REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 86 OF 2013

LENSON PRODUCTS LIMITED……..……1ST APPELLANT

FAJA INVESTMENTS LIMITED……..….2ND APPELLANT

VERSUS

NJERI MBURU…….……RESPONDENT

(Being an appeal from the judgment /decree of Hon. M.W. Mutuku, Senior Resident Magistrate delivered on the 13th December, 2011)

JUDGMENT

This judgment is in respect of an appeal against the judgment delivered in the Kigumo Resident Magistrate's court on 13th December, 2012. In that judgment, the respondent was awarded Kshs. 250,000/= as general damages for pain and suffering as a result of the injuries she is said to have sustained in a road traffic accident involving motor vehicle registration number **KAR 505S** (hereinafter "the vehicle") whose registered owner was the 2nd appellant; the first appellant was described as the vehicle's beneficial owner in the plaint dated 30th January, 2009.

According to the respondent's plaint the respondent was walking along Kenol-Murang'a road when the appellants' driver, servant or agent drove, managed and controlled the vehicle so negligently that he caused it to ram into the plaintiff.

As a result of the accident the respondent is said to have sustained injuries, more particularly on her chest wall and left hip; consequently she suffered loss and damage for which she sought compensation in the suit she filed against the appellants.

In their defence dated 27th April, 2009, the appellants denied that a road traffic accident involving their vehicle ever occurred and that if it occurred at all then it was solely caused or substantially contributed to by the respondent herein. The defendants also laid blame on an unidentified motor vehicle which they claim hit and ran over the respondent. They denied that the respondent sustained any injuries or suffered any loss in any event.

After taking evidence from the plaintiff, her two witnesses and one defence witness, the learned magistrate concluded that the plaintiff had proved her case on a balance of probabilities and entered judgment for the respondent against the appellants.

Being dissatisfied with the decision of the learned magistrate, the appellants appealed against the judgment and in their memorandum of appeal filed in court on 29th October, 2012, they raised the following grounds:

1. That the learned magistrate erred in holding the appellants 100% liable when the evidence on record showed that the respondent contributed to the accident;

2. That the learned magistrate erred in law and in fact in awarding Kshs. 250,000/= as quantum which amount is excessive and manifestly high in the circumstances as the injuries pleaded were soft tissue injuries and parties are bound by their pleadings;

3. The learned magistrate erred in law and in fact in finding that the plaintiff had suffered a fracture on the second rib when the same was not pleaded;

4. That the learned trial magistrate erred in law and in fact in awarding the plaintiff Kshs. 4,500/= as special damages which amount had not been pleaded or proved;

5. That the learned trial magistrate erred in law and in fact in wholly disregarding or failing to accord due and proper consideration upon the appellants' written submissions and the cases cited;

6. That the learned trial magistrate erred and misdirected himself in law and fact by relying on authorities which were not relevant in the circumstances thus arriving at an award which was erroneous;

7. That the learned trial magistrate erred and misdirected himself in law in the assessment of damages awardable to the respondent when the plaintiff had not proved her case on a balance of probability; and finally,

8. That the decision of the learned trial magistrate is against the weight of evidence.

In order to appreciate the case against the appellants and the grounds upon which their appeal is based, it is necessary to look at the evidence presented at the trial and evaluate it afresh; this exercise will, no doubt, enable the court appreciate the rationale behind the learned magistrate's judgment.

Without disregarding the evidence of the rest of the witnesses the evidence of the plaintiff and the defence witness was in, my view, quite pivotal in determination of the party liable for the road traffic accident.

The plaintiff testified that on the material day, she was walking off the road when the defendants' motor vehicle coming from the opposite direction knocked her down and soon thereafter overturned. According to her evidence the driver of the vehicle was to blame because he swerved off the road to her side and knocked her. She testified that there were two vehicles and that one of them was trying to overtake the other; in re-examination she was clearer that it was the vehicle that knocked her which was overtaking the other vehicle when the accident happened. This was the appellant's motor vehicle registration number KAR 505S.

The driver of the appellants' vehicle, Anthony Njenga Wanyoike testified, on the other hand, that he drove the vehicle at the time material to the suit in the subordinate court. He confirmed in his evidence he was driving down a slope from Kenol towards Murang'a behind a trailer which apparently was travelling in the same direction. The witness attempted to overtake the trailer but abandoned the move when he saw a Nissan matatu behind him also attempting to overtake. According to this witness, the matatu could not go beyond the trailer ahead of him ostensibly because there was an oncoming vehicle and therefore it forced its way between the vehicle that this witness was driving and the trailer.

The appellants' witness testified that in a bid to avoid hitting the matatu ahead of him he swerved to the right side and hit the matatu which then swerved to the extreme left side of the road. The vehicle this witness was driving landed in ditch. This witness said that "motor vehicle hit a woman who was holding a

child". It is not clear which motor vehicle he was referring to. The witness could only remember part of the registration number of the vehicle which is alleged to have overtaken the vehicle he was driving; according to him, part of the registration number of that vehicle was KAP. He confirmed in his evidence in chief that he did not see any other vehicle of registration number KAR.

The police officer from Kabati Police Station where the accident was reported told the court that apart from the vehicle the appellants' driver was driving, there was another vehicle at the scene at the material time; this vehicle was a Toyota matatu registration number KAR 505C. According to him, it is the minibus driven by the appellants' driver that hit the respondent.

According to the appellants' witness' evidence, there were at least three vehicles at the scene of the accident when the accident occurred; this was the vehicle he was driving, the trailer ahead of him and the matatu that overtook him. What is intriguing in his evidence is that apart from the registration number of the vehicle he was driving, he could not recall the registration numbers of either of the other two vehicles.

If the matatu overtook him and forced its way between this witness' vehicle and the trailer, as alleged by this witness, there was certainly enough time for this witness to note, at least in his mind, the matatu's registration number. This vehicle ought to have been of particular interest to him considering, as he alleged, it was being carelessly or recklessly driven to the extent that it was even hit by this witness' vehicle.

The officer from the police station where the accident was reported said that according to the report in the occurrence book, there were two vehicles at the scene of the accident; this was the minibus which the appellants' driver was driving and the matatu whose registration number was recorded as **KAR 505C**. This evidence appears to be consistent with that of the respondent who testified that indeed there were two vehicles and that one of them, which was the appellants' vehicle, was trying to overtake the other when it hit her.

The court also notes that the appellants' driver confirmed in his evidence that at one point before the respondent was hit, he attempted to overtake but could not because a matatu behind him was also trying to overtake. He said that he swerved to the extreme right in order to avoid hitting the matatu that was now in front of him. If indeed this vehicle swerved to the right, it is highly probable that it is at this time that it hit the respondent who was on that side of the road.

The appellants blamed the accident on another vehicle which they described as "unidentified." From the evidence given, the so called unidentified vehicle was the matatu whose particulars were with the police at Kabati police station where the accident was reported. If the appellant's driver could not recall the registration number of the matatu which they blamed on the accident, the appellants could easily have obtained this information from the police and taken appropriate steps to join the owner or owners of that vehicle to the suit against them if they believed the driver of that vehicle was to blame for the accident.

This analysis of the evidence on record leads me to conclude that the learned magistrate made correct findings of fact and came to the correct conclusion as to who was responsible for the accident; I have not found any evidence to suggest that the respondent and her witness were not credible witnesses. Although it has been argued that the respondent is said to have been unconscious after the accident and therefore could not tell immediately what transpired thereafter, she was alert before the accident and she could vividly recall the events before the accident. It was not proved that her loss of consciousness adversely affected her memory.

The appellants also argued that the case was still under police investigations, thereby suggesting that it had not been established as to who was responsible for the accident. It is true that the police may have still been investigating the cause of the accident, at least as at the time the police testified in court; however, if there was sufficient evidence to prove, albeit on a balance of probabilities, that the appellants' driver was to blame for the accident, there was nothing wrong in a civil suit based on negligence being lodged against them.

In these circumstances I am unable to agree with the appellants that the learned magistrate's findings on liability were against the weight of the evidence presented before him.

On the issue of quantum, it is apparent from the plaint that the respondent particularised the injuries sustained as "blunt injuries on the chest wall" and "blunt injuries on the left hip". The doctor who examined the respondent confirmed that indeed the respondent sustained blunt injuries on the chest wall and left hip; in addition, however, the doctor also testified that the x-ray showed that the respondent suffered a fracture on the 2nd rib of the left side of her body. It is for this reason that the respondent's counsel applied to amend her plaint to include this particular injury during the proceedings of 7th April, 2010. No objection was raised and therefore the amendment was allowed by the court.

In a nutshell therefore, the injuries which were proved and no evidence was led to the contrary, were blunt injuries to the chest wall, blunt injuries to left hip and a fracture of the left 2nd rib.

The respondent was admitted in hospital for five days. At the time of examination for purposes of preparing a medical report, the respondent complained of occasional pains on the left side of the chest. The doctor found no areas of abnormalities or tenderness. He also established the injuries on the chest were severe though the pain had subsided. The fractured rib had healed and there were no residual deformities; however, the chest injury had the potential of injury to the lungs. The doctor produced his medical report which comprised his findings and opinion in evidence. He charged Kshs. 1,500/= for the report and Kshs. 3,000/= for attending court and the receipts thereof were produced and admitted in evidence.

In awarding the sum of Kshs. 250,000/= as general damages for pain and suffering, the learned magistrate said that she had considered the decisions of the cases cited to her by both the appellants' and the respondent's counsel. It appears that counsel for the respondent relied on only one decision which was **High Court Civil Case No. 182 of 1996 Benard M. Mutua & Another versus Tawfiq Bus Service Ltd** where the plaintiff was awarded **Kshs. 300,000/=** as general damages for injuries on the clavicle, the upper arm and ribs to the left side of the body. Counsel asked that the plaintiff be awarded **Kshs. 350, 000/=** considering the nature of injuries and the incidence of inflation since 2001 when the decision she relied upon was made.

On his part counsel for the appellants proposed the sum of Kshs. 20,000/= as general damages. He relied on the award in **Nairobi High Court Civil Case No. 4150 of 1991 Loise Nyambeki Oyugi versus Omar Haji Hassan** where the plaintiff is said to have sustained multiple tissue injuries and shock and was awarded **Kshs. 20,000/=** in 2001. Counsel also relied on the decision in Nairobi High Court Civil Case No. **1309 of 2002 Pamela Ombiyo Okinda versus Kenya Bus Services Ltd** where the plaintiff was awarded Kshs. 50,000/= in 2004 for a blunt injury on the head, deep cut on the forehead and both legs, soft tissue injury on the neck and blunt trauma to the hip and right eye.

Assessment of damages is always the exercise of discretion of the trial court and the appellate court will hesitate to interfere with that discretion unless it is proved that the trial court acted on the wrong principles or that the amount awarded was inordinately high or low. If the court also takes into account matters which it ought not to have considered or disregard issues which it ought to have considered and therefore arrived at a wrong decision, the appellate court will intervene. This position is properly captured in the case of **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."***

The learned magistrate considered the injuries sustained by the respondent as proved at the trial; she also considered the awards in the court decisions that were cited and came to the conclusion that the award of Kshs. 250,000/= was a reasonable compensation as damages for the injuries sustained by the respondent.

It does appear to me that the trial court acted on the wrong principles and neither can it be said that in coming to that figure the learned magistrate considered extraneous matters at the expense of relevant matters and therefore came to the wrong decision. Considering the injuries sustained, the respondent's pain and suffering, I am unable to agree that the award was inordinately high.

As far as special damages are concerned, it had been submitted on behalf of the appellants that they should be awarded "as proved". Indeed they were proved by production of receipts; this evidence was not contested, and I find no basis of faulting the learned magistrate on this account.

One final issue that was mentioned in the respondent's submissions was that the appeal was filed out of time without leave of the court. The record shows that the judgment in issue was delivered on 13th December, 2011 and that the memorandum of appeal was filed on 1st February, 2012. Counsel claimed that the appeal was filed 18 days late.

Order 49 Rule 3A on computation of time for filing any pleading or doing any other act under the Civil Procedure Act excludes the period between the twenty-first day of December of any year and the sixth day of January in the year following both days included in computing time. Judgment in the case against the appellants was delivered on 13th December, 2011. Between that date and 20th December 2011 when time stopped running the appellants had seven days. In the month of January, the year following, time commenced running again on 7th January, 2012 until the 29th January, 2012 when the thirty day period within which the appellants ought to have filed their appeal elapsed. However, since the 30th day fell on a Sunday, the last day to file the appeal was Monday, the 30th January, 2012. The appeal was filed two days thereafter on 1st February, 2012; there is therefore no doubt that the appeal was filed out of time contrary to **section 79G** of the **Civil Procedure Act.**

Ordinarily the respondent ought to have filed an application to have the appeal struck out rather than raising this issue in submissions on the appeal itself; however, even though the issue was raised belatedly, I cannot close my eyes to this fundamental omission on the part of the appellants. I am therefore inclined to find that for reasons I have given the appellant's appeal is not only deficient of any merit but it is also incompetent and for that reason it is struck out with costs**.**

Signed, dated and delivered in open court this 9th day of May 2014

Ngaah Jairus

JUDGE