IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: G.B.M. KARIUKI, F. SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 83 OF 2017

BETWEEN

DAVID MARWA ..... 1ST APPELLANT

STEADY LIMITED ..... 2ND APPELLANT

AND

NELSON NJIHIA KIMANI ..... RESPONDENT

***(An appeal from the Judgement & Decree of the High Court of Kenya at Nakuru, (Mulwa, J.) delivered on 13th April, 2017 in* H. C. C. C. No. 294 of 2010)**

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JUDGMENT OF THE COURT

This is an appeal against the Judgement of Mulwa, J. delivered on 13th April, 2017.

A brief background to this appeal is that NELSON NJIHIA KIMANI the respondent herein (the then plaintiff) filed suit against DAVID MARWA and STEADY LIMITED, (the then 1st and 2nd defendants and the 1st and 2nd appellants herein). In paragraph 5 of the plaint, the respondent averred that:-

> ***"On 15th September, 2009 or thereabout while the plaintiff was lawfully driving motor vehicle registration number KBG 039 L along Nakuru/Eldoret road at Ngala Bridge, the steering cut as a result of which the aforesaid motor vehicle lost control and subsequently caused serious injuries to the plaintiff."***

The Respondent further averred that:-

> ***"As a result of the said accident, the plaintiff sustained serious injuries incapacitating his day to day activities and he is still undergoing treatment and he thus claims damages for loss of earnings and future medical expenses."***

The 1st and 2nd appellants filed a statement of defence dated 23rd February, 2001 and in particular stated in paragraph 5 thereof:-

> ***"The 1st Defendant denies each and every particular set out on paragraph 5 of the plaint. The 1st defendant particularly denies that the plaintiff was lawfully driving his motor vehicle Registration No. KBG 039 L. The 1st Defendant will state and prove at the hearing hereof that he has never employed the plaintiff as his driver and the plaintiff was not having his authority to drive motor vehicle Registration No. KBG 039 L on 15th September, 2009. He puts the plaintiff to strict proof on the issue of authority and legality to drive."***

After the trial and in a Judgement dated 13th April, 2017 Mulwa, J. found in favour of the respondent and ordered as follows:

"(1) Liability is apportioned equally at 50:50 basis between the plaintiff and the 1st defendant.

(2) The plaintiff's case against the 2nd defendant is dismissed with no orders as to costs. (3)General damages.

a) Pain and sufferingKsh1,500,000/-

b) Loss of future earning capacityKsh1,200,000/-

c) Future medical expensesKsh 160,000/-

d) special damagesKsh 158,890/-

TOTALKsh3,018,890/-

50% thereofKsh1,509,445/-

e) The above sum shall accrue interest at court rates from the date of this judgment.

f) Each party having been found to have been 50% liable, no costs will be awarded to either the plaintiff or the 1st defendant.

g) ***The Plaintiff case against the 2nd defendant is dismissed with no orders as to costs."***

The appellants were dissatisfied with the said outcome, hence this appeal. In a memorandum of appeal dated 29th May, 2017 the appellants listed no less than 12 grounds which can be summarized as follows:

i) The respondent did not prove that he was the appellant's driver.

ii) There was no evidence that the steering cut.

iii) The learned judge erred in not finding that the cause of the accident was not proved.

iv) That the learned judge erred in not finding the appellants liable inspite of lack of evidence.

v) Erred in awarding loss of future earning capacity, being special in nature yet it was not pleaded and proved.

vi) That the award of damages for loss of earning capacity was based on speculation.

vii) Erred in not awarding the 2nd appellant costs inspite of finding that there was no basis for its joinder.

viii) The assessment of damages was manifestly excessive and/or erroneous.

On 27th September, 2017 the appeal came before us for plenary hearing. Miss Ochwal learned counsel for the appellant urged the appeal. It was the counsel's submission that the respondent had failed to establish that he was the 1st appellant's employee as he did not produce any letter of employment; that there was no evidence that the 2nd appellant was a beneficial owner of motor vehicle registration No. KBG 039 L; that there was no mechanical report that the steering got cut; that the motor vehicle was in sound mechanical condition; that the 2nd appellant was entitled to costs, the suit against it having been dismissed and finally, that the respondent not having been the driver of motor vehicle registration No. KBG 039 L was not entitled to the damages awarded and which in any event were not proved.

In opposing the appeal, Mr. Gekonga pointed out that the 2nd appellant did not file an appeal challenging the order not granting it costs, which in any event is at the trial court's discretion; that the respondent established that he was the lawful driver of the motor vehicle registration No. KBG 039 L; that in any event the respondent was in the company of the hirer of the motor vehicle, Joseph Mogesi (DW4); that the respondent established that the steering got cut as stated on the OB produced by PW3 PC. CHRISTOPER KIARIE.

In a brief response, Miss Ochwal conceded that the Notice of Appeal did not include the 2nd respondent's grievance of not being awarded costs.

We have considered the rival oral submissions of counsel, the authorities cited by the appellant, the entire record of appeal and the law. The appeal before us is a first appeal. As a first appellate court, our mandate is as set out in Rule 29(1) of the rules of the Court namely, to re-appraise the evidence and arrive at our own conclusions on the issues under review. In **Cecillia Gathoni versus George Kariuki Kabugu [2013] eKLR** this Court put it thus;

"***This being a first appeal, we are reminded of our primary role as the first appellate court namely to re-evaluate, re-assess and***

re-analize the facts as they have before the learned trial Judge and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Sumaria & Another versus Allied Industries Ltd [2007] KLR1 where the Court held inter alia that being a first appeal, the Court was obligated to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that the Court of Appeal would not normally interfere with a final of fact by the trial court unless, it was based on misapprehension of the evidence or that the Judge has shown to have acted on wrong principles reaching the finding he did."

As we have stated above, the respondent filed suit and complained that the motor-vehicle registration No. KBG 039 L was defective as the appellants had failed to maintain it in a good working condition. The respondent stated that at the time he was earning a salary of Ksh.18,000/- per month and that he sustained serious injuries for which he was still undergoing treatment.

In a written statement of defence filed on 25th February, 2011 the 1st appellant denied that the respondent was his driver and further denied that the motor vehicle was not in good condition. The 1st appellant attributed the accident to the respondent's negligence of *inter alia*, driving carelessly and dangerously.

The learned trial Judge after hearing the respondent and his two witnesses (DR. KIAMBA, PW2) and (PC KIARIE, PW3) and the 1st appellant's evidence (DW1), DW2's evidence (JAMES NJAU KARIUKI), DW3's evidence (SAMWEL MARWA) and DW4's (JOSEPH MOGESI) came to the conclusion that the 1st appellant was liable. She however, dismissed the respondent's suit against the 2nd appellant, although she did not award the 2nd respondent costs.

In his defence in the trial court, the 1st appellant denied that the respondent was his driver. According to him, he had 6 motor vehicles and 6 drivers and that the motor vehicle allegedly driven by the respondent was under the charge and care of one "**Wasi Wasi**". This "**Wasi Wasi**" was, however, not called as a witness. It is also noteworthy to point out that the motor vehicle had been hired to ferry timber from Migori to Gilgil and that it was driven through the entire route by the respondent. If indeed the respondent was not the driver, why was he not held to account for driving the 1st respondent's motor vehicle without authority? The 1st appellant further contended that the 1st respondent did not produce a letter of employment. On our part, we take it that a letter of employment is issued by an employer. If the 1st appellant failed to do so, he cannot now turn around and blame the respondent for not availing a letter of employment.

DW4, JOSEPH MOGESI, told the trial court that the 1st respondent took over the driving from Kericho. If this be true, why didn't DW4 report to DW2 that a stranger had taken over the driving of the motor vehicle ferrying his goods? The trial Judge dismissed this assertion and rightly so in our view. More so because the law places an obligation on an employer to keep a record of persons he/she authorizes to drive his/her motor vehicle/s. Section 111 of the Traffic Act provides:-

"(1) Any person who employs any other person to drive a motor vehicle shall keep a written record of the name, address and driving license number of such other person.

(2) …

(3) Any person who fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings."

If indeed the respondent was not the 1st appellant's driver, then he should have disapproved the respondent's evidence by producing a record of his 6 drivers including the alleged driver of motor vehicle registration No. KBG 039 whom he called "**Wasi Wasi**". In view of what we have stated above, we too have come to the conclusion that the respondent was the lawful driver of motor vehicle registration No. KBG 039L.

The other ground taken by the 1st appellant was that the motor vehicle was in good working condition. The evidence of the respondent was that the 1st appellant had failed to service the motor-vehicle and that that failure resulted in the steering cutting. The trial court found that DW2 inspected the vehicle soon after the accident and he confirmed that the steering wheel was broken. However, DW2 attributed the breakage to high speed. In the absence of conclusive proof as to the cause of the accident, the trial court found ***"…that both the plaintiff and the 1st defendant were equally to blame for the accident."*** In essence the trial court attributed the accident to lack of good working condition that led to the steering breaking on account of high speed, thus the apportionment of liability at 50:50. On our part, we see no reason to disturb this finding.

On the quantum of damages, it is not denied that the 1st respondent sustained injuries during the accident. The trial judge considered relevant awards and came to the conclusion that the respondent was entitled to Ksh.1.5 M for pain and suffering. We do not think this figure was unreasonable given the injuries sustained by the respondent. The award for loss of future earning capacity and future medical expenses was also not unreasonable. In view of what is stated above, the trial court apportioned liability at 50:50 and as stated above; we see no reason to disturb that apportionment. The sum total of the above is that we find no merit in this appeal. It is hereby dismissed with costs to the respondent. Further, as it was conceded that the Notice of Appeal did not raise any issue as regards costs not awarded to the 2nd respondent, we shall not disturb that part of the judgement. The upshot of the above is that this appeal is dismissed with costs.

Dated and delivered at Nakuru this 22nd day of November, 2017

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR