adduced evidence. In his judgment, the learned magistrate found in the 1st Respondent's favour and held both the Appellant and 2nd Respondent wholly liable for the accident. The court awarded damages in the total sum of Kshs. 603,000/-, made up as follows:

a. General damages: Shs. 600,000/-;

b. Special Damages: Shs. 3,000/-.

3. Aggrieved with the outcome, the Appellant preferred this appeal challenging the finding on liability and quantum, based on the following grounds:-

1. THAT the Honorable Magistrate erred and misdirected himself when he found that the appellant was wholly to blame for the accident.

2. THAT the Honorable Magistrate erred and misdirected himself when he awarded general damages for pain and suffering of Kshs.600,000.00 which was too high that it amounted to erroneous estimate as compared to the nature of injuries sustained by the 1st respondent.

3. THAT the learned Honorable Magistrate erred when he failed to apportion liability on the part of the 1st respondent.

4. THAT the learned Honorable Magistrate erred and misdirected himself when he failed to appreciate glaring discrepancies in the 1st respondent's documents and evidence which if he did, he would have arrived at a different decision.".

4. The appeal was canvassed by way of written submissions. On liability, counsel for the Appellant argued the 1st Respondent contributed to the accident and the trial court erred when it found that the Appellant wholly caused the same. It was pointed out that the 1 st Respondent had admitted during the trial that he was a conductor employed by the savings and credit co-operative (Sacco) under which the suit motor vehicle was operated. That the 1st Respondent was negligent for failing to take precautionary measures to ensure his own safety when he alighted from a moving vehicle. Counsel urged this court to apportion liability on the part of the 1st Respondent based on his own negligence.

5. Concerning quantum of general damages, counsel submitted that the award was inordinately high and excessive given the extent of the injuries sustained by the 1st Respondent; that the trial court did not give any reasons to justify the estimate of general damages. Counsel further asserted that the 1st Respondent's evidence was riddled with inconsistencies regarding the date of the accident and the injuries sustained and he did not sufficiently prove injuries pleaded. Counsel asserted that if any injuries were sustained, these consisted of soft tissue undeserving of the award by the trial court. He urged this court to reduce it to a sum of Kshs. 50,000/-, citing **Sokoro Sawmills Limited v Grace Nduta Ndungu [2006] eKLR** which authority had not been cited in the lower court. He therefore urged that the appeal be allowed.

6. The 1st Respondent commenced his submissions by raising an objection to the effect that court has no jurisdiction to entertain the appeal on the ground that no certified decree or order was filed with the record of appeal. He cited several authorities, including **Chege v Suleiman [1988] eKLR**. On the merits of the appeal, counsel reiterated the applicable principles asa articulated in **Simon Muchemi Atako & Another v Gordon Osore [2013] eKLR**. Defending the findings on liability counsel asserted that the 1st Respondent's evidence was unchallenged and uncontroverted. He relied on **D.T Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati [2014] eKLR** .Concerning general damages, he submitted on the authority of **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR** and **Alphonce Muli Nzuki v Brian Charles Ochuodho [2014] eKLR that** the court's function of assessing damages entails an exercise of judicial discretion based on injuries sustained and comparable awards and the appellate court could only interfere if it is shown that the trial court took into account irrelevant factors while ignoring relevant ones or that the award was so inordinately high as to be an erroneous estimate. He asserted that the trial court's assessment was reasonable and should be upheld. He urged the court to dismiss the appeal with costs.

7. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123** in the following terms: -

> **"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.**
>
> **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."**

8. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] IKAR 278).**

9. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. In the court's view, appeal turns on two issues, namely, whether the finding of the trial court on liability was well founded, and secondly, whether the award of general damages was justified. But before considering these matters, it is necessary to address the objection raised by the 1st Respondent concerning the competency of the appeal before the court. The essence of the objection is that the Appellant has not complied with the requirements of Order 42 Rule 13 (4) (f) of the Civil Procedure Rules and that the court lacks the jurisdiction to entertain the appeal.

10. Order 42 Rule 13(4) of the Civil Procedure Rules provides that: -

> **"Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:**
>
> **(a) the memorandum of appeal;**
>
> **(b) the pleadings;**
>
> **(c) the notes of the trial magistrate made at the hearing;**
>
> **(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)".

11. The court having perused the Record of Appeal dated 10th January, 2020 has confirmed that indeed no copy of the certified decree of the lower court is therein included. However, the record contains certified copies of the proceedings and judgment of the lower court. On 22nd January 2021 a Judge certified the appeal ready for hearing and gave directions. The 1st Respondent did not raise any objection regarding the contents of the Record of Appeal. The objection raised on this appeal touches on the jurisdiction of the court and ought to have been raised at the time of directions pursuant to the provisions of Order 42 Rule 13 (2) which states:

"Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule."

12. It is my considered view however that in this case, the inclusion of the copy of the judgment of the lower court satisfies the requirements of sub-rule 4 (f) of Rule 13 of Order 42 of the Civil Procedure Rules, and that the Judge who certified the appeal ready for hearing and gave directions on 22nd January, 2021 in presence of counsel for the 1st Respondent was so satisfied. Further, the definition of decree in Section 2 of the Civil Procedure Act and the proviso thereto inter alia states that ***"for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up."*** It is too late in the day for the 1st Respondent to raise the objection which is hereby rejected.

13. Moving on to the substance of the appeal pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. The case of **Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated in this regard that: -

"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

14. The 1st Respondent by his plaint averred at paragraphs 5, 6, 7 & 8 that:

"5. On or about the 27th September, 2014 the Plaintiff was lawfully travelling as a passenger in motor vehicle registration number KBW 670H along Jogoo Road at Posta Stage an accident occurred when the 2nd Defendant managed, controlled and or drove motor vehicle registration number KBW 670H so carelessly and or negligently at a very high speed that he lost control causing the said motor vehicle to move as the Plaintiff was alighting thereby causing the Plaintiff serious bodily injuries, endured and continues to endure pain and has suffered loss and damage.

PARTICULARS OF NEGLIGENCE ON THE PART OF THE 2ND DEFENDANT BEING THE 1ST DEFENDANT AUTHORIZED DRIVER, SERVANT AND/OR AGENT

a) ….

b) …..

c) Failed to have any or proper control of the motor vehicle registration number KBW 670 H.

d) Drove without any due regard and attention.

e) Failed to have any or any sufficient regard for the safety of other road users and in particular the Plaintiff herein.

f) Failed to brake, stop, swerve, slow down or in any other manner manage or control the said motor vehicle registration number KBW 670 H so as to avoid the accident subject matter.

g) Drove recklessly, carelessly and dangerously.

h) Caused motor vehicle registration number KBW 670 H to move as the plaintiff was alighting and hence the accident…."

15. The Appellant filed a statement of defence denying the occurrence of the accident or particulars of negligence thereof by stated at paragraphs 4, 5 and 6 that:

> **"4. The defendant further denies that the occurrence referred to in paragraph 5 of the plaint and further denies the particulars of negligence as enumerated there under and puts the plaintiff into strict proof thereof.**
>
> **5….**
>
> **6. Further and in the alternative and without prejudice to the foregoing, the defendant avers that any such occurrence as the plaintiff may prove was caused solely and or substantially contributed to by the plaintiff's own negligence.**
>
> **Particulars of negligence**
>
> **a. The plaintiff was negligent in failing to take any or adequate precaution for his own safety.**
>
> **b. Inviting himself to be the conductor in the said vehicle.**
>
> **c. Jumping out of the vehicle negligently in effort to allow other passengers to pass even before the vehicle has completely stopped.**
>
> **d. Failing to heed the instructions on safety precautions when travelling.**
>
> **e. Failing to heed the traffic rules and regulations when travelling.**
>
> **f. Failing to wait for the motor vehicle to stop at a bus stop so as to alight."**

16. The occurrence of the accident involving the 1st Respondent and the Appellants' motor vehicle on the material date is not in dispute. What the Appellant is contending is whether it was wholly to blame for the occurrence of the accident. During the hearing the 1st Respondent testified as **(PW 2)** thus started by stating that he was a conductor by profession and proceeded to adopt his witness statement. In that statement, the 1st Respondent stated inter alia that ***"on reaching a place called Posta stage along Jogoo road and as I was alighting from the aforesaid motor vehicle the driver of motor vehicle registration number KBW 670H started moving before I could alight and hence the accident."***

17. The Appellant did not call any witness in support of its case. In its judgment the trial court accepted this evidence by stating as follows:

> ***"…….that the plaintiff is conductor who had stolen a ride in the subject motor vehicle. The plaintiff evidence remain uncontroverted since the defendant did not offer any evidence. On a balance of probability the court is convinced that the accident occurred as a result of the defendant's negligence. As was held in Trust Bank Limited v Paramount Bank Limited and 2 Others – Nairobi HCCC No. 1241 of 2001 - "where a party fails to call evidence in support of its case that the party's pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore remains unchallenged.…***
>
> ***On the basis of the plaintiff's uncontroverted and unchallenged evidence, I do hereby find and hold the 1st and 2nd defendant jointly and severally liable at 100%..."*** *(sic).*

18. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The duty of proving averments contained in the plaint lay squarely on the 1st Respondent. Equally, it was incumbent upon the defence to challenge the evidence of the 1st Respondent either by way of cross-examination and or tender evidence in rebuttal. In **Karugi & Another V. Kabiya & 3 Others [1987] KLR 347** the Court of Appeal stated that:

> **"[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof….<u>The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.</u>"** (Emphasis added)

19. The 1st Respondent's testimony regarding the manner in which the accident occurred was not challenged in any serious manner during cross-examination. Indeed, the Appellant's counsel did not suggest to the 1st Respondent that he jumped out of the moving vehicle, or in any way contributed to the accident through negligence as particularized in the defence. Secondly, the Appellant did not call any evidence to controvert the 1st Respondent's testimony. The fact that the 1st Respondent admitted being a conductor under the Sacco operating the vehicle could not be stretched as suggested by the Appellant, to be an admission or proof that he was somehow negligent. As the Court of Appeal stated in **Kiema Mutuku -Vs- Kenya Cargo Handling Services Limited [1991] 2 KAR 258**:

> **"There is, as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against**

the defendant where the claim is based on negligence."

20. This court upon its own review of the evidence agrees with the finding of the trial court that the 1st Respondent's evidence was neither challenged nor controverted at the trial and that on a balance of probabilities it established negligence wholly against the driver of the accident vehicle. There was no basis for apportioning liability in this case.

21. Regarding quantum, the court stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5** that:

> **"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 at a figure which was either inordinately high or low".**

22. In **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30**, it was held that:

> **"The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 damages." see also Butt v Khan (1981)KLR 349 and Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR."**

23. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that *"an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance".*

24. Counsel for the Appellant went to great lengths to attack the 1st Respondent's oral and documentary evidence regarding the injuries he sustained. In particular, he pointed out that the P3 Form - **(P. Exh. 2)** which **Dr. G. K. Mwaura (PW1)** relied on in preparing the Medical Report - **(P. Exh. 5a)** had only one (1) injury as compared to the five (5) listed after preparation of his report. Further, that the date of the accident as noted in the medical report **(P. Exh. 5a)** differed from the date pleaded.

25. The court has reviewed the above documents alongside the initial treatment notes by Kenyatta National Hospital **(P. Exh. 3)** and by the Aga Khan University Hospital **(P. Exh. 4)** . These indicate that the 1st Respondent's injuries were confined to the right thigh and part of the calf and soft tissue in nature. **PExh 4**, the earliest, and therefore most reliable, documents a large degloving injury to the right thigh accompanied by a large hematoma (swelling) as well as friction burns on the right thigh and leg. The swelling was drained, and the patient was transfused with 3 units of blood. He was hospitalized for a total of 16 days at the two hospitals. The medical report by Dr. Mwaura captures the injuries with some degree of accuracy even though in a slightly expanded manner, whereas the P3 form presents a more summarized description of the injury. Reviewing these records, the Court cannot find any glaring inconsistency as asserted by the Appellant; overall the documents are consistent. Secondly, nothing turns on the error on the date of the accident contained in Dr. Mwaura's report. The court is satisfied that 1st Respondent's evidence proved the pleaded injuries on a balance.

26. The most significant injury was the degloving injury to the thigh which healed with unsightly scarring. And although the 1st Respondent must have suffered a great deal of pain and extended periods of morbidity due to the wounds, he eventually recovered without any severe sequela. Keeping in mind the principles enunciated in **Kemfro Africa Limited t/a Meru Express Service and Gathogo Kanini v A. M. Lubia and Another** (supra), this court has considered the award of general damages assailed as excessive by the Appellant and defended by the1st Respondent.

27. In my opinion, authorities which the parties cited before the trial court were hardly on all fours with the instant case. However, this court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and a court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. It is unacceptable for parties to cite new authorities on appeal as the Appellant has done here; the case of **Sokoro Sawmills** was not relied upon by the Appellant in the lower court and this Court will disregard it. The case of **Alphonce Nzuki Muli** relied on by the 1st Respondent reflected a fracture of the tibia/fibula in addition to the degloving injury to the leg and foot, whereas the case cited by the Appellant **Sotik Tea Company v Phillip Cheruiyot Marel**, was not only too old to be of much assistance, but also the injuries reflected there were less severe.

28. That said, a degloving injury such as sustained by the 1st Respondent is not a minor injury though involving soft tissue only. The Appellant's proposal for an award of Sh.50,000/- is so low that if adopted would result in an erroneous estimate. Similarly, the 1st Respondent's proposal in the lower court for an award of Sh.900,000/- had it been upheld, would have resulted in an excessive award, and the trial court correctly rejected it. The award in **Alphonce Nzuki Muli,** was made by the trial court in 2011. The 1st Respondent in this case endured much pain, suffering and an extended period of morbidity in addition to permanent scarring because of his injuries. Even discounting the additional skeletal injury sustained by the plaintiff in **Alphonce Nzuki Muli,** but factoring inflation, it appears that the award of general damages in the sum of Shs.600,000/- in this case was reasonable. This court upholds the said award, therefore.

29. In the result, the court finds no merit in the appeal and will dismiss it with costs to the 1st Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 2nd DAY OF DECEMBER 2021

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms Rotich h/b for Mr Musyoki

For the Respondent: Mr Wachira

C/A: Carol