REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 528 OF 2015

ESTHER WANGARE…………………………………………APPELLANT

-VERSUS-

UMBI KAHENDA…………………….………….……..1ST RESPONDENT

JOHN SIMON KOROSO………………….......………….2ND RESPONDENT

(Being an appeal against the judgment and decree delivered by M. Obura (Mrs.) (Principal Magistrate) on 8th October, 2015 in Milimani CMCC no. 2543 of 2014)

JUDGMENT

1. Esther Wangare, the appellant herein, instituted a suit against the 1st and 2nd respondents and sought for both general and special damages together with costs of the suit and interest thereon.

2. The appellant pleaded in her plaint dated 7th May, 2014 and amended on 22nd May, 2014 that on or about 24th May, 2013 while she was lawfully walking near Visa Oshwal Primary School, motor vehicle registration number KAV 840R ("the subject motor vehicle") being owned by the 1st respondent and driven by the 2nd respondent at all material times, lost control and hit the appellant, causing her to sustain the injuries particularized in the plaint.

3. The appellant attributed the accident to negligence on the part of the 2nd respondent by setting out the particulars in her amended plaint. The 1st respondent was deemed to be vicariously liable for the accident and consequent injuries.

4. Upon entering appearance, the respondents filed their statement of defence and jointly to denied the allegations set out in the amended plaint.

5. At the hearing of the suit, the appellant testified and summoned an additional witness, while the 2nd respondent testified for the defence case.

6. Upon close of submissions, the trial court dismissed the entire suit with costs vide its judgment delivered on 8th October, 2015.

7. The appellant has now sought to challenge the aforesaid udgment on appeal and has put forward four (4) grounds of appeal vide her memorandum of appeal filed on 6th May, 2015:

> ***i. THAT the learned trial magistrate erred in fact in failing to find that the appellant had proved her case on a balance of probabilities.***
>
> ***ii. THAT the learned trial magistrate erred in law and in fact in using a higher standard of proof than on a balance of probabilities in arriving at the determination as to whether the appellant had proved her case.***
>
> ***iii. THAT the learned trial magistrate erred in law and in fact in failing to hold that the evidence presented by the appellant was more credible than that given by the 2nd respondent.***
>
> *iv.* ***THAT the learned trial magistrate erred in law in failing to make a finding as to the damages that would have been awarded to the appellant in the event that her case was successful.***

8. At the directions of the court, the parties put in written submissions on the appeal. The appellant on the one part contends that the trial court did not appreciate the fact that the oral testimony presented by the 2nd respondent contradicted the contents of his witness statement, while the evidence presented by the appellant clearly shows that the 2nd respondent was to blame for the accident. The appellant therefore pleads with this court to substitute the dismissal order with a finding of liability against the respondents herein.

9. The respondents on the other part submit that the appellant did not satisfy the standard of proof since she did not demonstrate that the injuries she sustained were as a result of negligence on the part of the 2nd respondent. The respondents are equally of the view that the evidence tendered by the 2nd respondent at the trial is more credible than that of the appellant. It is also the submission of the respondents that contrary to the arguments being raised by the appellant on appeal, the trial court made an assessment of the damages it would have awarded in the event that it had found in favour of the appellant on liability.

10. I have considered the contending written submissions on appeal. I have also re-evaluated the evidence which were presented before the trial court.

11. It is clear that the appeal challenges both the finding on liability and quantum.

12. On liability, the appellant (PW2) gave evidence that on the material date, she had dropped her child at Visa Oshwal Primary School and was headed for the pedestrian gate of the school when the subject motor vehicle approaching from behind veered to the side and knocked the main gate, which in turn knocked the pedestrian gate and caused the appellant to fall down thus sustaining various bodily injuries.

13. The appellant further gave evidence that good samaritans and teachers came to her aid and rushed her to the Aga Khan Hospital where she received treatment. The appellant then stated that she reported the incident at Parklands Police Station and was issued with a police abstract.

14. In cross-examination, it was the testimony of the appellant that the gate is usually guarded and that on the material date, one guard was nearby but that he was not manning the gate at the time of the accident and that he did not record any statement at the police station.

15. It was also the testimony of the appellant that there was no direct contact between the subject motor vehicle and her body, but that it is the main gate which was open at the time that knocked her down.

16. On his part, the 2nd respondent (DW1) stated that on the material date, he was dropping some children at the school and was on his way out when a strong gushing wind caused the main gate suddenly hit his vehicle and thereafter hit the pedestrian gate which is where the appellant was standing at the time.

17. The 2nd respondent stated that immediately thereafter, a group of angry parents confronted him, blaming him for knocking down the appellant, and that at the time, the guard to the gate was not manning the gate.

18. It was the testimony of the 2nd respondent that he was detained at Parklands Police Station in relation to the incident but was later cleared and released.

19. In cross-examination, the 2nd respondent restated that the accident was in no way his fault and that the police abstract lists the subject motor vehicle since it was at the scene of the accident.

20. The learned trial magistrate reasoned that though the appellant and the 2nd respondent had given varying accounts as to who or what caused the accident, the burden of proof ultimately rested with the appellant to prove her case but that she did not.

21. After re-evaluating the evidence tendered before the trial court,it is apparent that the evidence confirms the occurrence of the accident at the venue and on the date earlier referenced.

22. It is not disputed that both the appellant and the 2nd respondent were present at the scene of the accident on the material date. It is also not disputed that the 2nd respondent was driving the subject motor vehicle which was owned by the 1st respondent, whom the 2nd respondent mentioned was his employer at all material times.

23. The real question that arises is on whether the appellant proved the particulars of negligence against the 2nd respondent.

24. It is not controverted that the appellant was knocked by the gate. The appellant was emphatic that it is the subject motor vehicle which was being driven by the 2nd respondent that caused the gate to hit her, while it is the statement of the 2nd respondent that a strong wind hit the gate which then hit the subject motor vehicle before knocking the appellant. All the parties herein are in agreement that the gate was unmanned at the time.

25. It is noteworthy that both the appellant and the 2nd respondent mentioned the presence of other parents at the scene but none of them was called as witnesses to testify.

26. The investigating officer who visited the scene was not also called as a witness to give the results of his or her findings, and there is nothing to indicate that the 2nd respondent was ever charged or convicted in relation to the accident. If anything, according to the police abstract, the matter was pending under investigation.

27. It is therefore apparent that this was a situation of the word of the appellant against that of the 2nd respondent, as the learned trial magistrate correctly pointed out.

28. It is however clear from the testimony of the 2nd respondent that he was confronted by a group of angry parent who blamed him for the accident. It is clear in that the appellant credible evidence that indicate that the 2nd respondent recklessly drove the motor vehicle thus knocking the school gate which as a result hit the appellant.

29. The learned trial magistrate therefore fell into error in dismissing the appellant's case yet she had proved here case on a balance of probabilities.

30. On quantum, it is apparent that the appellant sought for an award of general damages for pain, suffering and loss of amenities; and for special damages in the sum of Kshs.37,347.96. It is also apparent that the main issue on appeal is whether the learned trial magistrate made any assessment of damages she would have awarded.

31. On general damages, the injuries as pleaded and indicated in the medical evidence tendered at the trial are:

> ***i. Blunt injuries to the head***
>
> ***ii. Sprain of the right wrist***
>
> ***iii. Blunt injury to the trunk***
>
> *iv.* ***Blunt injury and bruises on the right knee and toes***

32. The medical reports dated 29th May, 2013 prepared by Dr. Mativo of the Aga Khan Hospital and the other dated 2nd July, 2013 prepared by Dr. W.M. Wokabi respectively, classified the appellant's injuries as soft tissue in nature.

33. At the submissions stage, the appellant suggested a sum of Kshs.250,000/ under this head and cited *inter alia*, the case of **Dickson Ndungu Kirembe & another v Theresa Atieno & 4 others [2014] eKLR** in which the court awarded a sum of Kshs.150,000/ for comparable injuries. The respondents did not give any proposals under this head.

34. Upon considering the above and contrary to the averments made by the appellant, the learned trial magistrate assessed the general damages in the sum of Kshs.250,000/ which sum she would have awarded if the appellant had succeeded on liability.

35. On Special damages, upon my re-examination of the material and evidence tendered at the trial, I observed that the learned trial magistrate equally addressed her mind to the subject of special damages by indicating that she would have awarded the sum of Kshs.37,347.96 sought in the amended plaint since it was specifically pleaded and strictly proved. The award given shall remain by the trial magistrate shall remain undisturbed.

36. The upshot is that the appeal is found to be meritorious. It is allowed. Consequently, the order dismissing the suit is set aside and is substituted by an order of entry of judgment against the respondents and in favour of the appellant

> **i. The appellant is awarded a sum of kshs.150,000/= as general damages and kshs.37,347/95 as special damages.**
>
> **ii. The appellant is awarded costs of the suit.**
>
> **iii. The award of general damages to attract interest at court rates from the damage of judgment until the date of full payment while special damages will attract interest at court rates from the date of filing suit until the date of full payment.**

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 24th day of September, 2021.

…………..…………….

J. K. SERGON

JUDGE

In the presence of:

………………………………. for the Appellant

………………………………. for the 1st and 2nd Respondents