



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.56 OF 2018

DORCA MONYANGI OSOROAPPELLANT

VERSUS

JANET KATHINI WAA.....RESPONDENT

(Being an appeal from the judgment of Hon. P. Wamucii Nyotah R.M. delivered on 20th July 2018 in Kisii CMCC No. 293 of 2016)

JUDGMENT

1. Dorca Monyangi Osoro (“the appellant”) who was the plaintiff in the trial court, instituted Civil Suit No. 293 of 2016 against **Janet Kathini Waa**, (“the respondent”) for compensation following a road traffic accident that occurred along Kisii – Kisumu road involving the respondent’s motor vehicle registration number KAU 997 B. The appellant claimed that on 8th January, 2016 while travelling in the vehicle as a fare paying passenger, the respondent veered off the road occasioning an accident as a result of which she sustained severe injuries as particularized in the plaint at paragraph 5.

2. The appellant instituted this appeal vide her memorandum of appeal dated 10th August 2018 challenging the entire decision of the trial court on the following grounds;

1. The learned trial magistrate erred in law when she decided the case against the weight of evidence led at the trial and dismissing the suit and or generally on no legal basis at all;
2. The learned trial magistrate erred in law when she failed to evaluate the evidence relating to liability and ended up erring in her findings in toto notwithstanding the fact that plaintiff had pleaded and proved negligence at the trial;
3. The learned trial magistrate erred in law when he failed to appreciate that the standard of proof in civil litigation is different from the standard of proof required in criminal/inquest proceedings;
4. The learned trial magistrate erred in law when she failed in her duty as the trial court to evaluate the evidence, consider the pleadings and appreciate that in civil matters the standard of proof is premised on a balance of probability to make her own findings in her judgment from the evidence;
5. The learned trial magistrate erred in fact and in law when she failed to award special damages and or appreciate the fact the appellant had proved the instant case on special damages by tendering pertinent evidence and receipts as exhibits;
6. The learned trial magistrate erred in law and in fact when she failed to award the appellant costs of the suit though pleaded and proved;
7. The learned trial magistrate erred in fact and in law when she used her discretion wrongly in applying the law generally.

3. Counsel for the appellant canvassed the appeal by way of written submissions dated 20th March 2019. On liability, he submitted that the trial court had erred in failing to appreciate the standard of proof in civil matters is premised on a balance of probabilities. That the appellant had established that she had been involved in an accident involving the respondent’s motor vehicle registration no. KAU 997B on the material day. Being a passenger of the vehicle, the appellant had no control of the vehicle and could not assume liability of 100%. Counsel found it absurd that the trial court would take over a matter as a part heard but dismiss the evidence of PW 2 on the grounds that he did not investigate the matter. Regarding general damages, the appellant urged the court to adopt the trial court’s assessment of Kshs. 250,000/=. The court was also invited to address the issue of special damages and costs in favor of the appellant.

4. Before the trial court, the appellant testified that on 8th January 2016, she was travelling from Nyabururu to Mosocho as a passenger in motor vehicle registration number KAU 997P when the vehicle collided with another vehicle at Cardinal Otunga area. As a result of the accident she had suffered a cut wound on her head, nerve swelling, injuries on her mouth, lips and cheeks, left shoulder cut wounds and blunt trauma on her back and had been treated for the injuries at Kisii Teaching & Referral Hospital. She produced treatment receipts and a demand letter. Her treatment card, treatment notes, P3 form and medical report were also produced by consent.

5. PC Caleb Osodo (PW 2) testified that according to the police abstract, the appellant was involved in a road traffic accident along Kisii-Kisumu road at Cardinal Otunga area on 8th January 2016 at about 10:45 a.m. While the appellant was travelling as a passenger in vehicle KAU 997 B Toyota matatu, the driver of that vehicle failed to keep distance and hit motor vehicle KCC 086 Z from behind. On cross-examination, he conceded that he had not investigated the matter.

6. This being a first appeal, this court's role 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 or not to uphold the judgment. (See *Selle v Associated Motor Boat Co. [1968] E.A. 123*)

7. On the issue of liability, the trial court found that though the respondent had failed to adduce evidence to controvert her case, the appellant had not proved the respondent's contribution to the accident. The trial court also held that since PW2 had not investigated the matter, his testimony could not be relied upon. The court was not convinced by the appellant's testimony that the vehicle was being driven carelessly and at a high speed and that its driver hit the other vehicle from behind. The court further noted that the issue of the collision with another vehicle had not been pleaded and first arose during viva voce testimony.

8. Section 107, 108 and 109 of the Evidence Act places the burden of proof of a fact on the person who wishes to assert that fact. To prove her case, the appellant who was the sole eye witness of the accident testified and called PW 2 to corroborate her evidence. She testified that the respondent's vehicle registration number KAU 997 collided with another vehicle causing the accident from which she sustained her injuries. PW 2 affirmed this in his testimony. He produced the police abstract but conceded that he had not investigated the matter.

9. In her pleadings the appellant pleaded that the vehicle veered off the road causing an accident as a result of which she sustained severe injuries. She did not indicate in her plaint that there had been a collision between the vehicle she had been travelling in with another vehicle. It is trite that parties are bound by their pleadings and cannot depart from them unless an amendment is allowed. In **Simon Muchemi Atako and another v Gordon Osore Civil Appeal No. 180 of 2005 [2013] eKLR**, the Court of Appeal held that a departure from pleadings did not cause a failure of justice and was acceptable where the party had a fair notice of the case it had to meet and the departure was a mere irregularity.

10. In **Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 Others Civil appeal No. 219 of 2013 [2014] eKLR**, the Court of appeal cited the Supreme Court of **Nigeria in Adetoun Oladeji (NIG) Limited v Nigeria Breweries PCSC 91/2002** where the court held

“It is now a very trite principle of law that parties are bound by their pleadings that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

11. I find that the failure to indicate that motor vehicle registration number KAU 997 B had hit another vehicle in her pleadings was not fatal to the appellant's case.

12. By her oral and documentary evidence, the appellant established a *prima facie* case against the respondent which was not rebutted. The respondent entered appearance and participated in the proceedings but failed to tender evidence to counter the appellant's case or prove the particulars of negligence listed against the appellant. If the court were to disregard the evidence that the respondent's vehicle had collided with another vehicle, there was still sufficient evidence to prove that the appellant was a passenger in the respondent's registration number KAU 997 B at the material time when an accident occurred involving the respondent's motor vehicle. I hold that the respondent fully liable for the accident, respondent is 100% liable.

13. She also produced medical evidence during her evidence in court on the injuries she suffered as a result of the accident. The trial court noted as follows when analyzing the injuries the plaintiff suffered, “During the oral testimony, PW1 told the court that she suffered the following injuries, head-cut wound, nerve swelling, mouth, lips and chicks, left shoulder-cut wound, laceration on both legs and back trauma. The plaint indicates that she suffered; deep scapular cut wounds, deep cuts on the upper lip, cut wound on the upper lip, cut wound on the upper left jaw, contusion on the shoulder, back and both legs.

14. The trial court analyzed the medical document produced noting the contradictions in the medical report, the p3 form and Pexh 1(a) and (b) which did not indicate the treatment indicated in the medical reports which were filled on the 3.2.2016 medical report by doctor Ezekiel Zoga and the p3 form filled on the 11.1.2016.

15. The initial treatment notes of Kisii referral hospital indicated that the following, “on 8.1.2016 Diagnosis null. Clinical Inpr. Treatment plan: Diclofenac sodium tablet 50 mg flucillin capsules 250mg betadine mouth wash” At 19:16:43 of 8.1.2016 when she was seen again at the said hospital Diagnosis reads Prov. Diag;Diff Diagnosis Clinical Inpr: Remarks: Treatment plan: x-ray shoulder joint. The next treatment notes relate to the following dates; 8.6.2016 when she went back to hospital and complained of pain in the heels while walking, there was bony prominences on palpation pain was localized, back physiotherapy was recommended and other treatment was given.

16. Though there was no objection to the production of the appellant's treatment notes, medical report and treatment notes, in my view the initial treatment do not support **all** the injuries stated in the plaint or oral evidence. The medical report by Doctor Zoga reiterates what is pleaded in the plaint it mentions that the treatment was stitching, antibiotics, x-ray and T.I, that the wounds have healed well. His conclusion

is that the appellant sustained severe soft tissue injuries which shall heal with time. The p3 form dated the 11.1.2016 indicated that the appellant had deep cut wound on the scalp, cut on the upper lip, contusion on the back and shoulder, injures to the upper limbs, contusion on both legs. The age of the injury was 3/7, the injuries were assessed as "harm". Considering all these reports I find that the appellant did not establish that she sustained severe soft tissue injuries, as the initial reports don't mention the deep cuts on the head and neck area, the doctor who saw her 3 days after the accident assessed the injuries as harm in my view the appellant suffered soft tissue injures.

17. The trial court assessed general damages for these injuries at Kshs. 250,000/=. In reaching its decision, the court was convinced that the injures suffered by the appellant were comparable to those suffered by the plaintiff in **Francis Ochieng & Another -vs- Alice Kajimba [2015]eKLR** where the court awarded a sum of Kshs. 350,000/=. The court saw it fit to reduce the award since the appellant in this case had not been admitted in hospital. In the case of **Ndungu Dennis vs Ann Wangari Ndirangu & Another (2018) eKLR** the court awarded 100,000/- for soft tissues injures. Having made a finding that the appellant suffered soft tissue injures I find that an award of Kshs. 100,000/- is adequate for the injures suffered by the appellant.

18. As for special damages, the appellant claimed for Kshs. 6,500/= for the medical report but did not produce evidence of payment of the same. Special damages must not only be specifically pleaded but must also be proved.

19. In conclusion, I find that the appeal is merited. I set aside the trial court's judgment dated 20th July 2018 and enter judgment for the appellant on liability at 100% against the Respondent and with an award of Kshs100, 000/= as general damages. The appellant is awarded the costs of this appeal. Interest shall be at court rates from the date of this judgment.

Dated, signed and delivered at Kisii this 26th day of **July 2019**.

R.E.OUGO

JUDGE

In the presence of;

Mr. Kerosi h/b Mr. Mogire For the Appellant

Respondent Absent

Rael Court clerk