REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 155 OF 2012

SWIFT TRUCKERS LTD…….....1ST APPELLANT

MWANZI KITHOME……..…….2ND APPELLANT

VERSUS

MARY NYAKERARIO ORANGO……..... RESPONDENT

(An appeal from the judgment and decree of Hon. KIMUTAI (Senior Resident Magistrate) dated and delivered on the 15th day of December 2011 in the Original Kisii CMCC No. 334 of 2009)

JUDGMENT

1. The respondent herein, MARY NYAKERARIO ORANGO, sued the appellants before the trial court through a plaint filed on 26th May 2009 in which she claimed both special and general damages together with costs arising out of an accident that took place on 11th July 2007. The respondent's case was that she was on 11th July 2007 a lawful passenger travelling along Nyamira – Kericho Road in motor vehicle registration No. KAT, 997F when at Ikonge area, the 2nd defendant drove the 1st Defendant's motor vehicle Reg. No. KAW 173V/ZC 5438 so recklessly and negligently that he caused it to collude with motor vehicle Registration No. KAT 997F thereby causing the plaintiff serious injuries.

2. In their joint statement of defence filed on 12th June 2009, the appellants admitted only the description of the parties to the suit but denied owning the accident motor vehicle Reg. No. KAW 173V/ZC 5438 and further denied the occurrence of any accident or the allegation that they were negligent. The appellants further denied that the appellant was injured in the alleged accident. The appellants stated that if at all any accident occurred, then the same was solely caused or substantially contributed to by the negligence of the owner, agent or manager of motor vehicle Registration No. KAT 997F.

3. The case was heard by Hon. K. T. Kimutai Senior Resident Magistrate who at the close of the trial found the appellants 100% liable for the accident and awarded the respondent Kshs. 250,000/= general damages. The respondent was also awarded costs of the case together with interest.

4. The appellants were aggrieved by the said decision of the trial court and have filed this appeal against the decision on both liability and quantum. The appellants outlined the following grounds of appeal in the memorandum of appeal:

> **1. THAT the learned trial magistrate erred in law and in fact in awarding a manifestly excessive amount of general damages of Kshs. 250,000/= and by having disregard to the medical reports produced and the injuries suffered by the respondent.**

2. THAT the learned trial magistrate erred in law and in fact by using the wrong principle in assessment of damages.

3. THAT the learned trial magistrate erred in law and in fact in holding the appellants liable when no evidence of negligence was adduced against them.

4. THAT the learned trial magistrate erred in law and in fact in failing to dismiss the respondent's claim when there was no proof adduced in court to show that the Respondent was a passenger on the said motor vehicle.

5. THAT the learned trial magistrate erred in law and in fact in failing to hold that the Respondent had not proved that the alleged injuries were sustained as a result of the accident.

5. The appellant urged the court to allow the appeal or in the alternative, re-assess the award on general damages. They also prayed for the costs for the appeal. Parties thereafter agreed to canvass the appeal by way of written submissions.

6. Through their lawyers M/s Onyinkwa & Co. Advocates, the appellants submitted that the respondent did not prove her case against them to the required standards as she gave uncorroborated evidence that failed to prove her involvement in the alleged accident. The appellant argued that the respondent did not produce any documentary evidence to prove that she was a passenger in motor vehicle Registration No. KAT 997F which she alleged collided with motor vehicle Registration No. KAW 173V/ZC 5438. The appellants relied on the decision in the case of **Securicor Security Services vs Joyce Kwamboka & Another Kisii HCCA 230 of 2005** in which it was held that courts act on evidence, not suppositions, speculations or assumptions.

7. The appellants maintained that the respondent's injuries were not proved and neither was negligence proved as against the appellants. It was the appellants' case that the respondent did not prove that the first appellant owned the accident motor vehicle Registration No. KAW 173V since no certificate from the Registrar of Motor Vehicles was produced to establish ownership. The appellants cited the case of **Kangutu Mbithi vs Henkel Kenya Ltd & Another Nairobi HCCC No. 1566 of 1997** in which it was held:

> ***"The plaintiff is bound to prove to this court the issues before the court. In this instance no proof of ownership was tendered by the plaintiff. This would have been easily done by doing a search with registrar of motor vehicles. The registrar would have issued a certificate to verify the owner of the said motor vehicles. This was not done. I would hold that proof of ownership was not established by the plaintiff of the defendant."***

8. On quantum, the appellants stated that the trial court did not adhere to the laid down principles of assessment of damages thereby making an award that was manifestly excessive and not in tandem with the injuries allegedly suffered by the respondent.

9. Through her advocates M/s Obaga & Co. Advocates, the respondent submitted that she tendered sufficient oral and documentary evidence in support of her case as opposed to the appellants who did not offer any evidence to buttress their defence or counter her evidence. She therefore argued that the trial court was justified in making a finding that the appellants were 100% liable for the accident in question.

10. On quantum, the respondent stated that the award made by the trial court was commensurate with the injuries she sustained in the accident as shown in her treatment notes, medical report and P3 form which were produced as Pexhibits 1, 2 and 3 respectively. The respondent cited the celebrated case of **Kemfro Africa Ltd t/a Meru express Service Gathogo Karimi vs A. M. Lubia & Another [1982-88] I KAR 727** which set out the principles to be observed by an appellate court in deciding whether it was justified in disturbing the quantum of damages awarded by a trial judge. The respondent also cited several comparable awards to demonstrate that the award made to her by the trial court was justified.

11. This is a first appeal and I am therefore required to consider the evidence tendered before the trial court afresh with a view to drawing my own conclusions while bearing in mind and making allowance for the fact that I neither saw nor heard the witnesses testify – **See Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] E.A. 123**. I will also have to bear in mind the fact that the appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or a misapprehension of evidence or the trial court is shown demonstrably to have acted on a wrong principle in reaching its findings. This court will however be entitled to interfere if it appears that the trial court failed to take into account particular circumstances or probabilities material to an estimate of evidence or where his or her impression, based on the demeanor of a material witness, is inconsistent with evidence in the case generally. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982-88] I KAR 278**.

12. The issues for determination in this appeal can be summarized as follows:

a. Whether the respondent proved her case against the appellants to the required standards.

b. Whether the award of Kshs. 250,000/= general damages made to the respondent was merited.

13. On the first issue the respondent needed to prove, on balance of probabilities, that she was involved in the accident in question and that the said accident was caused by the negligence of the respondents. The respondent's testimony before the trial court was that she was, on 11th July 2011, a lawful passenger in motor vehicle Reg. No. KAT 997F travelling along Ikonge-Kebirigo road when at Ikonge area, the defendant's truck which was coming from the opposite direction and was overtaking another vehicle started swerving from side to side before hitting the matatu in which she was travelling. She sustained injuries for which she was admitted at Nyamira Hospital for 1 ½ weeks. The respondent's sole witness, PW1, Dr. P. M. Ajuoga stated that he examined the respondent on 22nd May 2009 and established that she sustained the following injuries in the accident.

a. Dislocation of right leg

b. Deep cut wound on the left leg and thigh.

c. Chest contusion

d. Bruises on the fore head.

14. As I have already stated in this judgment, the respondent availed the treatment notes, medical report, P3 form and police abstract as exhibits in support of her case. The respondent's claim that she was involved in the accident was not rebutted by the appellants who did not tender any evidence to controvert the respondent's case. I find that the plaintiff established, on a balance of probabilities, that she was involved in the accident in question and that she sustained the injuries outlined in her plaint.

15. Turning to the issue of liability and the respondent's claim that the appellants were responsible for her injuries because the accident in question occurred due to their negligence. The appellants specifically denied owning the accident truck Reg. No. KAW 173V (hereinafter "The accident motor vehicle"). This denial is contained at paragraph 4 of the defence. Having made the said denial, the respondent was under an obligation to establish on a balance of probabilities, that the 1st appellant was indeed the owner of the said accident motor vehicle.

16. **Section 107 (1) of the evidence Act** stipulates as follows:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of the facts which he asserts must prove that those facts exist."

17. Indeed, it is trite law that courts act on nothing else but evidence in arriving at a decision. **See**

Securicor Security Services vs Joyce Kwamboka & Another Kisii HCCA No. 230 of 2005. In the instant case, the only piece of evidence that the respondent presented in support of her claim that the appellants were liable for her injuries by virtue of being the owner and driver, respectively of the accident motor vehicle was a police abstract. This brings me to the next question which is, whether a police abstract is adequate/sufficient proof of ownership of a motor vehicle. The appellant submitted that ownership of the accident motor vehicle was not proved as the respondent did not produce a copy of the records of the registrar of motor vehicles to prove that the 1st appellant was indeed the registered owner of the motor vehicle.

18. Courts have on many occasions grappled with the same question and have held that there are circumstances under which a court may consider a Police Abstract sufficient proof of ownership. The position taken by various courts is that Police Abstract, when produced as evidence, is sufficient proof of ownership save where it is successfully challenged. In the case of **Joel Muga Opija – Vs- East African Sea Foods Ltd. [2013] eKLR** the court in affirming this position held as follows:

> ***"in our view an exhibit is evidence and in this case the appellant's evidence that the police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect that the learned Judge in failing to consider in depth the legal position of what is required to prove ownership erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the Abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."***

19. The same court before arriving the above finding had quoted with approval another court of appeal decision in the case of **Ibrahim Wandera -Vs- P.N. Mashru Ltd. (Ksm C.A. Civil Appeal No. 333 Of 2003** (Unreported) where the court made the Following observations;

> ***"The issue of liability was not specifically raised as a ground of appeal before the superior court. Tanui J., proceeded as though the appellant had not presented evidence on ownership of the accident bus. The learned judge with respect to him, did not at all make any reference to the police abstract report which the appellant had tendered in evidence. In that document the accident bus is shown as KAJ 968W with Mashiru of P. O. Box 98728 Mombasa as owner. This fact was not challenged……"***

20. The court found that the contents of a Police Abstract is sufficient to establish ownership of a motor vehicle.

21. It is also important to note that in civil cases the standard of proof is that of balance of probabilities. When an issue of ownership of a subject matter in a suit arises, a plaintiff or a party alleging it is required by law to prove the fact on a balance of probabilities. Going by the dictum in the above cited cases relating to the weight attached to a Police Abstract in so far as proving ownership of a motor vehicle is concerned, I find that the Police abstract produced by the appellant as Pexhibit 4 was sufficient proof of ownership. The said exhibit shows the 1st and 2nd appellants as the owner and driver of the accident motor vehicle respectively. The appellants did not oppose the production of the said Police abstract as an exhibit and neither were its contents contested. Under those circumstances, I find that the Police Abstract provided sufficient proof of ownership of the accident motor vehicle.

22. On negligence, the respondent attributed the accident to the negligence of the 2nd appellant who was the driver of the 1st appellant. The trial court made a finding of fact, that the accident in question was caused by the negligence of the appellants. The respondent's account on how the accident took place was not challenged by the appellants who did not tender any evidence to counter the respondent's case thereby leading the trial court to make the following findings:

"…on the issue of liability, I find the defendants to be wholly liable, the 1st defendant being vicariously so for the acts of the 2nd defendant."

23. It has severally been held that an appellate court should not interfere with the trial court's finding of fact unless the said finding is based on no evidence or on misapprehension of the evidence, the judge is shown demonstrably to have acted on wrong principle in reaching the finding. **See Mwangi vs Wambugu [1984] KLR 453**.

24. In the instant case, the appellants have not shown that there was no evidence or that the trial court misapprehended the evidence or acted on wrong principle.

25. It is therefore my finding that the trial court's finding that the appellants were 100% liable for the accident was justified and I uphold the said finding.

26. Turning to the issue of quantum, the trial court awarded the respondent the sum of Kshs. 250,000/= general damages for the injuries that she sustained in the accident. PW1 Dr. Ajuoga enumerated the injuries of the respondent as I have already noted in this judgment. 28. The principles to be observed in assessing damages were well stated in the case **of Kemfro Africa Ltd t/a Meru express Service case (supra)** as follows:

"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 for 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 of 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. See Ilango vs Mnayoka [1961] E.A 705 at p. 709, 713; Lukenya Ranching and farming Co-operatives Society Ltd vs. Kavoloto [1970] E.A. 414, 418, 419. This Court follows the same principles."

29. In the instant case, the trial court took into account the respondent's injuries and the comparable local authorities in making her award of Kshs. 250,000/= general damages. I find that the trial magistrate adhered to the principles of assessing general damages as explained in the **Kemfro case (supra).**

30. Having found that the respondent proved her case on a balance of probabilities on both liability and quantum, it is my finding that the instant appeal lacks merit and I therefore dismiss it with costs to the respondent.

Dated, signed and delivered in open court this 6th day of June, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Ochwangi for Onyinkwa for the Appellant

Mr. G.S. Okoth for Obaga for the Respondent

Omwoyo court clerk