



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 634 OF 2016

THE STANDARD GROUP LIMITED.....APPELLANT

VERSUS

BEATRICE MUGURE WANJOHIRESPONDENT

Being an appeal against the Judgment of the Hon. L.M. Wachira (Mrs) delivered at Nairobi on 16th September, 2016 in CMCC NO. 218 of 2009

JUDGEMENT

This appeal arises from the Judgment of the lower court delivered on 16th September, 2016. The respondent had sued the appellant for damages resulting from injuries sustained following a fall of a billboard owned and installed by the appellant. It was her case in the lower court that, the appellant was negligent in failing to maintain firmness of the said billboard from the ground as a result of which it became a threat to people's lives and as a result of that failure, it fell and injured the respondent.

The respondent suffered injuries to her head, neck, shoulder and upper back. The appellant denied the respondent's claim in the statement of defence by stating that it had not acquired the business from Prime Outdoor Network Limited. Further, it was pleaded that it was the respondent who was reckless by seeking shelter under the billboard which occasioned the said incident. All other allegations of negligence were denied and so were particulars of special damages claimed by the respondent.

The record presented before the court shows that the respondent gave evidence in support of her pleadings. The appellant on the other hand did not present any evidence in support of the statement of defence filed.

The lower court judgment blamed the appellant for the injuries sustained by the respondent and found out that the appellant was liable to the respondent at 100%. In arriving at that verdict the lower court stated as follows,

“As to who was to blame for the accident, the plaintiff told court that the board was blown off by the wind and it fell down together with the supporting post injuring several people including the plaintiff. This testimony has not been controverted. It was the duty of the defendant to maintain the billboard so that it does not pose a danger to the public. The fact that the billboard was blown off by the wind is an indication that it was not properly secured. The billboard was a property of the defendant and the defendant owes a duty of care to the public to ensure that its works are not a danger to the public. The defendant was in breach of this duty of care and will be held liable for the injuries sustained by the plaintiff. There is no evidence to indicate that the plaintiff contributed to the occurrence of the accident or was in any way to blame for the said accident. I will hold the defendant 100% liable for the injuries sustained by the plaintiff.”

On quantum the lower court awarded a sum of Kshs. 120,000/= general damages for pain and suffering and Kshs. 1,180/= special damages. The appellant was aggrieved by the said judgment and lodged this appeal.

In the Memorandum of Appeal the appellant faulted the lower court for finding that respondent had proved her case on a balance of probability; the lower court failed to find that the respondent contradicted herself in her testimony; the finding on liability was also not supported by the evidence adduced and negligence on the part of the appellant was not proved.

The lower court was also faulted for disregarding the defence evidence in its entirety and that the failure of the respondent to file a reply to the defence amounted to admission of the said defence. The appellant also complained that the submissions and authorities provided on behalf of the appellant were not considered, and the court also failed to find that the respondent contributed to her injuries.

The lower court was also blamed for failing to find that the doctrines of *volenti non fit injuria* and act of God were applicable in this case. Finally, that the award of general damages was inordinately high and excessive.

Both parties have filed submissions in support of their respective positions herein. As the first appellate court, it is my duty to evaluate the evidence presented in the lower court with a view to arriving at an independent conclusion. The grounds of appeal contained in the Memorandum of Appeal lodged by the appellant would be relevant in case the appellant offered evidence in the lower court in line with the statement of defence filed. I say so because pleadings and submissions in civil proceedings are not evidence. It is incumbent upon any party who has lodged pleadings either in support or in defence of a claim to adduce evidence in support thereof. In the absence of any evidence, the pleadings remain just that.

In **Civil Appeal No. 317 of 2003 Checkers Trading Limited & Another vs. Fatuma Kimanthi** the Court of Appeal stated as follows,

“The appellants did not produce any evidence at the superior court herein to rebut the evidence of the respondent. The result of this is that whatever evidence was produced by P.W. 1 and Hadija Kimanthi (P.W. 3), in so far as it is credible, is unchallenged and can be relied upon by the court”.

In line with the pleadings contained in the amended plaint, dated 24th January, 2014 the respondent testified in relation to the occurrence and the injuries she sustained. That evidence was not challenged by the appellant. In fact, under cross examination, the only suggestion by the appellant’s counsel was that she was at the scene illegally which she denied. Her evidence, in my assessment, was credible and since no evidence was adduced by the appellant, it remained uncontroverted.

The appellant cannot be allowed at this stage to adduce evidence by way of submissions or Memorandum of Appeal. The circumstances as narrated by the respondent leading to the falling of the billboard leave no chance to blame the respondent. The conclusion that the appellant was wholly to blame for the incident was therefore justified.

I have looked at the medical report produced by the respondent from Kenyatta National Hospital. In the first place, there was no objection to the production of the said documents by the defence. The P3 form was also produced and no objection was raised by the appellant. The respondent suffered what one may conclude to be soft tissue injuries. The appellant has complained that the award of general damages was inordinately high and excessive.

In the case of **Butt vs. Khan (1981) KLR 349** at page 356 the court in addressing the subject of interference with awards by the trial courts observed that, this may be done if,

“...it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material aspect and so arrived at a figure which was either inordinately high or low.”

In arriving at that figure, the lower court stated that the injuries in question, the submissions and the authorities cited by the parties had been considered. She also considered comparable injuries and inflationary trends. In my judgment, the award of Kshs. 120,000/= for general damages was not excessive in the circumstances of this case to warrant any interference.

The end result is that this appeal is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 4th Day of July, 2019.

A. MBOGHOLI MSAGHA

JUDGE