



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 92 OF 2007

SOLOMON WILLY KASINA.....1ST APPELLANT

CHECKERS TRADING COMPANY LIMITED.....2ND APPELLANT

-VERSUS-

PAUL ODAA SALAH.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. G. Mmasi, Senior Resident Magistrate, delivered on 3rd July 2007 in Eldoret CMCC No. 28 of 2003)

JUDGMENT

[1] This appeal arises from the Judgment and Decree of the Senior Resident Magistrate's Court (**Hon. G. Mmasi**) in **Eldoret Chief Magistrates Case No. 28 of 2003: Paul Odaa Salah vs. Peter Mwaura Chira T/A Kenya Witness; Solomon Willy Kasina and Checkers Trading Co. Ltd.** That suit had been filed against Appellants for General and Special Damages, Costs and Interest in respect of a road traffic accident that occurred on **18 November 2002** along Nakuru-Nairobi Road. It was the contention of the Respondent that he was then lawfully travelling aboard **Motor Vehicle Registration No. KAL 257S**, Isuzu Bus, when it rammed onto a stationery **Motor Vehicle Registration No. KAJ 991N**, a **Volvo Lorry** pulling **trailer No. ZB 8045**, belonging to the 3rd Defendant.

[2] The Respondent's assertion before the lower court was that the accident was attributable to negligence on the part of the 1st and 3rd Defendants and/or their servants, drivers or employees in driving and or managing the two motor vehicles; and that as a result of the accident, he suffered severe personal injuries, particulars whereof were set out in Paragraph 10 of the Complaint dated **20 December 2002**. It was on that account that he sought to be awarded Special and General Damages, Costs and Interest at court rates.

[3] The Appellants, who were the 2nd and 3rd Defendants before the lower court, filed a joint Defence dated **22 February 2003**. They denied that the 3rd Defendant was the owner of the lorry/trailer at the material time; or that it was being negligently driven by the 2nd Defendant along Nakuru-Nairobi Road as alleged, or at all. The Appellants similarly denied that an accident occurred as alleged, or that the Respondent sustained injuries in the alleged accident. Thus, the particulars of negligence, injuries and special damage as furnished in the Complaint were all denied by the Appellants. In the alternative, the Appellants averred that, if the said accident occurred, then the same was due to the sole negligence of the 1st Defendant's driver, agent and or employee; and therefore, that the accident was due to circumstances over which they had not control.

[4] The 1st Defendant, **Peter Mwaura Chiera** similarly denied the allegations against him in a Defence dated **14 August 2003**. The record of the lower court shows, however, that during the pendency of the suit, he was declared bankrupt; and that Counsel for the Respondent opted to proceed against the two Appellants.

[5] The Learned Trial Magistrate, having given consideration to the evidence presented before her as well as the written submissions made by Learned Counsel for the parties, came to the conclusion that the Appellants were fully liable for the Respondent's injuries. The Learned Trial Magistrate then proceeded to assess and award the Respondent **Kshs. 1,930** as Special Damages and **Kshs. 200,000** as General Damages for his pain, suffering and loss of amenities together with interest and costs of the suit.

[6] Being dissatisfied with the outcome of the suit, the Appellants filed this appeal on **31 July 2007** challenging the Judgment and Decree of the lower court on both liability and quantum on the following grounds:

[a] That the Learned Magistrate erred in law and in fact in making an award in general damages in favour of the Respondent what

was too excessive;

[b] The Learned Magistrate erred in law and in fact in failing to take into account the Appellants' submissions and authorities cited before her in arriving at her Judgment;

[c] The Learned Magistrate erred in law and in fact in finding the Appellants 100% liable for the accident.

[7] Accordingly, the Appellants prayed that the Judgment of the lower court dated **3 July 2007** be set aside; that the award for General Damages for pain, loss and suffering be re-assessed downwards; that the costs of the appeal be provided for, and that the Court be pleased to grant any other relief that it may deem fit.

[8] The appeal was canvassed by way of written submissions which were filed herein by Learned Counsel for the parties on **7 November 2017** and **9 March 2018**, respectively. On liability, Counsel for the Appellants blamed the Respondent for withdrawing his case against the 1st Defendant; contending that, in his evidence, he heaped blame on the 1st Defendant for his injuries. It was Counsel's further submission that the 1st Defendant never sought for stay of proceedings as provided for in **Section 11** of the **Bankruptcy Act, Chapter 53** of the **Laws of Kenya** (now repealed), and therefore that it was misguided for the Respondent to forego his rights against the 1st Defendant. Counsel relied on **Joseph Gitau Waweru vs. Francis Muchai Karera [2004] eKLR** to support his assertions. The Appellants further submitted that, in the circumstances, it was erroneous for the trial magistrate to fix liability against them at 100%, adding that their submissions in this connection were wholly ignored by the trial court.

[9] On quantum, Counsel for the Appellants drew the Court's attention to the applicable principles, namely, that an appellate court ought not to disturb an award unless it so inordinately high or low as to represent an entirely erroneous estimate; and that damages should represent a fair compensation and be within affordable limits, taking into account the state of the Kenyan economy. Thus, Counsel proposed an award of **Kshs. 40,000/=**, granted the injuries suffered by the Respondent. He relied on **David Okola Odera vs. Kilindini Tea Warehouses Ltd [2008] eKLR** and **Robert Ngari Gateri vs. Maingo Transporters [2015] eKLR** to support his proposal.

[10] On behalf of the Respondent, it was submitted that a party is at liberty to discontinue his suit against a party under **Order 25 Rule 2** of the **Civil Procedure Rules, 2010**; and that since no objection was raised by the Appellants who had in fact filed a Notice of Indemnity against the 1st Defendant, they are estopped from raising the issue on appeal. Counsel reiterated the posturing of the Respondent that he proved his case against the Appellants before the lower court on a balance of probability and presented unassailable evidence to the effect that the 1st Appellant was the author of the said accident, in that he had stationed or parked the lorry with the trailer on the road, thereby causing obstruction; and that he did not place any signs as required to show that the said lorry had broken down.

[11] Counsel further urged the Court to note that the 1st Appellant was charged with the offence of causing death by dangerous driving; and that he pleaded guilty and was fined **Kshs. 50,000/=**. According to Counsel, this was sufficient proof the 1st Appellant was to blame for the accident, which, in his view, had the hallmarks of negligence on the part of the 1st Appellant; and for which the 2nd Appellant was rightly held vicariously liable. He therefore urged the Court to find that the trial court's finding on liability was correct.

[12] On quantum, it was the submission of Counsel for the Respondent that the award was fair and reasonable, granted the injuries sustained by the Respondent as pleaded in paragraph 10 of the Plaintiff. He urged the Court to take into consideration the Medical Report prepared by **Dr. Gaya**, dated **24 September 2003** and note that the injuries included a cut on the Respondent's scalp on the right frontal area, with loss of hair at the site. Counsel relied on **High Court Civil Case No.75 of 2012: Duncan Kimathi Karagania vs. Ngugi David & 4 Others**, for the proposition that **Kshs. 200,000/=** is a comparable award in the light of the authorities cited before the lower court and the applicable inflationary trends.

[13] This being a first appeal, it is the duty of this Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated 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..."

[14] Accordingly, I have perused and considered the record of the lower court with a view of re-evaluating the evidence presented therein. The Respondent testified on **28 October 2004** as **PW1**. His testimony was that, on **17 November 2002**, he was travelling in **Motor Vehicle Registration No. KAL 257S**, known as **Kenya Witness**, from Eldoret to Nairobi. That on reaching **Gilgil** flyover, an accident occurred involving their bus and a stationary lorry; and that, as a result of the collision, he was injured on the head, neck, shoulder, both hands. He was taken to hospital and was treated and discharged; after which he visited **Moi Teaching and Referral Hospital** where the stitches were removed. The Respondent also produced the Police Abstract, the treatment notes, the receipts for his expenses in respect of the accident and his injuries and ticket for the fare he paid. The rest of the documents, namely the P3 Form, **Dr. Aluda's** Medical Report as well as **Dr. Gaya's** Medical Report were produced by consent.

[15] By consent, the parties adopted the evidence of **Police Constable Francis Kiprotich, PW2** in **Eldoret CMCC No. 91 of 2003: Anne Njeri vs. Checkers Trading Company Ltd**; and with that the Respondent's case was closed. The Appellants opted to adduce no evidence in rebuttal.

[16] Having given due consideration to the evidence adduced before the lower court, there is no disputing that the accident in question did occur in the manner alleged by the Respondent. In addition to the Respondent's evidence, that the 2nd Appellant's motor vehicle was

stationery in the middle of the road at night with no warning to other motorist, the trial court noted, from the testimony of **P.C. Kiprotich** that, he visited the scene and from his observations, the 2nd Defendant, the 1st Appellant herein was found to be at fault. He was accordingly charged with causing death by dangerous driving to which he pleaded guilty and was fined **Kshs. 50,000/=**.

[17] In **Section 47A** of the **Evidence Act, Chapter 80** of the Laws of Kenya it is recognized that:

“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

[18] Accordingly, there was credible evidence before the lower court to support the finding on liability. However, the Appellants disputed the finding that they were 100% liable, granted that the Respondent had also sued the owner of the bus in which he was travelling at the material time and alleged that his driver was equally to blame. Needless to say that a conviction *per se* is not conclusive proof of negligence; and that it is permissible for a defendant in a civil case to successfully allege contributory negligence on the part of either the plaintiff or a third party. In **Robinson vs. Oluoch [1971] EA 376**, it was held that:

“Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent, but that is a very different matter from saying that a conviction for an offence involving negligent driving is conclusive evidence that he convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident.”

[19] Thus, in their joint Defence dated **22 February 2003**, the Appellants alleged negligence in the following respects against the 1st Defendant’s driver, who is said to have died on the spot:

- [a] Failing to drive with due care and attention;
- [b] Driving motor vehicle **Registration No. KAL 257S** at an excessive speed;
- [c] Driving a defective motor vehicle;
- [d] Colliding with motor vehicle **Registration No. KAJ 991N/Trailer No. ZB 8045**;
- [e] Driving while under influence of alcohol, fatigue and sleepy;
- [f] Driving without keeping a proper look out for other road users;
- [g] Causing the accident;
- [h] Failing to notice the warning signals and icons in time or at all to avert the accident.

[20] It is noteworthy, however, that the Appellants opted to call no witness in proof of their assertions. Accordingly, they ran afoul of the requirement that he who alleges bears the burden of proof in civil matters. Hence, **Section 107(1)** of the **Evidence Act, Chapter 80 of the Laws of Kenya**, which stipulates 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.

[21] Also pertinent are the provisions of **Sections 109 and 112** of the **Evidence Act**. *Those two provisions state thus:*

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

...

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

[22] It was upon the Appellants to prove the allegations made by them in their Defence and having failed to discharge that burden, the lower court cannot be faulted for holding the Appellants 100% liable. Thus, I would agree with and adopt the expressions of **Mabeya J. in Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR**, that:

"...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true..."

[23] On quantum, it is trite that assessment of damages is a matter of discretion; and that an appellate court will not disturb an award unless sufficient cause be shown. In Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal restated this principle as follows:

"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."

[24] Similarly, 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] What then should the Court take into account? Useful suggestions were given in this respect by Wambilyanga, J. in HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf, thus:

"The Court will essentially take into account the nature of the injuries suffered the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."

[26] The Respondent's injuries, as pleaded, were set out in paragraph 10 of his Plaintiff thus:

- [a] The forehead was swollen and tender with a cut wound;
- [b] Blunt trauma to the neck which was tender;
- [c] Blunt trauma to the chest which was tender;
- [d] Blunt trauma to the spinal column which was tender;
- [e] Blunt trauma to both shoulders which were tender;
- [f] The right arm was swollen and tender with bruises;
- [g] Both legs were swollen and tender with bruises.

[27] In his evidence, the Respondent testified in proof of the injuries and confirmed that he was injured on the head, neck, shoulder, both hands; and that he was taken to hospital and was treated and discharged; after which he visited Moi Teaching and Referral Hospital where the stitches were removed. He was then aged 28 years; and in the two Medical Reports prepared by Dr. Gaya and Dr. Aluda, which were produced before the lower court by consent of the parties, it was confirmed that the Respondent sustained the injuries enumerated hereinabove. In Dr. Aluda's report dated **2 November 2002**, it was opined that the injuries, though severe, would subside with the use of analgesics; and that the healing would be ultimately be complete. The opinion of Dr. Gaya, in his report dated **24 September 2003**, was that the Respondent's injuries had healed with no permanent disability, save for the scar on his forehead. There was no contrary opinion or evidence in respect of the Respondent's injuries, for which the lower court made an award of **Kshs. 200,000/=**.

[28] Whereas Counsel for the Appellants proposed an award of **Kshs. 40,000/=** on the authority of John Otieno Ojwok vs. Samuel Onyango Abunga & Another and Raphael M. Kibui vs. Joseph J. Kinyua wherein **Kshs. 30,000/=** was awarded for similar injuries, Counsel for the Respondent urged for an award in the region of **Kshs. 300,000/=**. He relied on Nancy Nyambura Irungu & 3 Others vs. Michael Njoroge in which the Plaintiff suffered lacerations on the forehead with soft tissue injury to the right leg and contusion to the backbones and was awarded **Kshs. 150,000/=** as General Damages; and Harrison Peter Odek vs. Lyons Ltd wherein a similar award was made for similar injuries.

[29] In his submissions before this Court, the Appellants Counsel made reference to David Okola Odero vs. Kilindini Tea Warehouses Ltd [2008] eKLR wherein an award of **Kshs. 40,000/=** was made to the Plaintiff who sustained severe personal injuries when a fellow employee crushed a sack load on him; and Robert Ngari Gateri vs. Maingo Transporters [2015] eKLR in which **Kshs. 60,000/=** was awarded for soft tissue injuries to the lower chest, left elbow and right buttock.

[30] Having paid attention to comparable awards, I took note of the following decisions:

[a] In **Ndungu Dennis vs. Ann Wangari Ndirangu & Another [2018] eKLR**, the Plaintiff suffered multiple soft tissue injuries, including blunt injuries to the chest and both hands as well as concussion. The High Court on appeal reduced the lower court's award of **Kshs. 300,000/=** to **Kshs. 100,000/=**.

[b] In **George Kinyanjui T/A Climax Coaches & Another vs. Hussein Mahad Kuyale [2016] eKLR**, the Plaintiff suffered soft tissue injuries on his chest, neck and knees. He had been awarded **Kshs. 650,000/=** by the lower court. The award was, on appeal, reduced to **Kshs. 120,000/=**.

[31] Accordingly, I would, in line with the trends noted above, reduce the General Damages component of the award to **Kshs. 120,000/=**, noting that the Respondent's injuries were basically soft tissue injuries. The Special Damages of **Kshs. 1,930/=** was not disputed and is accordingly left undisturbed.

[32] In the result I would set aside the lower court judgment and substitute it with Judgment in the Respondents favour against the Appellants in the sum of **Kshs. 121,930/=** together with interest and costs, including costs of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN ELDORET THIS 18TH DAY OF JUNE 2019

OLGA SEWE

JUDGE