REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 168 OF 2016

ENTERTAINER TRUCKS COMPANY LIMITED.....APPELLANT

VERSUS

GEORGE KARANJA MAINA.....RESPONDENT

(Being an Appeal against the judgment of Senior Resident Magistrate Hon. J. N. Nthuku delivered on 25th November, 2016 in NAKURU CMCC No.425 of 2015)

J U D G M E N T

1. According to the plaint filed on 29th April, 2015, the plaintiff/respondent herein was travelling in motor vehicle registration KZF 196 Mitsubishi Pick Up on 9th October, 2013 driven by his employer Hellen Wangui Macharia. It was about 7.30 p.m. along Eldoret Nakuru Road near Rongai Trading Centre.

As the driver was rightfully turning right at junction, the defendant/appellant's driver, who was driving motor vehicle registration number KBC 495Y at high speed, overtook the two (2) trucks that were behind the motor vehicle appellant was travelling in smashed into and ran over it.

2. As a result, Hellen died, and the plaintiff/respondent sustained injuries set out at paragraph 10 of the plaint as; mild head injury, deep cut wound, dislocation of the right shoulder, post traumatic osteo arthritis of the right shoulder joint.

3. The plaintiff/respondent is also said to have lost consciousness after the accident, and was admitted in hospital at the Provincial General Hospital Nakuru for two (2) days. An examination after the injury assessed him to have suffered 10% permanent disability having developed post traumatic osteo arthritis.

4. The plaintiff respondent lay the whole blame for the road traffic accident on the defendant/appellant's driver, and filed the suit seeking special damages of Kshs. 9,910/=, loss of earnings for the two (2) days he spent in hospital at Kshs. 12,000/=, General damages for pain and suffering, damages for loss of earning capacity, interests plus costs.

5. The defendant appellant filed a defence on 25th May, 2015 and denied all the allegations of negligence, instead it heaped blame on the "plaintiff/deceased" warning that it would seek at the earliest to enjoin the estate of the deceased to the proceedings. That never happened.

6. At the close of pleadings, parties filed a statement of agreed issues for determination;

1. Was the plaintiff lawfully travelling in motor vehicle registration number KZF 196 Mitsubishi Pick – up at the time of the

accident"

2. Is the Defendant by itself and/or his servant/agent guilty of any of the particulars of negligence as alleged in the plaint"

3. Are the true facts of the accident and negligence those set out in the plaint and/or those set out in the Defence"

4. Did the accident arise out of the negligent acts of the Defendant and/or its servant as alleged in the plaint"

5. Is the Plaintiff entitled to the damages, medical expenses and other incidental expenses as sought in the plaint if at all"

6. Who should pay for costs of suit"

7. The plaintiff/respondent testified and called three (3) witnesses, who included the doctor, the records officer and the Provincial General Hospital, a police officer, and the husband of the deceased, who was also his employer. The defence did not call any witnesses. At the close of the case, each counsel filed written submissions.

8. On 25th November, 2016, the trial magistrate delivered her judgment. She found that negligence had been proved against the defendant/appellants driver and found liability at 100%. She found that special damages are proved at Kshs. 9,910/=. She found that there was no loss of earning capacity or loss of earnings. With regard to general damages for pain and suffering, she awarded Kshs. 750,000/=. She stated;

"The defendant proposes a sum of Kshs. 1,200,000 as general damages whereas the plaintiff in their submissions asks for Kshs. 750,000/=. This is the first case in my lifee as a magistrate to see a defendant willing to pay much more than what is requested and being the case I have no reason to award less than the Kshs. 750,000/= requested by the plaintiff. So I award Kshs. 750,000/= (Seven Hundred and Fifty Thousand)."

9. The defendant/appellant was aggrieved and filed this appeal on four grounds;

1. *THAT the learned trial magistrate erred and misdirected herself in fact and law by awarding damages to the Respondent that were manifestly excessive in the circumstances and thus failed to appreciate the principles applicable in the award of damages.*

2. THAT the learned Magistrate erred in law and in fact in assessing damages and failed to apply the principles applicable in award of damages of comparable awards made for analogous injuries.

3. THAT the learned magistrate erred in failing to consider and critically analyze the submissions made on behalf of the defendant and thus arrived at an unjustifiably high award for the injuries sustained.

4. THAT the learned magistrate erred in failing to consider the nature of injuries sustained by the respondent and awarding what was excessive and unjustified in the circumstances.

10. The plaintiff/respondent on his part filed a cross appeal on 30th January, 2017 on the grounds;

1. *THAT the learned magistrate erred in law by failing to appreciate the principles applicable in considering and/or awarding a claim for loss of earning capacity (diminished) and thus the magistrate failed to grant the respondent the claim for loss of earning capacity which had been adequately proved at the trial.*

2. THAT the learned magistrate erred in law by failing to appreciate the fact that the claim for loss of earnings for two (2) months had been properly pleaded and proved by the Respondent and thus the failure to grant the same occasioned a miscarriage of justice.

11. Each party filed written submissions in argument of their respective appeals and in opposition to the rival appeal.

12. I have read the record, and the submissions by each party.

13. The issues for determination are;

(i) Whether the cross appeal is competent

(ii) Whether the trial magistrate erred in the award for general damages.

(iii) Whether the plaintiff/respondent appellant was entitled to damages for loss of earnings and loss of earning capacity.

14. Before I delve into the appeals it is necessary to deal with the issue of the cross appeal.

15. It is the argument of the defendant/appellant that the cross appeal is invalid. First because it was filed on 31st January, 2017 yet judgment was delivered on 25th November, 2016. That in any event there was no established procedure for cross appeals in an appeal from the subordinate court to the High court as was stated in **George Kianda & Another vs Judith Katumbi Kathenge & Another [2018] eKLR** that the plaintiff/respondent was expected to file his own appeal, and then seek to have it consolidated with the defendant/appellants appeal. On that ground alone the plaintiff/respondent's cross appeal was time barred by **Section 79 G** of the **Civil Procedure Act.**

16. This position was debunked by the plaintiff/respondent who argued that firstly the **George Kianda** case was not binding to this court, and that the ultimate issue there was extension of time to file a cross appeal secondly that there is **Order 42 rule 32** of the **Civil Procedure Rules** which clearly envisages that an appeal and a cross appeal may be filed in the High Court

"[Order 42, rule 32.] Power of appellate court on appeal.

The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal."

That the only thing missing was the procedure for filing the cross appeal and went on to argue that that was no big deal because procedure could be borrowed from the Court of Appeal. For this submission he cited **Prime Bank Limited vs Esige [2005] eKLR** where the court, finding a lacuna in the Rules on the procedure for applications for stay of proceedings found that the principles applicable in the Court of Appeal would be applicable in the High Court. On that authority, the plaintiff/respondent/appellant proposed that this court be guided by the provisions of **Rule 93(2)** of the **Court of Appeal Rules (Rev. 2016**) which states;

"R. 93 (2): A notice given by a respondent under this rule shall state the names and addresses of any persons intended to be served with copies of the notice and shall be lodged in quadruplicate in the appropriate registry not more than thirty days after service on the respondent of the Memorandum of Appeal and the record of appeal or not less than thirty days before the hearing of the appeal, whichever is the later." (Emphasis added).

17. It is not in dispute that there really is no provision for the procedure to file a cross appeal. It is also cumbersome where issues arise from the same suit to file two (2) separate appeals, then have them consolidated yet the issue could well be dealt with in the same suit just like in the manner of a counter-claims, cross petitions etc. It is reasonable, even for the reasonable person on the Standard Gauge Railway train, that upon service of the Memorandum of Appeal on the respondent by the appellant, that respondent should be at liberty to cross appeal. The provisions of **Section 79G** would therefore not be applicable **because** until the memorandum of appeal is served, the respondent would not be aware of the grounds.

18. There were also other cases cited where parties had filed cross appeals in this court and the court had dealt with the same. See **Daniel Otieno Migore vs. South Nyanza Sugar Co Limited (20eighteen)EKLR**, **John Mutungu Waititu vs China Wu Yi (K) Ltd (20eighteen)EKLR, Mary Wanja Mugwa and Anor vs Tom Mbuthia Gotogo (2017) eKLR, Abdi Osman vs Kamau C. Njuguna (2015) eKLR.**

19. Clearly therefore I am for the borrowing of the procedure from the Court of Appeal if not anything else. In order to comply with **Section 1A (i) and 1(B) of the Civil Procedure Act** and counsel for doing their duty under **Section 1A (3)** of the same Act.

20. It is evident that my view is that the cross appeal is competent and validly on record.

21. Now to the appeals. These two (2) are first appeals. The duty of this court is expressed in the authorities;

Selle & Another vs Associated Motor Board Co. Ltd & Others (1968) EA 123;

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact it if appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs – Ali Mohamed Sholan (1955), 22 E.A.C.A., 270)" (Emphasis added)"

Peter vs Sunday Post [1958] EA 424 pg 429 the court stated;

"It is a strong thing for an Appellate court to differ from the finding, on a question of fact, of a Judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence… to determine whether the conclusion originally reached upon it should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

22. Was there an error in the award of General Damages"

It is clear from the judgment that the trial magistrate did not apply her mind to the evidence and authorities cited. The trial magistrate was guided by the apparent figures/sums mentioned in the submissions. In his submissions, the plaintiff/respondent sought General Damages for Kshs. 750,000/= relying on two (2) 2006 authorities where the High Court had awarded Kshs. 400,000/= and Kshs. 600,000/= respectively injuries.

23. The defence relied on **Patel Shaikesh Kashila vs Peter Logom Ekharani vs Peter Logom Ekharani [2011] eKLR,** where the injuries were dislocated right shoulder, dislocated right wrist joint, dislocated left elbow joint, dislocated right elbow joint. The trial magistrate made an award of Kshs. 480,000/= relying on Nakuru HCC 209/1996 where *Rimita J* had awarded Kshs. 514,907/05 to a plaintiff who had sustained fracture of left femur, injury to right knee joint accompanied by ugly scars. The judge *(Azangalala J)* as he then was, found that the award was excessive and reduced it to Kshs. 250,000/=.

24. According to the trial magistrate the defence had submitted for General Damages of 1,200,000/=. These submissions are at paragraph 17 of the defendant's submissions.

"*We do submit that an award of Kshs. **1,200,000**/= would be sufficient compensation to the plaintiff under this limb and place reliance on the case of Patel Shailesh Keshulal vs Peter Logom Ekharani [2011] eKLR where the court awarded Kshs. **250,000/=** to the respondent who had several dislocations and indeed injuries which were most manifest than the injuries sustained by the plaintiff herein. The plaintiff herein only sustained soft tissue injuries to the right shoulder and the mild head injury and as such the award is complacent with the principles and objections of awarding damages."*

It is evident on the face of it, that the defendant could not have been saying, give the plaintiff 1.2 million Kenya Shillings, from the totality of the authority cited, it is evident that it was their submission that the injuries were less than in the authority cited, and deserved less in General Damages, Kshs. 120,000/=.

Had the trial magistrate applied her mind to the authority cited, she would have noted the mistake and addressed her mind fully to the analysis of the plaintiff's injuries.

25. From the discharge summary of **9th October, 2013** the final diagnosis is *"mild head injury and soft tissue injury"*.

The history and treatment indicated;

"plaintiff involved in road traffic accident reports loss of consciousness 1 HR, bleeding from left ear no…. left ear stitched and not bleeding, lacerations on scalp… mild tenderness left lumber region"

The police abstract dated **6th May, 2014** indicated the plaintiff respondent as having sustained *injuries to the degree of harm*. The P3 dated **12th February, 2014** indicated *mild head injury STI in right shoulder region*. Degree of injury was ascertained as *harm*. The medical report by Dr. Omuyoma dated **12th May, 2014** set down the *injuries as mild head injury deep cut wound on left hear lobe dislocation of right shoulder joint.*

The complaints at that time were *"pain in the right shoulder joint… fresh scar on left ear lobe – 2 cm long"* He also noted *painful movements of the right shoulder joint*, x-ray showed dislocation of the left shoulder joint. He concluded that the *dislocation was not reduced* and the plaintiff/respondent had developed "*post traumatic osteo arthritis of the right shoulder joint with 10% permanent disability" Degree of injury – Grevious Harm.*

26. I have set out the plaintiff respondents injuries deliberately to demonstrate how the evidence was not consistent. He was discharged from hospital without any complaints about his shoulder. There is no way the hospital would have missed a dislocated shoulder joint. In fact the complaint he had was mild pain in the left lumbar region, somewhere in the lower back. Even the doctor who filled the P3, found only Soft tissue injury of the shoulder region. Dr. Omuyoma's report indicates that he relied on discharge summary and the P3. The X-ray mentioned in the conclusion is not mentioned as among the documents utilized or where it was taken.

In his oral testimony the plaintiff/respondent spoke about his injuries, and it was evident that they did not agree with the documents. Dr. Omuyoma confirmed that he relied on the P3 and discharge summary, mentioned X-ray for the osteo arthritis. He confirmed that the P3 simply spoke about injury on the right shoulder. He insisted that a dislocation was a soft tissue injury. He said the X-ray he used was the one taken at Provincial General Hospital before admission. That he examined the plaintiff/respondent nine (9) months later. So, something about the injuries does not add up. If the x-ray is the one that was taken at admission, why is it that the doctors who were with the plaintiff/respondent did not notice this serious injury" How would post traumatic osteo arthritis show up on the same x-ray that was taken on the day of admission" My analysis of the medical evidence just goes to confirm that the plaintiff's injuries were not serious enough to warrant the Kshs. 750,000/= awarded by the trial court. If indeed nine (9) months later the plaintiff had post traumatic osteo arthritis out of a dislocated shoulder joint the same was not supported by the medical evidence to be related to the road traffic accident.

27. The plaintiff/respondent worked for the deceased and her husband PW4. He alleged that he could not work the way he worked before and could not earn any bonuses. No such evidence was tendered, that indeed he was previously earning bonuses which he could no longer earn.

28. I have considered the authorities cited to support the ground that the plaintiff/respondent was entitled to damages for loss of earning capacity. I am not persuaded by the evidence that he sustained such an injury out of the road traffic accident to warrant such a claim.

As for loss of earnings for the two (2) days in hospital that would only be established if it was demonstrated that during that month, he was not paid salary for the two (2) days he was admitted in hospital. By the time of the road traffic accident he had worked for five (5) years for the PW4, as a casual labourer" Again something was not right with the evidence.

29. Clearly on the two (2) issues of the cross appeal, there was no evidence to prove the same and I must agree with the trial magistrate on her findings.

30. In conclusion, having analysed the evidence on record, I am of the view that the trial magistrate did not apply her mind to the medical evidence and awarded the General Damages simply because the defence appeared to be offering more than the plaintiff was asking for. Even in those bizarre circumstances she was obligated to analyse the evidence so as to arrive at the just award. On the authorities cited, based on the injuries sustained an award of Kshs. 200,000/= would be sufficed. The following orders are appropriate:

1. The appeal succeeds.

2. The cross appeal fails with costs to the defendant/appellant.

3. The award for General Damages of Kshs. 750,000/= is set aside and substituted with an award for Kshs. 200,000/=.

4. The other awards, liability at 100% against the defendant appellant and Special Damages of Kshs. 9,910/= and costs and interest remain the same.

Dated, delivered and signed at Nakuru this 16th day of January, 2020.

Mumbua Matheka

Judge

In the presence of

……. Court Assistant

Appellant ……

Respondent ……