REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 04 OF 2008

CORAM: D.S. MAJANJA J.

BETWEEN

IBRAHIM MUTWIRI KIBUA.....................................APPELLANT

AND

KENGETA BEER DISTRIBUTORS LIMITED....1ST RESPONDENT

KUBAI KIRINGO..2ND RESPONDENT

MOHAMED ABDI...3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. R. Karanja, CM

dated 6th July 2007 at the Chief Magistrates Court

at Meru in Civil Case No.280 of 2006)

JUDGMENT

1. The appellant's case before the subordinate court was that he was the owner of a Canter registration number KAC 846Q ("the Canter") while the 3rd respondent was the driver of a Nissan lorry registration number KYL 562 ("Nissan lorry"). The appellant alleged that the 3rd respondent was either an employee or agent of the 1st and 2nd respondents. On 18th July 2003 at about 7.30pm, while the appellant was driving the Canter along the Karama – Muthara Road, the 3rd respondent rammed the Nissan lorry into the rear of his vehicle causing extensive damage. The appellant also sustained injuries and as a result he claimed general damages for pain and suffering, Kshs. 240,107/- as the cost of repair of his vehicle and for loss of business at Kshs. 6,000/- per day for 93 days.

2. Although the defendants denied the claim in their joint defence, they alleged that if indeed the accident took place, it was solely caused by the negligence of the plaintiff who tried to overtake the Nissan lorry. In addition, the 2nd defendant claimed that he had been improperly joined to the suit.

3. After hearing the matter, the trial magistrate found the 1st and 3rd respondents jointly and severally liable for the accident and dismissed the suit against the 2nd respondent. He awarded Kshs. 65,399/- as special damages for repairs and Kshs 60,000/- as general damages for pain and suffering.

4. In the memorandum of appeal dated 24th December 2007, the appellant principally attacked the judgment on three broad grounds. The first ground was that the trial magistrate erred in law in stating that the 2nd respondent was not the owner of the Nissan lorry and was therefore not vicariously liable for the 3rd respondent's negligence. He contended that the trial magistrate did not exercise his discretion properly in awarding costs to the 2nd respondent. The second ground concerned the award of special damages. The appellant contended that the trial magistrate unjustifiably imputed ill motive when he termed the claim as unnecessary and unjustified and aimed at unjustly enriching himself. He contended that the trial magistrate also erred in holding that an assessment report was the only method of proving damages to the motor vehicle despite the unchallenged evidence of receipts. He further assailed the judgment on the ground that the trial magistrate improperly rejected the claims for spare parts, towing, transport and subsistence of the appellant and his agent and that the claim for loss of work or business for 93 was improperly rejected. Finally, and on the third broad issue, the appellant contended that the general damages awarded for

pain and suffering were too low and made without regard to the authorities cited.

5. Both parties filed written submissions and highlighted the same. I shall consider them later when making my determination but before I do so it is important to set out the manner in which this court exercises its appellate jurisdiction. It is the duty of the first appellate court 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 it to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**). Further, an appellate will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles (see ***Ephantus Mwangi and Another v Duncan Mwangi Wambugu*** **[1982 – 88] 1 KAR 278**).

6. I will deal with the first issue whether the 2nd respondent was properly sued. In the plaint, the appellant contended the 2nd respondent was the director and or manager of the 1st respondent and that the 3rd respondent was either an employee or servant of or agent of the 1st and 2nd respondent. In the evidence, the appellant produced a search certificate dated 1st November 2004, showing that the Nissan lorry was owned by the 2nd respondent

7. Counsel for the appellant submitted that the trial magistrate improperly applied the law of corporate personality settled in the case of ***Salomon v Salomon*** **[1897]AC 22** and ought to have lifted the corporate veil to hold the 2nd respondent liable. He cited the case of ***Corporate Insurance Co., Ltd v Savemax Insurance Brokers*** **[2002] 1 EA 41** where the court held that corporate veil may be lifted in certain circumstance where the company is being used as a vehicle for fraud.

8. Counsel for the respondent submitted that the principle of corporate personality in ***Salomon v Salomon*** **(Supra)** affirmed by the Court of Appeal in ***Victor Mabachi and Another v Nurturn Bates*** **NRB CA Civil Appeal No. 247 of 2005 [2013]eKLR** was applicable and that the appellant did not establish any basis for lifting the corporate veil.

9. The search certificate produced by the appellant established firmly that the vehicle belonged to the 1st respondent, a body corporate and although there was evidence from the police abstract that the 2nd respondent collected the vehicle from the police station and identified himself as the owner, he was only an agent of the company. The appellant did not plead fraud or establish any basis for the court to lift the corporate veil. In the circumstance the trial magistrate was right to dismiss the claim against him.

10. Since the case was dismissed, the general principle stated in the proviso to **section 27(1)** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** that costs follow the event was properly applied and there was no basis for the court to refuse costs to a party who had successfully defended his claim.

11. I now turn to consider the issue of special damages. The fact that the Canter was damaged is not in doubt. What is in issue is the nature of the damage and the extent to which the appellant is entitled to compensation for repair and whether he proved them. The trial magistrate held that Kshs. 27,880/- for transport and subsistence were not justified and out of the balance of Kshs. 212,227/- for repairs, spare parts, towing and inspection and search expenses, he was unable to award inspection expenses as no inspection and assessment report was produced to indicate the nature and extent of the damage to the vehicle. He therefore held that the expenses for repairs were doubtful and not shown to relate to the damage. He awarded only Kshs. 62,850/- evidenced by a receipt from Meru Body Builders Garage for panel beating and spraying. The receipt for spares were termed as not credible.

12. The appellant pleaded special damages as follows

(a) Costs of Spare parts purchased Kshs. 116,057

(b) Panel Beating and Spraying Kshs. 62,850

(c) Mechanical repairs and wiring Kshs. 19,000

(d) Towing and photos Kshs. 12,720

(e) Transport to Nairobi to

purchase vehicle search Kshs. 3,000

(f) Inspection and abstract Kshs. 1,100

(g) Cost of search at Registrar's office Kshs. 500

(h) Transport for the plaintiff to

and from Maua Kshs. 5,000

(i) Transport to and from Muthara Kshs. 1,800

(j) Transport 4 trips to Tigania Police Station Kshs. 6,000

(k) Transport and subsistence from Kithurine

to Meru Garage from 17.8.03 to 20.10.2003

subsistence and transport Kshs. 12,080

13. The plaintiff produced a *Certificate of Examination and Test of Vehicle* which showed that the vehicle was inspected on 24th July 2003 by the Government Vehicle inspector. The report showed that the Canter sustained extensive damages including the following;

- Engine and fuel tank damage
- Transmission and gear box damage
- Side body and roof damaged extensively
- Offside frame and rear suspension damaged
- Offside doors and windows damaged
- Front grill and front bar broken
- Windscreen smashed and wipers damaged
- All rear view mirrors and near side door window glass smashed
- Rear chassis frames broken
- Brake pipes damaged
- Rear lamps, reflectors smashed
- Rear body panel and tailgate damaged extensively

14. Together with the photographs produced in evidence, I find that the Canter sustained extensive damage as a result of the accident. The trial magistrate put much weight on the lack of a report by a vehicle assessor to indicate the extent of damage caused to the vehicle. An assessment report by an assessor would have been helpful to give an indication of the damage and estimated cost of repair to put the vehicle back to the state it was in prior to the accident. It must be recalled that the duty of a plaintiff in such a case is to prove the loss and damage on the balance of probabilities and in this case the fact that the vehicle was damaged was not contested and the inspection report, which was produced without objection from the respondents, showed the extent of damage.

15. The appellant produced various receipts to show that the vehicle was repaired. I have examined them. I come to a conclusion different from that of the trial magistrate and I find and hold that the conclusion that the receipts were doubtful and not credible and did not relate to the damage the vehicle suffered was not supported by the evidence. For example, there is a receipt for Kshs. 56,300/- for purchase of engine mounting, gear box mounting, engine piston, speedometer clock, fuel tank, clutch, dash board, side mirror, wiper blade, rear spring, side mirror among others. These items are consistent with the damage to the vehicle that was identified by the Vehicle Inspector. The other receipts which the trial magistrate termed as doubtful all relate to purchase of parts for the vehicle to repair the extensive damage. They were admitted without objection by the respondents who did not also show that the items were unnecessary or did not relate to the damage I have outlined above.

16. Further and by accepting that the appellant was entitled to the cost of repair for a damaged chassis, rear body, cabin and complete spraying of the body, the trial magistrate implicitly acknowledged that the appellant's vehicle was severely damaged and should not have rejected the other aspect of the repairs. Having studied the receipts, I award the plaintiff costs of spare parts purchased amounting to Kshs. 116,057, Panel Beating and Spraying being Kshs. 62,850 and cost of Mechanical repairs and wiring amounting to Kshs. 19,000/- making a total of Kshs 197,907/-. Like the trial magistrate, I find the costs of travel and subsistence unnecessary and unjustified once the vehicle was in the garage.

17. I now turn to the claim for loss of user. The plaintiff claimed that he suffered loss of business for 93 days of Kshs. 6000/- per day. The trial magistrate dismissed this claim on the ground that it was not proved. Damages for loss of user are ascertainable and quantifiable and are therefore in the nature of special damages. The law in this respect is that such damages must be pleaded and proved (see ***Waweru v Ndiga*** **[1983] KLR 236**, ***Macharia Waiguru v Murang'a Municipal Council & Another*** **NYR CA Civil Appeal No. 25 of 2013 [2014] eKLR**). The question in this appeal is whether the plaintiff proved this claim to the required standard. Apart from merely stating that he was transporting vegetables and earning Kshs. 6,000/- per day, the appellant did not provide any other evidence to support this claim. I also reject this claim.

18. There is no dispute that the appellant was injured as a result of the accident, Dr John Macharia (PW 3) testified and produced his report dated 6th November 2006. He confirmed that the appellant lost consciousness after the accident but was attended to at Tigania Hospital where he was admitted and regained full consciousness. He had severe back aches but X-rays did not show any fractures. At the time of examination, the appellant did not have any complaints. He concluded that the appellant had healed without any permanent disability. The doctor classified the injuries as soft tissue injuries.

19. In support of his case the appellant cited ***Danys Mabwaka Khabusi v Mawingo Bus Services Limited*** **NRB HCCC No. 2707 of 1990 (UR)** in which the plaintiff was awarded Kshs. 120,000/- in 1991 for soft tissue injuries; cut wounds on the right arm, face, chest and tendon of the right leg. The respondent suggested Kshs. 70,000/- and relied on the case of ***Sturrock Shipping (K) Ltd v Mnegwa Moka Maselwa*** **MSA HCCA No. 47 of 2004(UR)** where the plaintiff sustained a head injury concussion, contused wound and contusion on the chest and pelvis. He was awarded Kshs. 60,000/- on appeal in 2007. In ***Lilian Achieng v Nation Media Group Limited*** **KSM HCCA No. 18 of 2005 (UR)** where the plaintiff sustained soft tissue injuries on the chest and left arm. She was awarded Kshs. 60,000/- in 2005.

20. The evidence is clear that the appellant sustained minor soft tissue injuries without any residual effect. PW 3's report shows that at the

time he was examined he was not complaining of any pains or injuries. Considering the cases cited at the time the decision of the trial court was given, I cannot say that the sum of Kshs. 60,000/- was inordinately low as contended by the appellant to warrant interference.

21. Following what I have stated, I allow the appeal only to the extent that I award the appellant an additional Kshs. 135,057/- in special damages for cost of spare parts and mechanical repairs and wiring. I note that this appeal is a 2008 appeal and from the record, it is the appellant who bears the blame for not prosecuting it. In fact, the court, notified the appellant several times that it would be dismissed. It would therefore be unconscionable to award interest on that part of the claim from the time the suit was filed noting that this appeal has taken 10 years to prosecute. **Section 26** of the ***Civil Procedure Act*** gives this court discretion to award interest. I therefore award interest on the said sum from the date of filing suit up to the date of payment of the other decretal amount. The interest however, shall accrue from the date of this judgment.

22. The respondent shall pay costs of this appeal assessed at Kshs. 20,000/-.

DATED and DELIVERED at MERU this 7th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Kioga instructed by M.M.Kioga and Company Advocates for the appellant.

Mr Macharia instructed by Muthoga Gaturu and Company Advocates for the respondents.