



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MARAGA, M'INOTI & J. MOHAMMED, J.J.A.

CIVIL APPEAL NO. 180 OF 2005

BETWEEN

SIMON MUCHEMI ATA KO

PETER AMBANI SHRINDWA APPELLANTS

AND

GORDON OSORE RESPONDENT

(Appeal from the judgment and decree of the High Court of

Kenya at Nairobi (Angawa, J) dated 4th June, 2003)

in

H.C.C.C No. 645 of 2004)

JUDGMENT OF THE COURT

By a plaint filed in the High Court at Nairobi on 22nd January, 2002, the appellants, *SIMON MUCHEMI ATA KO* and *PETER AMBANI SHRINDWA* lodged a claim against the respondent, Gordon Osore for damages, interest and costs for personal injuries sustained in a motor vehicle accident. They pleaded that on or around 5th November, 1999, while travelling as fare-paying passengers along Mumias-Musanda road in motor vehicle No. KZN 060, owned and driven by the respondent, his driver or agent, the said motor vehicle was driven so negligently that it lost control and overturned, occasioning them various personal injuries. The particulars of negligence on the part of the respondent, his driver or agent and the particulars of injuries sustained by the appellants were pleaded in paragraphs 5 and 6, respectively of the plaint.

On 15th July, 2002 the respondent entered appearance and filed a defence to the claim. In paragraph 3 of the defence, the respondent admitted that an accident occurred on the date and at the place pleaded in the plaint, but denied that the accident was caused by his negligence. Otherwise, the

respondent denied all the other averments in the plaint. The appellants filed a reply to defence on 5th August, 2002, by which they joined issue with the respondent's defence.

The appellants subsequently filed their list of documents which included a police abstract report, Kenya Police Medical Examination Report (P 3), hospital treatment cards, medical reports by a medical practitioner and receipts vouching for medical expenses. On 3rd December, 2002, the appellants filed and served upon the respondent a notice to admit documents under the then *Order XII Rules 2(1) and (3) of the Civil Procedure Rules*, which it appears the respondent never responded to.

The suit was listed for hearing on 3rd June, 2003, when the respondent, though duly served with a hearing notice did not attend court. Upon satisfying herself that the respondent had been properly served with the hearing notice, the learned judge (*Angawa, J*) directed the hearing to proceed *ex parte* and heard the evidence of the two appellants and that of their doctor, reserving the judgement for the next day at 8.45 am.

On 4th June, 2003, the learned judge dismissed the appellants' claim with no orders as to costs. The grounds upon which the suit was dismissed was that the evidence adduced by the appellants showed that the accident occurred due to a tyre burst, but in the plaint, the appellant had not pleaded that the accident was caused by a tyre burst. The learned judge further found that in respect of the first appellant, the doctor's evidence did not prove any injury. Yet she concluded that had the claim on liability succeeded, she would have awarded the first plaintiff KShs.10,000.00 for his injuries. In respect of the second appellant, the learned judge did not indicate what damages she could have awarded because she found that no injuries whatsoever had been proved.

Aggrieved by the judgment, the appellants lodged the current appeal, listing the following 5 grounds of appeal.

- 1. The learned judge erred in law by holding that the evidence adduced by the appellants differed from their pleadings;*
- 2. The learned judge erred by holding that the doctor had exaggerated the injuries suffered by the appellants;*
- 3. That the learned judge erred in law by deciding the case without considering all the evidence on record;*
- 4. That the learned judge erred in dismissing the suit without determining the real issues in dispute; and*
- 5. That the learned judge displayed open and inexplicable hostility towards the appellants' counsel.*

Mr Okindo, learned counsel for the appellants, argued the grounds of appeal globally. He submitted that the appellants had pleaded their claim with sufficient particularity and that the evidence adduced, if properly evaluated, proved the claim on a balance of probabilities. Once the appellants had pleaded that the accident was caused by negligence arising from over-speeding and driving without due care and attention on the part of the respondent, his driver or agent, counsel submitted, they were not obliged to plead more. On the injuries sustained by the appellants, learned counsel submitted that the totality of the evidence adduced proved the injuries pleaded to have been suffered by each appellant and that the learned judge was plainly wrong in holding that the evidence did not prove any injuries at all. Mr Okindo did not offer any assistance to us regarding the quantum of damages that ought to be awarded to the appellants in the event of this appeal succeeding.

Mr Osando Osiemo, learned counsel for the respondent bordered on sophistry as he vigorously supported the judgment of the trial court. He submitted that the evidence adduced did not prove the

claim as pleaded. In his view, the evidence adduced proved that the accident was caused by a tyre burst, and that cause of the accident was not pleaded. Learned counsel further submitted that in the plaint it was pleaded that the accident occurred on 5th November, 1999, yet the appellants, in their evidence in court, testified that the accident occurred on 8th November, 1999. In his view, this was another disparity between the pleadings and the evidence, which justified dismissal of the suit. Mr Osiemo maintained the same line of argument regarding the injuries suffered by the appellants. As far as he was concerned, the medical evidence adduced showed that the appellants had suffered more injuries than those pleaded. He saw this as yet another disconnect between the pleadings and the adduced evidence, which again justified dismissal of the suit. In conclusion, learned counsel criticized the medical reports and the evidence of the medical doctor as lacking in veracity and maintained that the second appellant had not proved that he had suffered any injuries at all.

Since this is a first appeal, we are required to consider the evidence adduced before the trial court, evaluate it ourselves and draw our own conclusions, but always bearing in mind and making allowance for the fact that we did not have the opportunity which the trial court had to see and hear the three witnesses who testified. See SELLE AND ANOTHER V ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS, [1968] EA 123, RAMJI RATNA AND COMPANY LIMITED V WOOD PRODUCTS (KENYA) LIMITED, Civil Appeal NO. 117 OF 2001 and HANH VS SINGH, (1985) KLR 716. We also bear in mind that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on a wrong principle in reaching the findings that he did. Nevertheless we are entitled to and will interfere if it appears that the trial judge failed to take account of particular circumstance or probabilities material to an estimate of the evidence or where his or her impression, based on the demeanour of a material witness, is inconsistent with evidence in the case generally. See EPHANTUS MWANGI AND ANOTHER V DUNCAN MWANGI WAMBUGU, [1982-88] 1 KAR 278).

The first issue for consideration is whether the appellants proved on a balance of probabilities that the accident in question was caused by the respondent's negligence. The learned judge held correctly that it was admitted by the respondent that the accident had occurred on the date and at the place pleaded in the plaint and further that at the time of the accident, the motor vehicle registration No. KZN 060 was owned by and registered in the appellant's name, and driven by him. However, in holding that negligence on the part of the respondent was not proved, the learned judge delivered herself as follows:

“The negligence on the part of the defendant (respondent) was due to over-speeding and a tyre burst. This indeed was not mentioned in the particulars of the negligence of the defendant. I find that the plaintiffs’ (appellants’) particulars of negligence did not disclose the element of negligence on the part of the defendant-namely that there was a tyre burst. I would dismiss this suit as showing that negligence had not been persued (sic).”

With due respect, we are unable to agree with the above conclusion by the learned judge. In paragraph 4 of the plaint, the appellants pleaded that the motor vehicle registration No. KZN 060 “*was so negligently driven and controlled by the defendant or his agent that it lost control and overturned, thereby injuring the plaintiffs seriously*”. In paragraph 5 of the plaint, the particulars of negligence on the respondent's part were given as driving the motor vehicle registration number KZN 060 at an excessive speed in the circumstances, failing to stop, swerve and/or slow down so as to avoid the accident and driving without due care and attention.

In our view, the appellants had pleaded their claim with sufficient particularity to enable the respondent understand the case he was to meet. In ESSO PETROLEUM COMPANY LIMITED VS SOUTHPORT CORPORATION, (1956) AC 218, Lord Normand expressed himself as follows on the object of pleadings:

“The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them.”

In UGANDA BREWERIES LTD VS UGANDA RAILWAYS CORPORATION, (2002) 2 EA 634, the respondent's evidence concerning the occurrence of an accident was a departure from its pleadings in the statement of defence and counterclaim. The Supreme Court of Uganda held that the departure from pleadings did not cause a failure of justice to the appellant as the appellant had a fair notice of the case it had to meet and the departure was a mere irregularity not fatal to the case of the respondent whose evidence departed from its pleadings.

In this case, do not see how the evidence of the plaintiffs can be said to have been a departure from the pleadings. It is asking for too much to insist, as the learned judge did, that the appellants were obliged to specifically plead that the motor vehicle's tyre had burst. Two cardinal rules of pleadings require that a pleading must state material facts only and that a pleading must state facts, not evidence. In our view, the tyre burst was evidence adduced to show or from which it could be deduced that the respondent was driving at excessive speed, or without due care and attention so that, after the tyre had burst, he was unable to control the vehicle, which eventually overturned. If the respondent had not been driving at excessive speed, even with a tyre burst, he would have controlled the vehicle. There was sufficient evidence on record from which the court could draw the inference that the accident was caused by the negligent driving of the respondent.

As was stated in PUSHA VS FLEET TRANSPORT CO LTD, (1960) EA 1025, a distinction has to be made from findings of primary facts and the inferences to be drawn therefrom, and that failure to draw an inference which ought to have been drawn is equivalent to the drawing of a mistaken inference. In CASWELL VS POWELL DUFFRYN ASSOCIATED COLLIERIES LTD, (1940) AC 152, it was stated that in some instances there are objective facts which are proved from which other facts which are sought to be established may be inferred. In such cases, the other facts can be inferred with much practical authority as if they had been actually observed. It is only when there are no positive proved facts from which an inference can be drawn that the court should avoid drawing an inference because then it is mere speculation or conjecture. Proceeding as the learned judge did was perilously close to demanding that a plaintiff must specifically plead that an accident was caused, for example, by a snapped tie-rod, jamming brakes, or the sudden crossing of the road by a dog.

Regarding the injuries sustained by the appellants, paragraph 6 of the plaint gave the particulars of injuries sustained by the first appellant as, internal tear of the nose, injury to the left thumb and blunt injury to the right hip. In respect of the second appellant the injuries were given as multiple injuries on left arm, right knee and right hand, chest injuries and severe pain (sic) and cut wound on right knee.

Dr Peter N. Njagi testified on behalf of the appellants and produced two medical reports. As regards the first appellant, the medical report indicated the injuries that he has sustained as:

- i) *Injury to the nose with nose bleeding;*
- ii) *blunt injury to the chest;*
- iii) *blunt injury to the right hip;*
- iv) *cut wound on the base of the left thumb with partial loss of the nail; and*
- v) *bruise wound on the right knee.*

The medical report in respect of the second appellant indicated his injuries as:

- i) *Blunt chest injury;*
- ii) *cut wound on the left leg;*
- iii) *bruise wound on the right knee;*

- iv) *blunt injury to the left shoulder;*
- v) *cut wound above the right elbow;*
- vi) *cut wound over the occipital part of the head; and*
- vii) *cut wound on the palmar aspect of the left thumb.*

In addition to the evidence of Dr Njagi, the appellants had served upon the respondent notice to admit documents under the then *Order XII Rules 2(1) and (3) of the Civil Procedure Rules*. The documents involved included treatment notes at St Mary's Hospital, Mumias and Butere General Hospital which also showed the injuries sustained by the appellants. In the absence of objection to the said documents, the respondent was deemed to have admitted the contents and authenticity of the documents.

The manner in which the learned judge dealt with the evidence before the court was rather contradictory and left a lot to be desired. On the injuries sustained by the appellants, she stated:

“The question arises as to whether the plaintiffs indeed sustained any injuries. It seems that the plaintiff number 1 had a nose bleed. The plaintiff number 2 injuries were not supported by any independent document.”

The learned judge further stated:

“To my opinion the two plaintiffs most certainly sustained minor injuries but these injuries are not that which you would describe as maim (sic).”

The next part of the judgment took a totally different position as follows:

“The doctor's report indeed is shallow and does not support the fact that the plaintiff sustained any injury.”

The final determination was in these terms:

“From the evidence before me I find that plaintiff No.1 sustained a nose bleed. There had been no evidence of a nose tear. I would have awarded Kshs 10,000 for this injury. Plaintiff No. 2 I find no evidence whatsoever that there was any injury sustained. I would have made no award.”

The respondent did not call any evidence and the appellants' evidence in the form of the treatment notes and the evidence of the doctor was not controverted. Mr Osiemo made a big issue of the fact that the injuries in the medical report were “more” than those pleaded in the plaint. Yet there is no dispute that the pleaded injuries in respect of both appellants are reflected in the medical reports. At the very least, the learned judge should have considered the pleaded injuries that were proved by the medical reports and ignored the additional injuries in the medical report that had not been pleaded. As it is, the learned judge virtually ignored all the injuries that the appellants had suffered.

We have said enough to show that we will allow this appeal. The only outstanding issue is the quantum of damages that should be paid to the appellants. Mr Okindo and Mr Osiemo did not address us on quantum. Be that as it may, it is a well established principle that an appellate court will not interfere with the trial court's award on general damages unless it is shown that the sum awarded was demonstrably wrong or that it was based on a wrong principle or was so manifestly excessive or inadequate that a wrong principle or a misapprehension of the evidence may be inferred. See *SHABANI VS CITY COUNCIL OF NAIROBI*, (1985) KLR 516 and *KIRAGARI VS AYA*, (1985) KLR 273). In addition, in *JABANE VS OLENJA*, (1986) KLR 1, this Court stated that in assessment of general damages, it must be borne in mind that each case depends on its own facts, awards should not be excessive, comparable injuries should attract comparable awards and inflation should be taken into

account. See also ALI VS MUHOZOZO, CA. No. 9 of 1983 (Mombasa).

In Ali vs Mohozozo (*supra*) for example, KShs.20,000/= was awarded for sever cuts on the forehead and right eye, abrasion bruises, wounds on the right ankle and fracture of the right leg. The injuries and wounds had healed leaving no permanent or residual disability. In Jabane vs Olenja (*supra*) the injuries were more severe than those suffered by the appellants in the present appeal. The injuries included damages to the kidneys, fracture of the leg and middle finger, injury to the left eye, lacerations on the face and limbs, head injury and haemorrhic shock. The residual effects were a shorted right hand and leg, inability to bend at the knee, a distended iris and a scarred face. An award of KShs.450,000/= by the High Court was reduced to KShs.352,000/= by this Court. Lastly, in CECILIA W.MWANGI & ANOTHER VS RITH W. MWANGI, (CA NO 251 OF 1996 (NYERI)) this Court reduced an award of KShs.450,000/= to KShs.300,000/= for head injury (cerebral concussion), cut wound over the vertex of the scalp, cut wound over the right lower leg, injury to the pelvis resulting in fracture of the right superior and inferior pubic rami.

Those authorities are quite dated and two involved far more serious injuries than those suffered by the appellants. We note that the appellants suffered mainly soft tissue injuries which healed fairly well leaving no permanent or residual disability.

Taking into account all factors, namely the nature and seriousness of the injuries, comparable awards and inflation, we would award KShs.120,000/= as general damages for pain and suffering to each of the appellants. Accordingly, we allow the appeal, set aside the judgment of the High Court and substitute

therefor judgment for each of the appellants for KShs.120,000/= with interest. We award costs of the High Court and in this Court to the appellants. Those are our orders.

Dated and delivered at Nairobi this 8th day of November, 2013.

D. K. MARAGA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR