



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.140 OF 2014

GRACE WANJIRU KIHORO.....APPELLANT

-VERSUS-

PETER KIBOI MAGUA.....1ST RESPONDENT

SIMON KIMANI.....2ND RESPONDENT

(Being an Appeal from the Judgment delivered by the Hon. A Towett, Principal Magistrate on 2nd September, 2014 in Molo PMCC.196 of 2012)

JUDGMENT

INTRODUCTION

1. The appellant filed a suit against the respondents herein seeking general and special damages for the injuries she sustained while travelling in the 1st defendant's motor vehicle registration number KAR 062F which was being driven by the 2nd defendant. The trial magistrate found the defendants 100%liable and went ahead to apportioned liability at 70:30 on injuries. She awarded general damages of Kshs.80,000 and on subjecting to contribution reduced to 56,000. She awarded special damages of Kshs.4,000.

2. The appellant/plaintiff being aggrieved by the above decision filed this appeal on the following grounds:-

- i. That the learned magistrate erred in law and fact in apportioning 30% liability against the Appellant.
- ii. That the learned magistrate erred in law and fact in failing to consider that the Appellant was a fare-paying passenger.
- iii. That the learned magistrate erred in law and in fact in failing to consider that the Appellant could not have in any way contributed to the occurrence of the accident.
- iv. That the learned magistrate's finding on liability was based on no or no sound evidence.
- v. That the learned magistrate erred in law and fact in taking into account irrelevant or extraneous issues in assessing damages.
- vi. That the learned magistrate erred in law and fact in awarding Kshs.56,000.00/= as a general damages.
- vii. That the learned magistrate's assessment of damages was inordinately too low and unreasonable in the circumstances.
- viii. That the learned magistrate acted on wrong principles of law and fact and/or irrelevant consideration in the assessment of damages.
- ix. That the learned magistrate erred in law and fact in disregarding and/or ignoring the appellant's submissions.

APPELLANT'S SUBMISSIONS

3. The appellant reiterated grounds of appeal. In submissions, the appellant argued ground 1 to 5 together. Appellant submitted that she was a fare paying passenger and had a safety belt on.

4. Appellant submitted that the trial court failed to evaluate evidence adduced to arrive at a proper conclusion on causation of the accident

and how liability was apportioned. Further that from evidence the driver was descending and failed to reduce speed, brake or even stop; that apportioning liability was not justifiable as no contributory negligence was pleaded nor alleged in evidence.

5. On quantum, appellant submitted that the award was too low and unreasonable. Appellant cited the case of **Margaret T. Nyaga Vs Victoria Wambua Kioko [2004] eKLR** where the court held that it was settled law that the appellate court will not disturb an award of general damages unless the same is manifestly high or inordinately excessive or inordinately or manifestly low that the trial court had proceeded on wrong principle or misapprehended the law. Appellant listed injuries sustained and cited the case of **Kiwanjani Hardware Ltd & Another Vs Nicholas Mule Mutinda [2008] eKLR** where the court upheld an award of KShs.150,000 for similar injuries.

SUBMISSIONS BY RESPONDENT

6. In response, the respondent confirmed that the appellant was a fare paying passenger and that the accident occurred as the 2nd defendant who was driving the vehicle herein was trying to avoid a pedestrian. Respondent added that the respondent was to blame as per evidence of the investigating officer. Counsel for the respondent further submitted that the respondent was not driving at high speed and that the 2nd defendant was not charged with any traffic offence.

7. On issue of proof of negligence, counsel for respondent cited the case of **Trendsetters Tyres Ltd Vs John Wekesa Wepukhulu [2010]eKLR** where the court held as follows:-

“In an action of negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is upon the plaintiff to adduce evidence of the facts on which he bases his claim for damages...”

8. Respondent submitted that the trial magistrate did not err in finding the respondent 70% liable.

ANALYSIS AND DETERMINATION

9. I have considered arguments by parties herein. I have also perused record of appeal. This being the first appellate court I am guided by the court appeal decision in **Selle & Another vs Associated motor Boat Co. Ltd & Another[1968]EA 123** where the court held as follows:-

“My duty is to evaluate and reexamine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect...”

10. I will therefore reevaluate evidence adduced in the trial court with a view of arriving at an independent determination. This I do knowing that I never got opportunity to take evidence first hand and observe demeanor of witnesses. For the above reason, I will give due allowance.

11. On perusal of the record of appeal, paragraph 6 of the plaint indicate that the plaintiff was a fare paying passenger in motor vehicle registration number KAR 062F owned by the 1st defendant and driven by the 2nd defendant. This is however denied in the defence. The defendant also denied occurrence of the accident. Particulars of negligence were equally denied.

12. On perusal of evidence adduced, the plaintiff testified that she was travelling in the vehicle herein. She testified that the vehicle herein hit a person who was crossing the road and overturned. She said the driver was driving the vehicle at high speed. She blamed the driver/2nd defendant for the accident.

13. In cross-examination, the plaintiff testified that she never contributed to the accident as she had put on safety belt. She testified that the pedestrian who was hit, died and the vehicle landed in a ditch.

14. The 2nd defendant who testified as 2nd defendant confirmed that he was driving the vehicle. He testified that he was moving downhill when he saw a person whom he tried to avoid but hit and lost control. He blamed the person for the accident.

15. DW2 who was a conductor in the vehicle herein confirmed that the plaintiff together with her two children were passengers in the vehicle herein. He testified that the passengers were not to blame for the accident.

16. DW3 a traffic police officer confirmed that the accident occurred. He testified that he was not at the scene of the accident but according to witnesses, the pedestrian was trying to commit suicide. In cross-examination, he however said that he had not produced any witness statement.

17. From evidence on record, it is clear that the plaintiff was a passenger herein. Defendant admitted this in evidence adduced. There is also no doubt that a pedestrian was hit and the collision may have occasioned loss of control of the vehicle by the driver. There is no mention of distance at which the driver saw the pedestrian. Even though the driver talked of trying to avoid the accident, the impact point AT high speed making it difficult for him to control the vehicle and avoid the accident. DW1 indicated that witness said the pedestrian was trying to commit suicide but he never availed any of the witness who gave him that evidence.

18. No evidence was adduced to show how the plaintiff contributed to the accident. There is no role the plaintiff played in the occurrence of the accident. The theory of suicide by defence also remain uncorroborated.

19. From the foregoing, I find it erroneous for liability to be apportioned to the plaintiff.

20. In so far as quantum is concerned, I have perused Doctor Obed Omuyoma's medical report and note that he found the following injuries:-

1. Blunt injury to the neck.
2. Blunt injury anterior chest
3. Soft tissue injuries to the back, ,
4. Soft tissue injuries to the left hand
5. Soft tissue injuries to the left leg
6. Complaints at the time of examination were chest pain. The bruises had healed at the time of examination. He classified the degree of injury as harm

21. I have considered the injuries above and compared with injuries sustained in authorities cited. I have also taken into consideration inflation factor. The accident occurred in the year 2012 and judgment in the lower court delivered on 20th August 2014. In view of the above, I find that an award of kshs.80,000 low. I find it fair and just to enhance the award under general damages to kshs.100,000. Award of kshs.4,000 under special damages remain.

22. FINAL ORDERS

1. Appeal on liability allowed. Defendant to shoulder 100% liability.
2. Appeal on quantum set aside.
3. I do set aside judgment delivered on and enter judgment for plaintiff against the defendants jointly and severally for kshs.104,000.
4. Costs in the appeal and trial court to the plaintiff/Appellant.

Judgment Dated, signed and delivered at Nakuru this 20th day of June, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola Court Assistant

M/s Ndegwa Counsel for Appellant

N/A Counsel for Respondent