REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 250 OF 2017

(FORMERLY MACHAKOS HCCA NO. 200 OF 2015)

BOLPACK TRADING CO. LTD.....1ST APPELLANT

GEORGE MALONZA.....2ND APPELLANT

NICHOLAS MUTINDA.....3RD APPELLANT

-VERSUS-

BENSON MASILA NGUI.....RESPONDENT

(Being an Appeal from the Judgment of Hon. J.W. Gichimu (Ag.PM) in the Senior Resident Magistrate's Court at Tawa Civil Case No.162 of 2010, delivered on 28th February 2013).

JUDGEMENT

INTRODUCTION

1. The Respondent filed a suit in the lower Court against the Appellants seeking General Damages, Cost of the suit and Interest for injuries sustained in a road accident at Kisoo area along the Kitui-Machakos road on 22/03/2010*(herein after 'the material day*.

2. The Appellants filed their responses and after the preliminaries and hearing, judgment was eventually delivered. The learned trial found the Appellants 100% liable jointly and severally and awarded Kshs. 400,000/= as General Damages and Kshs. 2,200/= as Special Damages.

3. Aggrieved by the entire judgment, the Appellants filed the instant appeal and listed 4 grounds as follows;

> ***a)*** ***That*** *the Learned Magistrate erred in law and fact by holding that the driver of the suit motor vehicle was to blame on the ground that the suit motor vehicle was reversing contrary to the evidence of DW2, PC Ngano illustrating the circumstances leading to the incident.*
>
> ***b)*** ***That*** *the Learned Magistrate erred in law and fact in finding that the Respondent had proved his case on a balance of probabilities in view of the evidence on record.*
>
> ***c)*** ***That*** *the Learned Magistrate erred in law and fact in failing to consider all evidence adduced and produced in Court by the Appellants to wit:*
>
> ***i.*** *The evidence of DW2, PC Ngano that the driver was not to blame for the accident.*
>
> ***d)*** ***That*** *the Learned Magistrate's decision on assessment of quantum was unjust, against the weight of the evidence and was based on points of fact and wrong principles of law and has occasioned a miscarriage of justice.*

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. It is now settled that the duty of a first Appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

6. Having looked at the entire record, the Grounds of Appeal and the Rival Submissions, the issues which arise for determination are;

a) Who was liable for the accident and to what extent?

b) Whether the award on quantum should be disturbed.

7. I will proceed to deal with the issues under the distinct heads.

LIABILITY

8. The Appellants submit that the Learned Trial Magistrate did not analyze the issue of liability at all and especially the evidence of PW2 and DW1. That no evidence was adduced to justify the apportioning of liability at 100% against the Appellants. That PW2 and DW1 who were both officers concluded that both drivers were to blame and as such, liability should have been apportioned to both drivers.

9. Further, they submit that during cross-examination, PW2 blamed the driver of the third party motor vehicle and according to them, it means that the Respondent had a case against the third party.

10. They also submit that failure by the third party to attend trial does not mean that he should escape liability. According to them, the evidence on record suggests that the trial Court should have apportioned liability in the ratio of 50:50.

11. On his part, the Respondent submits that in the amended plaint, he blamed the driver of motor vehicle registration No. KBA 330Z *(herein after 'KBA')* and evidence was adduced by all the witnesses proving negligence on the part of it's driver. That the said driver pleaded guilty to a charge of stopping suddenly on the highway and reversing therein.

12. Further, he submits that although the Appellants blame the driver of motor vehicle registration No. KBK 632A *(herein after 'KBK')*, they did not ventilate their case against him as directed by the Court. He also submits that the 3rd Appellant pleaded guilty and that was conclusive evidence under section 47 of the Evidence Act.

13. I have looked at what PW1, PW2 and DW1 said with regard to how the accident occurred.

14. PW1, the Respondent, said that on the material day, he was on board KBK travelling to Nairobi from Kitui. He sat behind the driver and KBA, which was in front of them, was preventing their vehicle from overtaking.

15. On reaching *'kwa kisuo'* area, they found KBA reversing to pick passengers. They attempted to overtake but KBA's driver went into the road and the two vehicles collided. That by the time their driver saw KBA, it was too close because of a corner at the scene.

16. On cross examination, he said that there was no bus stage at the scene and denied that their motor vehicle was competing for passengers with KBA.

17. PW2 was P.C Silas Liyai, a traffic officer at Kitui Police station. He testified that after receiving a report of the accident, they proceeded to the scene with Cpl Ngila and PC Ngano where they found two motor vehicles. PC Ngano drew the sketch plan. KBA was ahead going towards Machakos and KBK was behind. Both motor vehicles were competing for passengers along the road.

18. At the scene, KBA was reversing at a corner to pick a passenger which it had passed. The oncoming KBK hit the rear of KBA. The 3rd Appellant was charged for careless driving, pleaded guilty and was fined Kshs. 2,000/=.

19. Upon being referred to the statement of P.C Ngano in the police file, he explained that 'E2' referred to Richard Mutinda, the driver of KBK who was also an accused person.

20. That PC Ngano had charged the driver of KBK for failing to keep distance and driving at a high speed. That the skid marks of 30 meters indicated that the driver of KBK was driving at a high speed.

21. PW2 also had the covering report prepared by PC Ngano which said that both drivers were to be charged with careless driving but the driver of KBK was not charged because he disappeared. He also had the sketch plan which showed that both vehicles were on the left side facing Machakos.

22. The skid marks of KBA were 2 meters while those of KBK were 30 meters long. According to him, it meant that the driver of KBK was driving at a high speed. That KBA skid after being hit and was pushed towards the middle of the road after the impact.

23. Further, he testified that investigations were completed on 08/04/2010 and they blamed one motor vehicle in the abstract. He said that according to investigations, both drivers were to blame for the accident. He also said that the driver of KBK would be charged if found.

24. DW2 was PC Ngano, the investigating officer in the matter. He testified that the two motor vehicles were headed in the same direction and were competing for passengers. That the point of impact was two meters into the road, on the left as you head to Machakos.

25. That both drivers were to blame. He then said that the driver of KBA was responsible for the accident because he stopped instantly on the road and reversed thus closing the distance between the two motor vehicles.

26. Further, he said that the driver of KBK was also to blame for not keeping a reasonable distance as required of 70 meters. That his recommendation was for the two drivers to be charged with the offence of careless driving.

27. On cross examination, he said that the Respondent was a passenger and could not have caused the accident. He confirmed that the 3rd Appellant admitted the offence and was fined Kshs. 2,000/= on his own plea. He also confirmed that the road is curved at the scene.

28. Further, he said that if the driver of KBA had not stopped and reversed on the road, the accident would not have occurred. He also said that the skid marks of 30 meters long showed that the driver of KBK applied brakes.

29. At this juncture, I would like to address the issue of the third party. By submitting that liability should have been apportioned between the two drivers, the Appellants behaved as if they were not aware of the Trial Court's ruling directing that liability between them and the third party would be determined after conclusion of the Respondent's case against them.

30. That ruling was never challenged and it is therefore binding. The Appellants' attempt to ventilate their claim against the third party through this appeal cannot be allowed. I will therefore restrict myself to the issue of liability between the Respondent and Appellants.

31. What is clear from the evidence on record is that both motor vehicles were headed towards Machakos from Kitui and as much as PW1 denied it, I am satisfied that indeed the two motor vehicles were competing for passengers. It was also confirmed by the three witnesses that KBA was reversing on the highway to go back for a passenger which it had passed.

32. In my view, that was not only illegal but the epitome of carelessness because he did it at a corner while it was still dark. He also ought to have known that KBK was following closely behind because they were competing for passengers anyway.

33. I could not find the basis of the Appellant's ground of appeal No. 3 (a). i.e. that DW2 did not blame their driver for the accident yet it is in black and white that he blamed both drivers. He stated as follows;

> ***"Both drivers were to blame. The driver of motor vehicle KBA 632A stopped instantly on the road and reversed thus closing the distance between the two motor vehicles. He was responsible for that accident. The other driver of KBK 632A was also to blame for not keeping a reasonable distance as required of 70 meters."***

34. As much as DW2 placed the blame on both drivers, my analysis of the evidence leads me to the conclusion that the 3rd Appellant was the sole cause of the accident. Stopping and reversing on the highway was most certainly going to obstruct the lane of KBK since they were both travelling towards Machakos.

35. Further, there is evidence to show that the driver of KBK tried to avoid the collision by braking. I agree with the sentiments of the Trial Magistrate that, in as much as a driver is supposed to keep a safe distance while driving behind a another vehicle, this particular case was peculiar because the 3rd Appellant was reversing thus closing that distance.

36. Evidently, the trial magistrate analyzed the issue of liability properly and did not err by finding that the Appellants were 100% liable jointly and severally. As admitted by DW2, the Respondent was a passenger and could therefore not have caused the accident.

QUANTUM

37. The Respondent pleaded that the injuries sustained were as follows;

a) *Fracture of the skull on the frontal bone.*

b) *Loss of one tooth on the upper jaw.*

c) *Blunt injury to the chest.*

d) *Bruises on the face and nasal bridge.*

e) *Wound on the right tibia.*

f) *Injury on the right hip joint with pains.*

38. There was a dispute as to whether the Respondent sustained a fracture of the skull on the frontal bone. The Trial Court's finding was that the Respondent did not suffer any fracture of the head.

39. The Respondent submits that he lost consciousness and was admitted for three days and it was therefore obvious that he suffered a head injury. He also submits that a doctor who sees a patient first has first hand information unlike one who sees a patient one year down the line.

40. He also submits that the doctors called by the Appellants did not act professionally. That Dr. Wambugu (DW1) was paid to give adverse evidence while Dr. Theuri (DW3) was an employee of Directline Assurance Co. Ltd which had insured the motor vehicle and as such, he could not be an independent witness.

41. On the other hand, he submits that the doctors who testified for him worked in Government hospitals and some of them treated him not knowing that a compensation case would be commenced. He urged the Court to disregard the evidence of the defence doctors.

42. Of all the medical practitioners who attended to the Respondent and gave evidence in Court, only Dr, Wambugu (DW1) was a specialist in diagnostic body imaging. She confirmed that a CT scan was conducted on the Respondent and no fracture was revealed.

43. In light of her specialty, I would agree with the Trial Court that indeed she was the best suited to comment on the fracture.

44. The rest of the injuries can be classified as soft tissue but evidently, they were serious owing to the fact that the Respondent was admitted for three days and was unconscious when he was taken to the hospital.

45. I have looked at the authorities relied on by the Appellants in the trial Court.

46. The injuries sustained therein were mild and the authorities were too old to be comparable. On the other hand, the authority relied on by the Respondent had injuries which were much more serious than in the instant case.

47. In their submissions before this Court, the Appellants relied on **Paul Kipsang Koech & Anor. –Vs- Titus Osure Osore (2013) eKLR** where the claimant suffered soft tissue injuries and loss of two teeth. The trial Court's award of Kshs. 300,000/= was substituted with Kshs. 200,000/=.

48. They also relied on the case of **John Mutisya Ngile –Vs- Nthambi Paul Mutisya (2006)** where the trial Court awarded Kshs. 340,000/= for loss of a tooth, abdominal injury and laceration wound. The amount was reviewed to Kshs. 200,000/= on appeal.

49. The Respondent relied on the same authority it had relied on in the trial Court where the plaintiff was awarded Kshs. 1,000,000/= for fracture of the skull. Having determined that the Respondent herein did not sustain a fracture of the skull that authority ceases to be comparable.

50. I appreciate the principle that comparable injuries should attract comparable awards but it is also prudent to appreciate the peculiarities of each case.

51. I am therefore convinced that the award of Kshs. 400,000/= was not inordinately high in the circumstances.

CONCLUSION

52. In the circumstances the court finds that, the appeal has no merit and makes the following orders:-

1) ***The appeal is dismissed.***

2) ***Costs to the Respondent.***

SIGNED, DATED AND DELIVERED THIS 13TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE