REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Appeal 10 of 2010

1. CHARLES KITONGA MUMO
2. EMMANUEL NZALE MUTISYA.....APPELLANTS

VERSUS

BENARD NDETO KYULE.....RESPONDENT

(*Being an appeal from the original judgment in Machakos Chief Magistrate's Court Civil Suit No. 748/2009*

by Hon. J.M. Munguti , SRM on 28/1/2010)

JUDGMENT

This is an appeal from the judgment and decree of the **Hon. J.M. Munguti** , SRM delivered on 28th January, 2010 in the Chief Magistrate's Court at Machakos Civil Suit number 748 of 2009. In that suit, **Benard Ndeto Kyule,** the respondent herein had sued **Charles Kitonga Mumo** and **Emmanuel Nzule Mutisya**, the appellants herein seeking General damages for pain, suffering and loss of amenities, costs of the suit as well as interest. The respondent alleged in the suit that on 28th November, 2008, he was lawfully walking along Machakos-Wote road when the 2nd appellant a beneficial owner and in actual possession of the motor vehicle registration number KBD 874J, but registered in the name of the 1st appellant, negligently and carelessly drove it such that he caused it to veer off the road and knock him down. Particulars of negligence he attributed to the 2nd appellant were that, he drove the vehicle without due care and attention, failed to look out or to have sufficient regard to persons or pedestrians expected to be at the place of the accident, he failed to have sufficient control of the motor vehicle and finally, he failed to break, stop and or in any other prudent manner to control the vehicle so as to avoid the accident.

As a direct consequence of the accident, the respondent sustained the following injuries;-

§ Scalp bruises

§ Blunt chest injury

§ Blunt injury of right shoulder

§ Blunt injury of right lower limb

§ Fracture of distal right fibula

§ Injury to the right ankle joint with stiffens and tenderness

Due to those injuries he incurred Kshs. 29,183/= on treatment related expenses, medical report, police abstract and transport to and from Machakos General. Following the accident, the 2nd appellant was arrested, charged with the traffic offence of careless driving, convicted on his own plea of guilty and sentenced to a fine of Kshs. 4,000/=. He therefore sought compensation for the injuries aforesaid.

The suit was defended. In a joint defence, the appellants denied that they were registered and or beneficial owners of the motor vehicle, the occurrence of the accident, negligence and the particulars thereof attributed to them. In the alternative, they pleaded that if there was such an accident the same was wholly caused by or substantially contributed to by the negligence of the respondent in that he did not keep a proper look out, had sufficient regard towards other road uses, jumped on to the road and thereby placed himself in the path of the vehicle, did not check and ascertain that the road was clear before crossing, failed to observe the Highway code and as a result caused the accident. They also denied the respondent's alleged injuries, expenses incurred in treatment and the fact that the 2nd appellant had following the accident been charged and convicted for a traffic offence. For all the above reasons, they prayed that the case be dismissed.

On 27th January, 2009, the hearing of the case commenced, before **J.M. Munguti,** SRM. The respondent testified. Basically he reiterated what he had averred in his plaint. Suffice to add that he was a computer technician in Machakos town then. The accident occurred at a place called Susana Lodge at about 7.30 p.m along Wote- Machakos road. He was knocked down while on his right side of the road about 1m from the main road. As he walked along, he heard a crashing sound and when he turned back, he saw the vehicle. He jumped towards a nearby fence but the vehicle followed him there and knocked and injured him. He was thereafter treated for the injuries at Machakos General Hospital the same night and discharged. He later reported the accident to Machakos Police Station and was issued with a police abstract. Following investigations, the 2nd appellant was arrested and charged in Machakos Traffic Case number 3126 of 2008 where he pleaded guilty, convicted and sentenced to a fine of Kshs. 4,000/= in default, 4 months imprisonment.

The respondent was subsequently examined by a doctor who prepared a medical report. The medical documents, police abstract and receipts for his expenses were all tendered in evidence by consent of the parties.

Cross –examined by **Mr. Kiplangat,** learned Counsel for the appellants, he stated that he did not know what caused the motor vehicle to leave the road but he later learnt that the vehicle had hit bumps and the driver ended up loosing control of the same and in the process knocked him. With this evidence, the respondent closed his case.

The appellants apparently from the record did not offer any evidence in rebuttal or support of their defence. In other words the appellants closed their case without calling any evidence. On 28th, January, 2010, the learned magistrate found the appellants 100% liable for the accident. On quantum he awarded the respondent Kshs. 500,000/= and special damages of Kshs. 26,841/=.

The appellants were aggrieved by the judgment and decree aforesaid. Hence they jointly filed this appeal on the grounds that:-

"1. ***The learned magistrate erred in law and fact in failing to take into account the submissions given on behalf of the appellants while considering his judgment.***

2. ***The learned magistrate erred in law and fact in failing to find or determine that the respondent had not discharged his evidential burden of proving negligence and liability claimed in the plaint and proving that the appellants were indeed the one who were negligent and liable.***

3. ***The learned magistrate erred in law and fact in relying on the inconsistent evidence of the respondent in arriving at his judgment***.

4. ***The learned magistrate erred in law and in fact in considering matters that were extrinsic to the case in arriving at his judgment.***

5. ***The learned magistrate erred in law and in fact in failing to state the reasons for his judgment and the reasons why he failed to consider the appellant's submissions.***

6. **The learned magistrate erred in law and in fact by awarding special damages which were not strictly proved in view of the evidence on record and in view of the fact that the same did not support the plaintiff's claim as specified in the plaint.**

7. ***The learned magistrate erred in law and fact by entering judgment against the appellants that was against the weight of the evidence adduced in court.***

8. ***The learned magistrate erred in law and fact in failing to appreciate all the evidence tendered in court in support of the appellant's arguments and misconstruing the law applicable to the entire case.***

9. ***The learned magistrate erred in law and fact in failing to consider the authorities presented to the Honourable court by the appellants.***

10. ***The learned magistrate erred in law and in fact by entering judgment for the respondent against the appellants in the sum of Kshs. 527,880/= plus interest and costs which is a huge sum compared to the alleged injuries sustained by the respondent."***

When the appeal came up for directions on 3rd February, 2012, parties agreed as part of the directions that the appeal be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

This is a first appeal, but even so, this court will be slow to interfere with the findings of fact made by the trial court unless the findings are based on no evidence, or on a misapprehension of the evidence, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. The rationale for that caution has been restated many times, and I take que from **Mwanasokoni vs Kenya Bus Services Ltd [1985] KLR 931** where it was held at page 934-

"although this court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on appeal if this should become necessary… but the jurisdiction (to review the evidence) should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion"

As I see it, there are basically 2 issues for determination in this appeal; whether the trial court was right in finding the appellants 100% liable for the accident, and secondly, whether quantum of damages was justifiable having regard to the injuries sustained, if at all.

Beginning with the 1st issue, though the appellants filed a defence, they did not call any evidence in support thereof. In the defence they had blamed the respondent for the accident either wholly or substantially. A defence just like a plaint consist of mere allegations which must at the hearing be buttressed with cogent evidence. If no evidence is tendered, such pleading remains and is treated by court as a mere allegation. It cannot take the place of or replace the evidence which must be tendered in support thereof. In this case, the appellants having elected not to call any evidence to rebut the respondent's testimony, the trial court could not have thus acted merely on the defence filed and find that

the respondent had played a role in the accident. There was no basis upon which the trial court would have come to the conclusion that the respondent wholly or substantially caused the accident. Simply put, there was no basis upon which the trial court would have found the respondent to have wholly or substantially contributed to the accident and proceeded to apportion the blame. The appellants have invited this court in their written submissions to draw inferences as to the respondent's culpability. My response is that written submissions cannot replace evidence. Parties cannot be allowed to use written submissions to introduce therein evidence which was not tendered during the trial. In any event, and in view of the proceedings in Machakos Traffic Case Number 4387 of 2008 in which the 2nd appellant was charged and convicted for the offence of careless driving contrary to section 49 (1) of the Traffic Act, the appellants' fate as to the causation of the accident was laid to rest by dint of the provisions of section 47A of the Evidence Act. The 2nd appellant's conviction was conclusive evidence of his negligence. For all these reasons, I am satisfied that on the material placed before me, the learned magistrate was right in holding the appellants 100% liable for the accident.

With regard to quantum, it is generally accepted that this court should be slow to disturb the findings of the trial court merely because it thinks that had it tried the case in the first instance, it would have given a larger or lesser sum. In order to justify reversing of the order of a trial court on quantum, It is necessary to show that either the trial court acted upon the wrong principles of law or that the amount awarded was extremely so high or so low as to make it an entirely erroneous estimate of damages. *See* **Rook vs Rairrie [1941] 1All ER 297** and **Butt vs Khan [1981 KLR 349.** It is in the light of these principles that I consider the submissions of respective counsel on the issue.

In his submissions, the appellants have stated that considering the injuries sustained which in their view are soft tissue injuries and a single fracture, they should not have attracted an award of Kshs.500,000/=. The award therefore was not commensurate with the nature of injuries suffered and or loss proved. The award was manifestly harsh in the circumstances.

In response, the respondent took the view that considering the injuries sustained and the inflationary trends, the sum awarded was fair.

Having considered the judgment of the trial court, I do not think that the accusations levelled at him by the appellants with regard to his assessment of damages, are valid. The medical report by **Dr. Kimuyu,** which unfortunately was not included in the record of appeal but which I have seen in the original record of the trial court, attest to the seriousness of the injuries sustained by the respondent in the accident. The doctor's opinion was that the respondent suffered multiple injuries both skeletal and soft tissue. His right ankle joint had developed features of post-traumatic joint **osteostrints** and was stiff. Indeed at the time of his examination, the appellant had a limping gait and walking with single crutch for bearing weight.

In the court below, the appellants had offered Ksh. 200,000/= as quantum whereas the respondents proposed Kshs. 800,000/=. Going by the authorities referred to him, I think that the learned magistrate cannot be faulted for the award of Kshs. 500,000/= as general damages for pain, suffering and loss of amenities.

The complaint with regard to prove of special damages cannot stand either. On 27th January, 2009, during the trial a consent order was recorded in terms:-

"Special damages amended to read 29/11/2008. Documents to be admitted by consent".

Thereafter, the respondent tendered receipts with regard to his expenses amounting to Kshs. 26,841/=. The appellants cannot now be heard to say that the respondent did not strictly prove special damages.

On the basis of all the foregoing, I have no option but to find and hold that this appeal lacks merit. Accordingly, it is dismissed in its entirety with costs to the respondent.

JUDGMENT DATED, **SIGNED** and **DELIVERED** at **MACHAKOS,** this **6TH** day of **JULY**, 20**12**.

ASIKE-MAKHANDIA
JUDGE