



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL NO. 27 OF 2018

ALICE WAUSI MWENDWA.....APPELLANT

VERSUS

NAFAS WORLD AUTO K. LTD.....1ST RESPONDENT

CORNELIUS SILA MUTISYA.....2ND RESPONDENT

(Being an appeal from the whole judgement delivered by the Honourable E. Agade, Resident Magistrate in Kangundo SPMCC No 85 of 2016 on 16.2.2018)

JUDGEMENT

1. According to a plaint filed in the subordinate court, the appellant was a passenger in a Motor Vehicle registration number KBC 328J registered in the names of the 1st respondent and beneficially owned by the 2nd respondent. While she was travelling on 6.2.2016 along Tala-Nairobi Road at Kwa Mumos Road, the respondents' vehicle was involved in an accident and hit Motor Vehicle registration number KAW 033W and as a result the appellant suffered serious injuries. The appellant claimed damages.
2. In their joint statement of defence, the respondents denied the accident; they denied the fact that the vehicle was being driven in the manner described, they denied negligence and also denied that the vehicle was driven and / or controlled by the respondents. In the alternative, the respondents pleaded that the accident was solely caused by the appellant and or contributed by her by exposing herself to danger. The respondents denied the injuries and prayed that the suit against them be dismissed.
3. After hearing the matter, the learned magistrate held that the appellant had failed to discharge her duty of proving her case because the driver who was to be blamed for the accident was not a party to the suit and she thus dismissed the suit which decision has precipitated this appeal.
4. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the memorandum of appeal dated 15.3.2018 and filed the same day.
5. Counsel for the appellant, J. K. Mwalimu and Co Advocates, augmented the grounds of appeal and submitted that the grounds of appeal are on the issues of liability and ownership of the suit vehicle. On the issue of liability, counsel submitted that the copy of records that was produced by the appellant proved that the 1st appellant was the owner of the suit vehicle, and the police abstract proved that the 2nd Respondent was the beneficial owner and this evidence was never challenged by the respondents. To this end they relied on the case of **Joel Muga Opija v East African Sea Food Limited (2013) eKLR**. The learned counsel submitted that though the trial court found that the appellant did not prove the relationship between the driver and the respondents, the finding was erroneous in that the trial court ought to have found the respondents 100% liable. Counsel cited the case of **Abdi Ali Dere v Firoz Hussein Tunda & 2 Others (2005) eKLR** where the court found that where it is proved that a car caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible.
6. Counsel for the Respondent has not filed any submissions.
7. This being a first appeal, this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that so as to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.
8. The principal witness on the issue of liability was the Appellant who was PW 1. She testified that she was a passenger in motor vehicle Reg. Number KBC 328J. She stated that the driver was overspeeding and overtaking and it collided head on with vehicle Registration Number KAW 033W. She stated that she suffered injuries as a result of the accident. She produced the abstract, copy of records, treatment notes and receipts for treatment and search. Pw2 was Patrick Amadi of Kangundo Police Station, and who testified that the driver of mv

KBC 328 J rammed into a personal vehicle and that 18 passengers were injured. He testified that the driver of KBC 328J was to blame and according to his records, the owner was Cornelius Mutisya.

9. The defence did not call any witnesses and closed their case.

10. Was liability proved in these circumstances? Was liability established against all the respondents? **Sections 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya** place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. It was the duty of the Appellant to prove liability on the balance of probabilities. Although, PW 2 did not investigate the accident, he testified about the police abstract which confirmed the fact of the accident, the date it occurred but however the cause of the accident was unknown. Pw1 testified of the fact that she was a passenger and that she sustained injuries. The police abstract relied on was produced. The officer who investigated the cause of the accident did not testify.

11. The question then is whether the appellant established negligence by establishing that an accident occurred and that the suit vehicle rammed into a personal vehicle.

12. Pw1 in her testimony stated that there was a head on collision with KAW 033W. She testified that the driver of the suit vehicle was overspeeding. The abstract indicated that the driver of the suit vehicle was to be blamed and Pw2 testified that the said driver ought to have been charged too. Because there is documentary evidence to guide court as to enable it make an inference, and the same is not controverted then the court can infer negligence and find the respondents liable.

13. In **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another (2015) eKLR**, the court observed that:

The evidence of the plaintiff on the occurrence of the accident attributed negligence to the 2nd respondent in that he was over speeding and driving without due care and attention causing the vehicle to lose control. This evidence was not controverted since the defendant chose not to tender any evidence. The 2nd defendant was charged with a traffic offence. The plaintiff therefore proved negligence on the part of the 2nd respondent

14. In this case, I find and hold that the appellant did prove negligence on the balance of probabilities. I would therefore disagree with the findings of the trial court dismissing the suit for want of proof. The respondents opted not to tender evidence in defence and therefore the Appellants testimony remained unassailed. She was a passenger and had no control over how the Respondents vehicle was controlled or managed.

15. On the issue of quantum, I agree with the findings of the trial court that an award of Kshs 130,000/- is sufficient. The evidence in the trial court as per the medical report prepared by Dr. Kimuyu was that the appellant suffered blunt injury to the right upper limb and blunt injury to the right thigh. The P3 form that was prepared by Mutua John on 16.3.2016 indicated that the appellant suffered tenderness of the right upper limb and swelling with hematoma on the right thigh and classified the injuries as harm. Counsel in the trial court submitted that an amount of Kshs 130,000/- would be adequate for the appellant and cited the case of **Channan Agricultural Contractors Ltd v Fred Barasa(2013) eKLR**. There were no submissions for the respondent. In the case of **Hassan Farid & another v Sataiya Ene Mepukori & 6 others [2018] eKLR**, the court reduced an award of damages of Kshs 250,000/- to Kshs 150,000/- for the following injuries;

- a) Deep facial cut wound.
- b) Blunt injury to the back
- c) Fracture of the metacarpal bone of the right thumb.
- d) Comminuted fracture of the right humerus.
- e) Blunt injury to both thighs

16. In the above case, the injuries were more severe than in the instant case. Therefore I find that the amount of Kshs 130,000/- is sufficient. On special damages receipts totaling to Kshs 12,550 were produced but Kshs 3,550 was pleaded. Therefore I shall award Kshs 3,550/- as special damages.

17. In the result I find the Appeal has merit. The same is allowed. The judgement of the trial court is set aside and substituted with an order entering judgement for the Appellant as against the Respondents jointly and severally as follows:

- (a) Liability - 100%
- (b) General damages –Kshs 130,000/=
- (c) Costs of the Appeal and in the lower court awarded to the Appellant.

It is so ordered

Dated and delivered at Machakos this 30th day of May, 2019.

D.K. KEMEI

JUDGE