



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.3 OF 2018

PETER MUNGAI CHEGEAPPELLANT

VERSUS

HADIJA MOHAMMED.....RESPONDENT

[An appeal from the Judgment and decree In Original Bungoma SRMCC No.184 /2009 delivered on 1/03/2017 by Hon C.N Oruo [RM]

JUDGMENT

By plaint dated 7th January 2009, the respondent in this appeal **Hadija Mohammed** sued the Appellant **Peter Mungai Chege** seeking general damages for pain and suffering and loss of amenities and special damages from injuries sustained in a road traffic accident involving motor vehicle registration number KBB 134A Isuzu Bus owned by the appellant and driven by appellant's driver along Eldoret-Webuye Road.

That Plaintiff avers in his plaint that on or about 21/02/2008 the plaintiff was lawfully travelling aboard KBB 134A Isuzu Bus along Eldoret-Webuye Road when the said motor vehicle which was being driven by the defendant himself, his servant, agent and /or driver was so negligently, carelessly and recklessly driven that that the same lost control, veered off the road causing an accident as a result of which the plaintiff suffered severe personal injuries. The particulars of negligence on the part of the appellant were pleaded under paragraph 5 and nature of injuries sustained tabulated in paragraph 6 of the plaint.

The defendant filed his defence stating that the accident was self-involving and the same happened due to tyre burst. After the close of the respective parties' cases their advocates filed written submissions both on liability and on quantum. After full hearing the trial court entered judgement on liability at 100% and general damages of Kshs.80,000/= and special damages of Ksh.3,000/=. The total award was thus Kshs.83,000/=.

The Appellant being aggrieved by the said judgement filed this appeal faulting the judgment on the following grounds:

- i. That the learned trial magistrate erred in fact and in law in failing to consider the appellant/defendant's defence that the plaintiff's injuries and treatment notes had been fabricated.***
- ii. That the learned trial magistrate erred in fact and in law in finding that and holding that the Respondent/Plaintiff had proved her case and injuries sustained on a balance of probability.***
- iii. That the learned trial magistrate erred in fact and in law in finding and holding that the Appellant/Defendant was 100% liable for the occurrence of the said accident.***

This being a first appeal, this court is obliged to re-evaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. The powers of the appellant court were stated in **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).

The evidence before the trial court was that, the Plaintiff, Hadija Mohammed as Pw1 testified that she left Nairobi going to Bungoma aboard

motor vehicle registration number **KBB 134A** and accompanied by her husband Mohammed and was given a bus ticket after paying Kshs.580/= as fare and produced Ticket P-Exhibit 1. She testified that while on the way they were involved in an accident and she sustained injuries on the neck, chest and back and she was treated at Bungoma District Hospital. She produced treatment book/patient's book as P-Exhibit 2. She testified that the accident was reported at Turbo Police station where she was issued with P 3 form.

Pw2 Dr. Samuel Aluda testified that he examined the Plaintiff on 25/10/2008 and she was involved in a road accident on 21/10/2008 and taken to Bungoma District Hospital. He produced medical report and receipt as Exhibits P-MFI-5(a) and (b) and P-Exhibit-5(a) and (b)

Pw3 Elias Adoka, Clinical Officer from Bungoma District Hospital testified that he has P3 form from Turbo Police Station. He testified that she had a history of been involved in an accident on 21/10/2008 and the P3 form was filed on 28/10/2008 and he produced the same.

Pw4

The Defence called DW1 Mulianga Ekesa testified as doctor in charge of Bungoma District Hospital, testified that register of patient attendance confirms that Khadija was seen at the hospital on 30/7/2008 under OP No.1437/2008 and had a fracture of the wrist joint and he produced a copy of the register.

Dw1 Philip Kosgei testified and produced register on behalf of Bungoma District Hospital indicating Khadija was treated as Out Patient on 30/07/2008 under out-patient number 14307. It is upon the above evidence that the trial magistrate made a finding on liability.

By consent of the parties, this appeal was canvassed by way of written submissions. Kairu for the appellant submitted on liability that the trial court found the appellant 100% liable for the said accident yet the matter was pending investigation. He submitted that corporal James Momanyi was not the investigating officer and produced police abstract that was incomplete thereof defendant could not be held liable for causing the accident and trial court failed to take into consideration defence evidence that a tyre burst resulting from pothole was cause of the accident relying on authority in **ROBERT COLLINS MURIMI Vs BENSON NJIHIA KAMAU (Suing as the legal representative of the estate of Veronica Nunujhia Deceased)** on apportionment of liability.

He further submitted that there was enough evidence produced that the injuries the respondent claimed for compensation had been sustained way before the accident occurred on ground that the plaintiff pleaded under paragraph 4 of the plaint that suit accident occurred on 21/10/2008 while Dw1 Dr. Philip Kosgei testified that the plaintiff was treated on the 30/07/2008 at Bungoma District Hospital. He submitted that treatment notes produced were for injuries sustained way back before the accident occurred hence without initial treatment notes indicating the date of the accident. He submitted that the evidence indicate that the injuries were sustained 3 months way back before the accident occurred. He submitted that parties are bound by their pleadings and any evidence led that does not support the averment in the pleadings must be disregarded relying on authority in **JOSEPH MBUTA NZUI V KENYA ORIENT INSURANCE COMPANY LIMITED [2015]**

The Respondent submitted through their counsel on record Mr.Ndinya. He submitted on respondent's medical treatment notes that respondent was involved in an accident on 21/10/2008 and the same were produced by consent therefore appellant are estopped from objecting to them. He submitted that Pw3 Dr. Elias Adoka produced P3 form that was filed 28/10/2008. He submitted that the appellant failed to prove any fraud on the part of the respondent.

He submitted on liability that the manner in which the accident occurred bears all hallmarks of negligence on the part of the driver of the said motor vehicle and urged the court to find the defendant 100% liable.

He submitted on quantum that the injuries suffered by the plaintiff were severe and learned magistrate arrived correctly at an award of Kshs.80,000/=.

That the Respondent sustained the stated injuries that were supported by Medical reports prepared by Dr. Mumoki that indicated the Respondent's incapacity was 13% and later reexamination 6 months after accident Dr. Oketch stated in his medical report that she was healed with no incapacity thereof counsel submitted the earlier report was excessive in nature and damages could not be assessed based on it and urged this court to set aside award of Kshs.280,000/= and replace with 50,000/=. I have also considered submitted authorities on the same.

The Respondent filed submissions through Counsel Mulamasi and submitted that the respondent sustained several serious injuries and the trial court took into consideration the same in arriving at the decision and they also cited supporting authorities which I have duly considered with regard 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:

- i. Whether the appellant should be held 100% liable for the accident?*
- ii. Whether injuries the respondent testified on were as result of the accident?*
- iii. Whether quantum damages were properly awarded in circumstance of this case?*

On issue one on liability the plaintiff evidence is that on 21st October 2008 she was a passenger aboard motor vehicle registration number **KBB 134A** heading to Nairobi when she was involved in an accident. Pw4 husband to the plaintiff confirmed that he was travelling with

Plaintiff on the fateful day. They testified that the motor vehicle was driven carelessly by the driver causing the motor vehicle to lose control and veered off the road.

The Defendant testified that the accident was self-involving due to a tyre burst. No inspection report was produced to prove this fact or any documents were tendered to show that the accident was due to the act beyond the driver's control to displace the claim of negligence.

CPL James Momanyi whose evidence was adopted in Webuye SRMCC No.183 of 2009 produced Police Abstract confirming Plaintiff was a passenger in motor vehicle KBB 134 A on the 21st October 2008.

Therefore it is my finding that the Appellant was properly held 100% liable for the said accident and I find no reason to interfere with the same.

On 2nd issue the Appellant alleges that the Respondent's treatment notes were fabricated and not genuine to establish injuries sustained in the said accident. The Respondent's contention is that she was involved in an accident on 21/10/2008 and treated at Bungoma District Hospital and she produced patient's record book as PExh.2. She produced both P3 form and Medical Report on injuries sustained in the accident which occurred on 21.10.2008. She also produced a bus ticket to show that she was a fare paying passenger. There is also Patient Record Book under O.P. No. 14307/08 for Khadija Mohammed the plaintiff herein.

I have also analyzed particulars of the injuries sustained and they were:

i. Blunt trauma to the neck which was tender

ii. Blunt trauma to the chest which was tender

iii. Blunt trauma to the spinal column

Per medical report dated 25/10/2008 prepared by Dr. S.I. Aluda M.D. and also the P3 form produced confirm the injuries.

It is my finding from court record that during the production of patient's record book the same was not objected to by the appellant. Also it is my finding that Dr. Adoka testified and produced P3 form that confirmed the respondent was involved in an accident on 21/10/2008 and sustained injuries.

Dr. Philip Kosgei testified as DW1 for Defendant and stated that the plaintiff was seen at Bungoma District Hospital on the 30th July 2008 and produced register for patients on behalf of the hospital. He did not have a P3 form filled on 30/7/2008 or patient's treatment notes. His evidence was that the Respondent had been treated at the hospital on 30.7.2008 and that the accident which occurred on 21.10.2008 would not have been the cause of the injuries complained of.

Dw1 being cross-examined by counsel for the respondent in this issue he stated;

“I do not know the whereabouts of Doctor Caleb Khasani. I do not have the original register in court. Original register would have details of 2008. The register is not the entire register. The Copies of the Register are not certified as true copies of the original. I know Dr. Elias Adoka worked with him for 4 years still based in Bungoma. In 2008 I was in hospital. I cannot authoritatively talk of the documents as I was not at the hospital. P3 form filled in Bungoma produced by Dr. Adoka P.3 form filled 28/10/2008 by one Quinto. I know Quinto Dr. Bungoma District Hospital. P3 in respect of Plaintiff. I do not have P3 for filled on 30.7.2008 neither do I have treatment copies. I only have register. Hospital also files for patients. I do not have file for plaintiff. I came to present the register. I was not there in 2008. The medical records do maintain at the register. I did not fill details of the register do not know filled details”.

With this evidence from Dw1 Dr. Philip Kosgei the assertion that the injuries were not from the accident were not proved as documents relied on were not authentic.

Having considered the evidence on record it is my finding that the appellant failed to prove any fraud on the respondent as he alleged. It is a matter of law that he who alleges must prove. No evidence was tendered to prove that the treatment notes and patient's record produced by the appellant were as a result of fraud.

The trial magistrate was correct in his finding that the Plaintiff was involved in an accident on 21/10/2008 and sustained the injuries set out in the P3 form and was treated at Bungoma District hospital on the said date.

On issue of quantum damages it is important to note that general damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in ***Simon Taveta v Mercy Mutitu Njeru. Civil Appeal 26 of 2013 [2014] eKLR*** thus:

1. “The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past”.

I have reviewed the entire record at trial and the judgment passed regarding assessment of damages and I have failed to find any error that would invite this court's interference with the discretion as exercised. I find no reason to interfere with the award and therefore I uphold the

award by the trial magistrate. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed.

No order as to costs.

It is so decided.

Dated at Bungoma this 26th day of September 2019.

S.N.RIECHI

JUDGE