REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.11 OF 2012

NGANGA JOSEPH.....1ST APPELLANT

MWANGI MARGARET.....2ND APPELLANT

VERSUS

JACKSON KIPLANGAT NGENO.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Kericho CMCC No. 185 of 2010 (Hon. N. Wairimu-(SRM) delivered on 29th February 2012)

JUDGMENT

1. The appellants in this matter were sued by the respondent following a road traffic accident ecisiowhich occurred on 4th May 2009. In his plaint dated 8th February 2010, the plaintiff/respondent alleges that on or about 4th May 2009, while he was travelling in motor vehicle registration number KAZ 959X as a passenger along Kericho-Kisumu Road at Kipsistet area the defendants/appellants' servant and/or agent and for whose acts and omissions the defendants are vicariously liable, so carelessly, negligently and or recklessly drove motor vehicle registration number KAZ 959X that he caused and/or permitted the said motor vehicle to violently collide with tractor registration number KYN 674/ZA Steyr thereby causing the pplaintiff serious injuries.
2. In her dn dated 29th February 2012**,** Hon. N. Wairimu (SRM) entered judgment for the pplaintiff against the ddefendants for a sum of Kshs.100,000/- in general damages as well as Kshs.4,700/- as special damages.

3. The appellants were dissatisfied with the decision of the court and have filed the present appeal in which they challenge the trial court's findings on both quantum and liability.

4. The appellants had in their defense dated 31st May 2010, denied that the respondent was ever a lawful passenger in motor vehicle registration number KAZ 959X. They had also denied any negligence on their part. They asserted that if any such injuries occurred to the plaintiff, the same were caused solely and/or substantially contributed to by the negligence of the plaintiff. They also alleged in the alternative that if indeed an accident occurred, it was occasioned wholly and/or substantially by the negligence of the driver of motor vehicle registration number KYN 674/ZA6672. They therefore prayed that the suit be dismissed with costs.

5. However, the trial magistrate found that the defendants were the registered owners of the motor vehicle involved in the accident, and that the pplaintiff's injuries were as a result of the accident. The court also found the defendants 100% vicariously liable for the acts of their driver in the said accident. The court granted general damages of Kshs.100,000/- and special damages of Kshs.4,500/-, bringing the total award

to Kshs.104,500.00.

6. In their Memorandum of Appeal dated 16th March 2012, the appellants raise 7 grounds of appeal, the gist of which shall appear from the following paragraphs of this judgment. The appellants urged the court to allow the appeal, set aside the decision of the lower court, and dismiss the respondent's suit with costs.

7. Pursuant to directions of this court, the parties filed submissions which they urged the court to rely on in rendering its decision.

8. In their submissions dated 30th September 2017, the appellants canvass their grounds of appeal on two issues, namely liability and the quantum of damages awarded to the respondent.

Liability

9. The appellants submit that the trial court erred in disregarding the defence evidence in determining the issue of liability. They observe that the court disregarded the evidence of PW1 who stated that according to the investigating officer's report, the driver of the matatu was not speeding and that the tractor had no reflectors. They contend that the trial court erred by finding them wholly liable for the accident and failed to analyse the evidence tabled before her. In their view, if the court had critically considered all the evidence before it, it would have found that the author of the accident was the driver of the tractor registration number KYN 674/ZA. The appellants urge the court to find the driver of the said tractor registration number KYN 674/ZA was substantially liable for the accident and dismiss the suit with costs.

10. The respondent submits in response that the appellants' driver rammed into the tractor from behind, and the cause of the accident was the carelessness and/or excessive speed of the matatu driver.

11. It is useful at this point to consider the evidence presented before the trial court on this point. The argument of the appellants is that the tractor had no reflectors, which emerges from the evidence of PW1, a police officer. The respondent argues that the tractor did have reflectors but the matatu driver was driving at an excessive speed. The respondent further argues that his evidence on the occurrence of the accident was not controverted by the appellants, and the court cannot attach liability on a party who was not before the court.

12. The evidence before the trial court was tendered through 4 witnesses for the plaintiff/respondent. PW1 was Cpl Samuel Saiya, then attached at Kericho Police Station Traffic Section. His evidence was that on 4th May 2009, an accident occurred involving motor vehicle registration No. KAZ 959X Toyota matatu and KYN 674/ZA 6672 Steyr tractor and was reported as OB. No. 14/4/5/09. Cpl Kambi and Minoti visited the scene.

13. The investigating officer had found that the motor vehicles were both headed to Kericho from Kisumu. At Kipsitet the driver of the matatu rammed into the rear of the tractor, killing the driver on the spot. Several other passengers, among them the respondent, were rushed to Kericho and Kisumu hospitals. He produced a copy of the police abstract issued to Jackson Kiplangat Ngeno. It was his evidence that the plaintiff was injured in the accident and was issued with a P3 form. The matter was recommended for an inquest as the driver had died on the spot, and the plaintiff/respondent had been a witness at the inquest.

14. On cross-examination, PW1 stated that the matatu driver was not speeding and that, according to the investigating officer's report, the tractor had reflectors. The plaintiff had been issued with a P3 form as his name was one of the ones appearing in the O.B.

15. In re-examination by Counsel for the plaintiff, PW1 stated that preliminary investigations revealed that the matatu was not speeding and that nowhere in the facts was it indicated that the tractor had no reflectors.

16. The respondent testified as PW2. His evidence was that on 4th May 2009, he was travelling from Kipsitet to Kisumu on board matatu registration No. KAZ 595X. An accident had occurred between Awasi and Kipsitet at Kaptegerer. He was seated behind the driver on the left. His evidence was that when they got to Kipsitet boundary, the driver attempted to overtake but when he attempted to get back to his lane, the motor vehicle rammed into the tractor from behind. It was his evidence that he could see the motor vehicle coming from the opposite direction when the driver attempted to get back to his lane. He further stated that at the time, the driver was driving at a speed of 70 km/hr.

17. The respondent testified before the trial court that he had been injured on his stomach, left arm and the shin of his left leg. He had been treated at the Kericho District Hospital and discharged. He tendered in evidence a P3 form filed and signed by the doctor as well as the police abstract. He maintained on cross-examination that the tractor had reflectors.

18. Dr. Raymond Churyai, a Medical officer at Kericho District Hospital, testified as PW3. He produced the treatment notes as well as the P3 form issued to the plaintiff. PW4. His evidence on cross-examination was that he would expect the plaintiff to have recovered fully as his injuries were minor. On re-examination, he stated that the permanent effect of the accident on the plaintiff would be ugly scars of cosmetic value.

19. The defendants/appellants called 3 witnesses. DW1, Richard Ongori, was attached to CID Nakuru performing general investigations. He stated that the plaintiff's name was not part of the list of victims in the OB. DW2, Chief Inspector Morris Okul, the Base Commander, Kericho Division, also testified that the name of the plaintiff, Jackson Kiplangat Ngeno, was not captured in the OB as having been involved in the accident. It was his evidence that an OB is not conclusive evidence that a person was involved in an accident, and further, that the police can mistakenly give out P3 forms. He conceded, however, that the plaintiff/respondent Jackson Kiplangat Ngeno was one of the first witnesses in the inquest No. 2/10.

20. DW2 testified that the plaintiff was called as a witness in the inquest as he had recorded a statement but it was most likely that he was not involved in the accident.

21. The third witness for the defendant, Pius Atsango Ligami, was an Executive Officer at Kericho Law Courts. He produced the inquest file No. 2 of 2010. His evidence was that the inquest had been finalized and the court had found that the accident had occurred and that the (matatu) driver ought to have been charged.

22. The question is whether, on the basis of the evidence before it, the trial court erred in apportioning 100% liability on the appellants. At paragraph 6 of their Amended Defence, the appellants had stated that if an accident had occurred, it was caused solely or substantially contributed to by the negligence of the driver of motor vehicle registration number KYN 674/ZA 6672. They have also sought to rely on the evidence of PW1 who stated that the matatu driver was not speeding and that the tractor did not have reflectors. In their view, had the magistrate considered the evidence before her she would have found that the driver of the tractor registration number KYN 674/ZA was liable for the accident.

23. The appellants, however, had not joined the driver of the said tractor as a party to the proceedings. If their defence was that a third party was to blame for the accident, it was their duty to join the third party in the proceedings. In **James Gikonyo Mwangi vs D M (Minor Suing through his Mother and next Friend, I M O) [2016] eKLR** the court stated as follows:-

> ***"it was incumbent upon the appellant, if his case was that a third party was to blame for the accident, to enjoin the said third party as he had already alluded to in his own pleadings (defence) at paragraphs 5 and 7. Order 1 Rule 15 provides for an elaborate procedure to be undertaken by a defendant claiming against a person not already a party to the suit. Order 1 Rule 15 provides as follows:***
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> ***"15.(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—***

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice(hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

24. The appellants did not avail themselves of the provisions set out above. Having failed to pursue the third party proceedings against the party they alleged was responsible for the accident, they cannot be heard to argue that the court erred, on the material before it, in finding that they were fully responsible for the accident. The evidence of the plaintiff respondent was that he was sitting behind the driver on the left hand side and was therefore in a position to see clearly. He was able to see the motor vehicle coming from the opposite direction, and when the driver of the matatu tried to get back to his lane, he rammed into the tractor which had visible reflectors.

25. There was a responsibility, in my view, on the defendants/appellants to show that there was no negligence on the part of their driver that led to the occurrence of the accident. Once an inference of negligence is made, then the defendant is under a responsibility to show a probable cause of the accident which does not connote negligence on his part. In **Embu Public Road Services Ltd vs Riimi (1968) EA 22** the court stated that:

"……..Where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence……"

26. It is my finding therefore that the trial court properly found that the appellants were responsible for the accident. They had not joined the third party whom they alleged was to blame for the accident, nor had they presented any evidence to displace the inference of negligence against them. As was stated by the Court of Appeal in **Nandwa vs Kenya Kazi Ltd (1988) KLR 488**:

"……In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendants evidence provides some answer adequate to displace that inference…"

Quantum of Damages

27. The appellants are aggrieved by the quantum of damages granted to the respondent. Their argument was that even had the trial magistrate properly analysed the issue of liability, their position being that the court had not, the amount of damages awarded still far exceeded the damages that have been awarded for similar injuries.

28. I have already come to the conclusion that the trial court was correct in its assessment and finding that the appellants were 100% liable for the accident. The question to address is whether the amount of damages awarded was excessive in the circumstances. The appellants' case is that the respondent sustained only soft tissue injuries from which full recovery was expected. In their view, an award of Kshs.50,000/- would have been sufficient.

29. The respondent's submissions on the quantum of damages are that the award of damages is discretionary and an appellate court can only interfere if the lower court, in awarding damages, acted on the wrong principles, misdirected itself or made an award in damages that was manifestly excessive or too low. He submits that the damages awarded were within the range proposed by Counsel for the parties in their submissions, and were adequate compensation for the injuries sustained by the respondent.

30. In considering the issue of damages, I will consider also the question raised by the appellants as to whether the respondent was a passenger in the motor vehicle involved in the accident before considering whether the damages awarded were excessive in the circumstances.

31. There is no dispute that an accident occurred on 4th May 2009 involving the appellants' motor vehicle registration number KAZ 595X and tractor registration number KYN 674/ZA 6672 Steyr. The evidence of the plaintiff/respondent was that he was sitting behind the driver, on the left, had seen him try to overtake, then try to return to his lane before ramming into the tractor from the rear. He had been called as a witness in the inquest involving the accident, and his name was in the occurrence book entry. While the appellants' witnesses sought to show that he was not in the vehicle, I am satisfied that the trial court was correct in arriving at its decision that he was a passenger and was entitled to damages for injuries suffered as a result of the accident.

32. Should this court interfere with the damages awarded by the trial court? The law is that an appellate court will only interfere with an award in damages if it is satisfied that the trial court acted on a wrong principle of law, has misapprehended the facts, or has made a wholly erroneous estimate of the damage suffered and awarded a wrong sum- see **Premier Dairy Limited vs Amarjit Singh Sagoo & Another [2013] eKLR** and **Shiva Carriers Limited vs Winston M. Runya (as the administrator of the Estate of Augustus Kadodo (Deceased) [2016] eKLR.**

33. The trial court in this matter made an award of Kshs.**100,000/-** in favour of the respondent. According to the evidence before the trial court, the respondent had sustained multiple soft tissue injuries whose permanent nature would be ugly scars of cosmetic value. The injuries had been described as minor and the plaintiff was expected to recover fully from them.

34. In her decision on the question of liability, the magistrate had stated as follows:

> ***"On quantum, the plintiff asks for Kshs.250,000/- in general damaghes in this suit, based on the injuries described by the plaintiff and the exhibits before the court. The defendant did not make any suggestions. I would upon consideration of the submissions by both the plaintiff and the defendant, award Kshs.100,000/- as general damages to the plaintiff."***

35. I note, however, that the defendants had proposed, in their submissions before the trial court filed on 28th February 2012, that the plaintiff should be awarded damages of Kshs.50,000/-. It would appear that the trial court overlooked the submissions of the defendants on this point.

36. The question, however, is whether, in the circumstances, the award made was so inordinately high as to invite interference by this court. Having considered the evidence and submissions that were before the trial court, I am not satisfied that an award of Kshs.100,000 was so excessive as to warrant interference. It is possible that this court would have awarded a lesser amount given that the injuries sustained by the respondent were soft tissue injuries, but I am not satisfied that the award was so manifestly excessive as to warrant interference.

37. I accordingly find that the present appeal is without merit. It is hereby dismissed with costs to the respondent.

Dated Delivered and Signed at Kericho this 3rd day of July 2018.

MUMBI NGUGI

JUDGE