REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 258 OF 2016

FRANCISCA KAVATA MUTUNGA.....APPELLANT

-VERSUS-

JAMES NYANGWARA.....RESPONDENT

(An appeal from the decision and decree of the Chief Magistrate's Court Nairobi Milimani

CMCC No. 8028 of 2013 delivered by Hon. M. Chesang (Mrs.) Resident Magistrate on 18th April 2016)

JUDGEMENT

1. Francisca Kavata Mutunga, the appellant herein, filed an action before the Chief Magistrate's Court, Nairobi, against James Nyangwara, the respondent herein, seeking for damages for the injuries the appellant sustained in an accident involving motor vehicle registration no. KAE 454X Toyota Corolla. The respondent filed a defence to deny the appellant's claim. Hon. M. Chesang, learned Resident Magistrate heard the suit and had it dismissed in her judgment delivered on 18th April, 2016.

2. The appellant being aggrieved by the decision, preferred this appeal and put forward the following grounds in her memorandum:

1. THAT the learned magistrate misdirected herself on the evidence and the applicable law.

2. THAT the learned magistrate made inference of fact and arrived at conclusions therein not manifest from pertinent facts in evidence.

3. THAT the learned magistrate failed to weigh or evaluate the evidence adduced by the plaintiff and to draw conclusions manifest there-from and thereby reached erroneous conclusions therein.

4. THAT the learned magistrate erred by not considering the submissions made by the plaintiff's counsel on both liability and quantum.

5. THAT the learned magistrate erred in considering irrelevant testimony by the defendant's witness which had no probative value.

6. THAT the learned magistrate erred in dismissing the plaintiff's case despite the fact that the plaintiff had proved her case on a balance of probability.

7. THAT the learned magistrate erred in making findings which were irrelevant to the issues before the court for determination.

8. THAT the learned magistrate erred in failing to take into account the traffic police's evidence and occurrence book information.

9. THAT the learned magistrate erred in failing and/or ignoring crucial evidence adduced by the plaintiff and thereby reached erroneous conclusions.

10. THAT the learned magistrate erred in not taking into account the glaring contradictions which formed the defendant's

evidence.

11. THAT the learned magistrate erred in not considering do documentary evidence produced in court and which formed the evidence adduced by the plaintiff.

12. The learned magistrate erred in not taking into account the cited authorities in the submissions filed by the plaintiff.

13. The learned magistrate erred in not taking into account the overwhelming evidence given by the plaintiff in court.

14. The learned magistrate erred in taking into account irrelevant facts and thus deriving erroneous findings there-from.

15. The learned magistrate erred in finding that the plaintiff did not prove her involvement in the accident despite the evidence in the P3 form and hospital documentation and he confirmed by "DW1" that the plaintiff's name was on the traffic police occurrence book.

16. THAT the learned magistrate erred in observing that the plaintiff's medical report did not indicate the injuries contrary to the contents therein.

17. THAT the learned magistrate erred in relying on the evidence adduced by DW1 whereas the said evidence was flawed and cold not stand scrutiny.

18. THAT the learned magistrate erred in making a finding that the plaintiff had not proved her case on a balance of probability despite the overwhelming evidence adduced in court.

3. When this appeal came up for hearing, the appellant successfully applied to this court to direct the appeal to be determined by written submissions. The appellant is the only party who filed her written submissions. Though the appellant put forward a total of 18 grounds of appeal, those grounds revolve around the twin questions of liability and quantum.

4. I have re-evaluated the evidence presented before the trial court. I have also considered the appellant's written submissions. It is the submission of the appellant that the judgement of the trial court is not balanced nor reasoned and that the same is based on assumptions. It was pointed out that the same flies on the face of the evidence adduced in court.

5. The appellant further faulted the trial court's findings on the medical report. This court was urged to set aside the decision of the trial court. The appellant also faulted the trial court's failure to make a finding on the damages she could have awarded had the suit succeeded.

6. I wish to first set out in brief the case that was before the trial court before determining this appeal. The appellant filed in an action vide the plaint dated 17.12.2013 against the respondent claiming damages for the injuries she sustained when she was knocked down by the respondent's motor vehicle registration no. KAE 454X while standing along Kibera Drive.

7. When the suit came up for hearing, the appellant (PW3) and one P.C. Martin Gatei (PW1) testified in support of the appellant's case. PW1 produced the police abstract form which indicates that the accident occurred on 6.6.2013 along Kibera Drive. PW1 further produced the occurrence book which indicated that the accident was reported by the respondent.

8. The appellant (PW2) told the trial court on 6/6/2013, she was selling fruits while standing in a food kiosk besides the road at Kibera Equity Bank when motor vehicle registration KAE 454X swerved and hit her. PW2 stated that the motor vehicle knocked the table which then knocked the appellant thus injuring her chest. PW2 produced the medical report prepared by Dr. Wokabi which report indicated that the appellant sustained blunt injuries to her chest.

9. James Mugire Nyagwara (DW1) testified alone in support of the defence case. He stated that the appellant was in the middle of the road when the accident occurred. DW1 claimed that there was a table with food which the appellant was selling and said that his vehicle knocked a jiko which knocked the table and the table hit the appellant. The respondent stated that the appellant was not injured but those who were buying goods from her got injured.

10. DW1 claimed that the appellant was injured by the jiko and the table. DW1 further claimed that he was trying to avoid an oncoming motor vehicle when the plaintiff was knocked down. In his evidence in re-examination DW1 said that his car hit the appellant and that she was among the people who were injured.

11. In her judgment, the learned Resident Magistrate stated that the appellant contradicted herself as to the place where the accident occurred. She also pointed out that the plaintiff did not explain why there was a delay by the appellant to seek immediate medical treatment after the accident.

12. The learned Resident Magistrate further noted that Dr. Wokabi did not indicate the injuries he observed. In the end, the learned trial Resident Magistrate came to the conclusion that the appellant was not injured in the accident as claimed and proceeded to dismiss the suit.

13. Having re-evaluated the case that was before the trial court, I now turn my attention to the substance of the appeal. I have already

considered the arguments put forward by the appellant to challenge the dismissal order. It is apparent from the evidence presented before the trial court that the appellant presented evidence showing that the accident occurred along Kibera Drive. In her written witness statement the appellant averred that she was hawking at Kibera Equity Bank when she was injured. T

14. The respondent admitted in paragraph 4 of his defence that the accident occurred though he said the appellant was solely to blame.

15. The respondent in his written statement was categorical that he drove along Kibera Drive and upon approaching Equity Bank to branch off, he knocked a wooden table thus causing the accident.

16. It is now clear from the evidence tendered that the learned Resident Magistrate erred when she concluded that the appellant had contradicted herself as to the place of the accident. It is apparent that the accident occurred along Kibera Drive near Equity Bank.

17. The other issue which the learned Resident Magistrate flagged out in her judgment is that Dr. Wokabi did not indicate the injuries the appellant sustained. With respect, the trial magistrate fell into error. It is clear from the medical report of Dr. Wokabi noted that the appellant suffered chest injuries. In fact the doctor specifically formed the opinion that the appellant suffered pain from the blunt injuries she sustained to her chest. Therefore, the learned Resident magistrate too fell into error in arriving at her conclusion.

18. The learned Resident Magistrate also stated that the appellant was not injured in the accident as she claimed. With respect, this conclusion flies on the face of the evidence adduced. The medical report of Dr. Wokabi shows that the appellant was injured. The evidence of the appellant shows that she was injured when motor vehicle registration no. KAE 454X hit the table the appellant was selling food thus injuring her chest.

19. The respondent equally admits in his evidence that his car hit the table the appellant was conducting business thus injuring her. There was clear evidence which was not controverted that the appellant was injured in the accident involving the respondent's motor vehicle. With respect, I am persuaded by the appellant's argument that the order dismissing the suit should be set aside. Consequently, the order dismissing the appellant's suit was not justified. The same is set aside and is substituted with an order entering judgment on liability as against the respondent.

20. It is apparent that the trial court did not propose the amount of quantum she could have awarded the appellant had the suit succeeded. It has been the practice for courts in this country even in cases where the court has dismissed the action to assess damages and propose the amount the court could have awarded if the action had succeeded.

21. This court has been invited to assess the amount of damages.

The record shows that the appellant had asked the trial court to award her a sum of ksh.300,000/= as general damages plus special damages of ksh.7,500/=.

22. The appellant cited the following cases as her authorities:

Peter Kalungu & Another =vs= Sarah Norah Ongaro (2004) eKLR where this court awarded a sum of ksh.80,000/= on appeal. The award is for cracked upper molar tooth, bruises on both knee and blunt trauma to the back.

In Pramod Patel =vs= Esther Wanjiru and A.G where this court awarded general damages for ksh.200,000/= for the injuries sustained on the upper and lower eyelids, deep cuts over the frontal region of his forehead.

23. The respondent urged the trial court to instead award a sum of ksh.50,000/= as general damages. The respondent pointed out that only a sum of kshs.2,500/= for the medical report and the search fees.

24. The respondent cited the following authorities **South Nyanza Sugar Co. Ltd =vs= Michael Jitoto (2009) eKLR** where this court awarded a sum of ksh.50,000/= on appeal for soft tissue injuries on the head, right arm, chest and back.

Sonkoro Saw Mills Ltd =vs= Grace Nduta Ndungu (2006) eKLR in which this court awarded a sum of skh.30,000/= for soft tissue injuries which had healed.

25. Having considered the rival submissions presented before the trial court, it is now clear that the appellant suffered blunt injuries to the chest. In the authorities cited by the parties, it is clear that the case whose injuries were near to those obtaining in this appeal is the case of **South Nyanza Sugar Co. Ltd =vs= Michael Jitoto (2009) eKLR** in which this court reduced in appeal an award of ksh.75,000/= given by the trial court to ksh.50,000/=.

26. In that case the party sustained multiple soft tissues injuries on the head, right arm chest and at the back. In the case before this court the appellant only suffered soft tissue injuries on the chest. However the decision on appeal was made in the year 2009 about 10 years ago. Taking into account the inflationary trends I think an award of ksh.80,000/= should suffice.

27. As regards special damages, the appellant pleaded in the plaint to be awarded ksh.3,500/=. The particulars are set out in paragraph 4 of the plaint as follows

a. Medical report 2000/=

b. Motor vehicle search 500/=

c. Medical expenses 1000/=

Ksh.3,500/=

28. I am convinced that special damages were pleaded and specifically proved.

29. In the end, the appeal is allowed. Consequently the order dismissing the suit is set aside and is substituted with an order entering judgment on liability in favour of the appellant (plaintiff) and against the respondent(defendant). The appellant is awarded damages as follows:

i. General damages for pain and suffering ksh.80,000/=

ii. Special damages ksh. 3,500/=

iii. Total ksh.83,500/=

iv. Costs of the suit.

v. Costs of the appeal.

Dated, signed and delivered at Nairobi this 20th day of September, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent