REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 109 OF 2012

PATRICK KAMUYA ALIAS

GACHAU PATRICK.....1ST APPELANT

STEPHEN THUITA

NJUGUNA ….....2ND APPELANT

VERSUS

ASAPH GATUNDU WANJIKU.....RESPONDENT

(Being an appeal from the judgment of Ms L. Mutai (P.M), dated the 3rd day of October 2012 in Karatina Principal Magistrates' Court Civil Case No. 54 of 2011).

JUDGMENT

The appellants were sued by the respondent for general damages for pain and suffering, special damages of **Kshs 123,933/=** costs of the suit and interest at court rates on damages and costs. The suit against the appellants arose out of a road traffic accident which occurred on Karatina-Sagana Road on 5th day of October, 2008. According to the respondent's plaint, the accident involved a collision of motor vehicle registration number KRL 570 and motor vehicle registration number KAZ 705W in which he was travelling as a lawful, fare-paying passenger at the material time.

The 1st appellant was alleged to be the owner of the vehicle while the 2nd appellant was its driver at the time of the accident; it was the respondent's case that were it not for the negligence or carelessness of the latter in driving, managing or controlling motor vehicle registration number KAZ 705W, the accident would not have occurred.

As a result of the accident, so the respondent averred, he sustained severe injuries as a result of which he suffered loss and damage. He also pleaded that the 2nd appellant was charged with the offence of careless driving at **Karatina Principal Magistrates' Court in Traffic Case No. 391 of 2008** where he was convicted on his own plea of guilty. He relied on the doctrine of res ipsa loquitor and imputed vicarious liability on the 1st appellant.

The appellants denied the respondent's claim and in their joint defence which they filed in court on 11th November, 2011 they denied the occurrence of the accident involving the two motor vehicles as alleged or at all; they also denied the ownership of motor vehicle registration number KAZ 705W or that the 2nd respondent was its driver; they denied that the respondent was travelling in that motor vehicle or that he

suffered any injuries as alleged or at all; the appellants also denied that the respondent had suffered any loss or damage. They pleaded that the accident was caused by the driver of motor vehicle registration number KRL 570 and to the extent that the plaintiff had not joined him to his suit, the suit was thereby incurably defective and incompetent.

At the hearing of the respondent's suit only the respondent testified; the appellants did not testify and opted not to call any witnesses.

Upon conclusion of the trial, the learned magistrate held that based on the evidence before her, the appellants were solely to blame for the accident; she proceeded to award the plaintiff the sum of Kshs 500,000/= as general damages and Kshs 3,700/= as special damages. The respondent was also awarded costs of the suit and interest accruing from the date of judgment. It is against this decision that the appellants have now appealed to this court. In their memorandum of appeal, they have raised the following grounds:-

1. The learned magistrate erred in law and in fact by failing to appreciate that the burden of proof lay squarely on the plaintiff;

2. The learned magistrate erred in law and in fact in entering judgment in favour of the plaintiff;

3. The learned magistrate misdirected herself on the assessment of quantum of damages in the sum of Kshs 500,000/=
4. The learned magistrate erred in law and in fact by disregarding the submissions by the appellants' advocate;

5. The learned magistrate erred in law and in fact by failing to give the reason for her determination and findings; and

6. The learned magistrate erred in law and in fact in basing her decision on the plaintiff's evidence that was not corroborated and which failed to discharge the burden of proof.

Parties agreed to have the appeal determined on the basis of written submissions and directions were issued accordingly. Before considering those submissions it is always necessary to revisit the evidence at the trial and analyse it afresh on an appeal such as this; as the first appellate court, this honourable Court is not bound by the findings of fact of the trial court but will normally come to its own conclusions before either upholding or upsetting the lower court's decision. It must always be noted, however, that the trial court always enjoys the advantage of hearing and seeing the witnesses. (See **Selle v Associated Motor Boat Co. [1968] EA 123**).

The respondent testified that he worked as a banker in Nairobi and that on 5th October, 2008, he was travelling from Nairobi to Nyeri in Motor vehicle registration number KAZ 705 W. The said vehicle was a public service vehicle commonly referred to as 'matatu' and he was therefore travelling in it and seated behind the driver as a fare paying passenger. At about 8.pm while at Karatina, the 2nd appellant who was driving the matatu attempted to overtake vehicles ahead of him but ended up ramming into a lorry which turned to enter a junction on the side of the road that the matatu was overtaking from; as a result of this collision the matatu landed into a ditch. The respondent testified that he was injured on the right leg; he lost two front lower teeth and the rest of the teeth were cracked. He was helped by Good Samaritans and got treated at Jamii hospital before he was transferred to Outspan hospital. An x-ray on his right leg revealed that he sustained a fracture. It was operated on at Outspan hospital and a metal plate inserted. Temporary dentine was also fixed in his mouth. He was discharged on 23rd October, 2008. The witness produced the medical records and the medical report which was admitted in evidence by consent without necessarily calling its maker. He testified that he incurred expenses of up to Kshs 120,200/= for his treatment.

It was the respondent's case that the accident had impacted his life negatively; he cannot play football as he used to; he cannot also walk for long distances; owing to the injury to his dental formula, he cannot eat

hot food or take cold liquids.

To support his contention that the 2nd appellant was negligent, the respondent relied on the criminal proceedings in the magistrates' court in which the 2nd appellant had been charged and convicted of the offence of careless driving contrary to **section 49(1)** of the **Traffic Act, Cap 403**. He asked for both special and general damages.

That is all there was to the evidence admitted at the trial; as noted the appellants did not proffer any evidence and therefore the only evidence upon which the learned magistrate based her decision was that the of the respondent.

One of the issues that the trial court was confronted with was whether indeed motor vehicle registration number KAZ 705 W was involved in a road traffic accident on the 5th October, 2008 along Karatina-Sagana Road. The answer to this issue was found in the uncontroverted evidence of the respondent who testified that he was a passenger in the vehicle at the material time and that the accident in which this particular vehicle was involved was reported to the police. A police abstract showing that the accident was reported at that Karatina police station on 5th October, 2008 was produced and admitted in evidence. The respondent is indicated in that abstract as having been a passenger in the ill-fated vehicle.

Besides the police abstract, the respondent also produced a charge sheet showing that the 2nd appellant was charged with a traffic offence related to the accident; according to the particulars of the offence, it was alleged that on 5th October, 2008 at around 8.00 pm along Karatina-Sagana Road at Jambo area in Nyeri District, the 2nd appellant drove motor vehicle registration number KAZ 705 W without due care and attention as a result of which this vehicle was involved in an accident with motor vehicle registration number KRL 570.

The ensuing criminal proceedings are clear that the 2nd appellant not only pleaded guilty to the offence and but he also admitted the facts to be correct. There is no doubt therefore that the motor vehicle registration number KAZ 705 W was involved in a road traffic accident as contended by the respondent.

Two other issues that the police abstract, the charge and the criminal proceedings against the 2nd appellant appear to resolve was whether the 2nd appellant was the driver of the vehicle and whether the respondent was a passenger in that vehicle. The police abstract shows that the 2nd appellant was the driver of motor vehicle registration number KAZ 705 W at the material time; he was charged in that capacity in the subsequent criminal proceedings in the magistrates' court and as noted, he pleaded guilty to the charges. There is no room for doubt that the 2nd appellant was the driver of the public service vehicle at the material time.

In both the police abstract and the charge sheet, the respondent is indicated as having been a passenger in the vehicle, registration number KAZ 705 W. The respondent himself testified that he was a fare-paying passenger in the vehicle and was travelling from Nairobi to Nyeri when this vehicle was involved in the accident.

The police abstract, the charge sheet and the criminal proceedings were admitted in evidence without any objection from the appellants or any of them; in the absence of any evidence to the contrary, this documentary evidence coupled with the respondent's unchallenged testimony constitute a sufficient proof, at least on a balance of probability of the fact that motor-vehicle registration number KAZ 705 W was involved in a road traffic accident on 5th October, 2008 along Karatina-Sagana Road; that the 2nd appellant was the driver of the vehicle at the time; that the respondent was a passenger in the vehicle; and that the 2nd appellant was negligent in driving, controlling, or managing it.

The appellants denied liability of the accident in their statement of defence; in particular, they attributed liability to the respondent and the driver of motor vehicle registration number KRL 570. The respondent was alleged to have failed to buckle himself with the safety belt and that he kept moving up and down the

vehicle despite repeated warnings from the conductor not to do so. The driver of the motor vehicle registration number KRL 570 on the other hand was blamed for being negligent and in particular when he allegedly swerved to the right lane from which the matatu was overtaking.

The respondent's case was that had the 2nd appellant not attempted to overtake at a junction then the accident would not have occurred. None of the appellants testified and therefore the allegations that the respondent might have neglected to fasten the seat belt or was moving up and down in a Nissan matatu was not proved. Generally, it was not proved as to how the respondent as a passenger could have contributed to the accident when he was not in charge of the vehicle.

As for the negligence attributed to the driver of motor vehicle registration number KRL 570, the appellants did not take out third proceedings against him to determine the issue of liability between them. The respondent was clear in his mind that the accident was caused by the 2nd appellant and if the appellants or any of them thought that any other party should be blamed for the accident then they should have invoked **Order 1 Rule 15** of the **Civil Procedure Rules** which enjoins a defendant or defendants claiming against any other person who is not a party to the suit to apply for a third party notice to issue against such person for contribution or indemnity. Indeed the defendants appeared to be aware of this course when they stated in their defence that they reserved the rights to take out third party proceedings against the owner of the motor vehicle registration number KRL 750; however that never came to pass.

Without any evidence of how the respondent or the owner or driver of motor vehicle registration number KRL 750 could have caused or contributed to the road traffic accident there is no basis upon which the learned magistrate would have attributed liability to either of these persons. As it turned out, the evidence by the respondent that the 2nd appellant was negligent and thus caused the accident was not controverted; I would agree with the learned magistrate that in these circumstances there is no reason why the appellants should not have been held solely responsible for the accident; I so hold.

The next question for determination is that of quantum of both general and special damages. The respondent was awarded **Kshs 3,700/=** under the latter head though he had prayed for **Kshs 123,933/=;** he does not, however, appear to have had any qualms with what he was awarded since he did not file any cross-appeal against this award. The appellants on the other hand appear to be content with the award under this head. If both parties are satisfied with this award, there is no need for this court to disturb it; I would instead focus my attention to general damages which has turned to be a major point of contention between the appellants and the respondent.

The learned magistrate awarded the respondent the sum of Kshs 500,000/= as general damages; in the appellants' opinion, the award was inordinately high but the respondent, on the other hand, thinks that this was a fair compensation for the loss and damage he suffered as a result of the injuries he sustained from the accident.

In examining this question I am cautious that aassessment of damages is always at the discretion of the trial court; the appellate court will only interfere with that discretion if it is proved that the trial court acted on the wrong principles or the award in damages was either inordinately high or low. The appellate court will also interfere if the trial court is held to have taken into account matters which it ought not to have considered or disregarded those issues it ought to have considered and thereby arrived at a wrong decision. This has all along been held to be the appropriate formula in determining the question of assessment of damages whenever it arises; in **Butler versus Butler (1984) KLR 225** where it was held;

> "***the assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on the wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered and, in the result, arrived at a wrong decision."***

Returning to the evidence at the trial, a medical report which detailed the injuries that the respondent suffered was admitted in evidence by consent of both parties; according to that report, the respondent

suffered a closed fracture; he lost the 1st and 2nd incisor teeth on the lower right jaw; he also broke the 1st and 2nd incisor teeth on the lower left jaw; and finally, he sustained a blunt injury to the 1st and 2nd incisor teeth on the upper right jaw.

Soon after the accident, the respondent was taken to Jamii Nursing home in Karatina. The X-ray showed a fracture of the tibia bone of the right leg and the limb was placed with a Thomas splint. He was later transferred to Outspan Hospital in Nyeri town where the fracture was fixed with a plate and screws. The respondent was gradually mobilised on crutches and was discharged on 22nd October, 2008 and thereafter he was attended to as an outpatient. He was on auxiliary crutches for two months and on an elbow crutch for one month. Two cracked teeth were restored by filling; two others were removed but he was fitted temporary dentures which could be replaced by permanent ones.

The respondent complained of pains at the fracture region on the right leg after strenuous activity; he could not play football as he used to do; he experienced dental sensitivity and he was unable to bite hard using his incisor teeth which are now weak and the temporary dentures were weak.

The physical findings were that the respondent had sustained surgical scar on the antero-lateral aspect of the right leg of up to 8 inches long; the lower part of the scar which was indicated to have taken long to heal was wider; the temporary dentures were easily removable by the tongue and the two broken teeth had been restored. The doctor estimated that the permanent dentures would cost Kshs 60,000/=.

It is evident from the judgment of the learned magistrate that she considered the extent of the injuries the respondent sustained and assessed them to be serious. She considered two decisions each of which was cited by the parties' respective counsel in their submissions on the appropriate award to be made under the head of general damages; in Kericho High Court Civil Case No. 76 of 2001, Erick Kimutai versus Austin Mageto, cited by the respondent, the plaintiff was said to have suffered near similar injuries and was awarded Kshs 600,000/= as general damages in 2004. On the other hand, in Nairobi High Court Civil Case No. 2637 of 1994, Francis Mwangi versus Francis Kimeu, the claimant was awarded Kshs 200,000/= as general damages for injuries also alleged to be similar to those that the respondent suffered. The award was made in 2001.

In the Erick Kimutai versus Austin Mageto case (supra) the plaintiff was certified to have sustained severe head injury, multiple fractures and broken upper teeth. The recovery from the head injury was found to be slow and left the plaintiff with residual slurred speech, poor memory and unstable walking gait. The broken teeth were removed and replaced with artificial teeth. The plaintiff developed post-traumatic cataract of the right eye and was left with the vision of the right eye only. The fractured forearm had healed and the degree of permanent disability was estimated at 60%.

In the **Francis Mwangi versus Francis Kimeu case** (supra) the plaintiff suffered a fracture of the left humerus and a fracture of the left tibia and fibular. The court awarded him Kshs 100,000/= as general damages.

There is nothing on record that suggests that after considering the evidence on the injuries sustained by the claimant and the decisions cited by the learned counsel, the learned magistrate acted on the wrong principles in making the award that she made. No case has also been made to suggest that the learned magistrate considered extraneous matters or failed to consider relevant matters in making the award. Considering the injuries that the respondent sustained, I cannot fault the learned magistrate for the award she made as I do not find it to have been inordinately high as suggested by the appellants.

In the ultimate, I do not find merit in any of the grounds raised in the memorandum of appeal against the judgment of the lower court; I hereby dismiss the appeal with costs.

Signed, dated and delivered this 11th day of March, 2016

Ngaah Jairus

JUDGE