REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 37 OF 2015

KURAWA INDUSTRIES LIMITED ……….......………….... APPELLANT

AND

DAMA KITI ………………………….……………. 1ST RESPONDENT

HARISSON KAZUNGU …………………………… 2ND RESPONDENT

(Being an Appeal against the judgement and decree of Honourable Y.A. Shikanda delivered on 22nd September, 2015 in Malindi Chief Magistrate's Court CMCC No. 187 of 2011)

JUDGEMENT

The 1st respondent was involved in a road traffic accident on 6.1.1990 involving motor vehicle registration number KUZ 825 along the Mombasa Malindi road. The trial court awarded the 1st respondent a total sum of Kshs.2,806,000/= as damaes in its judgement delivered on 23.6.2015. It is that judgement which is the subject of this appeal. The grounds of appeal can be summarized as follows: -

i. That the trial court erred by finding that the 1st appellant was the registered owner of motor vehicle number KUZ 825 which finding is contrary to the evidence of Peter Mwero Nyiro and also failed to take cognizance of the fact that the vehicle was bought by the appellant way after the occurrence of the accident.

ii. The court erred by finding the appellant 100% liable yet the 2nd respondent failed to enter appearance and defend himself.

iii. The amount of damages awarded is excessively high and is an erroneous estimate of damages.

iv. The court erred by awarding Kshs.504,000/= for diminished earning capacity.

v. The court erred by awarding Kshs.300,000/= for future medical expenses.

vi. The trial court failed to consider the appellant's submissions and authorities and also applied a higher multiplier of 14 years yet the 1st respondent was 53 years.

Counsel for the appellant submit that they filed their submissions on time but the trial court did not consider those submissions. It is also submitted that the log book for the accident vehicle clearly shows

that it was owned by Hekko Enterprises Limited by 1.2.1984. The registration was unchanged until 1994 when it was registered in favour of the appellant. Therefore, the correct owner of the vehicle was not sued. Counsel relies on the case of **THURANIRA KARAURI V AGNES NCHECHE Civil Appeal No. 192 of 1996** where the court stated as follows: -

> **"the plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the judge a certificate of search signed by the registrar of motor vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we reject it."**

The appellant also relies on the case of **JOEL MUGA OPIJA V EAST AFRICAN SEA FOOD LIMITED Civil Appeal No. 309 of 2010**. In both cases the court held that the best way to prove ownership of a motor vehicle is to produce a document from the registrar of motor vehicles showing the registered owner.

It is further submitted that the 2nd respondent failed to enter appearance and file defence. The appellant discharged the burden of proof. The trial court should have apportioned liability against the 2nd respondent. Counsel maintains that special damages need to be pleaded and strictly proved. In the case of **ZACHARIA WAWERU THUMBI V SAMUEL NJOROGE THUKU Civil Appeal 445 of 2003** Justice O.K. Mutungi stated the following: -

> **"It is my humble view that awarding of damages for future medical costs is irregular and outside the known and established heads of damages under the law of torts. Such an award is an affront to the general principles governing the award of special damages. For even if such claim is pleaded it cannot be proved. Even where a medical report gives a prognosis that the claimant will certainly require further medical treatment, estimated at whatever figure, until the treatment is carried out and actually be. It remains futuristic and in the same category of future loss of earnings which can only be claimed and awarded under the head of general damages."**

It is further submitted that the 1st respondent was 56 years old and the multiplier of 14 years was excessive. The appellant submit that a multiplier of 5 years is reasonable. It is contested that the award of Kshs.2,000,000/= as general damages is also excessive. Counsel contend that damages must be in line with those awarded in other cases for comparable injuries. In the case of **PATRICK MBATHA KYENGO V BAYUSUF FREIGHTERS LIMITED (2013) eKLR** Kshs.1.6 million was awarded for a crush injury leading to amputation of left leg and fracture of right radius and ulna. Similarly, in the case of **SALOME WAKARINDI WACHIRA V SIGNON FREIGHT LIMITED AND 3 OTHERS (2007) eKLR** Kshs.1.2 million was awarded as damages for amputation of the right leg above the knee and injury to the chest, ribs, hip and abrasions to both arms. The appellant proposes that an award of Kshs.1.5 million would be sufficient.

Counsel for the 1st respondent opposed the appeal. Counsel submit that by the time judgement was delivered the appellant's counsel had not filed their submissions. If those submissions were filed on 30.3.2015 then the same were not taken to the magistrate who had taken the file for judgement writing. That is not a good ground to set aside the judgement. Counsel relies on the case of **NTULELE ESTATE TRANSPORTERS LIMITED & ANOTHER V PATRICK OMUTANYI MUKOLWE HCCA. No. 67 of 2011** where the court held as follows: -

> **"Failure to set out the respective parties submissions and evaluate the authorities relied on in the judgment cannot be said to be the basis of holding that the court has failed to consider the principles applicable…what is significant is that the court has considered the same."**

It is further submitted that the accident motor vehicle was owned by the appellant. The appellant concentrated on the issue of registration and disregarded the issue of being the actual, beneficial and or

insured owner of the vehicle. A police abstract was produced by consent. The trial court did not find that the appellant was the registered owner of the vehicle but the beneficial owner. The evidence proved that the appellant was the one using the vehicle. The log book simply shows when the transfer was registered but does not show when the vehicle was bought. In the case of **JOEL MUGA OPIJA V EAST AFRICAN SEA FOOD LTD Court Appeal No. 309 of 2010** it was stated that **"when the abstract is not challenged and is produced in court without any objection its contents cannot be later denied."**

Counsel for the 1st respondent also relies on the case of **CHARLES NYMBUTO MAGETO & ANOTHER VS PETER NJUGUNA NJATHI (2013) eKLR** where it was stated as follows:

> **"That is why courts have consistently held that a registration card or logbook is only prima facie evidence of ownership and the person registered therein is deemed to be the owner of the motor vehicle unless the contrary is proved. That is the provision of section 8 of the Traffic Act (cap 403 Laws of Kenya). The inference being that a certificate of registration is not absolute proof of ownership and evidence may be led to prove the contrary. There is often a time lag between the sale and transfer of a motor vehicle, and the registration of the transfer by the registrar of motor vehicle."**

In the same case of **CHARLES NYAMBUTO** (supra) the court stated the following: -

> **"The courts recognize that there are forms of ownership that is to say actual, possessory and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the police abstract report as held in the Thuranira and Mageto cases (supra) that the police abstract report is not, on its own proof of ownership of motor vehicle. If, however, there is other evidence to corroborate the contents of the police abstract as to the ownership then the evidence in totality may lead the court to conclude on the balance of probability that ownership is proved."**

It is submitted that PW2 testified that on the material day the vehicle was being driven by the 2nd respondent who had been employed by the appellant. The vehicle was defective. That evidence proved that the appellant was 100% vicariously liable as the vehicle was being driven by its employee. The appellant did not file a claim against its co-defendant hence the issue of apportionment cannot arise. Damages for future medical treatment can be awarded depending on the circumstances of the case. A medical report by an expert indicated that medical expenses for prosthesis would cost Kshs.300,000/=. That report was produced by consent meaning that the parties agreed on its contents. Future medical expenses were specifically pleaded.

Counsel for the 1st respondent contend that this court should not interfere with the findings of the trial court. In the case **MBOGO AND ANOTHER V SHAH (1968) 1 E.A. 93** the court held: -

> **"…a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."**

The 1st respondent was 56 years old at the time of the accident. She was 79 years at the time she testified. Between that time, she had lived for 23 years without income because of the accident. The multiplier of 14 years is therefore justified. On the issue of general damages of Kshs.2 million, counsel maintains that the assessment is fair. The authorities relied upon by the appellant are quite old and relate to minor injuries.

This is a first appeal and the court is called upon to re-evaluate the evidence adduced before the trial court and make its own findings. Before the trial court PW1 DAMA KITI testified that on 6.1.1990 she was heading home from fetching water walking on the side of the road. A vehicle left the road and knocked her. The vehicle left the main road and knocked her while on the side of the road. She was taken to Kilifi

district hospital and was later transferred to Coast General Hospital. Her leg was amputated above the knee. She was seen by a doctor who prepared a medical report. Before the accident, she was a farmer and was also trading in cereals. The doctor advised her that she would require an artificial limb which cost Kshs.300,000/=. She lost consciousness after the accident.

PW2 KALUME KIRINGO MWAKOMBE testified that he was a driver. He used to work for the appellant and also used to drive the accident motor vehicle registration No. KUZ 825. On 6.1.1990 the vehicle was being driven by the 2nd respondent Harrison Kazungu who was a mechanic. PW2 had reported to the appellant's office that the vehicle was defective and needed repairs. The vehicle was owned by the appellant. PW2 had worked for the appellant for 9 years. On the material day, he was at his home at Matsangoni when the accident occurred near his home. He went to the scene and found many people. The 1st respondent was injured and trapped by the vehicle.

PETER MWERO NYIRO testified as the appellant's witness. He informed the court that he worked for the appellant as an accountant. He was employed in 1993. Motor vehicle registration No. KUZ 625 was an Izuzu lorry that was originally registered in the names of Hekko Enterprises. It was later registered under Kurawa Industries. The vehicle was later sold to a third party in 1995.

The issues being raised by this appeal ae: -

i. Whether the appellant was the owner of the accident motor vehicle.

ii. Whether the appellant was 100% liable.

iii. Whether the assessment of damages by the trial court was proper.

With respect to the issue of ownership of the accident vehicle, the appellant contends that the vehicle was registered, in the names of Hekko Enterprises at the time of the accident. That registered owner was not sued. Further, it can be implied from that line of argument that the police abstract produced in court did not prove ownership. The appellant has cited the cases of **THURANIRA KARAURI** and **JOEL MUGA OPIJA** (supra). On his part, counsel for the 1st respondent maintains that the appellant was in actual possession of the accident vehicle and was the beneficial owner.

The appellant produced the log book for the accident vehicle. It shows that by 30.9.1990, the vehicle was registered in the names of Hekko Enterprises Ltd. The vehicle was transferred to Kurawa Industries Limited on 30.6.1993. The police abstract produced in court indicate that the vehicle was owned by Kurawa Industries Ltd and insured by jubilee Insurance Co. Ltd. The appellant was the insured.

The issue of actual registration has to be evaluated in line with the evidence on record. Peter Mwero Nyiro seems to have stated the position as per the log book. He was not working for the appellant by the time of the accident. I have noted that part of the record of appeal is an accident investigation report. It is not indicated who commissioned the report but it was part of the 1st respondent's documents. The report indicates how the accident occurred. From the report, two people died as a result of the accident. The 1st respondent survived the accident. The report indicates that PW2 Kalume Kiringo Mwakombe was driving the vehicle on 5.1.1990. It developed mechanical problem and notified the appellant. The vehicle broke down near Matsangoni along the Malindi-Kilifi road. The 2nd respondent who was the appellant's mechanic was sent the following day to repair the vehicle. He repaired the vehicle and at around 5.00 pm drove the vehicle towards Matsangoni town. He lost control and hit the appellant and other pedestrians. Two people died on the spot. The 2nd respondent ran away and is still at large.

The above scenario is in line with the evidence of PW2. He testified that the vehicle belonged to Kurawa Industries where he was working. He used to drive the vehicle. It broke down and the 2nd respondent was called to repair it. It is therefore evident that the appellant was in possession, control and use of the accident vehicle registration number KYZ 825. Initial reference to motor vehicle registration number KUZ 625 was found to be erroneous. The appellant insured the vehicle in its own name. In 1993 when

the case was still pending, the appellant had the vehicle transferred in its name while fully aware of the accident. The appellant did not enjoin Hekko Enterprises Limited who sold the vehicle to the appellant.

Given the evidence on record, I do find that the appellant's ground that it did not own the accident vehicle is misplaced. Although the vehicle was registered in the names of Hekko Industries Ltd, the appellant was the beneficial owner who was in actual possession of the vehicle. That position was actualised in 1993 when the appellant effected the legal registration of the vehicle in its name.

Concerning the issue of liability, the defence evidence did not dwell on how the accident occurred. It only dwelt on the issue of ownership. The evidence shows that the 2nd respondent who was the 2nd defendant before the trial court was employed by the appellant. PW2 testified to that effect. The driver lost control and hit pedestrians who were off the road. The appellants are vicariously liable for the tortuous acts of their employee. It is clear that the driver was on official duty by the time the accident occurred. He had been sent to repair the vehicle. He was not on a frolic of his own. The trial court's finding on liability is therefore correct. Further, the appellant's employee is at large and it was upon the appellant to trace his whereabouts and hold him liable if the appellant felt that he was not allowed to drive the vehicle.

The next issue relates to the amount of damages awarded. There were two medical reports produced. A medical report dated 26.3.1990 by Dr. Zulfiqar A. Khandwalla describes the injuries as follows: -

INJURY SUSTAINED:

1. **Crush injury left leg.**

2. **Fracture shaft left radius.**

3. **Compound comminuted fracture left femur.**

4. **Fracture left ribs 5th, 6th, 7th and 8th ribs.**

5. **Soft tissue injury abdomen.**

TREATMENT GIVEN:

She was initially treated at Kilifi hospital for 4 days and then transferred to Mombasa.

Amputation of the left leg was done at the knee joint. Surgical toilet of the wound left thigh was done.

Below elbow plaster was applied on the forearm for 6 weeks.

Daily dressings of the wounds was done.

She was discharged from the hospital on 21st March, 1990.

A second report by Dr. S.K. Ndegwa dated 2.4.2012 gives the same injuries. The doctor opined that the 1st respondent healed with 50% permanent disability due to the loss of the left leg. The cost of a good multifunctional prosthesis is Kshs.300,000/=. The 1st respondent was awarded Kshs.300,000/= for future medical expenses. The appellant relies on the case of **ZACHARIA WAWERU THUMBI** (supra). It is submitted that special damages need to be pleaded and strictly proved.

The amended plaint dated 4.9.2010 pleaded at paragraph 7 (b) that the 1st respondent shall require a multifunctional prosthesis valued at Kshs.300,000/=. The trial court awarded that amount. The contention that special damages must have been specifically incurred and proved by way of documentary

evidence can no longer be good law. It is a fact that the 1st respondent lost part of her leg. It is also a fact that a medical practitioner estimated the cost of an artificial limb to be Kshs.300,000/=. That amount could be awarded either as part of general damages or as a separate special damages item. There is no evidence that the sum of Kshs.300,000/= was an over estimation. The estimation was done in 2012. I find that estimate to be reasonable. The appellant could have as well obtained its own estimate for the prosthesis and counter the estimate of Dr. Ndegwa. I am satisfied that the trial court's decision is proper. The amount of Kshs.300,000/= will be incurred by buying the prosthesis. That cannot be futuristic. I believe if the 1st respondent had means, she could have bought the prosthesis and produce a receipt.

There is the issue of diminished earning capacity or loss of future earnings. The trial court was referred to several authorities on this issue. The appellant is of the view that a multiplier of five (5) years is fair. It appears that the appellant is not contesting the monthly income of Kshs.3,000/=. The accident occurred on 6.1.1990. Judgement was delivered twenty five years later on 23.6.2015. The plaintiff has lived for this period and it is evident that her earning capacity was affected. The 1st respondent was born in 1934 as per her identity card number 4974102. She was 56 at the time of accident. A multiplier of 14 years would give her working life to be 70 years. She was not employed. She met the accident while coming from fetching water. I do find that a multiplier of 14 ears is reasonable. Even if the retirement age in Kenya is 60 years, one does not retire from seeking his/her daily bread after 60 years. Judges work upto 70 years. That means that anyone can continue working even after attaining the age of 60. The proposal by the appellant of a multiplier of 5 years is limited to the retirement age of 60 years. The 1st respondent has outlived the accident by 25 years and her earning capacity has been diminished for all this period. I find the trial court's assessment of 14 years to be fair. The award of Kshs.504,000/= made up of Kshs.3,000/= monthly for 14 years shall be left intact.

Lastly, there is the issue of the general damages of kshs.2 million. The injuries suffered by the 1st respondent have been itemized herein above. Apart from the amputation of the left leg, there is fracture of the left radius and fracture of four ribs. The trial court made reference to the case of **SAMUEL MUSINGA MWATETE V TAZ FREIGHTERS LTD & ANOTHER**, **Mombasa HCC No. 230 of 2009** where Kshs.1.5 million was awarded on 11.4.2012 for 50% permanent incapacity and amputation of one leg below the knee together with other injuries. There is the case **of SAVCO STORES LTD V DAVID MWANGI KIMOTHO Machakos Civil Appeal No. 12 of 2005**. Kshs. one million was awarded on 29.5.2008 for 20% permanent incapacity and fracture of the left tibia and fibula. In the case of **COSMAS MUTISO MUEMA V KENYA ROAD TRANSPORTERS LTD & ANOTHER, Mombasa HCCC No. 285 of 2006**; on 20.3.2014, Kshs.2.5 million was awarded by Kasango J. for amputation of one leg at the knee level. All these authorities were cited by counsel for the 1st respondent.

The appellant contends that its submissions were not considered. In its submissions dated 30.3.2015, the appellant cited the case of **PATRICK MBATHA KYENGO V BAYUSUF FREIGHTERS LTD [2013] eKLR**, Kshs.1.6 million was awarded for amputation of the leg and fracture of the right radius and ulna. The case of **SALOME WAKARINDI** (supra) was also cited where Kshs.1.2 million was awarded by H.P.G. Waweru J. for closed injury to the back, and amputation of the right leg above the knee.

The scenario given by the above awards show that damages for amputation of one's leg above the knee would range from Kshs.1.2 million to Kshs.2.5 million. The trial court awarded Kshs.2 million on 26.6.2015. I find that assessment not to be excessive. It is within the amounts awarded for similar injuries. There is the case of **SAMUEL MUSINGA MWATETE** (supra) where Kshs.1.5 million was awarded in 2012. The case of **PATRICK MBATHA KYENGO** was decided in 2013. Kshs.1.6 million was awarded. An award of Kshs.2 million in 2015 cannot be excessive noting that Kshs.2.5 million was awarded in March 2014 in the case of **COSMAS MUTISO MWEMA** (supra).

Taking all the circumstances of the case into account, I do find that the findings of the trial court on both liability and quantum are objective, fair and within the legal principles applicable in such cases. I do find that the appeal lacks merit and the same is hereby dismissed with costs.

Dated and delivered in Malindi this 1st day of February, 2017.

S.J. CHITEMBWE

<u>JUDGE</u>