REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 99 OF 2017

1. **DAVIS MAERA ONDERI**
2. **JAMAA ABDULRAZAK...APPELLANTS**

VERSUS

1. **MWANAMKASI JUMA MWIKU alias MWANAMKASI JUMA....RESPONDENT**

J U D G M E N T

1. Before the trial court the Respondent sued the plaintiff and sought the recovery of both special and general damages on account of personal and bodily injuries suffered by him when she was involved in an accident on along Lunga Lunga- Diani road aboard motor vehicle Registration KAT 035G. The Respondent gave evidence and called two other witnesses being the doctor who examined him and prepared a medical report and a police officer whose task was to produce a police abstract. For the appellant only a doctor who re-examined the Respondent was called to produce his medical report.

2. In her evidence the respondent said that she boarded the motor vehicle at Msambweni intent to alight at Kinondo but there occurred a tyre burst at Mulalani and the vehicle rolled several times leading to injury and loss of consciousness before she found herself at Mwaembe hospital in Msambweni with the injuries she enumerated as fracture of the right hand, injuries to the forehead, which was stitched, together with injuries to the cheeks and collar bone. She said that her hand was paralyzed and that she was hospitalized in that hospital for nine days. She was later seen by Dr. Adede (PW3) who prepared the medicine report at a cost of Kshs.2000/=. A search was conducted on the ownership of the motor vehicle and a certificate produced as exhibit P7. The Respondent blamed the driver for the accident for having driven the motor vehicle at a very high speed and carelessly. On cross examination, the Respondent said she lost consciousness for about four hours and reiterated his injuries. The next witness was the police officer who said he did not visit the scene but produced the abstract which showed that the owner of the motor vehicle was charged with the offence of failing to keep the records of the driver and was filed Kshs. 10,000. The third witness was the doctor who produced his medical report and receipt for the same and confirmed the injuries he established to have been suffered by the Respondent including an opinion that she had suffered 30% disability.

3. For the Appellant Dw1 Dr Leah Wainaina gave evidence to the effect that she examined the respondent on 31.7.2015 and established pain on the right shoulder, right upper limb could not get firm grip of a pen, cut wound on the neck although x-rays of the neck, cheek and chest revealed no fractures. She discounted fracture of the rib and dislocation of the clavicle on the basis that the same could not be established without initial x-rays.

4. The totality of the evidence of the occurrence of the accident was provided by the Respondent without with rebuttal by the Appellant. Even cross examination did not shake that evidence on how the accident occurred. The only piece of evidence availed by the appellant was on the extent of injuries but even that is limited to the effect that the examination was conducted some 0ne and a half years later and the doctor did not make final finding with a disclaimer that she did not see the initial x-rays.

5. This being a first appeal the mandate of the court is to reassess and reappraise the entire record of proceedings and trial and come to own conclusions noting that having engaged with the witnesses to see them testify and observe their demeanor, it is not open to it to reverse the trial court on both issues of liability and factual evaluation unless it be shown that the conclusion arrived at are outrightly untenable based on the evidence led and the law applicable.

On liability, I do take note that even though the Respondent and PW 2, a police officer gave evidence on the occurrence of the accident and the insolvent and injury of the Respondent, the Appellant did not offer any evidence. That position leaves the evidence by the Respondent on the occurrence and causation as uncontroverted because the denial by the Appellant in the defense, without any evidence being rendered, remained mere allegations[1].

6. There was offered on behalf of the Appellant a submissions that the onus to prove negligence was upon the Respondent. That cannot be in

doubt. However the unmarked fact is that the motor vehicle had a tyre burst and rolled several times. I take the view and position that not every time a tyre bursts a vehicle must lose control role and injure it occupants. Even when there occurs a tyre burst, a prudent, diligent, attentive and careful driver in full control of the motor vehicle is expected to maneuver and bring the motor vehicle to a safe stop. The tyre burst does not dissipate the primary duty of the control of the motor vehicle from the driver. In **Samwel Mukunya Kamunge Vs John Mwangi ,Nyeri Hcc 34 Of 2002, Okwengu J,** as she then was captured what I consider to be the uncontroverted position of the law in the following word:-

> **"where the deceased was a passive passenger in the motor vehicle and the evidence adduced shows that the accident was caused by a tyre burst and that the driver lost control of the motor vehicle, without an explanation of how the accident occurred, the evidence was sufficient on a balance of probabilities that there was negligence on the part of the respondent's driver hence his inability to control the vehicle as a rear tyre burst would not ordinarily cause a motor vehicle to overturn if the motor vehicle is being driven at a reasonable speed with due care and attention"**

7. That position of the law has been with us and remains unchallenged since the days of the east African court of Appeal. In **Embu road Services vs Remi [1968]EA 22** the court said;-

> **"…the law as set out by these two judgments of this court, where the circumstances of the accident give rise to the inference of negligence, the defendant in order to escape liability, has to show that there was a probable cause of the accident which does not create negligence.."**

8. In this matter once there was evidence that the was a tyre burst followed by the motor vehicle rolling, it was desirable that some evidence be led by the Appellant to show that despite all reasonable efforts made the vehicle still rolled. No such evidence was called.

5. I hold that the moment the Respondent led evidence that the vehicle rolled due to a tyre burst the evidentiary burden then shifted to the Respondent.That shifted burden was never discharged by the Appellant when no evidence was led on the occurrence.

6. On damages, the law is that assessment of damages is in the nature of judicial discretion[2], is a difficult task[3] and that an appellate court would not interfere with an assessment of damages on the mere fact that it or a different court could have awarded a different sum[4], is not a basis for interference on appeal. It must be demonstrated that the damages awarded are so high and exaggerated as to demonstrate an obvious and outright erroneous estimate. Without such demonstration, that limb of the appeal equally fails and is dismissed.

7. The upshot is that the entire appeal lacks merit and the same is hereby dismissed with costs.

Dated and delivered at **Mombasa** this **5th** day of **April 2019**.

P.J.O. OTIENO

JUDGE

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[1] **Motex Knitwear ltd Vs Gopitex knitwear ltd, Narobi HCC 79 0f 2011**

[2] Sophinaf Company Ltd And Another Vs Daniel Nganga Kanyi[2006]eKLR

[3] Per Court Of Appeal In Sophinafs' case **–'The assessment of damages for personal injuries is a difficult task**"

[4] Selle Vs Associated Moto boat Company Ltd [1968] EA 123