**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(APPELLATE SIDE)**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 85 OF 2017**

**BUSINESS TRAVELLERS.....1ST APPELLANT**

**MOMBASA RAHA BUS SERVICES.....2ND APPELLANT**

**VERSUS**

**PETER OGANGO ORUMA.....RESPONDENT**

**(*Being an Appeal from the Judgment and decree of the Chief Magistrate's Court at Machakos***

***Honourable Y.A. Shikanda (Mr.) Principal Magistrate on the 6th day of April 2017)***

**=IN=**

**PETER OGANGO ORUMA.....PLAINTIFF**

**VERSUS**

**BUSINESS TRAVELLERS LIMITED.....1ST DEFENDANT**

**MOMBASA RAHA BUS SERVICES.....2ND DEFENDANT**

**JUDGEMENT**

1. This appeal arose from the judgment of **Hon. Y. A Shikanda** (SRM) delivered on 6th April, 2017 in Machakos CMCC No. 979 of 2014. That suit was filed by the Respondent herein against the 1st Appellant as the registered owner of Motor Vehicle registration number KBN 878A while the 2nd Appellant was sued as the actual user and in possession of the said Motor vehicle.

2. According to the Respondent, on or about 19th of September 2013, while he was travelling in the Appellants' said motor vehicle along Mombasa Nairobi Highway, the Appellants' authorized driver so recklessly, dangerously and negligently drove the said vehicle as a result of which he lost control and caused and accident. After setting out the particulars of negligence, the Respondent pleaded that as a result of the accident, he sustained severe injuries for which he sought compensation. In form of general damages, special damages costs and interests. It was pleaded that the Respondent sustained fracture of the right hand, tenderness of the right distal 1/3rd, generalised body trauma, blunt trauma to the head and blunt trauma to the right arm at the wrist joint. On special damages he claimed Kshs 3,500.00 for the medical report and Kshs 10,000.00 for the doctor's attendance. In

3. In their joint defence, the Appellants denied ownership of the said vehicle and denied that the said accident occurred and that the Respondent was injured. They also denied that the same was caused by their driver's negligence and pleaded that if there was such an accident it was caused by the Respondent's own negligence particulars whereof they set out.

4. In support of his case, the Plaintiff relied on his statement in which he stated that on 18th September, 2013 he booked Mombasa Raha Bus from Mombasa to Nairobi from where he was to connect to Busia and he was issued with a ticket No. 2114 and allocated seat No. 10 for a

bus which was scheduled to depart at 10 pm. As required, he reported at the Bus Offices at 9.30pm and was directed to Motor Vehicle Reg. No. KBN 878A UD Bus and took his said seat.

5. Shortly after 10 pm they departed and he ensured that his seat belt was fastened. At around 5.30 am, on reaching Lumu Area past Sultan Hamud along Mombasa Nairobi Highway, the driver of the said bus attempted to overtake another vehicle (trailer) but on realising that there was another oncoming vehicle, swerved back to his lane and in the process hit the vehicle which it was following, lost control and the vehicle landed in a ditch. According to the Respondent, he was fully awake at that time though he was shocked. It was his statement that he was feeling pain in his right hand, his head and the body. However, since he had no visible injuries, he took a *matatu* and proceeded to Nairobi where he boarded a bus and travelled to Busia where he arrived in the evening. Since he was still feeling pain and his right hand was swollen and painful, he decided to seek treatment the following morning at Tanaka Nursing Home in Busia Town.

6. At the said medical facility, he was x-rayed and the same revealed that he had suffered fracture of his right hand with tenderness of the right distal 1/3$^{rd}$, blunt trauma to the head and blunt trauma to the right arm at the wrist joint. He was however treated as an outpatient though he was still feeling a lot of pain.

7. In his statement, the Respondent blamed the driver of the said vehicle since as a passenger the driver ought to have ensured that he arrived safely at his destination. He also blamed the driver for attempting to overtake another vehicle when it was not safe to do so.

8. In his oral evidence in court, the Respondent testified that the driver was overtaking two trailers ahead with one trailer overtaking the other while there was an oncoming motor vehicle. The driver then returned to his left lane and in the process, the bus rammed at the rear of the trailer which was ahead and it went into a ditch. Since the door could not open, he jumped out of the bus through the window. According to him, the police visited the scene and there was an ambulance which took casualties to hospital. He produced the receipt for Kshs 200/= for the *matatu* which he boarded to Nairobi where he arrived at about 8.00 a.m. from where he boarded a bus at the country bus station to Busia. According to him, though he was in pain, he did not know anybody in Nairobi. Because the left Nairobi late he reached Busia at about 10.00 p.m. He produced the receipt he used for boarding the bus from Nairobi and treatment notes dated 20$^{th}$ September, 2013 and the X-ray request form. According to him, the x-ray revealed fracture of the upper ulna and a plaster was applied on his hand. Before it was removed, an X-ray was taken and he exhibited the 2$^{nd}$ X-ray film dated 17$^{th}$ October, 2013.

9. It was his testimony that he later went to Sultan Hamud police station to obtain a P3 form but was advised to heal completely first before obtaining the same. Later, he obtained the police abstract and the P3 form which was filled at Coast General Hospital Mombasa. He identified the P3 form and exhibited the police abstract. It was his testimony that his advocate conducted a search at the motor vehicle registry for which he paid Kshs. 1,000/-. The copy of records indicated the 1$^{st}$ Appellant as the registered owner and he exhibited the copy of records as well as the receipt therefor. According to him, he had healed.

10. The Respondent testified that he was examined by **Dr. Mwaura** who prepared a medical report and to whom he paid Kshs. 3,000/-. He identified the said report and the payment receipt. Though he reiterated that he had healed completely, he prayed for orders of compensation. It was his evidence that after he was injured, he could not do his usual work and was on light duties for 3 months. He disclosed that he was treated on account of his insurance cover. He averred that he issued a demand letter dated 19$^{th}$ May, 2014 which was sent by registered post and he exhibited the same together with the certificate of registration.

11. In cross-examination, the Respondent reiterated that he felt pain in the head, hand and back and went to hospital while in Busia where he was examined as his hand was swollen. An X-ray was taken at Tanaka Nursing Home which confirmed that there was fracture.

12. The Respondent also called as his witness, **Abdallah Kimani Mwaura**, a Medical Practitioner in Nairobi, as PW2. According to him, the Respondent went to him on 11$^{th}$ July, 2014 with a history of having been involved in a road traffic accident on 19$^{th}$ September, 2013 after being treated at Tanaka Nursing Home. He testified that the Respondent sustained a blunt trauma to the wrist joint, fracture of the right ulna (distal) which was revealed by the x-ray and, blunt trauma to the head. The plaster was applied for 4 weeks and he was later discharged but continued with treatment for 4 weeks. When he went for examination, the Respondent complained of recurrent pain in the right wrist joint. On physical examination, PW2 found that the right wrist joint was tender and the X-ray revealed he had the fracture. The injury was half healed but could develop osteoarthritis. In PW2's opinion, the Respondent suffered grievous bodily harm. He prepared and signed the medical report which he produced as an exhibit as well as the payment receipt. He also produced the x-rays which he relied upon dated 20$^{th}$ September, 2013 and 17$^{th}$ October, 2013. According to him, he charged Kshs. 15,000/- for attending court and produced the receipt as well as the P3 form that he saw.

13. In cross-examination, he stated that for a person to travel a long distance with a fracture it depends on the extent of the fracture since the fracture could be intact. In this case, the fracture was not displaced and the edges were still together. He stated that whenever there is a fracture, normal tissues are destroyed but the fracture can still be seen in the X-ray even after 50 days.

14. Referred to a medical report prepared by **Dr. Leah Wainaina**, PW2 confirmed that the said report indicated that the Respondent suffered soft tissue injuries and did not indicate that there was a fracture.

15. The Respondent then called **Daniel Ndaho Somba**, a Medical doctor and Consultant Radiologist as PW3. According to him, he was given two previously taken X-rays for a patient known as **Peter Oruma** aged 49 years on 4$^{th}$ November, 2016. He also examined the patient and repeated the same examination at Machakos Imaging Centre. Based on the two X-rays that he received, he prepared a report. According to him, the first x-ray revealed an incomplete fracture while the second one revealed a plaster on the area. According to him, the X-ray he took on 4$^{th}$ November, 2016 revealed a normal arm and he concluded that there was complete healing of the fracture. He produced the X-ray film and charged Kshs. 1,600/- whose receipt he exhibited. It was his conclusion that the Respondent had an incomplete fracture of the ulna but had healed completely at the time of examination. He prepared a report and produced both the report and the receipt as exhibits. He stated that he had charged Kshs. 10,000/- to attend court though he had not carried the receipt as he still had the money with him.

16. In cross-examination, he stated that it is possible for one to have a fracture then travel for a long distance and that after an accident, one may miss to pick some symptoms. In re-examination, he clarified that his report referred to the current state of the patient.

17. The Appellants on their part called **Dr. Leah Wainaina**, a General Practitioner, who testified on her report dated 5th October, 2016 prepared for the Respondent. According to her, she relied on the history from the Respondent's treatment records from Tanaka Nursing Home, medical report by **Dr. Mwaura**, X-ray reports and clinical examination and concluded that the plaintiff sustained soft tissue injuries to the right arm and neck and had no permanent disability. It was her opinion that there was no need for future medical treatment. She however referred the Respondent to a Radiologist for further examination but she did not note any fracture or dislocation. She produced her report as well as the report by **Dr. Muruka**.

18. According to her, once a fracture heals, it leaves evidence and even if you do an X-ray years later, the fracture sight will be noted. The Respondent however, sustained only soft tissue injuries.

19. In cross-examination, she asserted that the X-ray was normal and there was no evidence of a fracture.

20. After hearing the case, the learned trial magistrate in his judgement found in favour of the Respondent and awarded him Kshs 300,000/= as general and Kshs 3,000.00 as special damages. It is this decision that provoked this appeal which is restricted to challenging the award of damages.

21. According to the Appellants, the x-ray reports from Tanaka Nursing Home which were relied upon by PW2 revealed neither a dislocation nor a fracture. It was noted that whereas one treatment note revealed a fracture the other did not. It was submitted that the one disclosing the fracture was prepared to suit the plaintiff's claim. Since the defence witness testified that she did not notice ant fracture, the trial court ought to have found that the Respondent sustained soft tissue injuries.

22. In that regard it was submitted that the award was inordinately high compared to the injuries suffered hence was founded on wrong principles. Based on authorities the court was urged to set aside the award and reduce the same to between Kshs 90,000.00 and Kshs 120,000.00.

23. In opposing the appeal, the Respondent submitted that during the hearing of the case, the Respondent called two doctors PW-2 **Dr. Abdallah Mwaura** & PW-3 **Dr. Daniel Somba** (Radiologist) both of whom confirmed that the Respondent suffered fracture of the Ulna Distal 1/3 of the right hand. It was submitted that considering the expert reports and evidence by the two Doctors, the trial magistrate made the right findings that indeed the plaintiff had suffered the fracture of the right ulna distal.

24. It was further submitted that the Clinical notes from Tanaka Nursing home were prepared a day after the accident and they showed that indeed the Respondent sustained a fracture of Ulna Distal of the right hand. Also the Respondent's right hand was put in plaster cast for 4 weeks and when it was removed on 17th of October 2013, a new x-ray was taken which revealed that the fracture had healed.

25. It was therefore submitted that the evidence on record clearly showed that the Respondent suffered fracture of the Ulna distal of the right hand, tenderness of the right hand at the wrist joint and blunt injury on the head. Though the wrist healed, his right hand remained with pain for some time hence hindering him from discharging his duties properly. In support of his case the Respondent relied on the decision in Civil Appeal No. 130 of 2014 - **Agnes Kamene and Harvest Limited** court cited the case of **Samuel Gikuru Ndungu vs. Coast Bus Co. Lt Nairobi Civil Appeal No. 177 of 1999** where an appellant who had suffered injuries comparable to those of the appellant herein was awarded Kshs. 300,000, overturning the High Court's dismissal of his claim.

26. Based on the foregoing the Respondent submitted that a holistic consideration of the facts and circumstances leading to the judgement was justified and legal in the circumstances. In his view, the Appellants' claim is unmerited and the court was urged to dismiss the appeal with costs.

**Determination**

27. I have considered the submissions of the parties in this appeal.

28. In this appeal, it is clear that the appellant is only challenging the quantum of damages. However, the challenge is based not on the assessment of damages as such but on whether that assessment ought to have been based on the evidence presented by the Appellants or by the Respondents.

29. In support of his case, the Respondent produced the initial treatment documents from Tanaka Nursing Home. These were the primary documents on the basis of which both PW2 and DW1 based their reports. It is however clear that the reports of the two witnesses were diametrically opposed. Whereas the report of PW2 revealed that the Respondent had a fracture the report of DW1 stated that the Respondent only suffered soft tissue injuries with neither a dislocation nor a fracture. The place of expert opinion in legal proceedings was restated in **Gatheru S/o Njagwara vs. R [1954] EA 139** where it was held that:

> **"Section 45 of the Indian Evidence Act provides that when the court has to form an opinion upon, inter alia a point of science, the opinions of "persons specially skilled in such science" are relevant. We think that such special skill is not confine to knowledge acquired academically but would also include skill acquired by practical experience. In *Vander Donckt vs. Thelluson, (1849) 8 CB 812*, Maule, J., SAID "All persons, I think who practice a business or profession which requires them to possess a certain knowledge of the matter in hand are experts so far as experience is required. That case has been very recently approved by their Lordships of the Judicial Committee in an appeal from Nigeria, *Said Ajami vs. Comptroller of Customs*, where their Lordships said that the practical knowledge of a person who was not a lawyer might be sufficient in**

**certain cases to qualify him as a competent expert on a question of foreign law…It may well be that the present circumstances in Kenya a police officer employed on operational or investigation work acquires a sufficient practical knowledge to qualify him to speak as an expert on the type of home-made weapon so frequently used by Mau Mau terrorists, but even so, his competency as an expert should, as in all cases, be shown before his testimony is properly admissible. In the instant case the officer in question merely describes himself as an inspector of police attached to the Criminal Investigation Department, Nanyuki. There was no evidence as to how long her performed such duties or whether he had ever seen or examined any home-made weapon other than those seized in the course of the operation which led to the appellant's arrest. The failure on the part of counsel for the defence to challenge this evidence does not excuse the laxity shown by counsel for the Crown in failing to establish the competency of the witness. Further, we would with deference point out that it is the duty of the presiding Judge to satisfy himself on this issue before receiving the opinion evidence."**

30. The status of opinion evidence was dealt with in **Shah and Another vs. Shah and Others [2003] 1 EA 290** where the learned Judge expressed himself as follows:

**"One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct…The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field…However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony…The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so…If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the court…Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."**

31. It was therefore appreciated by the Court of Appeal in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** that:

**"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."**

32. However, when all is said and done, as was held by the Court of Appeal in **Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988,** expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.

33. Therefore, where experts differ in their opinions, the appellate court will not interfere with the findings of the trial court merely because were it the trial court, it would have preferred one opinion and not the other. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in **Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001**, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

34. In other words, as appreciated in **Timsales Limited vs. Simon Kinyanjui Njenga Nakuru HCCA No. 103 of 2003:**

**"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."**

35. In **Kiruga vs. Kiruga & Another [1988] KLR 348**, the Court of Appeal expressed itself as hereunder:

**The word "proof", as a legal concept, is not pre-ordained and has no objective existence, discoverable either by logic or analysis. It is merely the conclusion that the tribunal draws on any given set of facts or evidence. If the evidence is available and accepted, unless the law directs that ascertain fact should be "proved" in a certain way, it cannot be the proper province of an appellate court merely to read that evidence and hold "it is not proved". That really is another way of saying it is not persuaded by evidence. But the tribunal needs to be persuaded, is the tribunal of fact to which the evidence is given not one which merely reads it in print. The only suggestion of the trial Judge having misdirected himself was on the onus of proof; but the trial Judge, quite rightly, makes no reference to the onus of proof, for, as often pointed out, no question of the burden of proof as a determining factor of the case arises on a concluded proof, except in so far as the court is ultimately unable to come to a definite conclusion on the evidence, or some part of it, and the question will arise as to which party has to suffer thereby. The trial Judge came to a definite conclusion on the evidence and no question of onus did or could arise. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. It is a strong thing for an appellate court to differ, from the finding, on question of facts, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon evidence should stand. But this is jurisdiction, which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."**

36. It was contended that the learned trial magistrate did not consider the evidence of DW1. With due respect the learned trial magistrate dealt with that evidence. He found that as opposed to the reports of PW2 and PW3 which were produced by the makers, the maker of the report produced by DW1 was never called to testify. Instead, DW1 produced the same on his behalf.

37. I have on my part considered the evidence on record and even if I had found that the evidence of DW1 was never considered, I find that the evidence of DW1 could not be relied upon to make a finding that the Respondent did not have a fracture. The mere fact that the trial court has not considered some evidence does not necessarily entitle the first appellate court to overturn the decision since a first appeal from a trial is by way of a retrial and the 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. See **Selle vs. Associated Motor Boat Co. [1968] EA 123**

38. The Court of Appeal **Alfarus Muli vs. Lucy M Lavuta & Another Civil Appeal No. 47 of 1997** in held that:

> **"The appellate Court interferes only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding…Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence."**

39. I agree with the sentiments of **Byamugisha, J** in **Sentongo and Another vs. Uganda Railways Corp. Kampala HCCS No. 263 of 1987**. In that case the learned judge held, citing ***Sarkar on Evidence*** 12th ED pp 506.R., that:

> **"Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of a Doctor who personally attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The Evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgement becomes warped and they become incapable of expressing correct opinion."**

40. In this case there was evidence that from the primary treatment notes that the Respondent had suffered a fracture. Apart from that the medical reports of PW2 and DW1 were referred to PW3, a radiologist, who confirmed the existence of the fracture. The radiologist examined the Respondent while the doctor whose report was produced by DW1 seems to have simply relied on the history and the documents presented to him. One of the said documents clearly disclosed a fracture yet he did not reconcile the same. In my view, the medical report of **Dr Muruka** produced by DW1, having been produced by a person who was not its author and therefore not in a position to defend the same, cannot be placed on the same plane as the reports made by PW2 and PW3. Therefore, there was ample evidence on record on the basis of which the learned trial magistrate could arrive at his findings.

41. Having considered this appeal, there is no basis upon which I can interfere with the decision of the learned trial magistrate. It was arrived at based on the evidence on record and the decision was legally sound.

42. In the premises this appeal fails and is dismissed with costs.

43. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 3rd February, 2020**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Miss Mutinda for Mr Mulanya for the Respondent**

**CA Geoffrey**