



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 72A OF 2018

BETWEEN

HARJEET SINGH PANDAL t/a SIMBA TRANSPORTERS.....APPELLANT

AND

ALOYCE OLOO RANDA.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Tamu SRMCC NO.15 of 2015 by Hon. E.M.Onzere (SRM) delivered on 01st March, 2018)

JUDGMENT

1. **Aloyce Oloo Randa (Respondent)** sued **Harjeet Singh Pandal t/a Simba Transporters (Appellant)** in the lower court claiming damages for injuries allegedly suffered in the course of duty on 01.09.14 while travelling in Appellant's vehicle KTCA 053S Tractor allegedly due to the negligence of the Respondent, its servant or agent.

2. The defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.

3. In a judgment delivered on **01st March, 2018**, the learned trial Magistrate found the Respondent's claim proved, apportioned liability at 100% against the Appellant and awarded the Respondent general damages in the sum of Kshs. 250,000/ and special damages in the sum of Kshs. 2,750/-.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 09.08.18 filed the Memorandum of Appeal dated 08.08.18 which set out 6 grounds of appeal which I have summarized into 3 grounds to wit:

1. **Vicarious liability was not pleaded**
2. **The initial treatment notes were not produced**
3. **The award was manifestly high**

SUBMISSIONS BY THE PARTIES

5. When the appeal came up for mention on 19.09.19, I directed that it be disposed of by way of written submission which the parties dutifully filed.

Appellant's submissions

6. Appellant holds the view that the Respondent was not on duty and was not acting on the instructions of the Respondent when he was injured and had not proved negligence on the part of the Appellant. In support thereof, Appellant relies on **Rashid Ali Faki v A.O. Said Transporters [2016] eKLR** where it was stated that: -

“There is a significant difference between an Employee who causes an accident and injury to self or to others, through “a

frolic of his own” and an Employee who does so through “a detour.” The first relates to an Employee who acts completely in his own capacity, rather than following the instructions of the Employer. The Employee takes a major departure from the instructions given by the Employer. He takes such departure for his own benefit. If there occurs an accident and injuries ensue to the Employee or 3rd Parties during such a frolic, the Employer cannot be held liable.

This is not so in cases of detour. This involves minor departures by the Employee from the instructions of the Employer. In detouring, the Employee’s conduct must remain within the scope of employment. This means the Employee’s conduct must be of a kind the Employee was hired to perform; occurs substantively within the prescribed time and space; and at least in part conduct purposed on serving the Employer.

7. Concerning quantum, the Appellant asserts that Kshs. 100,000/- is adequate compensation and has cited Ndungu Dennis v Ann Wangari Ndirangu & Another (2018) eKLR where the court on appeal reduced general damages from Kshs. 300,000/- to Kshs. 100,000/- for soft tissue injuries to the lower right leg and to the back and PF (Suing as next friend and father of SK (Minor) v Victor O Kamadi & Another [2018] eKLR where the court on appeal enhanced general damages from Kshs. 50,000/- to Kshs. 100,000/- for - Cut wound to the forehead, Multiple small abrasions to the face, blunt injury to the head leading to loss of consciousness for some time, abrasions to the back, abrasion wounds to the dorsum of the right hand and cut wound to the right leg.

Respondent’s submissions

8. Respondent submitted that he was acting on the instructions of the Appellant and was travelling on Appellant’s tractor when its lights went off and it overturned after hitting a pothole as a result of which he was injured. The Respondent asserted that his evidence was not challenged for the reason that the witness who testified was neither the Appellant nor the tractor driver. Respondent holds the view that liability was properly apportioned and damages awarded reasonable.

Analysis and Determination

9. As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.

10. This court has considered the parties’ pleadings, evidence on record and the submissions and cited authorities.

11. After evaluating the Appellant’s evidence, the trial court found that the Respondent was lawfully on duty and was injured due to the negligence of the Appellant. Respondent’s evidence that he was acting on the instructions of the Appellant were not controverted since the Appellant did not testify. Similarly, Respondent’s evidence that the tractor hit a pothole as a result of which it overturned was not challenged since the Appellant’s tractor driver did not testify.

12. With the foregoing set of facts, I do not find it difficult to agree with the decision of the trial court that the tractor driver was negligent and his employer the Appellant vicariously liable at 100%.

13. With reference to quantum, I notice from the Respondent’s submissions filed before the trial court that he prayed for Kshs. 700,000/- and filed no authority. The Appellant on the other hand offered Kshs. 150,000/- and cited Johnson Mose Nyaundi (minor suing through next friend and father Wilfred Wadibe Nyaundi) v Petroleum Industries Limited KSM HCCA No. 183 of 2010 [2014] eKLR where the plaintiff sustained bruises on the face, chest, contusions, cerebral concussion, bruises on the elbows and fracture of the right tibia and fibula was awarded Kshs. 180,000/- in 2014 and Mulwa Musyoka v Wadia Construction [2004] eKLR where the plaintiff was awarded Kshs. 150,000/- for bruises on face and head injury, fracture mid shaft femur, unconsciousness for 30 minutes and fracture mid shaft left tibia

14. The principle of law on whether a court, on appeal, can disturb the quantum of damages was well settled in the case of Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1985) 1KAR 727 . At page 730 Kneller J.A. said: -

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

15. The Respondent suffered serious head injury with extensive deep cut wound on parietal region of the scalp above left ear, blunt chest injury, damage to the lumbar sacral vertebrae which involved compression of left bone and dislocation and fracture of right ulna and radius.

16. It has not been demonstrated that the trial magistrate, 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 damage. I therefore decline the invitation to interfere with the trial magistrate’s discretion.

DISPOSITION

17. Consequently, the appeal is found to have no merit and it is dismissed with costs to the Respondent.

DELIVERED AND SIGNED IN KISUMU THIS 14th DAY OF November 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Appellant - Ms. Oloo hb Mr. Mumma

For the Respondent - Ms. Kirabo