REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 77 OF 2014

ROSE HELLEN ORUKO.....APPELLANT

VERSUS

JOSEPH KIOI KARIUKI.....1ST RESPONDENT

WILSON KIPKOSGEI MAINA.....2ND RESPONDENT

LOCHAB BROTHERS LTD.....3RD RESPONDENT

EQUATOR BOTTLERS.....4TH RESPONDENT

(An appeal arising from the judgment of Honourable. BRENDA BARTOO (RM) in Eldoret CMCC NO.267 of 2003 delivered on 16/5/2014)

JUDGMENT

The appellant filed the appeal being dissatisfied with the decision of the trial court in CMCC No. 267 of 2003. The cause of action was an accident that occurred on 21st June 2002 where the plaintiff was a passenger in the 1st defendants' vehicle and she suffered injuries. The trial court entered judgment against the 1st defendant and dismissed the suit against the 2nd and 3rd defendants with costs.

The appellant had various grounds of appeal the crux of which was that the trial court erred in dismissing the claim against the 2nd and 3rd defendants. She faulted the court for failing to award the special damages that were proved and receipts thereof produced.

APPELLANT'S CASE

The appellant filed submissions on 11th December 2018.

She submitted that the injuries were pleaded in her plaint dated 12th February 2003. That she suffered severe harm and the injuries were classified as maim as they involved hard tissue. The severity of the injuries was not disputed by the respondent. The learned magistrate failed to take into account the nature of the injuries and if she did would have awarded a higher amount in damages. She did not give a reason as to why she did not award special damages and as to why she arrived at the figure of kshs. 600,000/-. The learned magistrate should have awarded kshs. 1,500,000/- to kshs. 3,000,000/-. She relied on the case of ***Mutinda Matheka v Gulam Yusuf – Kisumu HCCC NO. 752 of 1993***. The trial magistrate did not consider the principles set out therein and an award of Kshs. 1,500,000/-

would have been reasonable. She relied on the submissions in the trial court found at page 25 of the record of the appeal.

1ST RESPONDENT'S CASE

There are no submissions on record for the 1st respondent.

2ND RESPONDENT'S CASE

There are no submissions on record for the 2nd respondent

3RD and 4TH RESPONDENT'S CASE

Submissions were filed on behalf of the 3rd respondent on two separate occasions. There are submissions dated 19th June 2019 and 11th October 2019 by two separate firms.

According to the submissions filed on 19th June 2019 the respondent submitted that it is a cardinal rule of evidence that he who alleges must prove. PW1 had admitted that she did not witness the accident in cross examination. Further, that the police abstract was silent on the role that the 2nd and 3rd defendant played in the accident. It did not mention the role that the other vehicle had played i.e. KAA 949Y. In its judgment, the trial court found that the 1st defendant's driver had failed to take into precaution of other road users and had rammed into a vehicle that had already been involved in an accident. Further, that since he was driving from behind, the 1st defendant's driver ought to have taken adequate precaution and should have kept a safe distance in order to avoid an accident.

In their submissions to the trial court the appellant overlooked the essence of having an eye witness or police investigator come and shed light on what really transpired. It is not enough to produce an abstract and leave it to the court to reach a conclusion.

The trial magistrate stated that the abstract did not specify any mistake committed by the 2nd and 3rd defendants and this means that they never contributed to the accident.

The respondent cited the case of ***Kenya Tea Development Agency Ltd. V Andrew Mokaya HCCA No. 174 of 2006*** where the court found that the burden of proof of allegations is on the plaintiff. The plaintiff must prove a causal link between someone's negligence and injury. The appellant should have proven that she was injured as a result of the 2nd and 3rd respondent's negligence. The trial court dismissed the allegations against the 2nd and 3rd defendants with costs after relying on the parties' submissions and authorities.

4TH RESPONDENT'S CASE

The 4th respondent (Equator Bottlers) filed their submissions referring to themselves as the 3rd respondent. The submissions were filed on 11th October 2019.

On liability the respondent submitted that the police abstract was silent on what role the third and fourth respondents played in the accident.

The appellant has to prove that:- a) the defendant owes the plaintiff a duty of care, b) the defendant breached that duty of care, c) the plaintiff has suffered loss and damage due to the breach as per the case of ***Jimmy Paul Semenye v Aga Khan Health Service T/A The Aga Khan Hospital & 2 others (2006) eKLR.***

There can be no liability without fault against the defendant. The 1st respondent or his driver did not enter appearance or file a defence. The police abstract produced as PExh 10 did not mention any role of the respondent in the accident. The appellant testimony ought to have been corroborated by the 1st respondent or his driver against the respondent.

The court of appeal in ***Statpack Industries v James Mbithi Munyao*** held that the plaintiff must adduce evidence which on a balance of probability, a connection between the two may be drawn and that an injury per se is not sufficient to hold someone liable for the same. The appellant was unable to establish a causal link between the respondent and accident hence no duty of care was breached.

The appellant testified that she did not witness the accident involving the second and third respondents. She could not confirm who was to blame for the accident. The 1st defendant and his driver failed to enter appearance thus there was no one to buttress the appellant's testimony in court.

The trial magistrate considered the testimony of the appellant and Dr. Aluda in respect to the injuries sustained by the appellant and the authorities relied upon by the appellant established more severe injuries hence were not comparable.

The court was only required to determine who was to blame for the accident and contribution and the damages awardable. The police abstract indicated

no role in the accident on the part of the 2nd and 3rd respondents. The trial magistrate also considered that the 1st respondent had not entered appearance or filed defense to controvert the appellant's claims. As a result, the trial court found the 1st respondent 100% liable and awarded damages after analysing the evidence.

The appellant pleaded special damages at paragraph 5 of the plaint, at page 27 of the record of appeal. The appellant only pleaded Kshs. 1500 for the medical report and Kshs. 36,145. It will be noted that the learned magistrate found that special damages in the sum of Kshs. 37,645 had been proven and awarded the same. Therefore, the ground of being silent on awarding special damages is misconceived.

The respondent submitted that the principle in award of damages is that comparable injuries attract comparable compensation and the case of James Oraro established injuries that were more severe than those suffered by the appellant therefore they were not comparable. The learned magistrates' judgment was in overall compliance with Order 21, rule 4 and 5 of the civil procedure rules as it gave the reasons for the decision.

The burden of proof was on the plaintiff to prove her case on a balance of probabilities even if the respondent's case was closed without calling any witness. The respondent relied on the case of ***Joyce Mumi Mugi v The Cooperative Bank of Kenya Civil Appeal No. 214 of 2004*** and submitted that it defeated the testimony of the appellant that the Matatu was not speeding. It is clear that it was the 1st respondent's'

vehicle in motion and not the 4th.

It was the appellant's testimony that she did not witness the accident involving the 2nd and 3rd respondent occur. She couldn't confirm who was to blame for the accident. The first respondent did not enter appearance or file a defence to controvert the respondent's claims of contribution as against the 1st respondent.

The appellant failed to prove her case on a balance of probabilities.

ISSUES FOR DETERMINATION

a) Whether the general damages awarded were inordinately low

b) Whether the trial court erred in failing to award special damages

c) Whether the trial court erred in dismissing the suit against the 2nd and 3rd respondents

d) Whether the judgment does conform with the legal requirements of a judgment

WHETHER THE AWARD FOR DAMAGES WERE INORDINATELY LOW

In ***Mbogo and Another v Shah [1968] EA 93*** the court held: -

> ***"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

In ***Kemfo Africa limited t/a Meru Express Services (1976) & Another V Lubia & Another, (1987) KLR 30*****,** the same court expressed itself as follows:

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage…".**

In the case of ***TAYAB -V- KINAU [1983] KLR,114 at 115*** the court of Appeal observed: -

> ***8.(a) The money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.***

The injuries that were sustained in the case upon which the appellant relied upon were more severe than those that she sustained. She relied on the case of James Oraro Machuka v Julius Nyabuti Ogeto HCCC 2048/99 where the plaintiff's injuries were more severe than those she sustained in the present suit. I find that the trial magistrate exercised her discretion judiciously.

WHETHER THE TRIAL COURT ERRED IN FAILING TO AWARD SPECIAL DAMAGES

The appellant pleaded the cost for special damages for the medical report and expenses as Kshs. 1,500/- and Kshs. 36,145/- respectively. Page 10 of the record of appeal contains a decree that has included the special damages in the sum of Kshs. 37,645. In the premises this ground is misconceived and fails.

WHETHER THE TRIAL COURT ERRED IN DISMISSING THE SUIT AGAINST THE 2ND AND 3RD RESPONDENTS

The burden of proof was on the appellant to prove her case against the respondents on a balance of probabilities. The police abstract was silent on the role of the 3rd and 4th respondents in the accident. Further, the appellant testified that she did not witness the accident involving the 3rd and 4th respondents. In ***Statpack industries v James Mbithi Munyao Nairobi H.C Civil Appeal No. 1152 of 2003*** the court stated as follows: -

> ***"Coming now to the more important issue of 'causation', it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable."***

The appellant failed to prove negligence on the part of the 3rd and 4th respondents. Further, she failed to prove if there was any causal link

between her injuries and the 3rd and 4th respondents. In the premises the trial court did not err in dismissing the case against the 2nd and 3rd defendants.

WHETHER THE JUDGMENT DOES NOT CONFORM WITH THE REQUIREMENTS OF A JUDGMENT

The appellant did not state in what ways the judgment failed to conform to the requirements of a judgment.

Order 21 rule 4 of the *Civil Procedure Rules* provides;

> ***"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."***

A perusal of the judgment in the lower court file indicates that it was in overall compliance with *Order 21, Rule 4* and *5* of the *Civil Procedure Rules.*

I therefore find the appeal unmerited and it fails on all grounds with costs to the 3rd and 4th Respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **26th day** of **November, 2019**

S. M GITHINJI

JUDGE

In the presence of:

Miss Muiruri holding brief for Mr. Chepkwony for the appellant

Miss Mibei holding brief for Mr. Maganga for the respondent

Ms Abigael – Court assistant