REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 138 OF 2010

TURBO HIGHWAY ELDORET LIMITED.....APPELLANT

VERSUS

JACOB KIPKOECH BIWOTT.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J.M. Njoroge, Principal Magistrate, delivered on 22 June 2010 in Kapsabet PMCC No. 15 of 2007)

JUDGMENT

[1] The appellant was the defendant before the lower court. It had been sued by the respondent, **Jacob Kipkoech Biwott**, in **Kapsabet PMCC No. 15 of 2007: Jacob Kipkoech Biwott vs. Turbo Highway Eldoret Limited** in respect of injuries sustained in a road traffic accident that took place on **29 January 2006** near Chirchir Centre along the Kaptagat-Eldoret Road. In his Plaint dated **18 October 2006**, the respondent averred that he was then travelling as a lawful passenger in the appellant's motor vehicle **Registration No. KAR 288V** when the said motor vehicle lost control, veered off the road and overturned. It was further the contention of the respondent that the accident occurred solely due to the negligence of the appellant's driver. He accordingly claimed general damages, costs and interest.

[2] In its Defence filed dated **15 February 2007**, the appellant admitted that it was the owner of the **Motor Vehicle Registration No. KAR 288V**, but denied that an accident occurred on or about **29 January 2006** as was alleged by the respondent. In the alternative, it was averred by the appellant that, if an accident occurred as alleged, then the same was not attributable to the negligence of the appellant or its driver. It further denied that the respondent was a lawful passenger in the said motor vehicle; and that if at all he was aboard the motor vehicle on the date in question then he did so without its authority or consent. Accordingly, the appellant pleaded the doctrines of *volenti non fit injuria* and *res ipsa loquitur*.

[3] Upon hearing the parties, the learned trial magistrate apportioned liability at 85:15 in favour of the respondent and awarded him general damages in the sum of **Kshs. 68,000/=** less contribution. His view of the matter was as follows:

> **"From the evidence on record, the plaintiff a passenger in motor vehicle KAR 288V, a Mitsubishi lorry owned by the defendant and were transporting paper materials from Webuye, Pan paper mills to Nairobi. The plaintiff blames the operators of the motor vehicle as the cause of the accident. He says that the brakes and the gears were faulty and the motor vehicle started to go back downwards. He further blames the driver of the motor vehicle was negligent by failing to engage the gears on a hill causing it to veer off the road, roll backwards and overturn. The DW1, further confirmed that the driver abandoned all the systems of the motor vehicle including the steering wheel, brakes, clutch e.t.c which led to loss of control and the happening of the accident.**
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> **I shall therefore hold the driver liable for the accident at 85% while the plaintiff shall shoulder 15% as contributory negligence. The defendant shall be held liable vicariously. On quantum the plaintiff's medical doctor states that the injuries sustained were usually on the forehead that was tender with a cut wound, blunt trauma to the chest, which was tender. Injuries were severe and have healed but for occasional pains which will subside with the use of analgesics…"**

[4] Being dissatisfied with the outcome of the suit, the appellant filed this appeal on **21 July 2010** raising the following grounds:

[a] That the learned magistrate erred in law and fact in failing to take into account that no traffic accident was ever reported to the police as no abstract report was produced in court.

[b] That learned trial magistrate erred in law and fact in failing to take into account that without the police report, no accident was proved to have occurred.

[c] That the learned trial magistrate erred in law and fact in failing to hold that in the absence of a report to the police station as required by law, and in the absence of evidence before court on the alleged accident then no accident occurred and/or ever took place.

[d] That the learned trial magistrate erred in law and in fact in failing to dismiss the claim herein for want of proof and/or production of primary documents in court at the hearing.

[e] That the learned trial magistrate erred in law and fact in arriving at a decision against the weight of evidence on record and/or without supporting evidence in that regard and therefore contravened the provisions of Order XX Rule 4 of the Civil Procedure Rules.

[f] That the learned trial magistrate erred in law and fact in failing to dismiss the respondent's suit with costs to the appellant for want of proof on a balance of probability as required by law.

[g] That the learned trial magistrate erred in law and fact in awarding damages which were excessive in the circumstances against the evidence and the submissions on record hence an erroneous estimate of the alleged loss suffered by the respondent if at all.

[h] That the learned trial magistrate erred in law and fact in failing to hold that there was no accident and the appellant was not to blame for what did not and/or never existed.

[i] That in the alternative and without prejudice to the foregoing, the learned magistrate erred in law and in fact in failing to consider that, if at all an accident occurred, it was caused by the sole and/or contributory negligence of the respondent.

[5] Accordingly, it was the appellant's prayer that the Judgment of the lower court be set aside and that in lieu thereof, the respondent's claim be dismissed with costs.

[6] The appeal was urged by way of written submissions, pursuant to the directions given herein on **6 September 2018**. **Ms. Wahome** for the appellant was of the stance that the respondent had failed to establish negligence on the part of the appellant's driver as not eye witness was called to corroborate and/or shed more light on the occurrence. She also took issue with the fact that no documentary evidence was produced by the respondent such as a policy abstract or traffic case proceedings to demonstrate either that the driver was at fault in some way, or that the motor vehicle was defective. Counsel cited **Section 107** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**, in urging the Court to find that the burden of proof was not sufficiently discharged by the respondent to warrant the findings made by the lower court.

[7] It was further the submission of **Ms. Wahome** that, since credible evidence was adduced by the respondent to demonstrate that it was the respondent who picked a quarrel with the driver and started a fight that caused the driver to lose control of the lorry before the accident, it was erroneous for the learned trial magistrate to ignore that fact and attribute liability to the appellant's driver. She relied on **Nairobi HCCA No. 211 of 2002: Abdalla Baya Mwanjure vs. Swalahadin Sain T/A Jomvu Total Service Station** for the proposition that it is not in all circumstances that an employer is liable in negligence for the injuries sustained by an employee; and that it was imperative for the respondent to demonstrate a causal link between his injuries and the appellant's negligence.

[8] On quantum, **Ms. Wahome** submitted that the lower court's award of **Kshs. 80,000/=** is excessive and therefore not commensurate with the injuries allegedly suffered by the respondent. She, on her part, proposed that an award of **Kshs. 20,000/=** would suffice. She relied on **Eldoret HCCA No. 21 of 2004: Eastern Produce (K) Ltd (Kaitet Estate) vs. Joseph Lemiso Osuku** and **Nairobi HCCC No. 4150 of 1991: Loise Nyabeki Oyugi vs. Omar Haji** in support her submissions.

[9] On behalf of the respondent, **Mr. Mirende, Advocate,** submitted that an accident need not necessarily be reported to the police as not all accidents are police cases. He therefore took the posturing that the fact that an accident is not reported to the police does not mean that it did not occur. Counsel consequently urged the court to disregard the submission that failure to produce a police abstract was fatal to the respondent's case. He further urged the Court to note that **DW1** candidly testified and confirmed not only the circumstances in which the accident occurred but also that both the driver and the respondent were employees of the appellant; and that it was in that capacity that the respondent was aboard the lorry at the material time. He consequently defended the lower court's decision on both liability and quantum and urged for the dismissal of the appeal with costs.

[10] I am mindful that, this being a first appeal, it is my duty to reconsider and re-evaluate the evidence adduced before the lower court with a view of making my own conclusions thereon. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123** this principle was stated thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."**

[11] A consideration of the record of the lower court shows that the respondent testified on **29 September 2009** as **PW1.** His evidence was that, at the material time, he was working for the appellant as a turn boy; and that on **29 January 2006**, he was travelling to Nairobi aboard the appellant's **Motor Vehicle Registration No. KAR 288V, Mistubishi lorry,** as the turn boy and that he had been assigned duties by one **Mihu Shah,** who he described as "the owner" of the appellant company.

[12] The respondent further told the lower court that on reaching **Chirchir** area, the gears failed and the motor vehicle started to roll back downhill before it overturned by the roadside; and that it was in that process that he suffered injuries on his chest, forehead and back. He blamed the defendant for the accident, contending that it failed to service the motor vehicle and ensure that its brakes and gears were

functional. On that account he asked for compensation in general damages.

[13] On behalf of the appellant, **Bernard Odhiambo Ombaja (DW1)** testified on **11 May 2010** and confirmed that he works for the appellant as an electrician; and that the respondent was a fellow employee, deployed as a turn boy. He further confirmed that on **29 January 2006** he boarded the subject motor vehicle with the intention of travelling to Nairobi; but that on the way, they were involved in a road traffic accident. Regarding the circumstances in which the accident took place, it was the testimony of **DW1** that they stopped at **Timboroa** for a cup of tea, but instead the driver and the respondent **"…went to drink and were drunk…"** and that when they resumed their journey, the two started quarrelling in Kalenjin language, which quarrel degenerated into a fight. He explained that that was the reason why the driver lost control of the lorry and caused it to veer of the road and roll backwards before overturning. **DW1** was categorical that motor vehicle was not defective.

[14] From the foregoing summary of evidence, there was not dispute that the respondent was an employee of the appellant, **DW1** having acknowledged this fact in his evidence as a defence witness. There is also no dispute that the **Motor Vehicle Registration No. KAR 288V** was owned by the appellant at the material time; and therefore that the respondent was aboard the motor vehicle as its turn boy. Accordingly, the averments in paragraph 7 of the appellant's Defence to the effect that the respondent had no authority or consent from it to travel in the subject lorry are untenable.

[15] In the same vein, there is no dispute, given the clear and unequivocal evidence of **DW1** that an accident occurred on **29 January 2006** involving the subject lorry while it was being driven by a duly authorized driver of the appellant. In this respect, I would agree with counsel for the respondent that the mere fact that no police abstract was produced by the respondent before the lower court is no proof that the accident did not happen. The occurrence was adverted to by **DW1** in clear and uncertain terms and therefore was proved before the lower court to the requisite standard.

[16] In the light of the foregoing, the key issues that present themselves for my re-evaluation and determination are whether the respondent proved negligence on the part of the defendant on a balance of probabilities; whether the apportionment of liability between the respondent and the appellant was justified; and whether sum of **Kshs. 80,000/=** awarded by the lower court as general damages is defensible.

[17] On liability, it is worth mentioning that the respondent's case was not hinged on the fact that he was injured while in the course of his employment; but on the assertion that he was travelling as a lawful passenger in the appellant's motor vehicle. Consequently, the particulars of negligence alleged against the appellant's driver at paragraph 4 of the Plaint were:

[a] driving at an excessive speed in the circumstances;

[b] failing to control, manage or in any way drive the motor vehicle carefully so as to prevent the accident from occurring;

[c] driving in total disregard of the condition of the road;

[d] driving a defective motor vehicle;

[e] failing to observe the traffic rules.

[18] From a careful consideration of the evidence of the respondent, there is no indication that the appellant's driver failed to observe the traffic rules, or that he drove the subject motor vehicle either at an excessive speed or in total disregard of the condition of the road. Likewise, the allegation by the respondent that the motor vehicle was defective was not supported by any credible evidence, noting that no inspection report was availed from which the lower court could base a finding that the either the brakes or the gears failed to function. To the contrary, **DW1** adduced evidence to the effect **"…the motor vehicle was not defective…"** Needless to say that the burden of proof was on the respondent to demonstrate his assertions on a balance of probabilities and leave nothing to conjecture, for **Section 107** of the **Evidence Act**, **Chapter 80** of the **Laws of Kenya**, is explicit that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

[19] Thus, of the particulars of negligence relied on by the respondent, the only valid ground appears to be that the appellant's driver failed to control, manage or in any way drive the motor vehicle carefully so as to prevent the accident from occurring. Indeed, in his Judgment, the learned magistrate appears to have place considerable premium on the evidence of DW1 that the driver **"…abandoned all systems, including brakes, accelerator, clutch and steering etc…"** He therefore concluded that this loss of control is what directly caused the accident.

[20] However, as rightly pointed out by counsel for the appellant, the lower court appeared to have ignored the explanation given by **DW1** for the situation; namely that a quarrel broke out between the driver and the respondent which degenerated into a fight while the motor vehicle was in motion. While I would agree that the driver was more reprehensible for letting the quarrel make him lose his composure and concentration while the motor vehicle was in motion, the pertinent question that ought to have been given careful thought by the lower court was whether in the circumstances the respondent was entitled to compensation, given his causative role in the incident. He got himself drunk while on duty and then got into a fight with the driver while the latter was driving. That is indicatable offence under **Section 59(1)** of the **Traffic Act, Chapter 403** of the **Laws of Kenya**.

[21] That being the case, the Plaintiff is in no position to seek the aid of the law to recover damages for injuries sustained on account of his illegal act; for the maxim of *ex turpi causa non oritur actio* would come into play. In **Scott vs. Brown, Doering, McNab & Co.** (3) [1892] 2 QB 724 it was held that:

> **"This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."** (emphasis supplied)

[22] It is my considered view therefore that negligence was not proved and therefore that the learned magistrate erred in fixing liability against the appellant in the foregoing circumstances. As regards quantum, again it is manifest that other than the assertion by the respondent he was injured there was no evidence at all as to the nature or extent of those injuries. While **DW1** testified that he saw blood on the face of the respondent, it is noteworthy that he conceded that he did not know how serious his injuries were. No medical report was presented before the lower court to enable it assess damages payable from a point of knowledge. I say so because, whereas there is a medical report forming part of the Record of Appeal along with an Out Patient Record bearing the name of the respondent, these documents were not produced as exhibits before the lower court by the respondent. And it appears that no reference was made to them in the Judgment of the lower court.

[23] Hence, in **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others** [2015] eKLR, in which the central issue on appeal was the probative value, if any, of a document marked for identification but which was neither formally produced in evidence nor marked as an exhibit. The Court of Appeal held that:

> **"The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held as proved or disproved. First, when the document is filed, the document though on the file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; …Third, the document becomes proved, not proved or disproved when the court applies it judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case…a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness…we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight…"**

[24] In the premises, even the injuries allegedly suffered by respondent were not proved; and therefore, on both scores, the respondent failed and his case was clearly for dismissal. Had I found in his favour on liability and quantum, I would have had no reason to interfere with the lower court's award, bearing in mind the holding in **H. West & Son Ltd vs. Shephard [1964] AC 326**, it was acknowledged that:

> **"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."**

[25] Moreover, it is now settled that assessment of damages is a matter of discretion; and that an appellate court will not disturb an award unless sufficient cause be shown. Accordingly, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR, the Court of Appeal held that:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages."** (Also see **Butt vs. Khan [1981] KLR 349)**

[26] Likewise, in **Stanley Maore vs. Geoffrey Mwenda [2004] eKLR,** the Court of Appeal suggested thus:

> **"…we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."**

[27] Bearing in mind that what was pleaded was basically soft tissue injuries, I would have been guided by the following authorities:

> **[a]** In **Ndungu Dennis vs. Ann Wangari Ndirangu & Another [2018] eKLR**, an appeal from an award that was made on **10 December 2015**, the Respondent had been awarded **Kshs. 300,000/=** by the trial court for soft tissue injuries. These included minor bruises on the back and tenderness on the right leg. The award was considered manifestly excessive and was reduced to **Kshs. 100,000/=** in a Judgment delivered on **1 February 2018**.
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> **[b]** In **Godwin Ireri vs. Franklin Gitonga [2018] eKLR**, the Respondent had been awarded **Kshs. 300,000/=** as general damages for two cut wounds on the forehead, cuts on the scalp and bruises on the left ankle and right knee. The award was reduced to **Kshs. 90,000/=.**

[28] In the result, I am satisfied that the appeal has merit and it is hereby allowed. The Judgment and Decree of the lower court is hereby set aside and substituted with an order for the dismissal of the respondent's suit. Granted the employer-employee relationship between the appellant and the respondent, it is hereby ordered that each party shall bear own costs of both the appeal and the lower court suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF MAY 2020

OLGA SEWE

JUDGE