



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.04 OF 2017

MARY WAMBUI NG'ANG'A.....APPELLANT

VERSUS.

CONSTANTINE KHISA.....RESPONDENT

**[An appeal from the judgment and decree in original Webuye SRMCC NO 104 of 2015 delivered on 8/03/2017 by Hon T. MWANGI.
Principal Magistrate)**

J U D G M E N T

By way of plaint dated 20.7.2017, the appellant in this appeal sued the respondent for general damages for pain, and suffering, loss of amenities and special damages arising from a road traffic accident that occurred on or about 29th July 2014 along Eldoret-Webuye Road at T-junction involving motor vehicle registration number KAP 442X owned by the Respondent. The appellants claim to that she was standing by road side when she was knocked down by the defendant's motor vehicle.

The particulars of negligence on part of the defendant and/or his driver were set out in paragraph 5 of the plaint as follows;

- a) Driving the said motor vehicle at an excessive speed in the circumstance;***
- b) Failing to have regard to the safety of the other road users;***
- c) Driving without a proper control of the said motor vehicle;***
- d) Driving without a proper look out***
- e) Driving on the wrong side of the road***
- f) Driving under influence of alcohol***
- g) Failing to stop, swerve, brake or in any way control the said motor vehicle***

The Defendant/Respondent entered appearance and subsequently filed his statement of defence dated 10th December 2015 denying the Plaintiff's claim and setting out particulars of contributory negligence on part of the plaintiff under paragraph 6 of statement of defence as;

- i. Standing on the lawful path of the traffic.***
- ii. Failing to heed to the warning by the driver of motor vehicle registration number KAP 442X.***
- iii. Crossing the road without ascertaining that it was safe to do so.***
- iv. Walking on lawful path of motor vehicle registration number KAP 442X and substantially contributing to the accident.***

The matter went to full hearing. PW1, Mary Wambui Ng'ang'a testified that she was a business woman and on 29.7.14 morning was going to the market at Chimoi and while at the stage waiting for motor vehicle the suit motor vehicle which was coming from Bungoma towards Eldoret at high speed lost control went off the road and hit her throwing her off the road. She testified that her leg and hand was fractured. She was taken to Webuye hospital for treatment and produced treatment notes as PMFI (a) and (b) and police abstract and a P3 form.

On cross examination she testified that she did not know if the driver was drunk and she also had x-ray for the injuries but she did not produce them to court.

PW 2 CPL Beatrice Adenyo testified that she received a report that there was an accident along Sango and it involved the suit motor vehicle and a pedestrian. She testified that there was a bus “mvumilivu” that had joined the road without checking if there was on coming motor vehicle and as a result the on-coming motor vehicle swerved to the left and as a result knocked the plaintiff who sustained a fracture on the left leg. She testified that after investigation she blamed the “mvumilivu bus” but she was not given the registration number of the bus. She stated that the regional Traffic Base instructed that the owner of KAP be charged and the owner of the said motor vehicle pleaded guilty to an offence of failing to keep records of driver. She produced a police abstract to that effect.

PW 3 Busiendich Johnson Masai a clinical officer at Webuye District Hospital produced notes of Mary Wambui who had inpatient No.51004/2014. She suffered a fracture of left femur when she had been involved in a road traffic accident on 14.1.2014. He stated that she was admitted on 5.11.2014 and produced a P3 form to that effect.

For the defence DW1 Constantine Kundu Khisa testified that on 29.7.2014 at 8.30am while in motor vehicle KAP 442X being driven from Bungoma to Eldoret in company of a driver and 2 others. They arrived at T-Junction there was a lady standing on the left. He stated that ahead of them there was an exit point and the lady was at the exit point. He stated that a “Mvumilivu bus” was exiting from the stage towards the road and the lady was on the left side of the road. He stated that instead of the bus paving way for them to pass it moved straight to the opposite side where the lady was standing as the lady was running in attempt to board the bus but it did not stop. He stated that when the lady saw an oncoming car she retreated to where she was holding a handbag and the handbag got stuck in the side mirror and the lady fell on the other side. He testified that the driver stopped and he was the first person to alight at the scene and found the lady who was in pain. He testified they took the lady to Webuye District Hospital and reported accident to the police. He stated that the police indicated that they were not at fault but he stated that it is the lady who was at fault for running on the road to board a bus without having a proper look out.

DW2 Chrisantus Suruui Kaitano testified that on 29.7.2014 at 8.30am while driving motor vehicle KAP 442X from Webuye headed to Eldoret with Dw1 and 2 others, at T-Junction Webuye he saw a motor vehicle “Mvumilivu Bus” coming from inside the market towards the main road. He stated that the bus did not stop but headed straight to the road occupying both the lanes that he had to stop. He stated that at the stage there was a lady who was attempting to stop the bus so that she can board but the bus did not stop. He stated that when approached the lady he swerved to left to give way to the bus to pass and when the lady saw the bus was about to pass her she decided to retreat to where she had come from and when he approached her the lady handbag got stuck, on the left side mirror and while trying to remove it she was twisted, lost control and she fell on the pavement. He stated that they stopped and carried her to Webuye District Hospital and reported the accident to the police.

After close of hearing the parties filed their respective written submissions on liability and quantum and after consideration the trial magistrate dismissed the plaintiff suit with no orders to costs.

The appellant having been dissatisfied with the judgment then filed this appeal on the following grounds:

- i. That the learned trial magistrate erred in law and fact by disregarding the weight of the Appellant’s evidence.*
- ii. That the learned magistrate erred in law and fact by failing to make a finding that the appellant’s evidence had not been rebutted*
- iii. That the learned magistrate erred in law and fact in making a finding that the appellant had not established her case on a balance of probability against the defendant.*
- iv. That the learned magistrate erred in law in arriving at a decision of dismissing the appellant’s suit basing on wrong and inapplicable principles of law.*
- v. That the learned magistrate erred in law in disregarding the appellant’s submissions.*
- vi. That the learned magistrate erred in law and fact in relying on evidence of respondent to blame the accident on a third party.*

By consent of the parties and court directions, this appeal was canvassed by way of written submissions. Mr. Ndiya counsel for the Appellant submitted that from the decision of the learned magistrate was contradictory.

Counsel submitted liability was apportioned between the respondent and 3rd party who was not party to the suit and that the appellant had not proved her case on balance of probability.

Counsel submitted that the respondent failed to enjoin a party it blamed for the accident and they did not blame the plaintiff. Counsel relied on case law in *Harrison Wafula Khamala Vs. Isaac Ndarwa Kiarie. (2016)*. Counsel submitted that the plaintiff had proved her case on balance of probability. He submitted that the trial magistrate considered extraneous issues in arriving at the decision.

The respondent herein did not file submission to the appeal.

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal is whether the appellant proved her case on balance of probability.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to re-evaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of *Selle V Associated Motor Boat Company Ltd [1968] EA 123* where Sir Clement De le Stang stated that:

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).

How did the accident occur?

PW 1 the appellant in her evidence testified that she was standing at a stage beside the road on the left side when facing Eldoret. She saw a motor vehicle which was driven at high speed lose control and swerve to where she was and knocked her. She as a result of the accident sustained the injuries complained of. In her evidence she stated: -

“I was standing behind the road on the side with luggage where I should have stood and I had a luggage. I did not try to cross the road and he (driver) never hooted. I blame the driver of the motor vehicle for road traffic accident because he left the road and came towards where I was and it was far from the road. I still have pain on leg and right arm and also the back.”

PW 2 No. 81540 Cpl Beatrice Adenyo who was the investigating officer while testifying how she from the investigating the accident occurred stated:-

“Accident involved motor vehicle Registration No. KAP 442X make Toyota Corolla G touring and a pedestrian, namely, Mary Wambui Nga’ng’a. According to the report driver was driving from T-Junction heading to Sango. On reaching the accident scene there was a bus belonging to “Mvumilimu Company” driven from the marked to join the road using the exit point. The bus joined the road without checking if there was an oncoming motor vehicle and as result the oncoming motor vehicle swerved to the left as you face Sango direction to avoid being knocked by the bus. As a result it knocked down the pedestrian, One Mary Wambui who was on the left side of the road as you face Sango direction. Mary Wambui sustained a fracture on the left leg. The driver of KAP 442X rushed her to Webuye District Hospital and came and reported to me. I was the investigating officer in the traffic case. After investigations, I blamed “Mvumilivu bus”, I was not given the registration number of bus.”

On being cross-examined by Keya for the defendant she testified: -

“When I received report of the accident between KAP and the victim, I went to the hospital. The driver of KAP after taking the victim, drove the motor vehicle to the police station. I inspected the motor vehicle which had no pre-accident defects noted. The driver of motor vehicle KAP was not charged because by the time I told owner of the motor vehicle to produce driver, he did not do that. Owner was charged for failing to keep records of driver. Motor vehicles KAP swerved to its left to avoid being hit by the mvumilivu bus. The victim was waiting to board the Motor vehicle. By the time I charged owner of motor vehicle because at the time he failed to produce the driver. The mvumilivu bus could not be traced. I recommended file be lased because evidence of KAP Driver and that of the victim failed.”

The driver of the motor vehicle KAP 44X Chrisantus Suruui Kaitano testified on how the accident occurred as follows: -

“Upon arrival at Webuye Market Junction at Sang I saw a motor vehicle come from inside the market. It was “Mvumilivu “bus. It was headed to the road. It did not stop and headed straight for the road I reduced speed he had occupied both lanes and I reduced speed to stop. At a junction lady headed to board bus she had raised her hand to stop bus because I had slow down. Because bus did not stop, I reached to where lady was. I swerved to my left go give way to bus to pass. When lady saw bus was about to pass her, she deiced to retreat to where she had come from. I had reached where she was holding a handbag in her hand which got stuck in left hand side mirror while trying to removing hand from mirrors she was twisted, lost control and pull down and she fell on pavement and did not rise up. I stopped. Bag was left at screen.”

On being cross-examined by Soita for the appellant he responded: -

“I was driver of KAP 442X. I have been a driver for more than 31 years. On 29th July, 2014 road traffic accident took pace. I saw lady for the first time when I was not very far. I saw her when she was entering the road ahead of me. In my understanding I saw lady was standing by road when I saw bus. I slowed down and stopped. At that time the lady was on the left side. She intended to stop bus. I passenger normally stops bus when off the road. The lady wanted to board bus. Bus she was stopping did not stop. When she was wailing back that I when she was hit. I had stopped when lady’s handbag hit car. In my motor vehicle did not hit the lady. We did not sue the bus because it did not stop. Lady fell from being touched by our motor vehicle. We took her to

hospital. Doctor said she suffered leg injury from the accident. I stopped because I did not want to be hit by bus. I stopped at the pavement. I stopped my motor vehicle at the very edge of road but did not get to the pedestrian's pavement. The road is narrow. That was my first time to use road."

From the evidence of these witnesses. It is clear that the motor vehicle that hit the appellant was motor vehicle KAP 44X owned by the Respondent Constantine Khisa and driven by DW 2 Chrisantus Siruui Kaitano. All witnesses are agreed that the "Mvumilivu Bus" did not knock the appellant. Secondly, all the witnesses agree that the appellant was not on the road; indeed even the driver admits that he swerved to the side of the road where the appellant had allegedly retreated to after failing to board the "mvumilivu bus". The point of impact was, therefore, on the side of the road, meant for pedestrian stage.

The Respondent's defence is that the driver of motor vehicle KAP 442X swerved of the main road to avoid knocking the "Mvumilivu" bus and that is how he ended up knocking the appellant. He did not in this suit enjoin the owners of the bus, in 3rd party proceedings under Order the owners of the bus were not party to these proceedings. As it did not hit the appellant, he had no reason to sue them. It was the Respondent who if they thought fit should have enjoined them. From the evidence of how the accident occurred. I am satisfied that the appellant proved her case on a balance of probability against the Respondent.

I, therefore, set aside the order of dismissal of the suit against the Respondent. I substitute thereof a finding that the Respondent was liable and assess liability at 100%.

On quantum, Mr. Ndenya had submitted that a sum of Ksh.700,000/- would be adequate compensation for pain suffering and loss of amenities. The trial magistrate correctly in my view analyzed what he would have awarded had he found for the appellant. I find the sum of Ksh.450,000/- general damages and ksh.20,600/- for special damages, all totaling to Ksh.470,600/- to be adequate compensation. Judgment, therefore, entered for appellant against the Respondent for Ksh.470,600/- and costs of the suit.

Dated, signed and Delivered at Bungoma this 30th day of July, 2020.

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S N RIECHI

JUDGE