REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 58 OF 2017

THE TRUSTEES OF THE CATHOLIC

DIOCESE OF MACHAKOS..... APPELLANT

-VERSUS-

BENJAMIN MWANZIA MUOKI….....RESPONDENT

(Being an appeal against the Judgment delivered by Hon. Y.A. Shikanda- Principal Magistrate delivered at Machakos CMCC No. 114B of 2016 on 20th April, 2017)

BETWEEN

BENJAMIN MWANZIA MUOKI.....PLAINTIFF

-VERSUS-

THE TRUSTEES OF THE CATHOLIC

DIOCESE OF MACHAKOS.....RESPONDENT

JUDGEMENT

1. The suit in the trial court arose out of a road traffic accident in which the Respondent was a pedestrian along Machakos- Kitui Road on 11th October, 2015 when motor vehicle KBZ 122M registered in names of and or beneficially owned by the Appellant occasioned an accident in which the Respondent was injured and in which the respondent pleaded negligence, *res ipsa loquitor* and vicarious liability. The respondent sought special damages and future medical expenses in respect of injuries as particularized in Paragraph 6 of the plaint dated 11.2.2016.

2. The appellant denied negligence on their part, the particulars of loss and injuries and denied the applicability of vicarious liability. The appellant pleaded that the accident was as a result of the contributory negligence of the respondent as particularized in paragraph 7 of the defence dated 6.6.2016.

3. The appeal is on quantum and liability and the parties agreed to canvass same via written submissions which they filed and exchanged.

4. Learned counsel for the appellant submitted on four issues that were considered errors; apportionment of liability, award of future medical expenses, determination of vicarious liability and award of general damages. On the issue of apportionment of liability, counsel submitted that a duty of care included a duty on the part of pedestrians and placed reliance on the case of **Teresia Sebastian Massawe (Suing as the Legal Administratix of the estate of the late Silvia Sebasian Massawe v Solidarity Islamic (Kenya Office & another [2018] eKLR**. Counsel submitted that the court ought to have found the Respondent to have contributed 30% liability.

5. Learned counsel submitted that the sum awarded of Kshs 1,800,000/- was unusually high. On the issue of vicarious liability, it was the strong argument of counsel that the driver of the suit vehicle was on a frolic of his own and therefore the appellant was not vicariously liable for the acts of the driver of the suit vehicle; in this regard, reliance was placed on **Salmond on the Law of Torts, 17th Edition.**

6. No amount of award was proposed but however they urged the court to allow the appeal in its entirety and set aside the judgement of the trial court.

7. The Respondent submits that, there were three issues for determination in this appeal; whether the trial court erred in its pronouncements on liability, vicarious liability and quantum.

8. On the issue of liability, counsel submitted that the trial court found that the appellant was driving at a speed above that prescribed by law and therefore it was correct to find that the appellant shoulders 100% liability. Counsel placed reliance on the case of **Equity Bank Ltd v Gerald Wangombe Thuni (2015) eKLR** where it was held that a finding of the trial court could not be reversed on appeal unless there was no evidence to support the finding and counsel urged this court to uphold the finding of the trial court. On the issue of vicarious liability, counsel submitted that the appellant ought to have taken out third party proceedings and cited the case of **Karisa v Solanki (1969) EA 318** where it was observed that a vehicle owner is liable for the negligence of the driver. On quantum, counsel submitted that the award of Kshs 500,000/- for future medical expenses was based on the evidence of the respondent's doctor who testified and was cross-examined hence the award was not erroneous. Counsel urged the court to uphold the award of the trial court and dismiss the appeal with costs to the respondent.

9. The role of the Appellate court is now a matter of judicial notice that is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**

10. In the case of **Lukenya Ranching and Farming Coop. Society Ltd –Vs- Kavoloto (1979) EA** the learned Judge recapped the grounds that the Appellate court will interfere with exercise of discretion by the trial court when assessing damages laid down by the court of appeal in **Kangu –Vs- Manyoka (1961 EA 705, 709, 713 and in Lukenya Ranching and Farming Coop. Society Ltd –Vs- Kavoloto (1979) EA** that if the trial court;

a) Took into account an irrelevant fact or,

b) Left out of account a relevant fact or,

c) The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

11. The Appellant avers that the trial court ought to have found the respondent 30% negligent on liability; that the Learned Magistrate's award was *extremely high* and that the finding of vicarious liability was erroneous.

12. The evidence on record is as follows; Pw1, PC Benjamin Kimaiyo told the court that an accident occurred on 11.10.2015 at about 11.30 pm when the suit vehicle a RAV 4 make was from Masii heading to Machakos along Kitui-Machakos Road and at Kaseve Market the suit vehicle hit a pedestrian called Benjamin Mwanzia Muoki and that a P3 form was later issued. It was his testimony that the police abstract indicated that the matter was still pending investigations. On cross-examination, he stated that there were bumps on the road that a driver had to slow down.

13. Pw2, the Respondent testified that on the date of the accident, a vehicle veered off the road and hit him and was thus injured. He was injured on the head and left leg and lost two teeth and his jaw was fractured. He testified that he found himself at Machakos Level Hospital. He tendered the discharge summary, Receipts for Kshs 42,875/-, Demand letter and Statutory Notice as documentary evidence. On cross-examination, he stated that he still goes to hospital.

14. Pw3, Griton Mwanzia Titus told testified that he saw the suit vehicle knock the Respondent and then it sped off after it saw the crowd.

15. Pw4 was Dr Washington Wokabi who stated that he prepared a report dated 2.2.2015 in respect of the examination that was carried out on the Respondent and observed that he had three fractures on the lower jaw, fracture of the right cheek bone and fracture of the right temporal ear and he confirmed that the respondent's face was deformed. He prepared a report and testified that the possibility of a surgical operation would cost Kshs 500,000/-. He stated on cross examination that a delay in the surgery would increase the cost.

16. The respondent's case was closed after Pw4 testified and the appellant also presented it defence case.

17. DW1 was Father Alexander Muthei Ndeti who testified that he was driving the suit vehicle when a person dashed onto the road and fell on the right side of the suit vehicle and that the person looked drunk or mentally retarded. The appellant closed their case.

18. The trial court found that it was undisputed that the accident occurred at a market place and under Section 42(3) of the Traffic Act, the prescribed speed was 50kph. He found that the driver of the suit vehicle was overspeeding and the owner of the suit vehicle was vicariously liable for the negligence of the driver. He found that an award of Kshs 1,800,000/- would be reasonable for general damages and awarded Kshs 13,250/- as special damages and Kshs 500,000/- as future medical expenses.

19. I have analyzed the evidence that was adduced by both parties. My issues for determination are:-

1) Whether negligence has been proven against the appellant and if so what is the extent of liability

2) Whether a case for interfering with the award herein has been made

3) If yes, how much is the Respondent entitled to?

20. The Respondent testified that on the date of the accident, a vehicle veered off the road and hit him and he was injured. He was injured on

the head and left leg and lost two teeth and his jaw was fractured. He testified that he found himself at Machakos Level Hospital and he tendered the discharge summary, Receipts for Kshs 42,875/-, Demand letter and Statutory Notice as documentary evidence. On cross-examination, he told the court that he still goes to hospital.

21. Pw4 confirmed the injuries and told the court that the Respondent needs Kshs 500,000/- for future medical expenses.

22. According to the medical report dated 2nd February, 2015 that was prepared by Pw4, with regard to an examination that was carried out on 26.1.2016 there is no indication of permanent disability. Pw4 when he testified was neither cross-examined nor did he explain why he prepared the report before the examination was carried out. This casts doubt on the report and in this regard the court is not able to tell whether or not the Respondent was examined or the report was a simple cut and paste job.

23. The Respondent was not examined by the Appellant's doctor. Pw3 told the court that he witnessed the suit vehicle hit the Respondent and that Pw1 confirmed the fact of the accident. Therefore the accident is undisputed and so are the injuries for the discharge summary of Machakos Hospital is indicative of jaw dislocation suffered by the respondent.

24. This court would therefore need to be satisfied that there was indeed negligence on the part of the Appellant.

25. Negligence as a tort is the breach of legal duty to take care which results in damage undesired by the defendant to the plaintiff. Thus its ingredients are (a) A legal duty on the part of A towards B to exercise care in such conduct of as falls within the scope of the duty, (b) Breach of that duty (c) and consequential damage to B. See **Winfield on Tort Eighth Edition Page 42. In Blyth v Birmingham Water Works 1856 11 EX P. Page 784** negligence was defined as the omission to do something which a reasonable man guided upon the consideration which ordinarily regulates the conduct of human affairs would or do something which a prudent and reasonable man would not do. The concept of duty, breach and damage as introduced in **Donoghue v StevenSon (1932) AC 562** is the neighbour principle according to which a duty is placed upon a person to take reasonable care to acts or omissions which he can reasonably foresee as likely to injure his neighbour and neighbour in this context means persons so closely and directly affected by the acts of another that the other ought reasonably to have them in contemplation as being so affected when doing or making the acts or omissions complained of. see **Donoghue v Stevenson (Supra).**

26. In the instant case, it is evident that the accident occurred at night at a market place and that is all there is to it. There is no evidence of the point of impact so as to enable the court make a finding as to who exactly was on the wrong. Be that as it may, there are certain things that do not normally occur in the absence of negligence and upon proof of these a court will probably ho1d that there is a case to answer **See Hoe Vs Ministry of Health 1954 Pages 66, 87- 88 Morris LJ**.

27. In this regard, the doctrine of res ipsa loquitor as pleaded by the respondent applies and it entitles the plaintiff to rely as evidence of negligence upon the mere happening of the accident. He need not allege or prove any specific act or omission of the defendant. If the result which he does prove, of some unspecified at or omission makes it more probable than that the damages was caused by the negligence of the defendant see **Clerks and Lindsel on Torts 12th Edition P 441.**

28. A driver at a market place does not just knock a pedestrian unless he was speeding and tha DW1 has not given any explanation that the accident was caused by any reason other than negligence on his part. He suggested that the Respondent was drunk or looked mentally disturbed. However on a balance of probabilities I am not convinced that the same was proven because Dw1 failed to call an independent witness to corroborate his observations. I am also unable to disturb the finding of the trial court in respect of 100% liability. In any event it was the responsibility of the appellant's driver to ensure that he drove carefully and observed other road users. The fact that he suddenly hit the respondent shows that he was driving at high speed and failed to apply brakes or swerve or do anything so as to avoid hitting the respondent. Even after the accident the appellant's driver sped off from the accident scene without even assisting the victim. He drove all the way past Machakos town to Kyumbi police post along Mombasa –Nairobi highway yet Machakos police station was nearer and could have reported the matter there.

29. The appellant has assailed the finding of vicarious liability. The law in this regard is well settled and according to **the East African Cases on the Law of Tort by E. Veitch (1972 Edition) at page 78**, an employer is in general liable for the acts of his employees or agents while in the course of the employers business or within the scope of employment. This liability arises whether the acts are for the benefit of the employer or for the benefit of the agent. In deciding whether the employer is vicariously liable or not, the questions to be determined are: whether or not the employee or agent was acting within the scope of his employment; whether or not the employee or agent was going about the business of his employer at the time the damage was done to the plaintiff. When the employee or agent goes out to perform his or her purely private business, the employer will not be liable for any tort committed while the agent or employee was on a frolic of his or her own. An act may be done in the course of employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently, or criminally, or for his own behalf, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out, then his master is liable (**see Muwonge v. Attorney General [1967] EA 17**) In the instant case, Dw1's statement that was filed was to the effect that he was carrying Kshs 200,000/- that was collected from a fundraising in church. This is within the scope of the activities of the church hence making the appellant vicariously liable for the acts of their driver who was Dw1 meaning that the trial court did not err in so finding. The appellant's driver might have been rushing to ensure that the fundraising proceeds were not intercepted by criminals on the road and hence the overspeeding. At the time the driver was lawfully executing the duties of his master and hence the master is vicariously liable in damages for the torts of the servant and or agent.

30. On the issue of quantum, the general principle upon which this court, as an appellate court, will interfere with an award of damages is if it is inordinately high or low as to represent an entirely erroneous estimate. It stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** as follows;

> ***An appellate court will not disturb an award of damages unless it is so inordinately 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 …."***

31. **The case of Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** listed some principles to guide the court in awarding general damages, *viz*;

a. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.

b. The award should be commensurate to the injuries suffered.

c. Awards in decided cases are mere guides and each case should be treated on its facts and merits.

d. Where awards in decided cases are to be taken into consideration then the element of inflation has to be taken into consideration.

e. Awards should not be inordinately high or too low.

32. Cases involving fracture and dislocation of jaws attract amounts of Kshs 500,000 to 800,000/-. In **Isaac Waweru Mundia V Kiilu Kakie Ndeti T/A Wikwatyo Services [2012] eKLR** the plaintiff was awarded Kshs. 750,000/- for:

a. Fracture of the base of the skull.

b. Comminuted complex mandibular fracture (right condylar neck fracture) with malocclusion and loss of left lower incisor tooth.

c. Right eye vertical dystopia and diplopia on left gaze with marked ptosis of the upper eyelids.

d. Resultant facial asymmetry caused by the above injuries.

e. Wounds and abrasions on the lip, chin, and both lower limbs.

f. Loss of blood, physical and psychological pain.

33. The above injuries being more severe than the instant ones and taking into account inflation, I find an award of Kshs 500,000/- would be sufficient as general damages.

34. The trial court relied on what was opined by Pw4 to make a finding that Kshs 500,000/- was needed for future medical expenses and that consideration was in view of the fact that the said report was not objected to or challenged in cross-examination. I agree with the trial court and add that the same was specifically pleaded and proven vide the medical report that I had indicated had anomalies with regard to the date. Thus the court finds no reason to disturb the findings of the trial court under that head. The special damages is undisturbed.

35. In sum the appeal succeeds to that extent and I proceed to issue the following order;

a) General damages for pain and suffering Kshs. 500,000/=.

b) Cost for future medical expenses Kshs. 500,000/=.

c) On special damages Kshs 13,250/.

d) Each party shall bear their own costs of the appeal while the Respondent is awarded full costs in the lower court.

It so ordered.

Dated and delivered at Machakos this 22nd day of October,2019.

D. K. Kemei

Judge