



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL APPEAL NO.29 OF 2015**

**KENYA TEA DEVELOPMENT AGENCY.....APPELLANT**

**VERSUS**

**SAMWEL KOSKEI.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Hon. S. Soita –(SPM) in Kericho CMCC No. 480 of 2007 delivered on 28<sup>th</sup> July 2015)*

**JUDGMENT**

1. This is an appeal from the judgment of the trial magistrate in Kericho CM CC No.480 of 2007 delivered on 28<sup>th</sup> July 2015.

2. The appeal, filed for the appellant by M/s Bett & Co. Advocates is on the grounds that:-

**1. The learned magistrate erred in law and fact in allowing the respondent's claim when it was apparent that the respondent's case was contrary to what was pleaded in the plaint.**

**2. That the learned magistrate erred in law and fact in failing to make a finding that the respondent's suit did not disclose a cause of action as the accident was not a reasonably foreseeable one in the entire circumstances of the case.**

**3. That the learned magistrate erred in law and fact in failing to fully analyze the evidence tendered by the appellant herein giving undue weight to the plaintiff's case and least weight to the defence case.**

**4. The learned trial magistrate erred in law and in fact in that he totally failed to take into account the appellant's case.**

**5. The learned magistrate erred in law and fact in holding the appellant 90% liable for the said accident when there were no grounds to sustain the finding.**

**6. The learned trial magistrate exercised wrong principles in awarding damages so widely different from awards given in comparable cases as to be an erroneous estimate of the damages to which the respondent was entitled.**

3. The appeal by consent of counsel proceeded by filing written submissions. The appellant's counsel M/s Bett & Co. Advocates filed submissions on 3<sup>rd</sup> June 2019, while the respondent's counsel Meroka & Co. Advocates filed submissions on 1<sup>st</sup> July 2019. Counsel did not highlight written submissions filed. I have perused and considered the submissions.

4. This is a first appeal. As a first appellate court, I am required to examine afresh the evidence on record, and come to my own independent findings - see the case of **Selle -vs- Associated Motor Boat Co. Ltd [1968] EA 123**.

5. In the grounds of appeal, the appellant has challenged the findings of the trial court on liability. The respondent called one witness, PW1. It was himself. He said he was a tea loader and was injured when the lorry driver moved the lorry without warning to him and he fell and became unconscious and was injured. DW1, one of the two defence witnesses was the driver of the appellant. He said that he was aware that farmers loaded their own tea and could have hired people to do so for them. He knew the respondent as a loader, but said that he was not aware that day that the respondent loaded tea, and got injured, but that he was later told by farmers that someone was injured and he went and visited the respondent in hospital and saw the respondent in an unconscious state.

6. The respondent was required to prove on the balance of probabilities that he was injured by the driver of the appellant the way he described the incident in the plaint. I am of the view that with the evidence on record, he did so. The key witnesses of the defence said that farmers or their representatives loaded the tea. It was the farmers who told him that someone was injured. He saw him in hospital. He knew

him as a loader of tea. He was unconscious so in my view, he could not even scream at the time of incident. Whether the respondent was a passenger or not in my view, was immaterial.

7. I agree with the finding of the trial magistrate that the respondent was injured by the driver of the appellant when he drove the vehicle without care and as a consequence the respondent was injured.

8. The major contest is on appeal with regard to the quantum of the award of damages. The magistrate apportioned 10% negligence on the respondent, and the respondent has not complained. I leave it at that. The appellant holds that the award of general damages was excessive and far above conventional awards for similar cases. I have been referred to a number of cases.

9. Courts are slow to interfere with the quantum of general damages assessed by trial courts, as such awards are an exercise of the discretion of the trial court. In this regard, in the case of **Butt -vs- Khan [1981] KLR 349, Law JA** stated as follows:-

*“An appellate court will not disturb an award of damages unless 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.”*

10. In the latter case of **Kemfro Africa Ltd t/a Meru Express Service and Gathoga Kanjui -vs- A. M. Lubia and Olive Lubia [1982-1988] 1 KAR 727 at page 730 Kneller JA** stated:-

*“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awardable by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied either that the judge, in assessing 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 low or high that it must be a wholly erroneous estimate of the damages.”*

11. Having seen the authorities cited by the appellant’s counsel herein; I do not find anything inordinate about the general damages award of kshs.400,000/- reduced by 10% to kshs.360,000/- awarded by the trial court. The cases cited by the appellant’s counsel which have a lower award figure are not similar to a case where the injured person was unconscious for days after the injury. The judgment of the trial magistrate was short, but I do not see anything that would make this court come to a different finding on damages.

12. Consequently, I find no merits in the appeal. The appeal herein is dismissed with costs to the respondent.

Dated and delivered at Kericho this 8<sup>th</sup> day of October 2019.

**GEORGE DULU**

**JUDGE**