



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO 49 OF 2019

MARGARET KWAMBOKA ONYONI.....APPELLANT

VERSUS

EDWARD ATANGA.....1ST RESPONDENT

JOSHUA ONSONGO MOSE.....2ND RESPONDENT

RICHARD MOMANYI.....3RD RESPONDENT

(Being an appeal from the Judgment/Decree of the Honourable P. Wamucii

Nyotah (RM) Kisii Law Courts delivered on the 18th December 2018)

JUDGMENT

1. The background to this Appeal concerns a road traffic accident. The appellant claimed she was on board as a passenger in motor vehicle KZP 418 belonging to the 1st respondent when it had a head on collision with motor vehicle KCD 290D owned by the 2nd respondent. She advanced that the accident was caused by the negligence of both drivers and as a result of the accident she sustained the following injuries; brain contusion, fracture of the mandible, chest contusion, fracture of the right humerous and bruises on the feet.

2. The trial court after conducting a full hearing it found that the 1st respondent was 100% liable and the appellant was awarded Kshs 350, 000/- and Kshs 7,000/- being general and special damages respectively.

3. The 1st appellant dissatisfied with the findings of the trial court has raised the following grounds in his memorandum of appeal;

1. The Learned Trial Magistrate erred in law and principle by failing to appreciate the injuries sustained by the appellant as being of a higher magnitude and did commensurate with the amount of general damages awarded.

2. That the award of general damages awarded to the appellant was manifestly and inordinately on the lower scale in the circumstance.

3. That the Learned Trial Magistrate erred in law and in principle by ignoring the evidence in regard to the injuries of the appellant as noted during the trial more specifically, that she had a fracture of the mandible and fracture of the right humerous thereby arriving at an award on the lower scale.

4. The 1st respondent on 15th February 2019 filed a **HCCA NO 20 2019** which was consolidated with the instant appeal. In his appeal filed before the court, he raised the following grounds of appeal;

1. The Learned Trial Magistrate erred in law and in fact in making a finding that the appellant herein was 100 % liable when in fact there was evidence on record that he was not the one who caused the accident.

2. The Learned Trial Magistrate was wrong in fact and in law in holding that the accident was solely caused by the Appellant herein.

3. The Learned Trial Magistrate was wrong in fact and law when she failed to properly evaluate and analyze the evidence before her and hence reached an erroneous conclusion and/or decision.

4. The Learned Trial Magistrate did not appreciate the evidence before her thus reached a wrong and irregular decision.

5. The Learned Trial Magistrate erred in law and fact in not apportioning liability.

6. The judgment of the Learned Trial Magistrate was contrary to the weight of evidence, submissions and all materials placed before her and thus she awarded very high general damages.

5. This appeal before me therefore touches on both liability and quantum.

6. The appellant submitted that an award of Kshs 350,000/- was manifestly low when considered with the injuries sustained by the appellant.

7. The 1st respondent submitted that the motor vehicle KZP 418 was lawfully being driven within its lane while KCD 290D veered off its lane while overtaking therefore causing the collision. He contends that the sketch plans reveal that the accident occurred on the left side facing Kisii town clearly indicating motor vehicle KZP 418 was on its lane. He also pointed out that Pw1 testified before the lower court that she blamed both drivers of the motor vehicles for the accident. The urged the court to set aside the finding that they were 100% liable for the accident and further proposed that an award of Kshs 150,000/- was adequate compensation.

ANALYSIS AND DETERMINATION

8. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See *Selle v. Associated Motor Boat Company Ltd [1968] E.A. 123 at p. 126*)

9. PC Kenneth Walumbe (Pw2) and Edward Santarana Atanga (Dw1) both testified that they did not witness the accident. The only direct witness was Margaret Kwamboka Onyoni (Pw1). She testified that she was in motor vehicle KZP 418 which started swerving, left its lane and collided with another vehicle from the opposite direction.

10. It is clear from the evidence of Pw1 that the 1st respondent's vehicle started swerving then veered off from its lane onto the lane of KCD 290 D thus causing the accident. Having considered the appellant's evidence, I am constrained to agree with the trial magistrate that the appellant proved its case on a balance of probabilities as she gave clear evidence that it was the 1st respondent's vehicle that veered off its lane on to the lane of motor vehicle KCD 290D thereby causing the accident.

11. The 1st respondent also contends that the trial court erred in finding him 100% liable for the accident. The plaintiff was a merely a passenger in the 1st respondent's vehicle no blame can be apportioned to her. It is trite law that parties are bound by their own pleadings and from paragraph 8 of the 1st respondent's statement of defence averred that motor vehicle KCD 290 D did not cause the accident. Paragraph 8 reads;

"The 1st Defendant denies each and every particular of negligence on the part of Motor vehicle KCD 290D numerated as (a) and (g) in the Plaint and also denies each and every particular of negligence on the part of Motor vehicle Registration No KZP 418 outlined as (a) to (f) in the Plaint as he is not aware of the same and puts the Plaintiff to strict proof thereof."

12. Although the 1st respondent in his list of documents attached a sketch plan of the scene of accident the same was not produced at the hearing by Dw1 and therefore the argument that the trial court failed to consider the sketch plan when determining the issue of liability is misconceived. In the circumstance, the trial magistrate cannot be faulted for finding the 1st respondent 100% liable for the accident.

13. I shall now proceed to consider the issue of quantum. The parameters under which an appellate court will interfere with an award in general damages was stated by the Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR** as follows:

'An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...'

14. The Court of Appeal observed in **Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR** that–

"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

15. According to the discharge summary from Christamarianne Mission Hospital the appellant was brought to hospital after a road traffic accident with a history of fracture of the humerus but upon investigations it was evident she had sustained fracture on the humerus and mandible. The appellant also testified before the trial court that she also suffered soft tissue injuries on her leg.

16. The plaintiff cited the case of **Francis Ochieng & another v Alice Kajimba [2015] eKLR** where the court held that the injuries sustained by the plaintiff were multiple soft tissue injuries without any fractures and that she had also sustained head injuries which aggravated the injuries and was awarded Kshs. 350,000/- as general damages. She also cited the case of **Fanny Esilako v Dorothy Muchene HCC NO 624 of 1991** where general damages of Kshs 150,000/- was awarded. The appellant however proposed that Kshs 1,500,000/-

would be sufficient compensation.

17. The 1st respondent did not submit on quantum before the lower court.

18. In **Agroline Hauliers Limited & another v Edwin Ochieng [2015] eKLR** the plaintiff had suffered a head concussion, contused neck and chest, a fracture of the right mandible, a fracture of the left humerus and bruises on the lower limb and was awarded Kshs. 450,000/-. In my view the injuries in **Agroline Hauliers Limited & another v Edwin Ochieng (supra)** are slightly severe that those suffered by the appellant.

19. Having considered awards given for similar injuries, I set aside the learned trial magistrate's award on general damages and substitute it with an award **Kshs. 400,000/-** as general damages and special damages of Kshs.7000/=.

20. The appellant shall have the cost of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF MARCH ,2021.

R. E. OUGO

JUDGE

In the Presence of;

Applicant Absent

1st Respondent Absent

Miss Nyanaro For the 2nd & 3rd Respondent

Ms. Rael Court Assistant