



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.121 OF 2014

(Appeal from the judgment of Hon. C.N. Sindani (PM) dated and delivered on 2nd October, 2014, in the original Keroka SRMCC No.185 of 2012)

H. YOUNG & COMPANY E.A LTD.....APPELLANT/APPLICANT

VERSUS

EDWARD YUMATSI.....RESPONDENT

JUDGMENT

1. On 26th October 2008, the respondent herein was a travelling aboard motor vehicle registration number KAS 047V, a Toyota Hilux Double Cabin (hereinafter in this judgment referred to as the “suit Motor Vehicle”) while in the course of his duties as the appellant’s supervisor when the said motor vehicle was involved in an accident at Amakara area along Keroka-Sotik Road in which the respondent sustained injuries. The case was heard before the lower court at Keroka and a judgment was rendered on 2nd October 2014 in which the court found the appellant solely liable for the causation of the accident and awarded the respondent the sum of Kshs. 500,000/= general damages and Kshs. 66,156/= special damages together with costs of the suit.
2. The appellant felt aggrieved by the outcome of the lower court’s case and have now filed the instant appeal in which they have raised the following grounds of appeal:
 1. **That the Learned Trial magistrate misdirected himself in law by making an award of General Damages in the sum of Kshs. 500,000/=, which sum is excessive in the circumstance vis-a-avis the injuries alleged to have been sustained by the Respondent in light of the recent Court Decisions and authorities relied upon by the Appellant.**
 2. **The learned Trial Magistrate erred in awarding special damages which were never proved to the requisite standard.**
 3. **The Learned Trial Magistrate erred in Law and in fact by failing to take into account and appreciate the Appellant’s written submission while dealing with his judgment thereby reaching erroneous decision.**
3. From the above grounds of appeal, it is discernable that the appellant has appealed against the findings of the trial court on both liability and quantum of damages.

4. When the appeal came up for directions before me on 21st September 2015, both parties agreed that the appeal be canvassed by way of written submissions.

Appellant's submissions

5. On liability, the appellant, through M/s O.M. Otieno & Co. Advocates, submitted that the respondent did not prove the allegation that there was a contract between the appellant and the respondent's employer, the Government of Kenya, that entitled the respondent to travel in the appellant's "suit motor vehicle" at the time of the said accident. The appellant contended that it was the duty of the respondent, upon alleging that there was such a contract between the appellant and his employer, to prove the existence of such a contract even if the appellant did not furnish evidence to the contrary.
6. The appellant emphasized the position held in the case of **Susan Mumbi vs Kefala Grebedhin (Nairobi HCCC NO. 3321 of 1993)** that:

"The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the defendant does not adduce any evidence is immaterial."

7. The appellant further argued that there can be no liability without negligence as the respondent did not prove that the appellant's driver was driving at a high speed and the appellant's driver was in any event not charged with any traffic offence following the said accident.
8. On quantum, while observing and acknowledging that appellate court can only interfere with the trial court's award of quantum where the same is inordinately high or low as to represent an erroneous estimate; or where the trial court proceeded on wrong principles or misapprehended material facts or evidence, the appellant submitted that the award of quantum of damages was not within the limits set by previous comparable decided cases.
9. The appellant therefore proposed an award of Kshs. 250,000/= general damages while stating that the award of Kshs. 500,000/= was inordinately high and did not correctly represent the damages suffered.

Respondent's submissions

10. The respondent, through his advocates M/s Oguttu Mboya & Co. Advocates submitted that on the issue of liability and negligence, the doctrine of **res ipsa loquitur** was applicable to the instant case as the respondent's testimony was to the effect that the appellant's driver/agent lost control of the suit motor vehicle thereby allowing it to veer off the road and roll without any contributing factors from third parties or the respondent who was a passenger therein.
11. The respondent stated that since the appellant did not tender any evidence to controvert the testimony of the respondent on how the accident occurred, the testimony of the respondent remained unshaken.
12. The respondent submitted that the police abstract (Exhibit P1) produced before the lower court by the respondent provided sufficient proof that the respondent was a lawful passenger in the appellant's suit motor vehicle. It was the respondent's submission, based on the holding in the case of **Muwonge vs Attorney General (1967) E.A pgs 17-27-** that it was immaterial how the respondent found himself on board the appellant's suit motor vehicle as what he needed to prove, was that he was a lawful passenger on the said motor vehicle at the time of the accident in question.
13. On the appellant's contention that the award of damages was excessive and hence erroneous, the respondent submitted that the trial court considered the injuries suffered by the respondent in the accident and past similar court's decisions before arriving at its finding on quantum. The

respondent referred to the principles set out in the case of **Butler vs Butler (1984) KLR** in the making of award on damages, and stated that this instant appeal did not meet the threshold set by the said principles and therefore, there was no need to interfere with the lower court's award. The respondent further argued that the instant appeal is devoid of merit and ought to be dismissed with costs.

14. This being a first appeal: This court is under an obligation to re-evaluate and analyze the evidence tendered before the lower court in order to arrive at its own independent determination while bearing in mind the fact that it neither heard nor saw the witnesses testify. See **Selle vs Associated Motor Boat Co. Ltd and others**.

15. The respondent called a total of 3 witnesses including himself, in support of his case as follows:

16. **PW1 was number 88950 Police Constable Saitoti David** testified that a police file No. TAR 83/2007 in respect to self-involving accident was opened in respect of the accident that occurred on 26th October, 2009 involving the suit motor vehicle. His testimony was that the driver of the suit motor vehicle stated, upon being interviewed after the accident, that the respondent was a passenger on board the said motor vehicle at the time of the accident in question. He stated that their investigations revealed that the suit motor vehicle lost control and rolled 3 times thereby causing injuries to the respondent. He however confirmed that the driver of the ill-fated motor vehicle was not charged with any traffic offence following the said accident and the police file was closed. He produced, exhibit P1, the police abstract in respect to the said accident.

17. **PW2 Edward Yumatsi Lusimba**, the respondent herein, testified that he was an employee as a material officer quality control building construction of the Ministry of Roads and was on the fateful day assigned to Keroka-Sotik road construction project in which the appellant was the main contractor. He stated that at the time of the accident, he was stationed at Kisii region and on the day of the accident, the appellant had assigned to him the suit motor vehicle to collect him and 4 other staff members from Kisii to the resident engineer's office in Sotik. They arrived in Sotik safely and the 4 staff members alighted from the vehicle whereupon the respondent and the appellant's driver proceeded to Keroka for other duties and as they were heading back to Sotik to collect the staff members, the vehicle which was moving at a very high speed swerved, lost control, veered off the road and rolled several times. The respondent testified that he lost consciousness only to regain it at Tenwek hospital and it is then that he realized that he had sustained the following injuries in the said accident:

- **Injuries on the right shoulder (clavicle) fracture.**
- **Deep cut wound on the elbow joint, wrist, pain in the head and chest, injury to the right knee.**

18. The respondent's case was, that he was following the said accident, admitted at Tenwek Hospital for about 2 days and thereafter to Aga Khan Hospital – Kisumu from 30th October, 2009 to 24th November 2009. He was later on treated at Kisii Level 5 Hospital as an outpatient and further admitted to Kakamega Referral Hospital from 1st December 2009 to 4th December 2009. He stated that he incurred treatment expenses at all the hospitals where he was treated. The respondent produced several exhibits in support of the injuries that he sustained in the accident and the treatment expenses that he incurred in the various hospitals.

19. **PW3 was one Wilson Mokongo Marwa, a medical officer stationed at Hema Hospital.** He testified that on 10th March 2011 he examined the respondent in regard to the injuries he had sustained in the accident and found that he had sustained a deep cut wound on the head, bruises on the knee, fracture of the right clavicle bone and deep cut wound on the left elbow. He prepared a medical report which he produced as Exhibit P13 and also filled the p3 form which was produced as exhibit p11. Upon being cross-examined by Mr. Ochoki counsel for the appellant, PW3 stated that the respondent may have fully healed from he said injuries and he classified the injuries as maim.

20. At the close of the respondent's case, the appellant's counsel sought an adjournment to enable him avail the defence witnesses but on 22nd July, 2014 the appellant closed its case without calling any evidence.
21. Judgment in the case, which is the subject matter of this appeal was then delivered on 2nd October, 2014.

Analysis and determination

22. After perusing the record of appeal, the parties respective written submissions and the authorities cited. I discern the issues that require this court's determination to be as follows:
- a. **Whether respondent proved that the appellant was wholly liable for the accident.**
 - b. **Whether the award of damages was so high that it amounted to an erroneous estimate.**

Liability

23. On liability, I find the respondent proved that the appellant was the owner of the suit motor vehicle through exhibit P.14 which was a copy of records from the registrar of motor vehicles. The said motor vehicle was at the time of the accident being driven by the appellant's driver whom the respondent named as one Romanus Okoth. The respondent produced a police abstract as an Exhibit P1, in support of his case that he was a lawful passenger in the appellant's motor vehicle.
24. The appellant has however argued that the respondent did not prove liability on its part on the basis that he did not prove that there was a contract/agreement between his employer, the Government of Kenya through the roads ministry, and the appellant, that entitled him to travel in the appellant's suit motor vehicle. I do not accept the appellant's argument that failure to produce an agreement/contract connoted failure to prove liability. The respondent testified under oath, on the circumstances that led to his being a passenger in the appellant's suit motor vehicle. I find that his testimony was consistent and was not shaken even upon rigorous cross-examination by the appellant's counsel. His claim that the roads ministry was working in conjunction with the appellant in constructing the Keroka – Kisii road was not controverted.
25. In any case, for the purposes of this claim under the provisions of Insurance (Motor Vehicle third Party Risks) Act Cap 405 of the laws of Kenya, it was enough for the respondent to prove that he was a lawful passenger in the suit motor vehicle for him to get compensation in damages. The circumstances under which he became a passenger in the said vehicle are immaterial in so far as the claim for damages is concerned.
26. The appellant did not furnish the court with evidence to counter the respondent's claim that he was a lawful passenger or that he happened to be in the suit motor vehicle without the driver's consent.
27. The appellant further argued that the respondent did not prove negligence on the part of the appellant's driver and therefore, liability could not arise without proof of negligence. On negligence, the respondent at paragraph 6 of the plaint, pleaded that he shall rely on the doctrine of **res ipsa loquitur**.
28. During evidence, the respondent testified as follows on examination in chief:

“We did not arrive to (sic) Sotik safely. We were heading towards Sotik, there was a sharp bend and the driver was moving at a very high speed. I could tell from the motion of the motor vehicle. As we approached Amakara area, the section of the road was under construction. The driver swerved and as he tried to bring it to the road the driver lost control since it was moving at a high speed and motor vehicle rolled.”

29. It is my finding that upon invoking the doctrine of *res ipsa Loquitor* and after giving a graphic testimony on the sequence of events that led to the accident, which testimony was not impeached on cross-examination, the burden of proof shifted to the appellant to prove that the accident occurred due to any other external or unforeseeable force other than the negligence of its driver/agent. The appellant did not discharge this burden. It is therefore my finding that a motor vehicle which is being driven carefully and diligently along the road does not, out of the blue, veer off the road and roll. The respondent was a passenger in the suit motor vehicle and could not therefore be said to have caused the accident or contributed to it in any way whatsoever.

I find that the trial court was therefore justified to hold that the appellant was wholly to blame for the accident.

Quantum

30. The appellant has taken issue with the award of general damages of the sum of Kshs. 500,000/= stating that the said sum was inordinately high and was not within the limits set by previous comparable decided case.

On quantum, it is now trite law that an appellate court will not interfere with trial court's award of damages except where the same is inordinately high or so low as to represent an erroneous estimate; or where the trial court proceeded on wrong principles or misapprehended material facts or evidence.

31. In *Henry Hilaya Ilanga vs Manyema Manyoka (1961) EA 705*, the court stated the principles of assessing damages as follows:

“the appellate court is entitled to reevaluate the evidence upon which the trial judge relied upon to arrive at those conclusions. Further, that the trial judge did not apply any wrong principle of law in assessing that damages at Kshs. 5,000/= as that amount was neither too low nor so inordinately high as to be a wholly erroneous estimate of the damages and the disallowance of the respondent's claim for Kshs12, 000/= did not sufficiently affect the gravity of the trespass to justify the reduction on damages.”

32. In the case of *Kemfro Africa Ltd T/A Meru Express Services, Gathongo Kaniohi vs A. M. Lubia and Olve Lubia (1982-88) I KAR 777* the court of Appeal held inter-alia, that:

“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 are that it must be satisfied that either the judge, in assessing damages took into account a relevant one or that short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages.”

33. In the instant appeal, the trial court had the following to say in making his final award on damages.

“As to the issue of quantum the plaintiff stated several injuries. The medical report produced by PW3 list the following injuries sustained by the plaintiff:

- **Deep cut wound on the head.**
- **Bruises on the knee.**
- **Cerebral concussion**
- **Fracture of the right clavicle bone**
- **Deep cut wound on the left elbow**

The report noted that the fracture was healing well while the other injuries being soft tissue injuries had healed leaving scars but with no permanent disability. I did

consider the submissions made by respective parties on the issue while the defence is of the view that an award of Kshs. 250,000 is sufficient the plaintiff is of the view that 800,000/= would be adequate. In the authority of *Hassan Noor Mahmood vs Jae Youn Ann (2001)* the court granted Kshs. 200,000/= as general damages for similar injuries. However it should be noted that the said case is over 13 years old and the standing of the shilling has changed due to fluctuation. I thus considering the fact that plaintiff sustained a fracture among other injuries find the award submitted to be on the lower side. In submissions by the plaintiff for an award of 800,000/= they relied on the authority of Civil Appeal No. 333 of 2003 where the court awarded Ksh. 784,662/= however the said authority is distinguishable from the present case since the plaintiff therein did pass on while in the present case the plaintiff only sustained a fracture among other injures that were said to be soft tissue in nature. After analyzing the nature of the injuries, the present economic realities and fluctuation rates I pine that an award of Kshs. 500,000 is sufficient. According I award the plaintiff general damages of Kshs 500,000. On the limb of special damages I concur with the analysis of the defence on the same. I award Kshs. 66,156/= which I found to have been proved.”

34. From the above extract of the trial court’s judgment, I note that the learned trial magistrate considered similar previous court decisions/awards made for the same injuries. The trial court also considered the nature of the injuries sustained by the respondent and their resultant effects on his health and further considered the proposals on quantum made by the respective parties before arriving at his findings on damages. The evidence on record shows that he respondent’s injuries necessitated in admission to various hospitals for treatment. The trial court also took into account the inflationary trends that have lowered the value of the Kenyan shilling from the time the comparable court awards were made.
35. Under the above circumstances, it is my finding that the trial court’s award of damages complied with the principles to be observed in the making of such awards.
36. This court finds nothing wrong with the said award. It is not enough to say that a different judge could have come at a different finding. The appellant has not stated that the trial court misapprehended or took into account an irrelevant factor or left out of account a relevant one or that the amount awarded was so inordinately high that it was a wholly erroneous estimate of the damages.
37. Fort the reasons stated above, I find no merit in the appeal and dismiss it in its entirety. The lower court’s decision is hereby confirmed and upheld. The respondent will have the costs of the appeal and the lower court case.

Dated, signed and delivered in open court this 6th day of June, 2016

HON. W. A.OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the Applicants
- Mr. Oguttu for the Respondents
- Omwoyo: court clerk