REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 61 OF 2016

CHARLES OCHIENG OGOLA.....APPELLANT

VERSUS

BHOLE KONDELE LIMITED.....RESPONDENT

(Being an Appeal from the Judgment of Hon. A.A Odawa (RM) in Kisumu CMCC NO.307 of 2013 delivered on 28th May 2014)

JUDGMENT

Charles Ochieng Ogola ***(hereinafter referred to as appellant)*** sued **Bhole Kondele Limited** ***(hereinafter referred to as respondent)*** in the lower court claiming damages for injuries allegedly suffered on 24th April, 2013 when he was knocked down by the respondent's motor vehicle number KAK 542A.

Defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's suit with costs.

In a judgment delivered on **28th May 2014,** the learned trial Magistrate found that the appellant had not proved his case on a balance of probability and dismissed it with costs to the respondent.

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 12.6.14 filed a Memorandum of Appeal dated 28th November 2016 which sets out 4 grounds as follows:-

1) The Learned trial Magistrate erred in law and in fact by failing to appreciate the doctrine of vicarious liability

2) The Learned trial Magistrate erred in law and in fact by ignoring the plaintiff's evidence and version of the circumstances leading to the accident which evidence was not rebutted/controverted by the defendant

3) The Learned trial Magistrate erred in law and in fact in writing a judgment that is at variance with the pleadings and against the weight of evidence

4) The Learned trial Magistrate erred in law and in fact in awarding the appellant damages, in any event, which were inordinately low and not commensurate with the injuries suffered by the plaintiff

SUBMISSIONS BY THE PARTIES

The appeal was argued by way of written submission filed on behalf of both parties.

Appellant's submissions

It was submitted for the appellant that the respondent being owner of motor vehicle number KAK 542A that caused harm to the appellant was vicariously liable for the negligence of its driver. It was also submitted that the appellant was injured at Abbysinia loading bay and that the respondent's witness did not controvert the appellant's evidence since he did not witness the accident. It was further submitted that appellant's evidence that he was an employee of the respondent was confirmed by DW1who stated that he saw appellant loading metals into motor vehicle number KAK 542A.

Respondent's submissions

It was submitted for the respondent that the appellant's evidence that he was an employee of the respondent was at variance with the pleadings which stated that he was a pedestrian. It was also submitted that the appellant did not establish that the respondent was to blame for the accident and further that the police abstract produced as PEXH. 4 shows that the case was still under investigations.

The evidence

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

The appellant told court that he was a loader at Abyssinia Company and that on the material date; he was directing a trailer that was reversing at the loading yard when he was knocked down from the back by motor vehicle number KAK 542A which was also reversing. In cross-examination by respondent's counsel, appellant denied that eh was standing at the gate of Abyssinia Company when the accident occurred.

DW1 Godfrey Manyiagi Nyabera a driver with the respondent confirmed that on the material date, he went to collect metals from Abyssinia Company. It was his testimony that he reversed vehicle number KAK 542A onto loading bay section 2 as directed by a turn boy one Ambani and after he alighted from the vehicle, appellant alleged that he had been knocked down by the said vehicle. The witness conceded that later as he was leaving Abyssinia Company, the watchmen informed him that he had knocked down someone. In cross-examination by appellant's counsel, the witness conceded that appellant was one of the persons that were loading metals onto vehicle number KAK 542A and further that only Ambani would know if the accident occurred or not.

Analysis and Determination

I have perused the entire record of appeal and considered the submissions by both counsels. I note that the appeal revolves around both liability and quantum which I shall consider as hereunder.

The learned trial magistrate rightfully found that the appellant was at Abyssinia Company on the date of

the accident.

At paragraph 5 of the plaint, appellant pleaded:- "The accident was caused by the negligence, recklessness and/or carelessness of the defendant, their agent and/or servant. DW1 Godfrey Manyiagi Nyabera conceded that he was respondent's driver and that he was driving motor vehicle number KAK 542A on the material date. Appellant stated that it was at the point of reversing motor vehicle number KAK 542A, that DW1 caused it to knock him down. The learned trial magistrate in her judgment rendered herself that the particulars of negligence were not proved because the respondent's diver was not a party to the suit.

From the evidence on record, appellant's evidence that DW1, who is respondent's driver, reserved without due care and attention and caused him injuries was not controverted. One Ambani who was DW1's turn boy and who is said to have been directing DW1 in reversing the accident motor vehicle was not called as a witness. In ***Kenya Akiba Micro Financing Limited V Ezekiel Chebii & 14 Others [2012] eKLR,*** the Court of Appeal held that:-

> ***"Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides: - In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him……where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party'.***

From the foregoing, this court is entitled to, and hereby makes *adverse inference* that if Ambani who is still an employee of the respondent had been called as a witness, his evidence would have been unfavourable to the respondent's case.

Defendant's liability is vicarious. In my view the fact that the driver was not joined as co-defendant was not fatal to Plaintiff's suit. In saying so I rely on the case ***LAKE FLOWERS V CILA FRANCKLYN ONYANGO NGONGA & ANOTHER [2008] eKLR*** where the Court of Appeal held as follows-

> **"We agree with the appellant's complaint both in the Memorandum of Appeal and the submissions before us that vicarious liability was not pleaded in the plaint; and that the driver of the Mitsubishi canter was not joined as a party to the proceedings in the superior court. However, it is our view that the failure to sue the appellant's driver and the omission by the 1st Respondent to directly refer to the appellant's liability as being vicarious was not necessarily fatal to his claim. It is sufficient that the relevant primary facts were pleaded and evidence led to show the owner of the Mitsubishi canter and from which vicarious liability can be inferred as a matter of law. And as put in *Dritoo v. West Nile District Administration [1968]E.A. 428*:-**
>
> **'Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible.'**

Similarly in the case of ***Ndungu v. Coast Bus Company Limited [2000]2 E.A. 462*** it was held that:-

> ***"Liability against the employer of a driver of an accident motor vehicle largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employee's liability but to his negligence whether such driver is joined in an action for damages or not".***

Consequently; I find that the learned trial magistrate failed to appreciate the doctrine of vicarious liability and fell into error. Therefore; I find that the appellant proved that the respondent's driver was negligent and thus the respondent is found liable at 100%.

In assessing damages as is the norm, the court will consider comparables to arrive at an opinion bearing in

mind the principles set out in making considerations in appeals of this nature. In **Stanley Maore & Geofrey Mwenda at Nyeri Civil Appeal No.147 of 2002** the Court of Appeal relied on the authority of **Kemfro Africa Limited t/a Meru Express Services Gathogo Kanini A. Jubia and Olive Lubia [1982 – 88) 1 KAR 727** and stated as follows:

> ***"The principles to be observed by the 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 of 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 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."***

In her judgment, the learned trial magistrate dismissed the appellant's case but nonetheless assessed damages at Kshs. 70,000/-.

A medical report produced as PEXH. 3 shows that plaintiff suffered:-

- Injury to the neck
- Injury to the back
- Injury to the chest
- Injury to the left shoulder
- Injury to the right knee joint
- Dislocation right knee joint

Appellant prayed for Kshs. 250,000/0 and cited ***NBI HCCC 642/91 Fanny Esilako V Dorothy Muchene*** in which Kshs. 150,000/- was awarded for multiple cuts on left wrist, left upper arm, right arm , right ankle and heel and left plaintiff with permanent scars and ***NBI H.C.C.C. NO. 3736 OF 1989 Harrison Peter Odek Vs. H. Lyons & Co. Ltd*** where the plaintiff was awarded Kshs. 150,000/- for blunt injuries to the head and right eye resulting into swelling, bruises on both lower limbs, left knee and hairline crack of left tibia. In the case of ***Leah Nyaguthii Kamunya v. Kenya Broadcasting Corporation (2009)eKLR*** cited before this court by the appellant, Kshs. 200,000/- was awarded for scalp cut wound, cut wound left calf region, multiple hand bruises and blunt trauma shin. now cited by the appellant The respondent offered Kshs. 50,000/- and cited ***Gilbert Odhiambo Owuor V Nzoia Sugar Co. Ltd [2012] eKLR*** which was not attached and the nature of injuries in that case were not stated.

I have considered the cited cases. It was the duty of the advocates to guide the court by citing relevant cases to enable the court to arrive at a fair decision. Both cases cited on behalf of the appellant relate to more serious injuries than those suffered by the appellant. I have reviewed the entire record at trial and the judgment passed regarding assessment of damages and I am of the view that the sum of Kshs. 70,000/- was low to warrant interference with the award. I therefore enhance the sum for general damages to Kshs. 100,000/-.

In the result the appeal is allowed to the extent that the order dismissing the appellant's case is set aside and substituted with an award of Kshs. 100,000/ general damages. The appellant shall have costs of the appeal and of proceedings in the lower court.

DATED AND DELIVERED THIS 13*th* DAY OF *July* 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk - Felix

Appellant - Mr. Okoth

Respondent - No appearance