



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL NO. 113 OF 2016

CAROLINE K KYALO.....APPELLANT

VERSUS

DANIEL K MWANGLI.....1ST RESPONDENT

SAMSON MBUTHIA KAMAU.....2ND RESPONDENT

(Being an appeal from the judgement delivered by the Honourable G. Shikwe, Senior Resident Magistrate in Kithimani PMCC 25 of 2012 delivered on 21.9.2016)

JUDGEMENT

1. According to a plaint filed in the subordinate court, the appellant was a passenger in Motor Vehicle registration number KAT 624G registered in the names of the 2nd respondent and in actual possession and control of the 1st respondent. While he was travelling on 13.4.2011 along Matuu- Mwingi Road, at Matuu Road Block the respondents' vehicle was involved in an accident and collided with Motor Cycle Registration Number KMCP 368U and as a result the appellant suffered serious bodily injuries, damage and loss. The appellant claimed damages from the Respondents jointly and severally and pleaded negligence as particularized in Paragraph 4 of the Plaint. The appellant pleaded vicarious liability. She sought special and general damages, interest and costs of the suit.

2. In their defence, the Respondents denied the accident as well as the particulars of negligence. They denied the injuries and pleaded that the accident was caused or substantially contributed by the plaintiff's negligence. They further pleaded that the accident was caused by inevitable accident and was caused by the rider of motorcycle KMCP 398U whom they pleaded that they would seek leave to enjoin in the proceedings. They pleaded negligence on the part of the said Motorcycle rider as per paragraph 6 of their joint defence and prayed that the suit be dismissed with costs.

3. Makindu Motors was joined as a Third Party and vide their defence filed on 7th May, 2014 they denied ownership of the suit motorcycle. They pleaded that they are sellers of motorcycles, had no interest in the suit motorcycle and had sold the same and in this regard prayed that the suit be dismissed against them.

4. After hearing the matter, the learned magistrate found that the accident occurred but found that the appellant had failed to prove negligence against the Respondents driver held that had the case been proved he would have awarded General Damages of Kshs 90,000/- and dismissed the suit with costs to the defendant which decision has precipitated this appeal.

5. 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 filed on 17th October, 2016. Counsel prayed that the judgement of the trial court be set aside and that the court make a finding of 100% liability against the Respondents and make a finding on quantum that is commensurate with the injuries suffered by the appellant.

6. Counsel for the appellant, Fred Mwhia and Co Advocates, framed two issues for determination that is on finding on liability and quantum. Learned Counsel submitted that during trial the evidence was that there was a roadblock and that the driver of KAT 624G sped off once cleared by the police and as a result caused the death of the motor cycle rider. Counsel added that the driver of the suit vehicle was charged with causing death by dangerous driving and the evidence on record showed that the 1st respondent was to blame for the accident hence the 2nd respondent should be held vicariously liable for the accident. On the issue of quantum, counsel submitted that the amount of Kshs 300,000/- ought to have been awarded for soft tissue injuries and pain and suffering and cited the case of **Patrick Mwit M'imanene & Another v Kevin Mugambi Njuguna (2013) eKLR** where the court affirmed an award of Kshs 170,000/- for similar injuries.

7. Counsel for the Respondent supported the findings of the trial court and consolidated the appeal into two issues namely, liability and quantum. On the issue of liability, counsel relied on the finding in the case of **Treadsetters Tyres Ltd v John Wekesa Wepukhulu (2010) eKLR** that the testimony of the plaintiff ought to have affirmative evidence of negligence that caused the accident. On the issue of quantum,

counsel in affirming the finding of the trial court relied on the cited authorities of **Ndungu Dennis v Ann Wangari Ndirangu & Another (2018) eKLR** where the amounts of Kshs 300,000/- was reduced to Kshs100,000/-.

8. 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**.

9. The principal witness on the issue of liability was CIP Dorcas Nyaga who was PW 2. She testified that the driver of the suit vehicle was Thomas Muturi Waweru who was involved in a fatal accident with the suit motorcycle and he was driving the suit vehicle that was stopped at a road block whereupon a lorry coming from the opposite direction and the driver of the suit motorcycle swerved onto the lane of the suit vehicle so as to overtake the lorry and as a result it collided with the suit vehicle. She told the court that the driver of the suit vehicle was to be charged with causing death by dangerous driving but is still at large and she confirmed that the appellant is one of the persons who were injured in the accident. On cross-examination, she testified that the statement of one of the victims indicated that the driver of the suit vehicle was riding in a zig zag manner so as to swerve to avoid a head on collision with the lorry and as such collided with the motor cycle that was overtaking the lorry. She testified that there was no indication that the suit vehicle was stationery.

10. Pw4 was the appellant who testified that the driver of the vehicle was over speeding that it collided with a motorcycle rider. She said she got cuts and went to Matuu Level 4 Hospital and produced the treatment card with no receipts for treatment. She also produced the copy of records as well as the demand letter. Pw1 was Benjamin Maingi, a clinical officer from Matuu Level 4 Hospital who examined Pw4 and produced the P3 form and treatment notes. Pw3 was Dr. Charles Musau who conducted a second medical examination on Pw4. The appellant closed her case and so did the respondents who called no witnesses. Samuel Kimile, a witness from the 3rd party testified that the suit vehicle was sold to M.2000 and tendered a delivery note. He told court that as of the date of the accident, the log book still indicated the name of Makindu Motors Ltd.

11. The following issues are to be determined.

- a) *Whether the accident was caused by the negligence of the 1st Respondent.*
- b) *Whether the Respondent mitigated damages in causing the accident.*
- c) *Whether the 2nd Respondent is vicariously liable for the acts of the 1st Respondent.*
- d) *Whether the Respondents are liable for damage and loss the Appellant claims to have suffered”.*
- e) *Remedies available to the parties.*

12. The answer to any of the above issues will depend and depends on the amount of evidence adduced by a party having the legal burden to do so. See sections 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya that place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. The learned author WVH Rodgers, Winfield and Jolowicz on tort 17th Edition Sweet and Maxwell, 2006 at 132 stated that there are three ingredients making up a case of negligence were established. These are:-

- a) *There must exist a duty of care owed by the defendant to the plaintiff.*
- b) *The defendant ought to have failed to exercise that duty of care.*
- c) *That such failure must have resulted into injuries, loss or damage to the plaintiff.*

13. It is already an established fact that Thomas Muturi Waweru and not the 1st appellant was a driver of the suit vehicle and the 1st appellant was not the 2nd appellant's employee. It is presumed that Thomas Muturi Waweru was in the course of his employment. It is also admitted that the accident occurred at a road block at Matuu along Matuu- Mwingi Road. This is because the evidence of Pw2 was not challenged by the Respondents by failing to call witnesses. This leads me straight to the issue of negligence.

14. The burden to prove that there was negligence was on the appellant see S.107, 108 and 109 of the evidence Act. To discharge that burden and relevant to this issue the appellant called PW4 who was the passenger of the vehicle that was involved in the accident. She was therefore an eye witness. She told the court that that the driver of the suit vehicle was over speeding that it collided with a motorcycle rider.

15. I have given PW4's evidence the attention it deserves and found it to be of little help to me to find that the Respondent's driver was negligent. Although I must quickly add that there are other circumstances which touch on the negligence of the Respondent. PW4 is equally not helpful in describing the manner in which the driver of the 2nd Respondent's vehicle joined the road. Was it at a very high speed? The plaintiff listed 6 items of particulars of negligence which I believe PW4 is the only witness who saw them happen. For clarity purposes, in summary the particulars were:-

- Failure to obey or observe traffic regulations.
- Driving too fast.
- Failure to brake, steer, swerve to avoid the collision.
- Driving without due care and attention.

- Failure to be on the lookout for traffic on the road.
- Causing the said collision.

16. I find the statement of evidence given by PW4 not to be covering the above particulars of negligence sufficiently. PW4's evidence would have gone an extra mile, especially in describing the conduct of the driver which she did not. There are questions which are not answered in proving the alleged particulars of negligence yet it would have been her evidence to provide the answers.

17. However on evaluating all the evidence, there are areas which point to the negligence of the Respondents. The first one I will deal with is the position of the police officer on the roadblock. Pw2 was not at the road block and she relied on the police file and told the court that the driver was driving the suit vehicle that was stopped at a road block whereupon a lorry coming from the opposite direction and the rider of the suit motorcycle swerved onto the lane of the suit vehicle so as to overtake the lorry and as a result it collided with the suit vehicle. She told the court that the driver of the suit vehicle was to be charged with causing death by dangerous driving but is still at large and she confirmed that the appellant is one of the persons who were injured in the accident. On cross-examination, she testified that the statement of one of the victims indicated that the driver of the suit vehicle was riding in a zig zag manner so as to swerve to avoid a head on collision with the lorry and as such collided with the motor cycle that was overtaking the lorry. She testified that there was no indication that the suit vehicle was stationary.

18. It is my considered view that there is no evidence of anyone who was positioned on the road at the time of the accident at such a point, that he could tell how the lorry was stopped and how it moved and depending on his good judgment, he would clear either the lorry or the vehicles on the main road when it is safe to drive and avoid collision of vehicles. It leaves room therefore that it is more probable than not that the motor cycle which collided with the suit vehicle came into the road without sufficient warning as the driver of the 2nd Respondent could not see its movement properly and there is evidence that the driver of the suit vehicle drove in a zig zag manner to avoid colliding with the lorry. Secondly the Respondent's failure or refusal whichever is true, to call the any witness had a negative impact on their denial of liability. In this case, although the driver was sued and served, he never participated in the case. The Respondents counsel filed a defence but never bothered to call any witnesses. 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."

In **Pushia d/o Roajibhai M. Patel Vs The Fleet Transport co. ltd [1960] EA 1026** at page 1033 the court of 1026 at page 1033 the court of EA African court of appeal said

"Whether an adverse inference should be drawn from the fact that a particular witness has not been called is a matter which must depend on the particular circumstance of each case".

19. In the cases before me, this kind of conduct invited criticism above cited cases and I would for the reasons given find that to some extent the degree of the accident was caused by the negligence of the 2nd Respondent. This will be determined shortly.

20. Mitigation of damages would be actions a person *as a reasonable prudent man, took to prevent hurt to himself and others*. In the present case the evidence of Pw2 on the actions of the 2nd respondent's driver in an attempt to swerve when need arose to avoid the accident meant there is evidence on the balance of probabilities to establish the mitigation of damages. However the collision would not have resulted if he was driving at a reasonable speed. I therefore find the 2nd Respondent's driver's conduct of over speeding on the road while knowing that there was a roadblock amounted to negligence that contributed to the accident. There was a need to be prudent and failure to do so amounted to breach of duty of care.

21. What amounts to prudent conduct of a driver on the road has been stated in **Tart Vs Chitty & co. (1931) ALL ER (Rep) 826** at 829 as follows

".....it seems to me that when a man is driving a motor car along the road he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he sees it".

22. The duty is bigger if the driver is driving a public transport vehicle carrying passengers. In **BROCKHURST Vs WAR OFFICER [1957] C.L.Y 2388** the Court of Appeal of England stated:

".....it is expected that a Public transport vehicle driver should at all times be aware of such obstacles on such roads. A driver should not assume that the road shall be clear all the time so as not to mind and look out to be prepared to slow down or stop suddenly in an emergency".

23. For similar reasons as stated in the above case and my review of the evidence in this case, I find that the driver of the 2nd Respondent made a reasonable contribution in the causation of the accident by being negligent himself.

24. It was the strong argument of counsel for the appellant that the driver of the 2nd Respondent was to be charged with the offence of death

by dangerous driving. Counsel therefore asked the court to give that fact very serious consideration and equally hold that based on that fact, the driver of the 2nd Respondent was negligent. With due respect I disagree with the said submissions.

25. I note that on the part of the appellant, there is no traffic accident report, sketch plan and the inspector of motor vehicles report. Nevertheless, the failure or refusal to tender in evidence relevant exhibits which would help this court to reach a reasoned and evidence based conclusion will guide my final decision.

26. Having concluded that the 2nd Respondent's driver contributed to the negligence, I must naturally proceed and apportion the degree of blame to each of the parties, bearing in mind that not all the requisite parties are party to the suit. In so doing I must take into account all the material facts and considerations. See **Khambi and Another Vs Mahithi and Another [1969] EA 70**. As seen in the first part of this judgment, I have considered the following:-

a) That the 2nd Respondent's driver was driving a public vehicle with passengers while it is unknown what the lorry and the motor cycle were carrying.

b) That 2nd respondent's vehicle got off the road.

c) The collision at a roadblock suggesting over speeding on the part of the 2nd Respondents Driver.

d) Nature of the scene of accident, is unknown. Is it a straight road, was the surface of the road slippery.

e) That the Respondents elected not to participate in the case and no explanation at all was given as regards the accident.

27. Considering all the facts surrounding this case, the 2nd Respondent's driver must have been 60% to blame for the accident while the Driver of the motor cycle was 40% to blame, however he is not a party to the suit. The Third party herein has given its version of events and confirmed that it had already sold the motor cycle. It was up to the appellant to pursue the beneficial owners of the motorcycle as it would be unjust to blame the third party who had already sold the same. The fact that the driver of the 2nd Respondent was in employment of the 2nd Respondent at the time of the accident is a fact for inference. Therefore my answer to the 3rd issue is in the affirmative. My resolution of the issue on Mitigation of damages will mean that the 2nd Respondent could not be 100% liable for the accident.

28. Where the appellant proved loss such loss or damage shall be limited to the Respondent's degree of blame. The Appellant prayed for special damages, general damages, interest and costs. Particulars of special damages were given by items in paragraph 5 of the plaint. She called PW3 and Pw1 and she testified to prove loss and damage the accident caused to her. Exhibits PE1, PE 2, PE 3, PE4 and 5 were tendered in evidence for the same purpose. I will award damages of 100,000/- subject to contribution of 60% from the Respondents and 40% from the motor cycle owner or rider because of the mitigating conduct of the 2nd Respondent's driver. I place reliance on the case of **Ndungu Dennis v Ann Wangari Ndirangu & Another (2018) eKLR** where the amounts of Kshs 300,000/- was reduced to Kshs100,000/- for similar injuries. The appellant herein had sustained mostly blunt injuries on forehead, chest, left leg and left knee joint which in my view are soft tissue in nature and are similar to those in the cited authority.

29. On the issue of special damages, on record are receipts totaling to Kshs. 2500, whose production has not been objected to. The claim for Kshs. 5000/ is disallowed as same was not specifically pleaded in the plaint. Hence the sum of Kshs 2500 is awarded as special damages.

30. The appeal has merit and the same is allowed. The judgement of the trial court is set aside and substituted with the following:

a. Liability at 60% against the 2nd Respondent and 40% against the owner and/or rider of motor cycle.

b. General damagesKshs. 100,000/=

c. Special damages.....Kshs. 2500/=

The Appellant is awarded the costs and interest in this appeal and in the lower court.

It is so ordered.

Dated and delivered at Machakos this 24th day of September, 2019.

D.K. Kemei

Judge