REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

HCCA NO. 163 OF 2013

LAZARUS MUTHAMA KAMOTA .....APPELLANT

VERSUS

KINATWA CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LIMITED.....RESPONDENT

(Being an appeal from the judgment of Hon. H.M Ng'ang'a, RM at Tawa Civil Case No. 255 of 2012 delivered on 10/7/2013)

JUDGMENT

INTRODUCTION

1. This is an Appeal from the Judgment of the Tawa Resident Magistrate's Court (H.M Nganga, RM) delivered on 10/7/2013 in a personal injury claim. The suit was commenced by a Plaint filed on 6/12/2012 seeking general damages for pain suffering and loss of amenities as a result of a road traffic accident involving the Appellant as Plaintiff and a motor vehicle registered under the name of the Respondent.

2. The facts of the accident as set out in the Plaint is that on or about 10/1/2012 the Plaintiff then (now Appellant) was lawfully travelling in a motor vehicle registration number KBR 352 B Nissan bus along Kitui-Machakos road when the Defendant/Respondent driver so negligently and recklessly drove, managed and or controlled motor vehicle registration number KBR 352 B that he caused the Plaintiff to fall as he alighted from the motor vehicle, whereby he sustained bodily injuries.

3. The Plaintiff then pleaded for general damages for pain, suffering and loss of amenities, special damages of Ksh 8750/-, interest on the above and costs of the suit.

4. On 15/1/2013 the Defendant (now Respondent) filed its Defence denying the contents of the plaint and putting the Plaintiff (now Appellant) to strict proof and praying that the suit be dismissed with costs to the defendant.

5. On 29/1/2013 the Plaintiff (now Appellant) filed a reply to defence averring the correctness of the plaint and seeking that the defence be struck out and judgment be entered in favour of the plaintiff.

HEARING

6. PW1 who was the medical doctor (Dr Pius Mutuku) produced two documents being the medical report and the P3 form for the Plaintiff (now Appellant) and the two marked as exhibit 1 and 2 respectively. PW1 stated that there was obvious deformity, pains, stiffness, reduced ability to use the left arm. He also stated the fracture had healed with deformity which would need surgery to help him heal quickly and rehabilitation.

7. On Cross-Examination, PW1 stated that it was not the Defendant's (now Respondent) fault that the Plaintiff (now Appellant) was not adequately treated and went on to blame the plaster administer. He further said that the current charges for orthopedic surgery is Ksh.80,000-90,000/- exclusive of the hospital fees. He also stated that if the Plaintiff (now Appellant) was treated adequately the surgery would not have been necessary.

8. PW2 was the Plaintiff (now Appellant) stated that on or about 10/01/2012 he was a fare paying passenger on motor vehicle registration number KBR 352 B Nissan bus from Katangi to Machakos town for Ksh. 150/- and he was given a receipt.

9. He was told to increase the fare mid-way and he refused and was told to alight. As he alighted the conductor pushed him and his hand got stuck at a bar of the door and broke. He reported the mater at Masii police station and later went to a hospital in Masii.

10. He was given first aid at Masii health center and the treatment card was produced as exhibit 4. He later went to Shalom Hospital and produced 2 receipts as exhibit 5. He produced a copy of search for motor vehicle KBR 322 as exhibit 3A and receipt of payment for the search as exhibit 3B. He also produced exhibit 6 being receipts issued upon him for use of the taxi for 3 days. As exhibit 7 PW2 produced a discharge summary from Shalom Hospital and police abstract as exhibit 8. The demand notice was produced and marked as exhibit 9 while the statutory notice to the insurance produced as exhibit 10.

11. On Cross Examination PW2 stated that he did not know the conductor and does not know if he was charged. He also stated that he did not know that the police said that no one was to blame as indicated on the Abstract. PW2 further stated that he had to use a taxi due to the nature of injuries and that he still uses medicine. He produced receipts for P3 forms and marked as exhibit 11.

12. On Cross-Examination PW2 stated that the car did not stop completely for him to alight and if he was not pushed he would not have fractured his hand, and that he was pushed by the person collecting fare.

Appellant's Submissions

13. The Plaintiff (now Appellant) submitted that both the driver and the conductor owed him duty of care to ensure that the vehicle had fully stopped for him to safely disembark and relied on **HCCA No. 108/2007**: ***Equator Bottler Ltd v Dennis Kimeri Mecha*** where the court found that the driver owed a duty of care to see that the passenger alighted from the vehicle safely.

14. The Plaintiff (now Appellant) submitted that since the Defendant (now Respondent) did not call any witness to tender evidence, then their evidence was unchallenged and the appellant should be held 100% liable.

15. On quantum, the Plaintiff (now Appellant) relied on the medical report he had produced and the fact that further medication would be required at a cost of Kshs.100,000.

16. It was the Plaintiff's (now Appellant) submission that the injury suffered was a serious injury and a sum of Kshs.700,000 would be sufficient compensation and relied on the authorities-

1) ***Habiba Abdi Mohammed v. Peter Maleve*** *HCCC 950 of 1988.*

2) ***Beauty line limited v. David Njuguna Gichari*** *(2012) eKLR.*

17. On special damages, the Plaintiff (now Appellant) submitted that he had produced receipts for his claim of Kshs.5,750.00. In conclusion, he asked the appellant be found 100% liable for causing the accident and be awarded Ksh.700,000.00 and special damages of Kshs.5,750.00.

Defendant's Submissions

18. The Defendant (now Respondent) filed their submissions on 27th May 2013 submitting that the burden of proving is on the Plaintiff (now Appellant) and cited the case of ***Eastern Produce (K) Ltd v. Christopher Atiando Osiro*** (2006) eKLR referred to the case of ***Kiema Mutuku v. Kenya Cargo Hauling services ltd*** (1991) 2KAR 258 where it was held that there is as yet no liability without fault in the Kenyan system and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

19. In ***Winfield and Jolawicz on Tort***,11th Edition (S&M) 1979 at page 99 it stated:

> *"In order to discharge the burden of prove placed upon him, it is usually necessary for the plaintiff to prove specific acts or omissions on the part of the defendant which qualify as negligent conduct"*

20. It was their submission that the Plaintiff (now Appellant) gave contradicting information where at some point he stated that the vehicle had stopped and in another that he was in the process of alighting. It was submitted that due to the inconsistency in the Plaintiff's averments in the Plaint and those in his witness statement the court should disregard his evidence.

21. On quantum, the Defendant (now Respondent) submitted that an award of Kshs.100, 000.00 would be fair and adequate compensation and that, the Plaintiff (now Appellant) had healed and that the deformity was obvious as a result of inadequate treatment. They submitted that this was negligence on the part of the Plaintiff (now Defendant) and it should not be burdened with the costs of the surgery. In ***Charles Maina Migwi v. Khilna Enterprises Limited*** (2006) eKLR, the Plaintiff had suffered a fracture of left ulna distal and fracture of radial styloid and the court had awarded Kshs.100,000.00 for general damages.

22. As for special damages, it was submitted that the Appellant only proved and or provided receipts of Kshs.5250 and stated that, that is what was due to the Plaintiff.

Judgment of the trial Court

23. In its judgment, the trial Court narrowed down the issues for determination as follwos:

a) Whether an accident occurred on 10/01/2012 as alleged involving the Plaintiff and motor vehicle registration No. KBR 352 B

b) Whether the Defendant and or its agent, servant or employee, being the driver of the vehicle was negligent as pleaded under

paragraph 4 of the Plaint and whether the Plaintiff was liable for any contributory negligence.

c) Whether the Plaintiff was injured and entitled to damages.

24. The trial Court noted that the Defendant did not call any evidence to rebut the evidence adduced by the Plaintiff. The Learned Magistrate was of the opinion that the defence is a mere pleading which does not amount to evidence and cited the definition of pleading according to ***Black's Law Dictionary 8th Edition*** as *"A formal document in which a party to a legal proceedings(especially a Civil Law suit) sets forth or responds to allegations, claims denials or defenses"*.

25. The trial Court noted that the Plaintiff in the Plaint had entirely attributed the negligence to the driver but in his evidence in Court, he apportioned and shifted the blame to the conductor.

26. The Magistrate stated that "It is a cardinal rule of adjudication of Civil Suits that parties are bound by their pleadings and as such in the plaint filed, the Plaintiff did not aver and or plead the negligence attributable to the conductor……". His evidence is therefore a clear departure from his Plaint filed in Court.

27. The Court was of the opinion that the Plaintiff had proved that the Defendant was the owner of the vehicle as at 10/01/2012 and that it was vicariously liable for the actions of the driver and conductor, but was of the opinion that the doctrines of *res ipsa liquitor* was not applicable.

28. The trial Court dismissed the suit and stated as follows: -

> *"On the totality of the evidence on record, I find that the plaintiff has failed to discharge his burden of proof, on a balance of probability, that it was the driver of the vehicle (as pleaded in the plaint) who negligently caused the injury he sustained. The case must therefore be dismissed with costs to the defendant.*

29. As obliged by judicial practice (see ***Selle & Anor. v. Associated Motor Boat Co. Ltd. & Ors.*** (1968) E.A. 123, per De Lestang, V-P. *obiter*, that "*it is always advisable for a judge of first instance to decide all the issues raised in the case before him so that further expense to the parties and further delay caused by sending the case back, as in this case, for an assessment of damages"* , the trial Court assessed the damages that would have been awarded to the Plaintiff had the suit succeeded as follows:-

> *"I hold an award of Kshs.320, 000.00 as general damages would have been reasonable and fair compensation in the event that I would have allowed the plaintiff's claim. The plaintiff would also have been entitled to Kshs.5,250.00 being the proved special damages which included the cost of taxi hire and medical expenses."*

MEMORANDUM OF APPEAL

30. The Memorandum of Appeal was filed on 7th August,2013 and set the grounds as follows:-

1) The Learned Magistrate misdirected himself on law and facts when he held against the weight of evidence that liability had not been proved on a balance of probability.

2) The Learned Magistrate erred in law and facts when he found that the appellant's injuries were as result of assault and not of road traffic accident.

3) The Learned Magistrate erred in law and facts when he found against the weight of evidence that the driver of motor vehicle registration number KBR 352B was not negligent.

4) The learned magistrate erred in law and facts in assessing the damages that the appellant would get

5) The findings of the learned magistrate were against the weight of evidence adduced.

40. The Appellant thus prayed that the Judgment by the Learned Magistrate be set aside and or reversed and the Court do find the Respondent liable to compensate the Appellant and assess the damages, and that this Appeal be allowed with cost together with those of the Subordinate Court.

APPELLANT'S SUBMISSIONS

41. The Appellant submits that the issues for determination in the Appeal are:

i. Whether an accident occurred on 10/01/2012 involving the plaintiff and motor vehicle registration number KBR 352B.

ii. Whether the Defendant and or its agent, servant or employee, being the driver of the motor vehicle registration number KBR 352B was negligent as pleaded under paragraph 4 of the plaint.

iii. Whether the Plaintiff was liable for any contributory negligence.

iv. Whether the Plaintiff was injured and entitled to damages.

42. The Appellant cited Lord Atkin's ***neighbour principle*** in the case of ***Donogue v Stephenson*** [1932] AC 562 where he said:

> *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would likely injure your neighbor……"*

43. They further cited ***Equator Ltd v. Dennis Kimori Mecha, HCCA No. 108/2007,*** the Court found that the driver owed a duty of care to seeing that the passenger alighted from the vehicle safely. On damages they submitted as prayed in the trial court that an award of Ksh. 700,000/- would have been sufficient together with special damages of Ksh. 5,250/-.

RESPONDENT'S SUBMISSIONS

44. The onus of prove is on the Plaintiff/Appellant, the Respondents cited the case of ***Eastern Produce (K) Ltd v. Christopher Atiando Osiro*** (2006) eKLR which referred to the case of ***Kiema Mutuku v. Kenya Cargo Hauling Services Ltd*** (1991) 2 KAR 258 where it was held that *"there is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence"*.

45. They also cited ***Winfield and Jolowicz on Tort***, 11th Edition (S&M) 1974 at page 94 where it is stated as follows:

> *"In order to discharge the burden of proof placed upon him, it is usually necessary for the plaintiff to prove specific acts or omission on the part of the defendant which qualify as negligent conduct"*.

46. The Respondents further highlighted the inconsistencies of the Plaintiff in his pleadings, statements and testimony in court as to whether the vehicle had stopped or still moving when he was alighting.

47. The Respondents also submitted on the Appellant's departure of claim in the Plaint where it solely blames the driver but in trial he shifted blame solely to the conductor under oath, and that no particulars of negligence were pleaded against the conductor. The Respondent concluded its submission by praying that the Judgment of the lower court be sustained and the Appeal be dismissed with costs to the Respondent.

DETERMINATION

Proof of negligence against the driver of the motor vehicle

48. The particulars of negligence that the driver was increasing speed when the Appellant was alighting never came up at the hearing of the trial Court and was not pleaded but has only been brought up in the Appellants submissions in the Appeal. It is not permissible to introduce evidence or pleading of facts by way of Submissions.

49. Further, the issue as to whether motor vehicle KBR 352B was in motion is a matter of fact that never arose precisely at the trial. It is not in dispute that the driver was in control of the motor vehicle KBR 352B but from the record it is not also disputed that he did not participate in the pushing of the Appellant.

50. There was no evidence as to how long or far was the vehicle in motion with the Appellant's hand stuck at the metal bar before it came to a halt or otherwise. This would have shown if there was negligence upon the driver, if he became aware of the Appellant's hand having been stuck and yet continued to keep the vehicle moving.

51. Apart from the driver who was in control of the motor vehicle at the time of accident and is usually an employee of the owner the Conductor/turnboy, who assists in collecting fare, dropping and picking up of passenger and also usually an employee of the owner of the vehicle independent of the driver, by his acts may also give rise to vicarious liability of the owner of the vehicle. The doctrine of vicarious liability would have been applicable against the Respondent as the employer of the driver and the conductor had negligence been pleaded and proved against the driver and or the conductor.

52. The Appellant was during the trial very particular that the injury was solely caused by the action of the conductor and it appears that the accident could have still occurred independent of any alleged action on the part of the driver as set out in the particulars of negligence claimed by the Appellant against the driver. Indeed, the only particulars of negligence pleaded by the Appellant that would have connected the driver to the accident is clause 4 (d) which states :

> *"Failing to brake, swerve, slow down and/or act in any manner possible to control the said motor vehicle so as to avoid the accident"*.

53. It is noted that breaking does not necessarily mean stopping, and this does not prove causation of the injury as it was not shown that the Appellant's hand got tsuck as he alighted because of any of the alleged negligent acts particularized against the driver. In addition, it does not show that the driver was aware of the altercation between the Appellant and the conductor, and of the fact of the conductor pushing the Appellant and of the latter's hand getting stuck.

54. In this case, it would appear that the negligent acts, if any, that caused the injury on the appellant were on the part of the conductor as

there was no evidence as to whether the driver had stopped the vehicle or whether it was in motion and for how long after he learnt, if he did, that the appellant had been stuck.

Want of pleading of negligence against the conductor

55. In ***SAMUEL GIKURU NDUNGU v COAST BUS COMPANY LTD*** **[2000]eKLR,** the Court of Appeal (Omolo, Lakha & Bosire, JJA.) clarified that vicariously liability of the owner of a motor vehicle did not depend on the liability or decree against the driver but on proved negligence as follows:

> *"As we stated earlier, the appellant did not sue the driver of the accident motor vehicle. In Omar Athman v. Garissa County Council, Nairobi High Court Civil Case No. 2484 of 1992 (unreported) which the trial Judge cited in his judgment but did not make any comments on, Aganyanya, J. struck out the plaintiff's suit for incompetence because the driver of a motor vehicle in a running down defended suit was not made a party in the suit. In his view the liability against the owner of the vehicle in such a case being vicarious is dependent on a decree against his driver on the same facts.*
>
> *In Selle & Another v. Associated Motor Boat Company Ltd. & Others [1968] EA 123, the respondents who owned and maintained a boat involved in an accident in which one of the appellants was injured, were held vicariously liable for their driver's negligence even though the said driver was not a party in the suit. Likewise in Mwonia v. Kakuzi Ltd [1982- 88]1 KAR 523, the respondent was held liable for its driver's negligence although the driver was neither made a party nor did he testify in the case against his employer. Chesoni and Nyarangi Ag. JJA (Kneller JA, dissenting, but not for the reason that the driver was not joined) held that on the basis of the evidence before the court the respondent as owner of the accident motor vehicle was liable to the appellant in damages for the proved negligence of its driver.*
>
> ***From the authorities it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employees' liability but to his negligence. Having come to that conclusion we are unable to agree with Aganyanya J. that the non-joinder of the driver in an action as the one which gave rise to this appeal renders the suit incompetent.***

[Emphasis added]

The non-joinder of the conductor as a Defendant does not, therefore, of its own defeat the Plaintiff/Appellant's suit.

56. This Court would have had no problem finding the owner of the vehicle responsible for the collateral negligent act of the conductor with whom a master and servant relationship existed. However, that the said negligence was not pleaded and the Defendant, therefore, had no knowledge of such a claim and could not therefore respond to it in the defence and on evidence, makes it unfair that any liability may be established on the basis of the unpleaded issue. The exception of ***Odd Jobs v. Mubia*** [1970] EA 476 that *'a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for decision'* does not apply in this case because the Defendant had not led any evidence on the matter of the alleged negligence act of the conductor which only came up during the Plaintiff's testimony at hearing. See also ***Vyas Industries v. Diocese of Meru*** 1982) KLR 114, where the unpleaded issue was the vicarious liability of the owner of a motor vehicle for the act of the driver as servant or agent in a case where the fact of ownership of the vehicle was pleaded and admitted by the Defendant. The Learned Magistrate herein rightly held that-

> *"It is cardinal rule of adjudication of civil suits that parties are bound by their pleadings."*

I also agree that there was no occasion for the application of the doctrine of *res ipsa loquitor.*

Conclusion

57. As the Plaint did not plead negligence against the conductor of the motor vehicle owned by the Defendant, the Respondent did not respond to such negligence or lead evidence to rebut the testimony of the Plaintiff that he was pushed by the conductor. It would be unfair to decide the case on the unpleaded issue of the negligence of the conductor to which the Defendant had not been called upon to respond in pleading and evidence. The Plaintiff/Appellant must be held to his pleadings in which he alleged negligence against the driver of the motor vehicle, which he did not prove on the evidence but instead testified to having been pushed by the conductor. The Court only heard one side of the story implicating the Defendant's conductor who, although not fatal to the case, was not a party to the suit. Having not been put on notice by pleading the defendant did not call rebuttal evidence. No Judgment can issue in favour of a Plaintiff in such circumstances where the cogency of the evidence of negligence has not been tested against Defendant's rebuttal evidence for no fault of his own.

58. On the Quantum of damages, nothing has been shown by the Appellant as would justify departure from the general principle of non-interference with an award of damages by a trial Court. See ***Shabani v. City Council of Nairobi*** (1985) KLR 516, 527.

ORDERS

59. Accordingly, for the reasons set out above, the court makes the following orders:

1. The Appellant's appeal herein is dismissed.

2. Each party shall bear its own costs of the appeal and in the trial court.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 6TH DAY OF DECEMBER 2018.

D.K. KEMEI

JUDGE

Appearances:-

M/S Mulwa Isika & Mutia Advocates for the Appellant.

M/S J.M. Mutua for the Respondent.