REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 106 OF 2016

SIMIYU DANIEL alias DANIEL SIMIYU.....APPELLANT

-VERSUS-

BENSON MULI MAKAU alias **BENSON MULI.....RESPONDENT**

(Being an appeal against the Judgment delivered by Hon. P.O. Ooko (P.M) in Mavoko PMCC No. 976 of 2014 on 7.9.2016)

BETWEEN

BENSON MULI MAKAU alias BENSON MULI.....PLAINTIFF

-VERSUS-

SIMIYU DANIEL *alias* DANIEL SIMIYU.....DEFENDANT

JUDGEMENT

1. The suit in the trial court arose out of what is said to be an accident that occurred on 24.5.2014 in which the Respondent was a mechanic authorized by the appellant to service vehicle KBB 987P when the appellant by his agent ignited the engine of the subject vehicle that caused it to hit another vehicle and in the process crush the respondent thereby causing an accident in which the Respondent was injured and who has pleaded negligence against the appellant. The respondent sought special damages and general damages in respect of injuries as particularized in paragraph 6 of the plaint. The respondent pleaded *res ipsa loquitor* and sought to rely on the Traffic Act.

2. The appellant in his defence dated 30.7.2015 denied driving and possession of the suit vehicle, denied the occurrence of the accident in the manner described by the respondent, denied negligence on his part, the particulars of loss and injuries. The appellant pleaded that the accident was as a result of the sole and contributory negligence of the respondent as particularized in paragraph 8 of the defence. The appellant pleaded volenti non fit injuria and res ipsa loquitor. The appellant pleaded that the accident was caused by circumstances beyond his control.

3. The decision of the trial court gave rise to an appeal by the appellant that was filed on 5.10.2016. The appellant's appeal is on quantum and liability. The parties agreed to canvass same via written submissions which they filed and exchanged.

4. Learned counsel for the appellant submitted on two issues that were considered errors; that is proof of liability and quantum. On the issue of proof of liability, counsel submitted that respondent did not prove the particulars of negligence and did not prove the causal link between his injuries and the pleaded particulars of negligence. Reliance was placed on the case of **Statpack Industries v James Mbithi Munyao (2005) eKLR**.

5. Learned counsel submitted that an award of Kshs 1,000,000/- was unreasonably high and not commensurate with the injuries**.**

6. The Respondent submitted on two broad issues; that is liability and quantum. On the issue of liability, counsel submitted that on a balance of probability negligence was proven. On the issue of quantum, counsel submitted that the award of Kshs 1,000,000/- was in order and reliance was placed on the case of **Mastermind Tobacco (K) Ltd v Jane Miyogo & Another (2016) eKLR**.

7. The role of the Appellate court is well settled, that is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of ***Selle v Associated Motor Boat Co.*** **[1968] EA 123.**

8. The evidence that was rendered in trial was as follows; Pw1 was the respondent who told the court that he was employed as a mechanic

and on the material day he was repairing the appellant's vehicle when the appellant's agent arrived and ignited the engine and in the process the vehicle moved and he was hit and he sustained injuries. He testified that he was examined and that he blamed the owner of the vehicle for the injuries he sustained. On cross examination, he told the court that he was treated as an inpatient at Kenyatta Hospital.

9. **Pw2** was **Pc Rider Kiboi Ibrahim** who testified that he received a report that Pw1 had been injured while repairing the suit vehicle. On cross examination, he testified that he did not know how the accident occurred.

10. **Pw3** was **Dr. Emmanuel Loiposha** who testified on behalf of Dr. Kimuyu who examined the respondent and prepared a report wherein injuries were noted and permanent incapacity was assessed at 40%. The report was tendered under Section 50(1) and (2) of the Evidence Act. The respondent closed his case and the appellant was put to the stand.

11. DW1 was the appellant who testified that he worked for Mastermind Tobacco Company and that he blamed the respondent for the accident as he did not properly park the suit vehicle before repairing the same. On cross examination, he admitted owning the vehicle and that he gave the vehicle to Erick Peter Kyalo who was his driver and could not tell exactly what happened and how the accident occurred.

12. I have considered the evidence adduced by both parties together with the pleadings and the submissions in support and against the appeal, I find the issues for determination in this appeal are:-

1) What is the cause of action in this case and whether the suit discloses a cause of action against the appellant?

2) Whether negligence has been proven against the appellant and if so what is the extent of liability.

3) Whether a case has been made to warrant interfering with the award that has been made.

13. The **9th Edition of Black's Law Dictionary at page 251** states that a cause of action is **"[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person."**

14. Therein, Edwin E. Bryant is cited as defining a cause of action in the **Law of Pleading Under the Codes of Civil Procedure 170 (2d ed. 1899)** thus:

"What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be – (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property."

15. The Respondent pleaded that he was a mechanic and got injured because of the negligence of the appellant in operating the suit vehicle negligently. He testified that he was injured whilst repairing the suit vehicle.

16. Negligence as a tort is the breach of legal duty to take care which results in damage undesired by the defendant to the plaintiff. Thus its ingredients are (a) A legal duty on the part of A towards B to exercise care in such conduct of as falls within the scope of the duty, (b) Breach of that duty (c) and consequential damage to B See **Winfield on Tort Eighth Edition Page 42.**

17. In **Attorney-General v Oluoch [1972] 1 EA 392** in deciding whether a suit discloses no cause of action the East African Court of Appeal sitting at Nairobi held at page 394 that:

"***In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true."***

18. The suit discloses no cause of action where the Plaintiff sues a party against whom there is no cause of action as held in **Auto Garage vs. Motokov [1971] EA 514 at 519**. Spry VP in summarizing the essential ingredients of a cause of action held at 519:

"***In addition, of course, the Plaintiff must appear as a person aggrieved by the violation of the right and the Defendant as a person who is liable. I would summarize the position as I see it by saying that if a plaint shows that the Plaintiff enjoyed a right, that the right has been violated and that the Defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment."***

19. The evidence on record established that the respondent was injured in the course of duty as a mechanic repairing the appellant's vehicle.

20. It can be inferred that the respondent was promised a reward for his services in repairing the suit vehicle and in the process of rendering his services he got injured. It suffices to state the case of **Combe v Combe [1951] 2 KB 215 relying on Central London Property Trust Limited v High Trees House [1947]** "Where one person has by words or conduct made to the other party a promise or assurance which was intended to affect the legal conditions between them and be acted on accordingly, then once the other party has taken him at his word and acted on it the one who gave the promise cannot afterwards be allowed to revert to the previous relationship as if no such promise had been made."

21. A contract of employment is an agreement between the employer and employee giving rise to obligations between employer and the employee which are enforceable or recognizable by the law. Such a contract, like other contracts, may be inferred and implied from the conduct of the parties concerned. See: **Cassidy v Minister of Health [1951] 1 All ER 574.**

22. In the case of **Rosemary Vassaux v Kenya Power & Lighting Co. Ltd [2014] eKLR,** the court observed that duty of care flows from [that] contract. From the facts I am satisfied that the appellant owed the respondent a duty of care not as a result of a road traffic accident but from what appeared to be an employment relationship although the respondent did not plead this fact. The appellant in his evidence confirmed that indeed the respondent had been entrusted to conduct repairs to the suit vehicle. The appellant also confirmed that he was the owner of the vehicle and that an accident did occur in which the respondent was injured. The appellant claimed that he had given the vehicle to his driver one Eric Peter Kyalo who was best placed to give an account of how the accident took place. It is therefore clear that even though the respondent did not plead the relationship, the evidence left no doubt that there was indeed a relationship between the two. That being the position I find the respondent had a cause of action against the appellant.

23. As regards the second issue the respondent blamed the appellant for the accident. He claimed that he was busy working on the vehicle inside the bonnet when the appellant's driver or agent ignited the engine without warning forcing the vehicle to jerk forward and that the cabin fell on him injuring him seriously. On the other hand the appellant maintained that the respondent ought to have made sure that the vehicle was properly parked before embarking on the repairs and also ought to have informed the driver not to start the vehicle before the repairs are completed. The appellant during cross examination admitted that it was his driver who could shed light on how the accident took place. It is instructive to note that the said driver was not called to testify for the appellant and as such it is the version of the respondent that will be considered. If the appellant's driver ignited the engine without warning the respondent then the driver was negligent as he owed a duty of care to the respondent who was then busy repairing the engine compartment in the front and was then under the canopy of the cabin (bonnet) that had been hoisted up to pave way for the repair works. An issue arose to the effect that the engine was ignited while the gears were on there is blame game between the appellant and the respondent. Ordinarily a stationary vehicle could be in gears or in neutral mode and that it is the responsibility for a prudent driver to first check the position of the gears before switching on the ignition. From the evidence adduced it appears the vehicle was in gear mode and that the appellant's driver switched on the engine without ensuring that the gears were in neutral mode. No driver worth his salt could do that. I am satisfied that the driver was clearly negligent because even without the presence of the respondent's presence in the cabin compartment the said driver ought to have ensured that the gears were in neutral mode. The appellant confirmed that his driver John Peter Kyalo was the one who handled the vehicle leading to the accident. As the driver's version has not been presented then the respondent's version must be believed. Under those circumstances I am unable to attribute any portion of negligence upon the respondent as the incident was so sudden. The respondent was busy on the front under the honest belief that the gears were on neutral mode. I find the appellant wholly liable in damages to the respondent at 100%. The trial court's finding on liability was therefore sound and there is no reason to disturb the same.

24. As regards the third issue it is not in dispute that the respondent sustained injuries as a result of the accident. The particulars were noted by the doctor who examined him and which comprised; deep cut wound frontal region, blunt head injury, depressed skull fracture, fracture of ethmoid and lamine papyracea and nasal bones, fracture of mid zygomatic bone with fracture of lateral and anterior walls of right maxillary sinus and lateral pterygoid forehead bruises, forehead bruises, blunt injury right elbow, permanent incapacitation assessed at 40%. The trial court awarded general damages of Kshs 1,000,000/ for pain, suffering and loss of amenities after considering authorities cited to him by the parties. It is trite that an appellate court can only interfere with quantum of damages if it is shown that the trial court had taken into account an irrelevant factor or left out a relevant one so that the eventual award is either high or low as to represent an erroneous estimate of damages. The appellant has castigated the trial court for awarding a high amount of damages. I note that the trial court had been supplied with authorities. I have looked at the said authorities and find that the respondent's injuries were severe going by the doctor's opinion that he had suffered 40% incapacitation. The authorities cited by the respondent both in the lower court and this court appear to indicate the similarities of injuries sustained by the victims in the said accidents. For instance the case of **Peter Gichuru Mwangi V. James Kabathi Mwangi (2001) eKLR** the plaintiff therein suffered head injury, ophthalmic injury to right eye, severe face injuries, right zygomatic complex fractures and orbital fracture. An award of Kshs 1,294,500 was awarded. A gain in the case of **Julius Chelule &Another V. Nathan Kinyanjui (2013) eKLR** an award of Kshs 600,000/ was given for a fracture to the skull, head injuries and injury to left knee.

Looking at the injuries sustained by the respondent herein and considering those authorities I find the award of Kshs. 1,000,000/ by the trial court was reasonable and not excessive as contended by the appellant. The special damages were specifically pleaded and proved and so the same are sustained.

25. In the result it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 5th day of February 2020.

D. K. Kemei

Judge