



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 610 OF 2017

PATRICK MUNYUA BURUNGU.....1ST APPELLANT

PURITY WANGARI MUNYUA.....2ND APPELLANT

-VERSUS-

FRANCIS WAMBUA NG'ANG'A.....1ST RESPONDENT

MOHAMMED IBRAHIM.....2ND RESPONDENT

JOYCE WANGARI KIBIRIE.....3RD RESPONDENT

(Being an Appeal from the Judgement of Nairobi Chief Magistrates Court delivered on the 23rd of October 2017 in Civil Case No. 4780 of 2011)

JUDGEMENT

1. The Appellant had sued respondents who were defendants in lower for damages arising out of a road traffic accident that occurred on 1/9/010 involving Appellant in motor vehicle registration No. KBB 036M and motor vehicle KAX 536K.
2. That they were lawful passengers aboard motor vehicle KBB 036M when the Appellants or their authorized agents, or owners/servants drove negligently motor vehicle KAQ 449E and KAX 526K that they caused them to collide and as a result they sustained injuries.
3. The Respondents were served and they filed defence on 2/4/012 and denied wrongdoing and instead blamed driver motor vehicle KBB 036M.
4. The 4th respondent was served and filed defence dated 23/5/012 and stated that she was a stranger to the accident since she purchased motor vehicle on 25/10/014. There was no judgment entered against 1st respondent.
5. The case was heard and trial court verdict was that on liability KAQ 449 E via 1st Appellant was 40% liable, KBB 036M via 3rd and 5th Appellant were held liable 30%, KAX 526K driver was held 30% liable.
6. on quantum the awards were as follows; -

-1st Appellant

General damages Kshs. 120,000/=

Special Kshs. 2,000/=

-2nd Appellant

General damages Kshs. 300,000/=

Special Kshs. 2,000/=, plus

Costs and interest.

7. The Appellants were aggrieved by the aforesaid verdict and thus lodged instant appeal and set out 4 grounds;

(i) The learned trial magistrate erred by failing to award 100% liability against the 5th Appellant while the case against her was uncontested and interlocutory judgement on liability had already been entered against her.

(ii) The learned trial magistrate erred in the way he apportioned liability between the parties.

(iii) That in any event learned magistrate erred by failing to equally apportion liability between the parties that were in court despite the fact that none called any evidence to refute the Appellants case.

(iv) The learned trial magistrate erred by giving an award that was inordinately low in the circumstances of the case.

8. Parties were directed to file submissions to canvass appeal but none complied.

EVIDENCE ADDUCED

9. The Appellant called 2 witnesses in support of their case. PW1 was Patrick Munyua Burugu the 1st Appellant, he told court that he was aboard motor vehicle registration number KBB 036M headed to town when the driver who was driving at high speed intended to overtake the trailer ahead, he hit the trailer on the right side, lost control and fell in a ditch.

10. He produced copy of records for KAX 526K and KAQ 449E. He testified that he was taken to Guru Nanak hospital where he was treated and discharged. He produced the treatment notes and receipts.

11. He also testified that later he was examined by Dr. Wokabi and produced the medical report. He blamed the driver of motor vehicle registration No. KBB 036M for carelessly overtaking at high speed and causing the accident.

12. PW2 was Purity Wangari he repeated what the 1st Appellant stated. She testified that the motor vehicle belonged to Sarah Muema as per the police abstract and as per the copy of records it belonged to Joyce Kibirie. She told court that after the accident she found herself at Guru Nanak hospital. She produced treatment notes and receipts .She told court that the police blamed the driver of KAQ 449E but in her own view the driver of KBB 036M was to blame.

13. The Respondents did not call any witnesses in support of their different cases. Parties agreed to file written submissions but only the Appellant filed.

ISSUES, ANALYSIS AND DETERMINATION

14. The issues for determination are:

i. Whether the apportionment of liability by the trial court was justified in the circumstances of the case?

ii. Who is to blame for causing the accident?

iii. Whether the awards made in Appellant s favour were inordinately low?

15. On liability, the Appellant evidence was that the driver of motor vehicle registration number KBB 036M was driving at high speed and while trying to overtake a lorry ahead lost control and landed in a ditch.

16. The Appellants has submitted that the driver of the lorry KAX 526K should bear some blame since that is the motor vehicle that swerved to the path of the matatu. They submit that he failed to explain what steps he had taken to avoid the accident.

17. From the evidence as gathered, the police abstract produced in evidence shows that in the preliminary the driver of motor vehicle registration number KAQ 449E was to blame. However no evidence was led to clothe this assertion with some sort of evidence.

18. The Appellant alludes to the fact that it is their driver who was to blame for speeding. They also blame the lorry for swerving to the matatus path. Faced with three prepositions that are only supported by the oral evidence of the Appellants. It would therefore appear that all the three motor vehicle involved in the accident contributed to the accident.

19. The police abstract denotes a higher responsibility of the accident to the driver or motor vehicle KAQ 449E. The trial court a finding that, that driver who was the 1st Respondent was 40%liable. The driver of motor vehicle registration number KBB 036 M who was the 3rd and 5th respondents were held 30% to blame and the driver of KAX 526K are held 30% liable.

Quantum:

20. 1st Appellant Patrick Munyua Burugu, particularized the injuries sustained as blunt injury to the chest. The medical report by Dr. Wokabi dated 07/12/2010 confirmed the injury and gave an opinion that they were soft tissue and that he will make full recovery.

21. The Appellant in their submissions had urged the court to award Kshs. 350,000/= and had referred to the case of **Francis Ochieng & Another vs Alice Kajimba [2015] eKLR** where the court awarded Kshs. 350,000/=. The injuries in these authorities as put by the judge were that he sustained head injuries which aggravated the injuries.

22. They appear to have been more serious and therefore the authority is not illustrative. Doing the best the trial court could, and based on the nature of injuries it made an award of Kshs. 120,000/=.

23. The 2nd Appellant had particularized injuries as fracture of the left shaft of left ulna. The medical report by Dr. Wokabi described the injuries sustained as complete fracture of the shaft of the left ulna. He stated that there was only slight functional disability.

24. The Appellant in her submissions had asked the court to award Kshs. 500,000/= She had made reference of the case of **Peter Kamau Nanu vs Philemona Mwangoti [2016] eKLR**. Which trial court considered the injuries, the rate of inflation, and the cited authority. Doing the best it could, the trial court made an award of Kshs. 300,000/= in the circumstances.

25. This is a first appeal and its duty is to evaluate the entire evidence afresh and make its own conclusion. The parameters upon which this court can interfere with the finding of the trial court are well established. In the case of **Butt vs Khan (1981) KLR 349** the court held as follows:-

“The appellate court cannot interfere with the decision of trial court unless it is shown that the judge proceeded on the wrong principle of law and arrived at misconceived estimates.”

26. Similarly, in the case of **Shabani vs City Council of Nairobi (1985) eKLR, 516**. The Court of Appeal equally held as follows:-

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or on a misapprehension of the evidence.”

27. The appellants have not demonstrated any of the factors with evidence which would warrant this court to make contrary findings on liability and quantum to the one made by the trial magistrate.

28. ***Thus the finds no merit in the appeal and dismisses the same with no orders as to costs.***

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

.....

C. KARIUKI

JUDGE