IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJA.

CIVIL APPEAL NO. 44 OF 2014

BETWEEN

CELTEL KENYA LIMITED.....1ST APPELLANT

PAUL NJOROGE RUNGAI.....2ND APPELLANT

AND

DANIEL MACHIRA MUTHIRI.....RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Kisii (Mrs. R. Lagat-Korir, J.) dated 30th day of January, 2013

in

H.C. CIVIL APPEAL NO. 185 OF 2010)

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court, **(Lagat-Korir, J.)** dismissing the appellants' appeal against the judgment and decree of the Senior Resident Magistrate, Kisii, **(Hon. Oduor)**.

[2] The respondent herein sued the two appellants in the Senior Resident Magistrate's Court at Kisii for damages for injuries he sustained in a road traffic accident. The respondent averred that at the material time, he was a lawful passenger in motor vehicle registration **No. KAM 225Z** registered in the name of **Celtel Kenya Limited *(1st appellant)(Celtel)*** and driven by the 2nd appellant, a servant of the 1st appellant when it veered off the road and landed in a ditch due to negligence of the driver thereby occasioning serious injuries to the respondent.

He gave the particulars of negligence and the particulars of injuries he sustained.

[3] The appellants filed a joint statement of defence denying that the vehicle was registered in the name of the appellant; that the respondent was a lawful passenger; that the accident occurred and that the vehicle was negligently driven. In the alternative and without prejudice to the foregoing, the appellants attributed the injuries sustained to the respondent's negligence.

[4] The respondent gave evidence at the trial and called one witness – a police officer who investigated the accident. No evidence was tendered on behalf of the appellants.

[5] After reviewing the evidence, the trial magistrate made findings *inter alia*, that;

(i) it is a matter of general notoriety that Kencell Communications Ltd *(Kencell)* changed its name to Celtel Kenya Limited and that

(ii) the accident was without prompting by an external force and that on balance of probabilities the 2nd respondent was driving at night at a speed which was excessive in the circumstances and that the appellants were jointly and severally wholly liable.

The trial magistrate awarded the respondent Shs. 600,000/= as general damages for pain and suffering; Shs 600/= as special damages, costs and interest at court rates from the date of filing the suit.

[6] The appellants appealed against the judgment to the High Court mainly contending that the learned judge erred in finding the appellants liable without the respondent establishing the ownership of the vehicle; that general damages were not proved and that the award was manifestly excessive.

On the issue of the ownership of the vehicle, the High Court relying on **sections 112** and **116** of the **Evidence Act** held that the nexus between Kencell and Celtel was within the knowledge of the 1st appellant and the burden of proving that it was not the owner of the vehicle was upon the 1st appellant which it failed to do. As regards the quantum of damages, the High Court made a finding that the injuries sustained by the respondent were serious and that the award of Shs. 600,000/= was not excessive.

[7] The appellants contend in the grounds of appeal that the learned judge erred in fact and law in failing to appreciate that there was no evidence that Celtel had any link or relationship with Kencell; that the doctrine of public notoriety did not apply; that the issue of the alleged change of name not having been pleaded, the finding that the name had been changed was a baseless conjecture; that the learned judge erred in shifting the burden of proof; that the learned judge erred in failing to appreciate that the award of Shs. 600,000/= was too high in comparison with awards for comparable injuries and that the learned judge failed to address the issue of the date from which interest on damages should be paid.

[8] This is a second appeal which is governed by **section 72 (1)** of the **Civil Procedure Act**. A second appeal lies to this Court on either the ground that the decision is contrary to law or some usage having the force of law, or the decision failed to determine some material issue of law or usage having effect of law, or substantial procedural defect which may possibly have produced error in the decision of the case on the merits.

[9] Regarding the issue of ownership, the respondent pleaded that the 1st appellant was the registered owner of the vehicle. The 1st appellant denied that it was the registered owner. Although the copy of records of registration from the Registrar of motor vehicles is omitted from the record of appeal, the proceedings of the trial show that it was produced. The two courts below made a finding that the copy of records reflected that Kencell was the registered proprietor.

However, the 1st appellant testified that he was at the material time a security guard employed by G4S which provides escort services to Celtel and that he was assigned the duty of escorting Celtel's technicians to their site. The police abstract produced at the trial showed Celtel as the owner of the motor vehicle. That was consistent with the evidence of the respondent that it was to Celtel that escort services were provided.

The 1st appellant did not deny that it was using the motor vehicle or that the 2nd appellant was its employee.

[10] By **section 8** of the Traffic Act *(Cap 403)*, the person in whose name a vehicle is registered is deemed to be the owner of the vehicle unless the contrary is proved. Further, **section 116** of the **Evidence Act** provides:

> **"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is in the person who affirms that he is not the owner."**

[11] The ownership of a motor vehicle is a mixed question of law and fact. In law, Kencell was the registered proprietor. However, the appellant proved to the contrary by oral evidence and police abstract that Celtel was in possession of and was using the motor vehicle for its business when the accident occurred. The burden of proof shifted to the 1st appellant to prove that it was not the owner.

The 1st appellant did not offer any evidence at the trial. It did not even issue a third party notice to Kencell. In the premises, the finding of the trial court cannot be faulted.

Furthermore, the 1st appellant has not shown that the decision was contrary to law and that a second appeal lies to this Court from the findings of the trial judge.

[12] The general damages of Shs. 600,000/= awarded by the trial magistrate were based on the appreciation by the trial magistrate of the gravity of the injuries and incapacity that the respondent suffered.

The High Court considered the award and made a finding that the award was not excessive and that the appellants had not shown that the trial court proceeded on wrong principles. The assessment of general damages is an exercise of judicial discretion by a trial court which discretion should be exercised judicially. An appellate court can only interfere with the exercise of such discretion on the well-known principles. The High Court declined to interfere. The appellants have not satisfied any of the requirements of **section 72 (1)** of the **Civil Procedure Code** in respect of the award of general damages. It follows, and we find, that a second appeal does not in law lie against the decision of the High Court.

[13] The trial magistrate awarded interest *"on the award"* at court rates from the date of filing the suit. The appellants complain that the High Court failed to address the issue of interest although it was raised in the written submissions. We have perused the memorandum of appeal filed in the High Court which is dated 2nd August, 2010. It is clear that the appellants did not appeal against the award of interest.

Lastly the first appellate court could not have lawfully considered or determined an issue which was not raised as a ground of appeal before it. There is thus no merit in this ground of appeal.

[14] For the foregoing reasons, the appeal is dismissed with costs to the respondent.

We so order.

DATED and Delivered at Kisumu this 25th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR