REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 70 OF 2015

ALPHONCE KITEMA MUNYAO.....APPELLANT

VERSUS

E.COACH COMPANY LIMITED.....1ST RESPONDENT

JOHN KITEME.....2ND RESPONDENT

*(Being an Appeal from the Judgment in **Mwingi Senior Resident Magistrate's Court Civil Case No. 202 of 2008** by **Hon. Gichimu W. J. (R M)** on **26/02/09**)*

J U D G M E N T

1. **Alphonce Kitema Munyao,** the Appellant, was a passenger aboard motor-vehicle Registration Number **KAZ 858B** owned by the 1st Respondent and at the time was being driven by the 2nd Respondent. It was his case that the accident occurred due to the negligence of the 2nd Respondent whereby he sustained serious injuries. As a result he claimed for special and general damages.

2. The Respondents denied the allegations.

3. The Appellant's evidence was that he boarded the subject motor-vehicle on the **25th February, 2008** as he was travelling to Mwingi. The conductor of the motor-vehicle demanded for **Kshs. 200/=** instead of the usual **Kshs. 100/=.** Therefore he asked them to let him alight and moved towards the door. The conductor and another person pushed him out. As a result he fell and sustained injuries. The motor-vehicle stopped and they took him to the police station. He sought treatment following the injuries sustained and a report was issued.

4. The defence did not call any evidence.

5. The learned trial Magistrate considered evidence adduced and was of the opinion that the person who was to blame for the accident was the conductor who pushed the Appellant from the motor-vehicle before it stopped. That the driver was not to blame for the accident, and that without suing the conductor the 1st Respondent would be held liable for acts of the person who was not sued.

6. On quantum, he stated that had the case been proved, he would have awarded **Kshs. 70,000/=** as general damages and **Kshs. 3,700/=** as special damages. The suit was dismissed with costs.

7. Aggrieved by the decision of the Court, the Appellant appealed on grounds that; the decision was reached against the weight of evidence; finding that the owner of the bus was not to blame for the negligence of the driver, conductor or other employees when the Plaintiffs evidence was not challenged was erroneous.

8. Pursuant to directions taken, the Appeal was to be canvassed by way of written submissions. Only the Appellant filed submissions. It was urged that no evidence was called to controvert that of the Appellant as to causation of the accident. That the driver and conductor were both agents of the owner of the bus therefore he was vicariously liable for the acts of negligence of his employees and/or agents. That the conductor and driver work in consonance in controlling the motor-vehicle and in case of an accident the driver is the right person to sue.

9. This being a first Appellate Court, it is my duty to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility **(See Selle vs. Associated Motor Boat Company Limited (1968) EA 123).**

10. I must also remind myself of what was state in the cast of **Makube vs. Nyamuno (1983) KLR 403** that:

> ***"A court on Appeal will not normally interfere with the finding of fact by a trial Court unless it is based on evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."***

11. Negligence on the part of the driver of the motor-vehicle (2nd Respondent) was particularized thus: Driving without due care and attention to passengers; Failing to apply brakes when the Plaintiff was alighting; Driving too fast in the circumstances; Driving recklessly; and ignoring instructions and warnings from both the Plaintiff and the Conductor.

12. In the case of **Kiema Mutuku vs. Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258** it was stated that:

> ***"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."***

It was therefore the duty of the Appellant (Plaintiff in the Lower Court) to prove on a balance of probabilities the negligent conduct on the part of the Defendants. In his testimony the Appellant stated that he asked the conductor to allow him to alight since he was charging more money than the usual bus fare. He moved to the door where the conductor and another individual pushed him outside and he fell, sustaining injuries. When the driver ultimately stopped they took him to the police station.

13. It is trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded. **(See Adetoun Oladeji (NIG) LTD vs. Nigeria Breweries PLC S.C. 91/2002).**

14. At no point did the Appellant blame the driver for the occurrence of the accident. The motor-vehicle was in motion when the conductor and another pushed him out per his evidence. He did not allege that they (conductor and himself) gave any instructions and warnings to the driver that he ignored. In fact he did not attribute any negligence to the conductor in his pleadings. Therefore his evidence was at variance with the averments of the pleadings, such must be disregarded.

15. It was the finding of the learned trial Magistrate that the Appellant should have enjoined the conductors who pushed him outside in the suit. It is however urged that failure to enjoin the conductor was not fatal to the claim. As the driver was the right person to sue. I am in agreement that the non-joinder of the conductor as the Defendant would not on its own defeat the Plaintiff's claim. Had the negligence on the part of the individuals who pushed the Appellant out of the bus been pleaded and the fact of existence of master-servant relationship between them and the owner of the bus proved then the owner of the motor-vehicle would have been vicariously liable for their negligence.

16. I have noted that no evidence was called by the Respondent in defence of their case to controvert the evidence adduced by the Appellant regarding causation of the accident but the Respondents could not be held liable for what they were not notified to respond to. In the premises the learned Magistrate was justified in reaching the decision to find the Respondent not liable.

17. Concerning quantum of damages it is a general principle that an Appellate Court would only interfere with an award of damages if irrelevant factors were taken into account or the amount of damages were inordinately high or low that the sum awarded was erroneous. Had the case been proved to the required standard, I would not have interfered with what was considered by the Lower Court.

18. From the foregoing I have no reason to interfere with the decision of the Lower Court, which is affirmed. In the premises the Appeal is dismissed with no orders as to costs.

19. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **13th** day of **February, 2019.**

L. N. MUTENDE

JUDGE