



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJA.)

CIVIL APPEAL NO. 62 OF 2014

(CONSOLIDATED WITH CIVIL APPEALS NOS. 53, 54, 55, 56, 57 & 58 OF 2011)

BETWEEN

ELDORET EXPRESS CO. LTD..... FIRST APPELLANT

ENOCK KIPTOO SECOND APPELLANT

AND

SILVANCE OJWANG ODERO RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kitale (Karanja, J.) dated 17th June, 2014

in

HCCA NO. 59 OF 2011

JUDGMENT OF THE COURT

1. **Silvance Ojwang Odero**, the respondent, filed **P.M.C.C. No. 21 of 2008** at Kapenguria against the appellants. He stated in his plaint that on 26th August, 2007 he was travelling as an authorized passenger in the first appellant's bus registration number **KAT 974 V**, which was driven by the 2nd appellant. The respondent testified that he was travelling together with his wife, **Grace Akinyi**, and their children, **Felix Ouma**, **Gordon Omondi**, **Peter Ouma** and **Roseline Atieno**. The respondent's sister in law, **Cynthia Mary**, was also accompanying the respondent's family. At Marich area along Makutano - Lodwar road, the 2nd appellant lost control of the bus and it went off the road, occasioning the respondent bodily injuries. The respondent claimed general and special damages. He alleged that the accident was caused by the 2nd appellant's negligence. He relied, *inter alia*, on the doctrine of *res ipsa liquitor*. He added that following the accident the 2nd respondent was charged and convicted of contravening route regulations in **Traffic case No. 62 of 2009** at Kapenguria Law Courts.

2. The aforesaid persons who were travelling together with the respondent also filed similar suits as the respondent, *to wit*, **SPMCC Nos. 14, 15, 16, 18, 30 and 32 of 2008**. By consent, these suits were consolidated with the respondent's suit and heard together.

3. The respondent testified that following the accident, together with Roseline Atieno, they were treated at Lodwar District Hospital. Cynthia Mary and Peter Ouma were treated at Kakuma Refugee Camp Hospital while Felix Ouma, Grace Akinyi and Gordon Omondi were treated at Kitale District Hospital.
4. The appellants filed a joint statement of defence and denied, *inter alia*, that the respondent was a lawful passenger in the said bus, the occurrence of the accident, and any negligence on the part of the 2nd appellant.
5. After a full hearing, the trial court held that the respondent and his family members had not proved their cases on a balance of probabilities and dismissed them.
6. Dissatisfied with that finding, the respondent filed an appeal, *to wit*, **Civil Appeal No. 59 of 2011**, in the High Court at Kitale. Similar appeals, Nos. **53, 54, 55, 56, 57 and 58** all of **2011**, were also filed by the respondent's family members. All these appeals were consolidated by consent and heard together with the respondent's appeal.
7. Having considered all the evidence on record as well as the parties' written submissions, the High Court came to the conclusion that the accident was caused by the second appellant's negligence. In his judgment, the learned judge, **Karanja, J.**, stated, *inter alia*:

“In this court’s opinion, the basic issue arising for determination was whether the accident was caused by the respondent’s negligence and if so, whether the appellant was entitled to damages and to what extent. The occurrence of the accident and the ownership of the material motor vehicle were factors which were not substantially disputed and so was the appellant’s presence in the motor vehicle at the material time of the accident. Indeed, there was sufficient evidence from the appellant and his wife (PW 2) establishing that they were authorized passengers in the vehicle.”

8. The High Court set aside the trial court's judgment and awarded the respondent general damages in the sum of **Kshs.80,000/=** and special damages of **Kshs.5,700/=** as well as costs of the suit. The court did not state what each of the other claimants were entitled to, despite the fact that counsel had made submissions on quantum in respect of each and every claimant.
9. The appellants were aggrieved by the said judgment and preferred a second appeal to this Court. In their memorandum of appeal, the appellants raised three grounds of appeal as follows:
 1. **“The learned judge erred in law and misdirected himself when he framed his own issues and omitted the main grounds of the appeal.**
 2. **The learned judge erred in law and misdirected himself when he failed to consider the applicants (sic) submissions and evidence on record.**
 3. **That the learned judge erred in law and misdirected himself when he disregarded the respondents’ evidence on fraud and misrepresentation.”**
10. By way of a supplementary memorandum of appeal, the appellants argued that the learned judge erred in law: by shifting the burden of proof to them, by failing to re-evaluate the evidence properly so as to find that the respondent and his family members were neither injured nor treated as alleged, and by basing his judgment on wild presumptions, conclusions and no evidence. The gravamen of the appellant's appeal, briefly stated, was that the respondent and his family members were not passengers in the first appellant's bus, and neither were they treated for any injuries as a result of the accident, which accident they contended was inevitable.

11. Mr. Rotich, learned counsel for the appellants, submitted that the two courts below had failed to consider and determine whether the respondent was a passenger in the first appellant's bus. Counsel

submitted that although the accident occurred on 26th August, 2007 the record showed that the respondent's treatment record at Lodwar District Hospital (**P Exhibit 2**) was dated 22nd August, 2007. However, that is not factually correct. P. Exhibit 2 has no date. It is Patient Record Book from Lodwar District Hospital which bears the respondent's name, his age and address.

12. Although counsel submitted that the appellants called **Linus Ligale (DW 2)**, from Lodwar District Hospital, who testified that the respondent's name was not in the hospital's treatment register of 26th August, 2007, the record of appeal shows that DW 2 was a Clinical Officer based at Kitale District Hospital, who was in-charge of outpatient department. What the witness was referred to and testified about were treatment notes for **Grace Akinyi, PW 2, (Exhibit 29)** and outpatient register for Kitale District Hospital, (**DMFI 1**), not Lodwar District Hospital. The said documents did not relate to the respondent, who testified that he had been treated at Lodwar District Hospital.

13. PW 2, wife to the respondent, testified that she was treated at Kitale District Hospital. The outpatient register for Kitale District Hospital that had been marked as DMFI 1 was produced by **Joachim Getwambu Okero (DW 3)** as **D. Exhibit 1**. It showed the names of PW 2, Felix Ouma and Gordon Omondi were not in the register of the patients who were attended to on 26th August, 2007.

14. In cross examination, DW 3 said that absence of a patient's name in the outpatient register "*does not mean that he or she was not treated.*" DW 3 was not the author of the names in D. Exhibit 3 and so he could not fully explain why the said names were missing from the register. The witness said that PW 2, Felix Ouma and Gordon Omondi could have been attended to by an intern and that could explain why their names were not in the outpatient register.

15. Benard Bundotich, DW 4, was a Clinical Officer attached to Lodwar District Hospital. He was in-charge of the outpatient register at that hospital. He said that the respondent's name and that of Roseline Atieno were not in the outpatient register for August, 2007. The register was produced in evidence as **D. Exhibit 5**.

Dr. Lawrence Kioko, DW 6, was a medical doctor at Kakuma Refugee Camp Hospital. Although he was not working there when Cynthia Mary and Peter Ouma were allegedly treated there, he testified that their names were not in the hospital's outpatient register, which was produced as **D. Exhibit 8**.

16. Opposing the appeal, **Miss Maritim**, learned counsel for the respondent, submitted that there was sufficient evidence that demonstrated that the respondent was a passenger in the 1st appellant's bus. She referred the court to the evidence of **P. C. Paul Muchiri Mburu, PW 4**, who was then based at Kapenguria Police Station. That witness produced a police abstract report in respect of the accident which showed that on 26th August, 2007 the appellant, among others, was a passenger in the said bus. Miss Maritim submitted that there must have been a typographical error in recording that the respondent's P. Exhibit 2 was filled on 22nd August, 2007.

17. The witness further testified that the driver of the bus, the second appellant, was charged for contravening traffic route and fined Kshs.200/= or two month's imprisonment in default. The accident was caused by cattle that were being driven on the road. The 2nd appellant was unable to control the bus and it veered off the road at a corner.

18. Dr. Donald Mogoi, PW 5, also produced the respondent's medical report, **P. Exhibit 17**, prepared by the witness on 23rd October, 2007 at a cost of Kshs.5,000/= as **P. Exhibit 18**. The same witness had also examined the other appellants and prepared their medical reports at a similar fee of Kshs.5,000/= each. PW 5 tendered in evidence copies of those medical reports and receipts for the payments made by each of the claimants.

19. However, the evidence of PW 4 and PW 5 was contested by the appellant's counsel. He referred to the evidence of **Sergeant Stephen Karanja, DW 5**, who was then the Base Commander, Kapenguria. DW 5 testified that after the occurrence of the accident he caused investigations to be conducted.

Several passengers in the ill-fated bus recorded statements and were issued with P 3 forms and police abstract reports. However, following reports from Lodwar, Kitale and Ortum Hospitals that some people who had not been treated at the said hospitals following the said accident were making false claims, DW 5 revoked the P 3 forms as well as the police abstract reports, including the ones that had been produced by the respondent.

20. In cross examination, DW 5 was unable to state any law that gave him power to revoke the P3 forms as well as the police abstract reports. The witness could not also categorically state that the documents that had been produced by the respondent and the other claimants were fake.

21. We now turn to consider the grounds of appeal. In the first ground, the appellants complained that the learned judge omitted the main grounds of appeal and instead framed his own issues. In the memorandum of appeal before the High Court, the respondent (*who was the appellant*) criticized the trial magistrate for failing to find, *inter alia*, that the first appellant was the owner of the subject motor vehicle and that the second appellant was its driver.

22. The respondent had also stated that the learned trial magistrate erred in law in failing to find that he (*the respondent*) was a lawful passenger in the said bus; and thus award him general damages for the injuries that he had sustained as a result of the accident.

23. In his judgment, the learned judge said that the basic issue for determination was whether the accident was caused by the second appellant's negligence and if so, whether the respondent was entitled to damages. The learned judge took the view that the occurrence of the accident and ownership of the bus were not substantially disputed issues. Further, the learned judge summarily stated that the respondent and his wife were authorized passengers in the said bus.

24. The trial court had held that there was nothing to show that the respondent and the other claimants in the cases that were before it were passengers in the first appellant's bus. In view of that firm finding, we believe it was incumbent upon the first appellate court to carefully re-evaluate the evidence and make its independent finding whether the respondent had, on a balance of probabilities, established that he was a passenger in that bus. **Selle v Associated Motor Boat Company Limited [1968] E. A. 123, Williamson Diamonds Limited v Brown [1970] E. A. 1.** The learned judge did not do so.

25. The respondent had testified that on 26th August he boarded the first appellant's bus at Kitale headed for Lokichogio, where he was operating a shop. He said he was travelling with his wife, PW 2 and four children. The respondent further testified that he had paid bus fare and was issued with a receipt, but as a result of the accident the receipt got lost. He also testified as to how the accident occurred. The respondent relied on a police abstract report and a P 3 form to prove that he was a passenger in the said bus. He also cited the disputed treatment notes.

26. On the other hand, neither the first appellant's driver nor its bus conductor testified. The appellants did not produce a passenger manifest or any other document to counter the respondent's assertion that he and his family were lawful passengers in the ill-fated bus. Where a defendant does not adduce evidence to disapprove the plaintiff's evidence about an alleged fact, the plaintiff's evidence is to be believed, unless the plaintiff's contention is too outlandish to be believed. Allegations or denials in a statement of defence are not evidence. See **Edward Muriga V Nathaniel D. Schulter [1997] eKLR.** In the circumstances, on a preponderance of evidence, we agree with the learned judge that the respondent and his family members were lawful passengers in the said bus.

27. The next issue is whether the respondent was injured in the said accident and if so, whether he was treated for the injuries sustained. The respondent testified that:

“Following the accident, I suffered injuries to my head and eyes. I was treated at Lodwar District Hospital as per this treatment book/patient record book S/No.29894 (P. Exhibit 2)”.

The respondent went on to state where the rest of the family members he was travelling with were treated and produced their individual treatment notes. A report of the accident was made at Kapenguria Police Station.

28. P. C. Paul Muchiri Mburu, (PW 4), of Kapenguria Police Station, testified that the respondent, his wife and their children were among the accident victims. The witness had the police file in court. The file contained, *inter alia*, statements recorded by the respondent, his wife and their children. That evidence was in line with that of Sergeant **Stephen Karanja Ngugi, DW 5**.

29. DW 5 added that the accident victims were issued with police abstract reports and P3 forms under his authority. The P 3 form, which is headed: “*MEDICAL EXAMINATION REPORT*”, was addressed to the Medical Officer of Health, (MOH), Kitale. The Base Commander, Kapenguria, required the MOH to furnish him with a report of the nature and extent of bodily injury sustained by the respondent. Similar P3 forms were also issued to the respondent’s family members.

30. According to the P 3 form, the MOH examined the respondent on 17th October, 2017 and filled the form, indicating the nature and extent of the injuries. There were no allegations that any of the P 3 forms were not filled at Kitale District Hospital.

31. Joachim Getwambu Oreko, DW 3, medical records officer at Kitale District Hospital, did not discredit the contents of the P 3 forms produced by the respondent. The thrust of his evidence was that the names of **Felix Ouma** in **P. Exhibit 6**, **Gordon Omondi** in **P. Exhibit 7** and **Grace Akinyi** in **P. Exhibit 29** were not reflected in the outpatients register at the hospital. However, in cross examination, the witness conceded that the absence of a patient’s name in the outpatient register “*does not mean that he or she was not treated at the hospital*”.

32. Similar evidence was given by **Benard Bundotich, DW 4**, of Lodwar District Hospital. He stated that the names of the respondent and **Roseline Atieno** were not in the hospital’s outpatient register. The patient record book, P. Exhibit 2 and P. Exhibit 4 do not have any outpatient number and bear the same serial number. The witness however stated that the respondent’s patient record book, P. Exhibit 2, had his signature. In cross examination, DW 4 conceded that a patient could be treated at the hospital without an outpatient number.

33. In our view, the evidence adduced by the appellants was not sufficient to enable a court reach a conclusion that the respondent and his family members were neither injured as a result of the said accident nor were they attended to at Kitale, Kakuma Refugee Camp and Lodwar District Hospitals. In other words, DW 3 and DW 4’s testimonies revealed that the outpatient registers were not fool proof evidence of all the patients who were treated at the two hospitals. The same may be stated about the evidence of DW 6, who was not even working at Kakuma Refugee Camp Hospital at the material time and neither was he the keeper of the hospital’s outpatient register.

34. In view of the foregoing, we must conclude that on a balance of probabilities, the respondent proved that he was injured and treated at Lodwar District Hospital as evidenced by the police abstract report, P 3 form, treatment record and medical report. Equally, there was sufficient evidence that the respondent’s wife and the children he was travelling with were injured and treated at the various hospitals cited.

35. As regards liability for the occurrence of the accident, we do not think that the accident was inevitable as pleaded by the appellants. There was evidence that the second appellant was driving the bus at a high speed. He was also unfamiliar with the route he was using. That is why he was charged and convicted for contravening route regulations. In **Patrick Mutie Kamau & Another V Judy Ndurumo [1996] LLR 6011**, this Court held that failure by a person to observe any provision of the Highway Code may be relied upon by any party to proceedings to establish or negate liability.

36. The fact that there were cattle that were being driven across the road cannot *per se* absolve the second appellant from liability. He was approaching a corner and he ought to have slowed down and more so, because he was driving on a rough road that had loose soil. We must therefore dismiss the appeal as

against liability.

37. As regards quantum of damages, the trial court, having found that the respondent had not proved his case and in dismissing it, did not assess the damages it would otherwise have awarded had the claim succeeded. This Court has repeatedly stated that even if a trial court dismisses a claim for damages, it is duty bound to assess the damages it would have awarded in the event that it found for the claimant. See **Manchester Outfitters Suiting Division Limited & Another V Standard Chartered Bank Limited [2002] eKLR**

38. The first appellate court, having overturned the trial court's judgment, proceeded to assess the damages payable to the respondent. It awarded general damages in the sum of Kshs.80,000/= and special damages of Kshs.5,000/= for the medical report, Kshs.200/= for police abstract and Kshs.500/= for search certificate, totaling to Kshs.87,500/=. The costs of the suit and the appeal were awarded to the respondent.

39. Mr. Rotich for the respondent urged us to reduce the general damages from Kshs.80,000/= to Kshs.50,000/=. It is trite law that assessment of quantum of damages is a discretionary exercise by the trial court. That discretion must, however, be exercised judicially. An appellate court will only interfere with that discretion if the trial court (or the first appellate court) took into account an irrelevant factor or left out of account a relevant factor or where the award is so inordinately high or inordinately low, that it must be a wholly erroneous estimate of the damages. See **Lukenya Ranching And Farming Co-op Society Limited V Kalovoto [1979] E.A. 414** and **Kemfro Africa t/a Meru Express & Another V A. M. Luba & Another(1982-88) 1 KAR 727.**

40. Before the magistrate's court, the respondent had sought general damages of Kshs.150,000/=. On the other hand, the appellant had submitted that an award of Kshs.40,000/= for each of the claimants was sufficient. According to Dr. Mogoi's medical report, the respondent had suffered blunt head injury, contusion to the shoulders, contusion to the chest, contusion to the back and contusion to the right eye. The learned judge awarded the respondent general damages in the sum of Kshs.80,000/=. He did not however pronounce himself as regards the other claimants whose appeals had been consolidated with this one. We believe that was an oversight on the part of the learned judge.

41. Taking into account the above principles that guide an appellate court in an appeal against quantum of general damages, we do not think that the learned judge erred in his assessment of both general and special damages. We shall not therefore disturb the award with respect to **Silvance Ojwang Odera**, the respondent.

42. Regarding the other claimants whose appeals were consolidated with this one, their medical reports that were produced before the trial court showed that they suffered soft tissue injuries, mainly to the head, chest and legs. The respondent's advocate had urged the court to award each of them Kshs.150,000/=.

43. The appellant's advocate submitted that an award of Kshs.40,000/= as general damages for each of the claims was reasonable. As regards special damages, he conceded that each one of them had proved their claim of Kshs.5,000/= on account of medical reports that were prepared by PW 5. What he disputed was the claim of Kshs.200/= by each of the claimants paid for the police abstract reports because no receipts were produced as evidence of purchase of the same.

44. Considering that the injuries suffered by Felix Ouma Ojwang, Cynthia Mary Atieno, Roseline Atieno, Peter Ouma, Grace Akinyi Ojwang and Gordon Omondi were not very different from the ones sustained by Silvance Ojwang Odera, the respondent, we make a similar award of general damages, Kshs.80,000/= for each one of them.

For special damages, we allow the claim of Kshs.5,000/= for each of the claimants, being the amount paid for medical report.

As regards the claim of Kshs.200/= for the police abstract reports, although no receipts were produced as evidence of their purchase, we take judicial note of the fact that police abstract reports are not issued free of charge.

At the time of the accident the cost of acquiring a police abstract report was Kshs.200/=. We therefore allow that claim as well.

45. In conclusion, each of the claimants in this consolidated appeal is awarded general damages of Kshs.80,000/= and special damages of Kshs.5,200/= for medical report and police abstract. We shall not award Kshs.500/= to each of the claimants on account of payment made to the Registrar of Motor Vehicles for search of details of ownership of vehicle registration number KAT 974 U, the 1st appellant's bus. Only one copy was produced as P.Exh.1 and the learned judge awarded the respondent a sum of Kshs.500/= for the same.

46. For the reasons aforesaid, we dismiss this appeal with costs to the respondents, including costs in the High Court and in the Principal Magistrate's Court.

DATED and delivered at Kisumu this 12th day of February, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR