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Advocates:	Mr Wattangah for the Appellant Mr karira for Respondent.
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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL APPEAL NO.99 OF 2008

(Appeal arising from BGM CM CC NO.492 of 2007)

MOHINDER SINGH BRAH **APPELLANT**

VRS

SHAMIN WAMAITHA **RESPONDENT**

JUDGMENT

This appeal arises from the judgment of the Chief Magistrate, Bungoma in CM CC No.492 of 2007 delivered on the 13/11/2007. The Appellant Mohinder Singh Brah was the Defendant in that case while the Respondent herein was the Plaintiff. Judgment was entered in favour of the Respondent against the Appellant on full liability. General damages for loss of amenities awarded was Ksh.1,200,000/=, future medical expenses Ksh.150,000/= and special damages of Ksh.317,000/= all totaling to Ksh.1,667,000/=. The Appellant was aggrieved by both the finding on liability and the quantum of damages.

The Respondent was a passenger in vehicle registration number KAV 393 V Scania Bus traveling from Kampala to Nairobi via Busia, Mumias and Bungoma on the 12/09/2006. Along Busia-Mumias road at a place known as Koyonzo, the bus was involved in an accident around 9.00 p.m. On the left side of the road was a stationary tractor registration number KAU 866 L loaded with stacks of sugarcane onto which the bus rammed into. The Respondent sustained several injuries as a result of the accident. Police visited the scene of accident and commenced investigations. The driver of the tractor was charged with two traffic offences in respect of which he was convicted and fined Ksh.3,000/=. The Respondent sued for damages in Bungoma CM CC No.492 of 2007 which gave rise to this appeal.

Mr. Makokha for the Appellant argued the grounds of appeal which raised two pertinent issues being that negligence was not proved against the Defendant and that the damages awarded were inordinately high and excessive. The Appellant contended that the receipt for special damages had no revenue stamp and were therefore not admissible in evidence. The Respondent filed a cross-appeal which contains two grounds. Mr. Karira argued that the damages awarded were too low in the circumstances of the case calling for enhancement. The counsel further argued that the court erred for failing to award the Respondent future medical expenses of Ksh.500,000/= which were proved. Mr. Karira opposed the appeal arguing that the Plaintiff adduced adequate evidence on negligence which led the court to find that the Appellant was fully liable. As for the receipts for special damages, Mr. Karira referred this court to some authorities in support of his argument that failure to stamp documents is not fatal to the Respondent's case.

The Respondent testified that she was traveling in the bus on 12/09/2006 from Kampala to Nairobi when it was involved in an accident around 9.00 p.m along Busia-Mumias road. She told the court that at the time of the accident, she was asleep and did not see how the accident occurred. She sustained severe injuries on impact which led to loss of consciousness. PW5 visited the scene of the accident and also investigated the case. He testified that vehicle registration number KAV 393 V Scania Bus rammed into a stationary tractor parked on the left side of the road. Investigations revealed that the driver of the tractor was not authorized to drive class D vehicles which include the tractor. The driver had failed to place life savers on the road to warn other motorists of the danger posed by the broken down tractor. The tractor had suffered a tyreburst while fully loaded with sugarcane stacks. This was about one hour before the accident. PW6, the driver of the bus testified that on the material day, he was driving vehicle registration number KAV 393 V Scania bus to Nairobi from Kampala. At Koyonzo, he saw a stationary canter vehicle on the right side of the road with lights on. Then he suddenly saw a stationary tractor on the left side which was his correct lane. PW6 could not swerve to the right side because the canter was there. The bus glazed the tractor. There was no sign of life savers or any other warning on the road. PW6 blames the tractor driver for obstructing other motorists without a warning.

The defence called one (1) witness who was the driver of the tractor. He told the court that he was transporting sugarcane stacks in the tractor when a tyre burst occurred. He parked the tractor beside the road and placed twigs on the road about 70 metres as a warning to other motorists. At the time the bus rammed in his tractor, the witness was waiting for the mobile unit to rescue him. The reflectors of the tractor were removed by the impact of the accident. He denies that he was negligent and that he caused the accident.

The Plaintiff in this case was honest enough to admit that she was asleep when the accident occurred and therefore, she had no evidence on liability to offer. PW5, the investigating officer and PW6 the bus driver were the main witnesses on the occurrence of the accident. When PW5 visited the scene at around 10.00 a.m he found the two vehicles there. It was his testimony that the tractor driver had not placed any warning signs on the road. This evidence was corroborated by that of PW6, the bus driver. PW5 told the court that the law requires that in case of a breakdown of a vehicle, life savers must be placed as a warning to other motorists. It was at night and a wet night for that matter which raises the

risk of accident occurring. The tractor driver ought to have been more cautious and ensure that he warns other motorists of the broken down vehicle. The trial court did not believe the witness (DW1) when he said that he had placed twigs on the road as a warning. Instead, the magistrate found PW5's evidence credible. Had there been any twigs on the road on a stretch of 70 metres as DW1 put it, PW5 would have seen them when he visited the scene. The broken down vehicle according to PW5 was partly on the road which caused obstruction to other motorists. Section 53 (1) of the Traffic Act imposes a duty on the driver of a broken down vehicle ***"to remove the vehicle from the road, or, where the vehicle has to remain on the road between 6.45 p.m and 6.00 a.m, to clearly indicate its position by a light or lights visible to drivers of vehicles approaching from either direction."*** The driver is also required to place on the road not less than fifty metres from the vehicle two red reflecting triangles one ahead of the vehicle and one behind so that each is clearly visible to other drivers.

The law puts emphasis visibility of the signs where a part of the broken down vehicle is on the road. The law leaves no doubt that twigs are not adequate signs in the circumstances. The evidence was that there was no ***"light or lights"*** at the scene to serve as a warning to other drivers in the absence of life savers.

It is not in dispute that the tractor had a mechanical problem. However, the law imposes a duty on the driver to give a clear warning to other drivers. The magistrate found that the driver had failed in this important duty. I agree with this finding which was supported by the evidence of PW5 and PW6. The magistrate also pointed out in his judgment that had the vehicle been removed from the road, the accident would not have occurred. DW1 said he was waiting for the mobile unit to give him assistance. It was not explained where the unit was coming from and when it was expected at the scene. All the same the unit was not effective having left the vehicle on the road for more than one hour after the breakdown. The owner of the tractor was under a duty to ensure that drivers are assisted as a matter of urgency during breakdowns. The owner also committed a breach of duty if the matter had been brought to his attention.

It was the contention of the defence that the bus driver said he has been a driver since 1976 and was familiar with the road. This admission does not take away the statutory duty imposed on the driver. Every driver has a right to be warned of a broken down vehicle as is required by the law irrespective of whether he is familiar with the road or not. In that regard, it does not matter whether he is an experienced driver or not. Every driver ought to drive with due care and attention on the road. On the part of PW6, there is no evidence that he drove carelessly at the material time.

The relevant particulars of negligence were proved against the Appellant who is vicariously liable for the acts of his employee, the tractor driver. The finding on liability is hereby upheld. I agree with the defence argument that the fact that the tractor driver was convicted with driving a vehicle without a licence (class D) does not make him negligent in regard to this case. The reason for this conclusion is because his vehicle was stationary at the time of the accident. Being convicted of driving a vehicle without reflectors would affect other road users. Although the vehicle was stationary at the time of the accident, the presence of reflectors would have assisted other drivers to notice from the rear that there

was a vehicle on the road. In this regard, I disagree with the Appellants argument that his conviction for that offence has no bearing to negligence. The owner is liable for failing to fit his vehicle with reflectors as required by the law.

It is correct that particulars of negligence I, ii and iii in paragraph 4 of the plaint relate to driving the vehicle. The case of the Plaintiff was founded on the stationary tractor and does not support the particulars of negligence relating to driving of the vehicle. However particular iv reads:

“Failing to have regard to other road users.”

The totality of the Plaintiff’s evidence on negligence supports the fact that the driver of the tractor cause obstruction on the road and failed to warn other road users of the risk posed by the broken down tractor. PW6 is one of the drivers who were not warned of the obstruction by the tractor. Due to this omission, his vehicle rammed onto the tractor from the rear. The driver of the tractor is faulted for failure to warn other motorists of the presence of the broken down vehicle on the road. The driver therefore failed to have regard to other road users. The contention of the Appellant that none of the four particulars of negligence was proved is not valid.

I am satisfied that the magistrate was correct in his finding that the Appellant was fully liable for the accident.

The Appellant argued that the receipts for special damages were not stamped as required by section 19 of the Stamp Duty Act, Cap 480. The Respondent submitted that the receipts can be stamped later as provided for by section 20. The counsel submitted that leave of the court was obtained and the receipts stamped. The receipts in the record of appeal have all been stamped.

Section 19(1) provides:

“subject to the provisions of sub-section (3) of this section and to the provisions of sections 20 and 21 of this Act, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except-

(a) in criminal proceedings; and

(b) in civil proceedings by a Collector to recover stamp duty, unless such instrument is duly stamped.”

Section 20 (1) provides:

“Where an instrument is chargeable with stamp duty under this Act and should have been

stamped before a certain event or before the expiration of a certain period, but has not been so stamped, a Collector may give leave for the stamping of such instrument if he is satisfied-

(a) that the omission or neglect to stamp duly did not arise from any intention to evade payment of stamp duty or otherwise to defraud; and

(b) That the circumstances of the case are such as to justify leave being given."

This court was referred to some authorities where the court ruled that stamping of instruments under the Stamp Duty Act may be done out of time. In the case of **SURGIPHARM LTD VRS AKSHAR PHAMARCY LTD & ANO. K.LR. 2004 e KLR** it was held by Emukule, J that the party should be allowed reasonable time on leave of the court to have instruments stamped. In the case of **MORJARIA VRS KENYA BATTERIES [1981] LTD & 2 OTHERS NAIROBI HCCC NO.701 OF 2002** where the facts of the case were similar put emphasis on the same principle.

I therefore find that the stamping of the receipts for special damages was in compliance with the law. The special damages of Ksh.317,000/= was rightly awarded.

The Respondent pleaded for Ksh.500,000/= for future medical expenses. Dr. Sirma (PW3) testified that the Plaintiff required specialized medical treatment by a neurosurgeon to correct the problem of memory lapse. She also needed an operation to remove screws fixed to reduce the fracture. The estimated costs of both operations was given as Ksh.500,000/=. The magistrate noted that there was no evidence from a neurosurgeon to explain whether specialized treatment was necessary. The magistrate awarded Ksh.150,000/= for future medical expenses. Dr. Sirma is a qualified medical officer unless there is evidence to the contrary. All doctors study surgery in the course of their bachelor of medicine degree. For all intents and purposes, he would be qualified to give an expert opinion on surgery and all that pertains thereto including cost of removing metal plates. However, he is not an expert in neurosurgery. It would require a neurosurgeon to testify on the brain damage suffered and how it may be treated. The patient required physiotherapy according to the doctor. In this area, the doctor was qualified to make the recommendation although the actual cost was not given.

In my opinion, a sum of Ksh.150,000/= to cover surgery on removal of plates and for physiotherapy expenses was reasonable. The award cannot be said to be excessive considering the cost of medical care in this country.

Dr. Jakaiti Sangaro (PW2) testified that the Plaintiff sustained the following injuries:

- a) a severe head injury;**
- b) deep cut wound on the forehead;**
- c) cut wound on the nasal bridge;**
- d) fracture midshaft ulna and radius of left hand;**

e) blunt injury on the right knee.

She was in the intensive care unit for five (5) days and for twenty (20) days at Mediheal Hospital having been transferred from St. Mary's Hospital, Mumias. Due to the head injury, the Plaintiff lost consciousness for six (6) days.

The Plaintiff urged the court to award her Ksh.1,800,000/= for pain and suffering while the Defendant proposed Ksh.200,000/=.

I have carefully considered the injuries sustained by the Plaintiff which are indeed severe as described by the doctors especially the head injury. The authorities relied on the Defendant relate to injuries of a much lesser magnitude, the awards were made more than ten (10) years ago. Some of the Plaintiff's authorities relate to more serious injuries than those suffered by the Plaintiff. The magistrate awarded Ksh.1,200,000/= for lost of amenities. Dr. Sangaro said that the Plaintiff was expected to recover after undergoing physiotherapy. For this reasons, I find no merit in the prayer to enhance general damages in the cross appeal. The surgical scars would however remain permanent. The general damages awarded were on the higher side.

Having considered all the above, I find that a sum of Ksh.1000,000/= will adequately compensate the Plaintiff. I therefore set aside the general damages awarded and substitute it with Ksh.100,000/=. The awards of special damages and future medical treatment are upheld.

The Appellant will meet the costs of this appeal and those of the court below.

F. N. MUCHEMI

JUDGE

Judgment dated and delivered on the 1ST day of DECEMBER 2010 in the presence of Mr Wattangah for the Appellant and Mr karira for Respondent.

F. N. MUCHEMI

JUDGE



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