REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.44 OF 2006

DANIEL NJAGI MWAI & ANOTHER…………………..APPELLANT

VERSUS

JENNIFFER WANJIKU JOHN……………………….RESPONDENT

JUDGMENT

1. The Respondent instituted a suit in the lower court (Nyahururu PMCC NO.147 of 2000) seeking general and special damages for injuries she suffered following a road traffic accident that occurred on 30th May, 2001.

2. It was the respondent's case that on that day (30th May, 2001) she was lawfully travelling aboard Motor vehicle registration Number KXN 049 Nissan Matatu along Nyahururu-Nyeri road when the 1st appellant, an agent, servant and/or employee) of the 2nd appellant so negligently drove and/or managed the said motor vehicle that it lost control and overturned and occasioned serious injuries, loss and damage to her.

3. The respondent contended that the accident and the resultant damage and loss was caused by negligence on the part of the 1st appellant. In particular, she blamed the 1st respondent for driving the motor vehicle at a speed that was unreasonably high in the circumstances; failing to apply brakes, slow down, swerve or in any other manner control the motor vehicle in order to avoid the accident; losing control of the motor vehicle and causing the motor vehicle to roll.

4. The respondent also relied on the doctrine of *Res ipsa loquitor*.

5. On his part, the 1st respondent denied the allegations of negligence levelled against him and the pleaded particulars of injury and special damages. It was his contention that the accident was caused by circumstances beyond his control namely, a tyre burst. Alleging that the tyre which burst was new, the appellants contended that any blame arising out of the tyre burst should be attributed to the tyre manufacturer, Firestone Kenya Ltd.

6. In accordance with the contention in paragraph, 5 above, the appellants issued a third party notice to Firestone Kenya Ltd (hereinafter called ***"the third party)."***

7. Despite having been served with a third party notice, the third party failed to enter appearance or file any pleadings. Consequently, on application by the appellants, an interlocutory judgment was entered against the third party.

8. The evidence adduced in court in support of the respondent's case was to the effect that, on 30th May, 2001, the respondent was travelling from Nyeri to Nyahururu as a fare-paying passenger aboard the motor

vehicle herein.

9. According to the respondent, the motor vehicle was being driven at a high speed. This was so despite it having had what the 1st appellant (driver) allegedly described as ***"a small mechanical problem."***

10. Upon reaching Wiyumiririe area, the respondent heard the sound of a metal scratching the road before the motor vehicle started swerving and eventually overturned. Although she could not read the speedometer, it was her testimony that, from the way the vehicle was moving, it was at a high speed. Since the motor vehicle overtook several vehicles and the driver was unable to control it after it started swerving, the respondent concluded that the motor vehicle was being driven at a speed that was very high in the circumstances.

11. As a result of the accident, the respondent sustained injuries on the forehead, a deep cut wound above the nose, left cheek and injuries on the left arm and left leg. She also sustained back and neck injuries and a broken tooth. She received treatment at Nyahururu District Hospital and later on at Kenyatta National Hospital. To prove these facts the respondent produced the treatment notes from Nyahururu District Hospital, PEX 2, and the treatment cards issued at Kenyatta National Hospital, PEX3.

12. Later on she saw Dr. Eustace Gatembura who prepared a medical report for her. For the services rendered by Dr. Gatembura she paid Kshs. 1000/=, supported by a receipt for Kshs. 1000/= (PEX 5). She also spent Kshs.3080/= in respect of drugs as per exhibit 6. The respondent also produced a bundle of other receipts for payments in connection with the accident herein, PEX 7(a) to (d) (This court has not is unable to confirm the total value of those receipts, as the bundle of the receipts was not availed before this court).

13. The respondent also claimed that she expended Kshs.3000/= on account of transport. She was, however, unable to prove that expense as she did not have receipt(s).

14. Before filing the suit hereto the respondent instructed her advocate to demand restitution from the appellants by a demand letter dated 13th May 2002 PEX 8. She reiterated that the driver of the motor vehicle was to blame for the accident. In this regard she contended that the driver ought to have been cautious when he realized that there was a metal bar coming off.

15. Dr. Eustace Getambura confirmed that the respondent had sustained head injury, fractured tooth and multiple soft tissue injuries.

16. In his testimony, the 1st appellant, admitted that the accident herein occurred but contended that it was caused by, a tyre burst which was beyond his control

17. Explaining that after the accident the motor vehicle was investigated and no pre-accident defects were detected, he blamed the manufacturer of the tyre, which was allegedly new when it burst, for causing the accident.

18. The 2nd appellant, Patrick Kanyangi Wachira, admitted that he was the owner of the motor vehicle herein and that the 1st appellant was his employee at the time the accident occurred. When he learnt about the accident, he visited some of the victims of the accident in hospital who informed him that the 1st appellant controlled the motor vehicle three times before it rolled.

19. When he visited the police station where the motor vehicle had been taken, he was informed that the cause of the accident was the tyre burst. Like D.W.1, he contended that the tyre that burst was new. To prove that fact, he produced a receipt that was issued to him when he bought the tyre, DEX 1.

20. After the respondent sued him, he successfully applied for leave to enjoin the third party herein to the suit. To prove that fact, he produced the application for leave to issue a third notice which he served on the third party as DEX 3. Subsequently, he applied for interlocutory judgment and was issued with a receipt, DEX 5. Like the 1st appellant he blamed the third party for causing the accident and urged the

court to condemn the third party to pay any damages awardable to the plaintiff and the cost of the suit.

21. D.W.3, CIP Harun Muriasi, who testified on behalf of the investigating officer, informed the trial court that the tyre burst contributed to the occurrence of the accident. According to him the tyre burst was beyond the control of the driver, 1st appellant. He produced the investigation report, DEX 6, which was to the effect that the motor vehicle had no pre-accident defects and that the tyre which burst was relatively new.

22. As a result, the investigation team sent the tyre to Kenya Bureau of Standards for examination. However, at the time DW3 gave his testimony no report had been received from the Kenya Bureau of Standards.

23. It was on the basis of the foregoing evidence, that the trial magistrate entered judgment in favour of the plaintiff and against the appellant jointly and severally for Kshs. 200,000/= (General damages) and Kshs. 7180/=, special damages.

24. Aggrieved by the judgment and decree of the lower court, the appellants brought the appeal herein on eight (8) grounds which can be summarized as follows:-

a) That the trial magistrate failed to enter final judgment for the defendant against the third party;

b) That the trial magistrate failed to consider the defendant's submissions and authorities;

c) That the trial Magistrate failed to find that the accident was caused by circumstances beyond the 1st respondent's control;

d) That the plaintiff did not prove negligence on the part of the 1st appellant;

e) That General damages awarded were manifestly excessive; and

f) That the trial magistrate awarded special damages which were not specifically pleaded and proved.

25. On 28th September, 2012 the parties recorded consent to dispose off the appeal by way of written submissions. Consequently, counsels for the respective parties filed submissions which I have read and considered.

26. In the submissions filed on behalf of the appellants, it is submitted that the trial magistrate failed to consider the evidence presented before her. It is contended that respondent's allegation that the motor vehicle was over speeding was merely speculative; that after the tyre burst there was nothing the driver or any reasonable man would have done to avoid the accident and that the appellants had exercised due care to ensure the road worthiness of the vehicle. Besides, nothing was produced in court to show how the accident occurred.

27. Further that after the accident occurred; the police carried investigations but failed to find the appellants culpable.

28. Since the 1st appellant's defence was that the accident was an act of God and as such unavoidable, It is submitted that the respondent ought to have led evidence capable of proving that the accident was avoidable. In this regard, reference was made to, among other cases, **Zipporah Wambua** v. **Joseph Sett Karogo** Nairobi **HCC NO.607 of 1996** where it was observed:-

> **"Indeed high speed alone does not constitute negligence. It must be shown that under the circumstances in which the vehicle was driven it was negligent to drive at the speed the offending or accident vehicle was driven. Such circumstances as were underscored in the following cases cited by defence; Thomas Lemalon Case (Supra) and Kanyi Karuga case**

(supra) are a road full of curves, dips and rises, a narrow road and one with pot holes, wet road surface, poor visibility, the number of vehicles and human being on the road etc. It was stated that it must be shown that the speed at which the vehicle was driven ought to be considered negligent in the presence of these contribution. However, there are other circumstances. For instance the slopy nature of the road as was the case in here ought to be considered"

29. In the circumstances of this case it is submitted that the appellants were able to prove that the tyre was new by producing a receipt to attest purchase of the tyre. It is reiterated that the manufacturer of the tyre was to blame for occurrence of the accident. The trial magistrate is faulted for having failed to enter final judgment against the third party.

30. As regards the award of damages, it is submitted that the general damages awarded to the respondent are not commensurate to the injuries she suffered. The argument advanced is that the trial magistrate ought to have awarded the respondent Kshs.30,000/= as opposed to the Kshs.200,000/= it awarded her. In support of that contention, the appellants referred to **Nairobi HCCC 2001 of 1992; John Otieno Ojok** v. **Samuel Onyango Abunga & Another; Nairobi HCCC No.2462 of 1981; Simon Mbai Waweru** v. **James M. Ithua; Nairobi HCCC NO.4150 of 1991 Loise Nyambeki Oyugi v. Omar Haji Hassan and Nairobi HCCC NO. 2163 of 1991; James Kevocio Mole & Bernard Kamwilwa vs. Kenya Bus Ltd.** In those authorities, general damages of Kshs. 30,000/=, 40,000/=; 20,000/= and 30,850 were awarded for injuries that were allegedly similar.

31. In reply, it is submitted that the learned trial magistrate considered the evidence presented before her by all the parties and arrived at the correct conclusion, and that the respondent gave cogent evidence to prove that the 1st appellant was negligent.

32.The fact that the motor vehicle moved for 500m (half a Kilometre) before it rolled is said to be enough evidence of the fact that the motor vehicle was being driven at a speed that was excessive in the circumstances. The 1st appellant is also blamed for having failed to apply brakes or steer the motor vehicle in a prudent manner so as to avoid the accident.

33. Regarding the cases cited by the appellants and in particular, **Nairobi HCCC NO.100 of 2002; Yusuf Abdalla v. Mombasa Liners,** it is submitted that the case is distinguishable as in that case no witnesses were called to testify and give an account of how the accident happened.

34. Concerning the contention that the trial magistrate failed to enter final judgment against the third party, it is submitted that there was no basis for doing so because the appellants failed to avail evidence capable of proving that the tyre was new but defective. The appellants are also blamed for having failed to enjoin the third party in this appeal. The court is urged not to issue any orders against the third party since it cannot lawfully be condemned unheard.

35. As for the damages, based on the decision of the Court of Appeal in **Butt** v. **Khan (1981)KLR 349** it is submitted that this court's jurisdiction to entertain the appeal on the award of damages is limited and is only exercisable on certain principles namely; the award must be inordinately high or low as to represent an entirely erroneous estimate and/or the judge must have proceeded on wrong principles or misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

36. In the circumstances of this case, it is submitted that the injuries which the respondent suffered were serious and as such incapable of being classified as soft tissue injuries.

37. Contrary to the appellants' contention that the award was excessive, the trial magistrate is said to have been guided by the authorities cited in support of the respondent's case some of which had higher awards. The authorities cited by the appellants are faulted as not being relevant to the injuries which were purely soft tissue injuries and the circumstances prevailing at the time they were decided are described as inapplicable to the present day Kenya where inflation has taken toll on the currency leading to its

devaluation.

38. Since the appellants did not submit on the other grounds of their appeal, the court is urged to treat those grounds as having been abandoned and disregard them.

39. From the grounds of appeal herein and the submissions by the respective parties the issues for consideration are:-

> i. Whether the learned trial magistrate considered the appellants' submissions?
>
> ii. Whether the learned trial magistrate erred by failing to enter final judgment against the third party?
>
> iii. Whether the respondent proved her case against the appellants?
>
> iv. Whether the general damages awarded by the trial court were inordinately high to warrant interference by this court?

40. Concerning the first issue, I find as a fact that the trial magistrate did not indicate whether or not he considered the submissions filed by the parties. I also find as a fact that the trial magistrate failed to express his opinion on the submissions filed on behalf of the respective parties. However, upon considering the totality of the judgment, I hold the view that such failure to expressly state whether he considered the submissions filed by the parties did not prejudice any of the parties.

41. With regard to the second issue, having considered and re-evaluated the evidence adduced before the lower court, I agree with the trial magistrate observation that:-

> **"Up to the close of the case there was nothing to show that the tyre was new thence not expected to burst."**

42. In my view, the burden of proving that the tyre was new and thus unexpected to burst lay with the appellants. This is so since they are the ones who sought to rely on that assertion to wriggle out of the respondent's claim. To do so they needed to lead evidence capable of proving that the tyre was indeed new but defective. Having failed to produce any report from Kenya Bureau of Standards or any other expert, their assertion that the tyre was new remains a mere allegation which could not form the basis of entry of final judgment against the third party. In this regard see Section 107 of the Evidence Act, Chapter 80 Laws of Kenya which provides:-

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

43. In the circumstances of this case the receipt produced by the appellants (DEX 5) was, in my view, incapable of forming the basis for entering final judgment against the third party.

<u>Did the respondent proveher case against the appellants, and in particular the 1st appellant?</u>

My answer is in the affirmative. I say so because the evidence on record suffices to prove, on a balance of probabilities, that the motor vehicle was being driven at a speed that was excessive in the circumstances.

44. Although the 1st appellant denied having stopped on the way on what was alleged to be a small mechanical problem, upon review of the evidence on record, I find the respondent's account of what transpired before the accident happened to be more credible. For instance, the allegation that the motor vehicles overtook several other vehicles and the 1st appellant's own admission that the motor vehicle moved for about 500 metres before it overturned coupled with his evidence to the effect that he did not apply brakes to stop the motor vehicle leaves me without any doubt that the motor vehicle was being driven at a very high speed in the circumstances. In my view, that speed is the one that resulted in the 1st

respondent's inability to control the motor vehicle despite the long distance it travelled after the tyre burst. In this regard see **Robert Gichuchu Maina** v. **John Kamau** Nairobi **HCCC No. 1162 of 2002 (2004)eKLR** where faced with a similar case M.A Ang'awa J., observed:-

> **"The driver was driving on a good road when the alleged tyre burst occurred. He was over speeding and failed to control this speed. If he was indeed travelling at 50 to 60 KPH and if the tyre burst occurred the vehicle would have stopped without any incident. In this situation the said vehicle had a self-accident thus causing personal injuries to the plaintiff. I would not agree that this accident was inevitable. I find that the same was caused due to the negligence of the defendant's agent and or driver with the defendant being vicariously liable for his acts. I hereby find liability at 100%"**

Also see **Kenya Bus Services Ltd** v. **Kawira** **(2003) 2 E.A 519** where the Court of Appeal held:-

> **"Buses, when properly maintained, properly serviced and properly driven, do not just run over bridges and plunge into rivers without any explanation…………..”**

45. The evidence adduced by PW2 established negligence on the part of the appellant's driver thus:-

> **If the burst tyre was new, there is no explanation, other than that the tyre burst on hitting the bridge rails, to show why the tyre burst. New tyres do not just burst. It is either they run over a sharp object or surface or upon impact over an obstruction. The appellant, in effect, wants us to infer that because the bus had a burst rear right side tyre after the accident, then the tyre must have been the cause of the accident. With due respect to the appellant, evidence having been adduced to the effect that the bus was moving fast, it was incumbent upon the defendant to show, by evidence, that it was not the speed and lack of proper control which were the cause of the accident."** (Emphasis supplied).

46. As pointed out in the respondent's submissions an appellate court would not interfere with damages awarded by a trial court unless it is satisfied that the trial court in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or short of this, the amount was so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages. See Butt v. **Khan** (supra) and **Kemfro Africa Limited t/a "Meru Express services" V. Lubia & Another** **(No.2) (1987) KLR 30.**

47. In deciding damages to award a court must ensure that the award is within limits set out by decided cases and within limits the Kenyan economy can afford. The award must also be based on comparable injuries. See the Court of Appeal decision in **Kigaragari V. Aya** **(1982-1988) 1 KAR 768**. In the instant case the respondent had submitted for Kshs.350,000/= whereas the appellant had submitted for 30,000/=. The trial court awarded Kshs.200,000/=.

48. Having considered the circumstances of the current case, the submissions by the respective parties and the authorities cited in support thereof, I agree with the respondent's counsel that the authorities cited by the appellants were rather old and inapplicable to the circumstances of the case. The prevailing

awards for the kind of injuries the respondent suffered ranged from Kshs.150,000/= to Kshs.200,000/= for comparable injuries. See **John Mutisya Ngile** v. **Nthambi Paul Mutisya** **(2006)eKLR** where D.A Onyancha in November, 2006 awarded Kshs.200,000/= to a plaintiff who had sustained comparable injuries to wit, loss of an incisor tooth, abdominal injury likely to cause an obstruction in life, laceration wound in the perinea region and some bruises on the lower limb. Also see **Leah Nyaguthii Kamunya** v. **Kenya Broadcasting Corporation** Nairobi **HCC No.1128 of 1993 (2009)eKLR** where R.N Sitati J., on 19th June, 2009 awardable Kshs. 200,000/= as general damages for pain and suffering for comparable injuries to wit, scalp cut wound, cut wound left calf region, multiple hand bruises and blunt trauma shin. In view of the foregoing, the award of Kshs.200,000/= assessed by the lower court was not inordinately high to warrant interference by this court.

49. As concerns the award for special damages, I hold the view that no case has been made to warrant interference with that award. This is so because the appellants other than faulting the award did not lead any evidence to prove in what way the trial magistrate erred in awarding the impugned award of Kshs.7180/=. Although this court did not see the exhibits referred to in the proceeding, there being no claim by the appellants that such exhibits were not produced before the lower court, I have no basis for faulting that award as it was pleaded and strictly proved by production of receipts as by law required.

50. The upshot of the foregoing is that the appeal has no merit and is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nakuru this 7thday of October, 2014.

H. A. OMONDI

JUDGE