REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL NO.175 OF 2010

PERUSE AYUMA OTTAWA.....APPELLANT

-VERSUS-

COAST BROADWAY COMPANY LIMITED.....RESPONDENT

(Being an appeal from the judgment/decree of Chief Magistrate Hon. Wilbroda Juma

dated and delivered on the 8th Day of June 2010 in Nakuru CMCC No 1666 of 2004)

JUDGMENT

1. This appeal arises from the judgment of the trial court dated and delivered on the 8 thJune 2010 in Nakuru CMCC No. 1666 of 2004, whereof the plaintiff's suit was dismissed with costs. The claim for general and special damages in the sum of Kshs.446,724/=arose from a traffic road accident whereof the plaintiff, was a lawful passenger in the Respondents motor vehicle No. KAL 140R along the Kericho-Nakuru road on the 19th August 2002. The vehicle overturned from which she sustained injuries.

2. The grounds for the appeal are summarised as

1. Misdirection and misapprehension of the uncontroverted evidence tendered by the trial magistrate.

2. Failure by the trial magistrate to consider the appellant's submissions and authorities.

3. The duty of the 1st appellate court has been stated in numerous court decisions. **In Selle & Another –vs- Associated Motor Boat Co. Ltd & Others (1968) EA 123** is to

> ***'Briefly to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance on this respect…"***

4. The **Court of Appeal in Peters –vs- Sunday Post Ltd (1958) EA 424** rendered that

> *"It is strong thing for an appellate court to differ from the finding, on a question of fact, if the judge who tried the case, and who has had the advantage of seeing or hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution, it is not enough that the appellate court might itself have come to a different conclusion."*

Upon the above principles, I shall re-examine, and re-consider the evidence adduced before the trial court, in line with **Section 78 of the Civil Procedure Act.**

5. **The Pleadings**

The appellant blamed the Respondent's driver for negligence by driving the vehicle at an excessive speed in the circumstances, driving dangerously and failure to have control of the same leading to the overturning of the vehicle, in her Further Amended plaint filed on the 16 th May 2008.

The Respondent filed its defence on the 8th December 2004 and denied the claim, in its entirety.

6. **The Evidence on Liability**

The appellant testified as PW1. Her evidence was that she was among a group of church members who travelled by Coast Bus from Kakamega intending to go to Mombasa for a conference. She produced the list of the members as exhibit 1.

That on the way past Kericho, the vehicle overturned due to overspeeding. They were injured and taken to Nakuru General Hospital. She produced medical evidence and receipts to support special damages on medical expenses from the various hospitals.

7. She produced the police abstract, without objection by the defence as PExt 6 P3 Ext 7. She testified that the bus driver was charged convicted and sentenced to serve two years imprisonment – proceedings produced As PExt 8.

On cross examination, the appellant stated that the vehicle belonged to Coast Bus,registration No. KAL 140R. It was her evidence that in Traffic case at **Kericho PMCC No.1942 of 2002 Republic –vs- Kithome Mwinzi**, the driver of the vehicle was charged with six counts of causing death by dangerous driving contrary to Section 46 of the Traffic Act, was convicted and sentenced to pay a fine of Kshs.30,000/=.

8. PW2 was the Doctor who examined the appellant and prepared a medico-legal report on her injuries.

PW3 was a maxillofacial surgeon. He too examined the appellant and did surgical procedures on her face. He produced his report on the medical treatment.

The defendant/respondent herein did not call any evidence before the trial court, but filed submissions, which I have considered.

Though served with the Record of Appeal and hearing notices, neither the Respondent nor his Advocates filed submissions in response to the appeal.

9. I have considered the trial court's judgment delivered on the 8th June 2010.

It was the court's finding that the appellant failed to prove her case stating stating at par 75 that;

> *"on the part of the court, I am not satisfied that the plaintiff herein was the very person who travelled in that bus because of that confusion. I am afraid I am not satisfied that the plaintiff had proved that bit of her case that of identifying herself to the accident. PW1 treated her for a condition he said was recent to 2008 and this would mean that the blood clot on the brain may or may not have been related to the accident of 2002."*

10. The reasons or the failure of the appellant's case are as stated in the above paragraph.

11. **Issues for determination.**

> **(i) Whether the appellant was a passenger in the ill-fated bus Registration No. KAL 140 R on the 18th August 2002, and whether she sustained injuries.**
>
> **(ii) *Quantum* of damages**

12. **Analysis and Determination**

The Respondent did not file any submissions in this appeal. The appellant's submissions are dated 28th March 2019 and filed on the 29th March 2019.

The appellant's names as stated in the plaint and the verifying affidavit are Peruce Ayuma Ottawa.

PW2 Dr. Julius Githinji Kiboi testified that PERIS AYUMA ATTAWA was his patient since 2008, having been referred to him with a head injury upon suffering a blood clot on the brain, caused by trauma caused about one or two months before, facial head deformity, eyelids problem and lips. She stated that the injuries were from previous injuries. The doctor prepared a report that showed serious cosmetic injuries on the face.

13. On cross examination, the doctor stated that the injuries were residual from the accident, and that she was not properly managed at initial treatment, in that she had not been diagnosed with clot problem before, that from 2002 to 2008, anything could have happened to her.

14. PW3 Dr. John Fredrick Onyango referred to the appellant as Peruce Ayuma. He saw her in August 2002 having been involved in an accident along Kisumu–Kericho Road. He noted multiple laucaraphage on face, had no fractures, did surgical repairs in theatre and discharged her on 30th August 2002.

A list of members from the church who travelled in the bus was produced as PExt 1. **No. 42** the name **Mrs Perus Omboto appears.**

15. The hospital appointment card and treatment card (PExt 2A state Peris Omboto at Nakuru Nursing home states the patients names as Peris Omboto. Discharge summary PExt 3 – from M.P.Shah hospital states the names as Peruce Omboto Ottowa.

Dr. J.F. Onyango – Ext 5 stated Perice Omboto Ottawa. The Police Abstract, Ext 6 stated Peruse Ayuma Ottawa as passenger with date of accident as 18th August 2002 in motor vehicle Reg. NO KAL 140 R Scania Bus.

PExt 7, the P3 form stated names as Peruce Ayuma Ottawa – with injuries sustained in a road traffic accident on the 18th August 2002. Kenyatta National Hospital discharge summary stated the names as Peruce Ottawa – MFI 9 as well as a Peruce Ottawa Ayuma. All payment receipts for medical expenses and treatment state above names interchangeably.

16. It is evident that the appellant by her names stated in the exhibits and in the plaint refer to her and no other person, though spelling differ.

In particular, the police abstract captured the names of the passengers when they were either dead or undergoing treatment in various health institutions.

17. As submitted by the appellant the said documents and exhibits are clear proof that the appellant by her names, though interchangeably was in the accident bus, was injured, and treated. The P3 form and the police Abstract in particular affirm that indeed the appellant was one of the passengers in the accident bus.

18. The defence did not call any evidence to put flesh into its defence. The appellant's evidence thus remained uncontroverted.

In my opinion, the names attached to the appellant are one and the same, but different spellings, by different people. This is bound to happen where pronouncements are specific to particular dialects.

19. In the case **Milton L. Milimu –vs- Coast Bus Safaris Ltd & Another, (2015) e KLR,** the Court of Appeal rendered that

> "*….when the abstract is not challenged and is produced in court without any objection, its contents cannot later be denied."*

In **Philip Kipkorir Cheruiyot –vs- Nebco K. Ltd & Lawrence Ajugi – Eldoret HCC NO. 70/2000**, the Court held that

> "*….the Appellants uncontroverted oral testimony and production of the police abstract in the lower court was enough proof that he was a passenger in the accident vehicle"*

20. In the end, I find that the trial magistrate misdirected herself in holding that there was a confusion as to whether the appellant was a passenger in the accident bus. I am satisfied that the appellant's identification, by the above documents, exhibits and pleadings, that she was indeed a passenger among the 47 stated in the list of Mothers Union Members that travelled on 8th August 2002 and that the appellant sustained injuries as pleaded in the plaint, and further demonstrated by the medical evidence tendered before the trial court.

21. To that end, I am persuaded that the appellant discharged the burden of proof to the required standard, upon a balance of probability.

It is my further finding that the trial magistrate failed in his duty to assess damages that would have been awarded to the appellant had the suit on lability had succeeded.

22. The upshot is that the trial court's judgment delivered on the 8th June 2010 is set aside in its entirety, and substituted it with one, that the appellant proved her case on liability to the required standard.

23. I now proceed to fill the gap that the trial court failed to, to assess both special and general damages as prayed for in the plaint.

I have considered the treatment records from the various hospitals as well as the medical reports prepared by Dr. Julius Githinji Kibo (PW2) PExt 11 and Dr. John Fredrick Onyango PW3) PExt 10.

The injuries, in summary are as follows:

- Gross facial oedema
- Lacerations of the left face
- Running from forehead, across left orbit to involve upper lip
- Oedema of the face
- Colloboma of the lower eyelid with occasional tearing.

- Tenderness in upper teeth when chewing hard food

- Chronic subduaral haematoma on right temperoparietal area (blood clot on the brain)

24. As stated earlier, the respondent did submission on likely awards before the trial court. The appellants considering the injuries sustained proposed a sum of Kshs.1,000,000/= in general damages for pain and suffering and Kshs.630,724 in special damages.

25. **Special damages**

A sum of Kshs.320,724/= was pleaded in the amended plaint.

It is trite that special damages must be specifically pleaded and proved.

What I can state, upon examination of the exhibits produced and admitted, are the following:

(1) Paid to Nakuru Nursing Home – Ext 2(b) - Kshs. 49,975/=

(2) Paid to MP Shah Hospital Ext P4 - Kshs.101,500/=

(3) Medical report fees, Dr. Onyango - PExt 5A - Kshs. 5,000/=

(4) Kenyatta National Hospital – Ext 9A - Kshs. 35,000/=

(5) Medical Report fees Dr. Onyango – Ext 13 - Kshs. 10,000/=

(6) Other fees at M.P. Shah Hospital – Ext 12 - Kshs. 27,800/=

Total Kshs.229,275/=

That is the amount I find duly proved.

I award the same as a special damage

26. A further sum of Kshs.126,000/= was pleaded as future medical expenses. Some of the future expenses may have been necessary, as recommended by the doctors.

27. Dr. Koboi Julius Githinji (PW2) of M.P. Shah Hospital, a consultant neurosurgeon concluded that the appellant had serious cosmetic injuries on the face, with a disfigured nose, discomfort in the left eye which affected her ability to work. He followed her up on epilepsy.

28. Dr. John Fredrick Onyango (PW3) a maxillogicial surgeon and specialty of face surgery prepared two medical reports on the appellant's injuries. He did surgical procedures to repair laucaraphage on the face on the 28th August 2002 soon after the accident, but a year after made further observations that notching of lower eyelid and serious scars was necessary,and as at March 2010 would require Kshs.350,000/=.

29. The doctor was a consultant at Nairobi Hospital and others.

The future surgical procedures being necessary, I am of the opinion that in public hospitals the cost would be much less. To that extent I would award a reasonable sum of Kshs.280,000/=, almost ten years after, taking into account inflation.

30. **General damages for pain and suffering**

I have stated the amount purposed by the appellant as Kshs.1,000,000/=. I have considered the decisions cited in support. The injuries are serious.

In **Omar Musa Hassan & Another –vs- Rashid Salim & Another, HCCC No.2391/95(UR) , the court rendered that no two injuries can be similar, but only comparable.**

Fatuma Abdalla –vs- Tusks Restaurant Ltd & Another NBI HCCC No. 1727 of 1000 (UR), the injuries are also not comparable.

31. In **Kenya Wildlife Service –vs- Godfrey Kirimi Mwiti(2018) e KLR** injuries sustained by the plaintiff were left zygomatic bone fracture, left ethmoidal bone fracture and maxillary fracture, lower orbital floor fracture and distal left radious fracture. A sum of Kshs.200,000/=. The injuries were more serious. In **Joseph Mwanza –vs- Eldoret Express Kisumu Civil Case No. 160 of 2004, (UR**) the plaintiff sustained facial serious injuries including diplopia of right eye, multiple facial injuries, gross right peribitaloedema and tenderness with enaphith almos facial craniomaxillofacial fractures. A sum of Kshs.1,200,000/= was awarded.

32. Further, in **Civil Appeal No. 42 of 2015 Leonard Njenga Ng'ang'a & Another –vs- Lawrence Maingi Ndeti (2018) e KLR,** with every comparable injuries to those of the appellant, being, fractures of the various, deep cuts on the lower lips loss of lower teeth denture, injury to the gums, fracture of left ankle and dislocation, hospitalised for four weeks, several operations undertaken. The court substituted an award of Kshs.2,150,000/= with one of Kshs.1,500,000/=.

33. Guided by the principles that underpin the assessment of damages as stated in numerous decisions of the supervisor courts; that compensation for physical injury are fixed on monetary terms and are at the courts discretion – **Southern Engineering Co Ltd –vs- Musangi Mutua (1985) KLR 730**, that comparable injuries ought to attract comparable awards, I find that a sum of Kshs.800,000/= would be reasonable for pain and suffering and loss of amenities in the circumstances.

34**. The upshot is that the appeal succeeds, the trial court's judgments is set aside, and substituted with a finding that the appellant proved her case against the respondent to the required standard, as herebelow:**

(a) Liability against the Respondent - 100%

(b) General damages for pain

and suffering - Kshs.800,000/=

(c) Future medical expenses - Kshs.280,000/=

(d) Special Damages - Kshs.229,275/=

35. The special damages shall accrue interest at court rates from the date of filing the **Further Amended Plaint**, while general damages and future medical expenses will accrue interest at court rates after 30 days from the date of this judgment.

Costs of this appeal, and those of the trial court shall be borne by the Respondent.

Delivered, signed and dated electronically at Nairobi this 13th day of May 2020.

J.N. MULWA

HIGH COURT JUDGE.