Nyang'era v Thuo & another (Civil Suit 209 of 2013) [2022] KEHC 11168 (KLR) (Civ) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11168 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 209 OF 2013

JK SERGON, J

MAY 31, 2022

BETWEEN

PEACE KEMUMA NYANG'ERA .... PLAINTIFF

AND

MICHAEL THUO .... 1ST DEFENDANT

WAIGANJO JANET .... 2ND DEFENDANT

JUDGMENT

1. Peace Kemuma Nyang'era, the plaintiff herein lodged a suit against the 1st and 2nd defendants by way of the plaint dated June 3, 2013 in which she sought for general and special damages in the sum of Kshs 1,347,543/= together with costs of the suit and interest thereon.
2. The 1st and 2nd defendants are sued in their capacity as the driver and owner of the motor vehicle registration number KBM 247V ("the subject motor vehicle") respectively, at all material times.
3. The plaintiff pleaded in the plaint that sometime on or about the 15th day of June, 2012 while she was lawfully travelling aboard the subject motor vehicle as a fare paying passenger along Komarock road at the phase 1, section 3B roundabout, the subject motor vehicle was involved in an accident resulting in bodily injuries to the plaintiff, particularized under paragraph 4 of the plaint.
4. The plaintiff attributed the accident to negligence on the part of the 1st defendant and set out its particulars under paragraph 4 of the plaint.
5. The 2nd defendant is pleaded as being vicariously liable for the acts/omissions of the 1st defendant.
6. Following a request by the plaintiff, an interlocutory judgment was entered against the defendants on December 3, 2014.

7. Subsequently, the defendants applied to have the interlocutory judgment set aside and for leave to put in their statement of defence.

8. Upon the setting aside of the interlocutory judgment and upon being granted leave by the court, the defendants entered appearance and filed their joint statement of defence on June 25, 2015 to deny the plaintiff's claim.

9. At the hearing, the plaintiff testified and summoned two (2) additional witnesses while the defendants did not call any witnesses or participate at the hearing despite evidence to show that they were served with a hearing notice through their advocate.

10. The plaintiff who was PW1 adopted her signed witness statement and bundle of documents as evidence and exhibits respectively.

11. The plaintiff then stated that she worked as a lab technician at all material times and that she continues to undergo treatment resulting from the injuries sustained in the material accident.

12. Dr Theophilus Wangata who was PW2 gave evidence that upon examining the plaintiff on February 18, 2013 he noted that she had sustained multiple pelvic fractures indicated in the medical report, and that the plaintiff also underwent multiple surgeries as a result.

13. The doctor also gave evidence that the plaintiff would require further medical treatment in the future to remove the metal plates inserted in her body, and produced the medical report, receipts for the same as P Exhibits 3, 4 and 5.

14. CPL Beth Kamande who was PW3 produced the police abstract as P Exhibit 6 and testified that she was attached to Kayole traffic base at the time of giving her testimony and that she is the one who issued the plaintiff with the police abstract.

15. The police officer further testified that the investigations revealed that the plaintiff sustained her injuries while alighting from the subject motor vehicle and that it is the subject motor vehicle that was solely involved in the accident.

16. Upon close of the hearing, the plaintiff filed written submissions.

17. On liability, the plaintiff contends that the defendants ought to be find 100% liable in the absence of any contrary evidence to refute the averments made in the plaint and reinforced by the evidence presented at the trial.

18. The plaintiff contends that she has proved her case to the required standard and relies on the case of *Interchemie E A Limited v Nakuru Veterinary Centre Limited* [2001] eKLR in which the court determined that in the absence of any evidence tendered on behalf of a defendant, the plaintiff's case stands uncontroverted.

19. On damages, the plaintiff prays for the sum of Kshs 5,000,000/= on general damages for pain and suffering and loss of amenities, with reference to the case of *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR where the court, on considering injuries in the nature of multiple fractures and other injuries requiring future medical treatment, awarded the plaintiff therein general damages in the sum of Kshs 4,000,000= for pain, suffering and loss of amenities.

20. Finally, the plaintiff prays for an award in the sum of Kshs 1,347,543/= under the head of special damages, inclusive of the cost of future medical treatment.

21. I have considered the evidence on record, the submissions and authorities relied upon by the plaintiff. It is clear that the twin issues for determination are liability and quantum.

22. On liability, upon my examination of the evidence on record, both oral and documentary, I established that an accident took place on the material date involving the subject motor vehicle, the result of which the plaintiff sustained injuries to her person.

23. On the subject of ownership of the subject motor vehicle, the plaintiff tendered a copy of records dated March 18, 2013 indicating that the 2nd defendant was the registered owner of the subject motor vehicle at all material times.

24. The aforesaid evidence was not at all challenged by the defendants. In the absence of any evidence to the contrary, I am of the view that the contents of the copy of records are deemed to be *prima facie* evidence of ownership pursuant to the provisions of section 8 of the *Traffic Act*, cap 403 Laws of Kenya which stipulates that the person whose name appears on the registration document in respect to a motor vehicle will be considered its owner.

25. Furthermore, PW3 tendered the police abstract relating to the accident, the contents of which I also considered. According to the police abstract, the 1st defendant was the driver of the subject motor vehicle.

26. The defendants on their part did not call any evidence to challenge the contents of the police abstract. In the absence of contrary evidence, a police abstract is deemed to be conclusive proof of ownership. This was the reasoning taken by the Court of Appeal in the case of *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another* (2010) eKLR as referenced in the case of *Lochab Transport (K) Limited & another v Daniel Kariuki Gichuki* [2016] eKLR that:

    "Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a *prima facie* evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"

27. In view of the foregoing circumstances, I am satisfied that the plaintiff has proved on a balance of probabilities that the 1st and 2nd defendants were at all material times the driver and registered owner of the subject motor vehicle.

28. On the subject of negligence, upon my examination of the pleadings and evidence, I observed that both the plaintiff provided a detailed account of the moments leading up to and following the accident and her evidence is supported by the contents of the police abstract and the oral testimony by PW3, none of which were controverted by the defendants at the trial.

29. Moreover, the plaintiff pleaded the doctrine of *res ipsa loquitur* which would prove relevant in determining whether there was negligence on the part of the defendants.

30. The said doctrine was aptly discussed in the authority of *Susan Kanini Mwangangi & another v Patrick Mbithi Kavita* [2019] eKLR with reference to the East African Court of Appeal's decision in *Embu Public Road Services Ltd. v Riimi* [1968] EA 22 where the following was enunciated:

    "The doctrine of *res ipsa loquitor* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any

explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant…The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control.”

31. From my understanding of the above rendition, a mere pleading of the doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.

32. In the present instance, the plaintiff discharged the burden of proof by pleading the doctrine and it fell upon the defendants to disprove it but they did not.

33. In the premises, I am satisfied that the plaintiff has made her case against the 1st and 2nd defendants to the required standard and I hereby enter a finding of 100% liability against both defendants jointly and severally.

34. Having settled the first issue, I turn my attention to the second issue on quantum and which I shall address under the following heads.

    a. General damages for pain, suffering and loss of amenities

35. Going by the pleadings and medical evidence adduced at the trial, it is clear that the same are consistent in terms of the injuries suffered by the plaintiff, namely:

    a. Fracture of the sacrum bone (transforaminal fracture)

    b. Fracture of the right superior pubic ramus of the pubic bone

    c. Fracture of the right ischium/inferior pubic ramus of the pelvic bone

    d. Hematoma on both thighs

    e. Lumbo-sacral hematoma

36. The medical report prepared by Dr Theophilus Wangata who was PW2 further indicated that the plaintiff was admitted at Mater Hospital from June 16, 2012 to July 10, 2012 during which time she underwent multiple surgeries and received treatment.

37. The doctor termed the injuries as grievous harm in nature and assessed permanent disability at 45%.

38. Upon considering the sum of Kshs 4,000,000/= suggested by the plaintiff under this head and coupled with the authority of *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR cited above, I am of the view that the same constituted injuries of a more extensive nature.

39. I therefore considered the following cases:

    a. In the case of *Penina Waithira Kaburu v LP* [2019] eKLR wherein the plaintiff had suffered multiple pelvic fractures but with no permanent incapacity, an award in the sum of Kshs 2,000,000/ was found to be suitable under the head of general damages for pain, suffering and loss of amenities.

b. In the recent case of *Wurano Tosha & another v DMK* [2021] eKLR the High Court sitting on appeal assessed an award of damages downwards from the sum of Kshs 3,200,000/ to Kshs 2,500,000/ in respect to multiple fractures and other injuries, with permanent incapacity being assessed at 22% and 40% respectively, based on two (2) medical reports, and which injuries were categorized as grievous harm.

40. Upon taking into account the above-cited authorities, the seriousness of the injuries sustained in the present instance as well as the higher degree of permanent incapacity of 45%, I find an award of Kshs 3,000,000/ to suffice in the circumstances.

b. Special damages

41. Upon my examination of the pleadings and evidence tendered, I established that the plaintiff produced receipts to support the claim for Kshs 1,347,543/= sought in the plaint, inclusive of the sum of Kshs 200,000/= for future medical expenses as per the medical report tendered. I will therefore award the abovementioned sum.

42. Accordingly, I hereby enter judgment in favour of the plaintiff and against the 1st and 2nd defendants on liability and make the following award in favour of the plaintiff:

a. General damages for pain,suffering and loss of amenities Kshs 3,000,000/=

b. Special damages Kshs 1,347,543/=

TOTAL Kshs 4,347,543/=

c. The plaintiff is awarded cost of the suit.

d. Special damages to attract interest at court rates from the date of filing the suit and general damages to attract interest at court rates from the date of judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2022.

....

J. K. SERGON

JUDGE

In the presence of:

................................for the Plaintiff

.... for the 1st Defendant

.... for the 2nd Defendant