



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 58 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

ANASTACIA RUGURU.....APPELLANT

AND

ANTHONY MWAI WAWERU.....1STRESPONDENT

KENYA POWER AND

LIGHTING COMPANY LIMITED.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. Mungai, CM dated 27th June 2017 at the Chief Magistrates Court at Isiolo in Civil Case No.41 of 2014)

JUDGMENT

1. The appellant's case before the subordinate court was dismissed. Her case, set out in the plaint, was that on 23rd October 2013 at around 6.30pm, she was riding motorcycle registration no. KMCZ 667 ("the motorcycle") as a pillion passenger along the Isiolo – Meru road when the 1st respondent, who was driving the 2nd respondent's motor vehicle registration no. KAR 230L ("the lorry"), recklessly and carelessly drove it causing it to knock down the motor cycle thus causing her injuries.

2. Although the respondents denied the claim, they also pleaded that it was caused wholly and/or substantially by the negligence of the rider of the motorcycle. In their amended defence, they added that the appellant was also negligent in submitting herself to be carried as a pillion passenger by a rider who was neither qualified nor authorised to carry a passenger along the highway. Before I consider the issues raised in this appeal, I will set out the evidence as it emerged before the trial court.

3. The appellant (PW 1) testified that on 28th October 2013, she was riding a motorcycle heading to the market coming from Isiolo facing Meru direction. She recalled that the 2nd respondent's lorry came and hit the motorcycle from behind. She heard a bang then fell on the road. PW 1 recalled that after falling she was rushed to the hospital by the lorry. She told the court that she blamed the lorry driver as he hit the motorcycle, which was riding on the left side of the road, from behind as it was trying to overtake. In cross-examination she told the court that the motor cycle was knocked by the rear part of the lorry.

4. Nicholas Mwangangi (PW 2), the motorcycle rider, testified that on the material day he carried PW 1 as a pillion passenger as they were on the Isiolo – Meru Highway, the lorry came from behind and started overtaking when another vehicle came from behind forcing the lorry to move back to the left lane causing the lorry to hit the motorcycle with its rear part causing him and PW 1 to fall. In cross-examination, he confirmed that the motorcycle was not damaged on the front part and that he was knocked on the side by the lorry.

5. PC James Mwaura (PW 3), who was summoned to attend court, produced the police abstract to confirm that the accident took place. He admitted that he did not visit the scene but from the police file and investigation diary he noted that the lorry driver was overtaking when he hit the motorcycle on the rear side. He confirmed that the driver of the lorry was charged.

6. The lorry driver, Antony Mwai (DW 1), testified that on the material day, he was on the Meru-Isiolo road when a motorcycle came from the left side intending to join the road, he swerved and passed it and after which he heard a bang. He found the lorry had been knocked on the rear side. He alighted and found PW 1 was lying beneath a motorcycle and assisted in taking her to hospital. He told the court that when the police came to inspect both the motorcycle and the lorry, they found the lorry had been damaged on the chassis at the rear side and the motorcycle was damaged in front. He was charged for the offence of dangerous driving but was acquitted.

7. The singular issue in this appeal is whether the appellant proved her case before the trial court on the balance of probabilities. In this regard, I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusion bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanour (see *Selle v Associated Motor Boat Co. [1968] EA 123*).

8. There is no dispute that an accident took place on the material day and at the material time. The dispute revolves around which of the versions of the accident is true. In analysing the evidence, the trial magistrate was convinced that the respondent's version of events was correct as it was supported by the proceedings before the criminal court. In that case before the criminal court, the trial magistrate while acquitting the 1st respondent held that the appellant's version that the motorcycle was hit from the rear was not true as the damage on the lorry was on the chassis behind the rear wheel and the damage on the motorcycle on the steering hand.

9. The trial magistrate relied extensively on the judgment in the criminal case to reach the conclusion that the respondent was not liable. It must be appreciated that although the proceedings before the trial court were admitted, they were not produced for the purpose of proving the truth of the contents therein otherwise the civil trial would be superfluous. The evidence in the previous proceedings could only be admitted under the provisions of **section 34** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* which provides as follows;

34. Admissibility of evidence given in previous proceedings

(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding—

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.

(2) For the purposes of this section—

(a) the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and

(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused.

10. It is obvious that the first condition of admission in **section 34(1)(a)** of the *Act* was neither established nor met hence the statements in those proceedings were inadmissible. The criminal case was between the State and the 1st respondent and the purpose of those proceedings was for the State to prove, beyond reasonable doubt, that the accused committed the offence charged. The witnesses who testified therein were not called in the civil proceedings and subjected to cross-examination by the appellant hence the criminal proceedings can only be used for purpose of showing that an accident had occurred.

11. I also note that the statements made by PW 1 and PW 2 in the criminal proceedings were not put to them in cross-examination in order to prove those statements in the civil case. **Section 153** of the *Evidence Act* provides as follows;

153. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict a witness by a previous written statement, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. [Emphasis mine]

12. I therefore find and hold that the trial magistrate erred in relying entirely on the criminal proceedings to discredit the testimony of the appellant and PW 2's when their statements in the criminal proceedings were not put to them. Further, the inspection report relied on to discredit the appellant's version of events was not produced to prove its contents. In the circumstances, what is left is for the court to assess the appellant's and respondent's evidence to determine whether the case was proved on the balance of probabilities.

13. PW 1, PW 2 and PW 3 all testified that the lorry was overtaking whereupon it hit PW 2's motorcycle. DW 1's case was that it was PW 2 who was intending to join the road as evidenced by the position of the damage on both the lorry and the motorcycle. I am inclined to believe PW 1 and PW 2's version of events as this is supported by the fact that DW 1 was charged. Further, the fact that the lorry was hit on the rear side of the chassis is not inconsistent with the appellant's version of events because the lorry while overtaking would have hit the motorcycle on the front while the motorcycle would have hit the lorry at the rear side. Thus I find that on the balance of probabilities the appellant proved her case and since she was a passenger she could not shoulder any contribution. Although the respondent's particularised negligence against the motorcycle rider, he was not joined as a third party hence the court cannot apportion liability to him.

14. In the memorandum of appeal, the appellant contended that the award was too low as to amount to an erroneous estimate of damages in light of the injuries sustained by the appellant. The appellant sustained bruises on the forehead, both knees and on the right thigh. She also suffered a fracture-dislocation of the right thigh. The medical report of Dr Kihumba dated 4th May 2014 was admitted without objection. He noted that because the appellant was suffering from another ailment, the course of treatment was prolonged to 4 months. Although at the time

of examination, she complained of chronic pain in the right arm, she had regained full functionality with no disabilities. He concluded that the injuries had healed with minimal complication.

15. In support of the award, the appellant submitted before the trial court that Kshs. 1,000,000/- was reasonable to compensate her. She cited the case of **Joash M. Nyabicha v Kenya Tea Development Authority KSM CA Civil Appeal No. 302 of 2010 [2013] eKLR**. In that case the appellant sustained a fracture of the right leg. He was hospitalised for 9 days and had two operations. He was awarded Kshs. 1,000,000/- by the trial judge which award was affirmed by the Court of Appeal in 2013. The respondent did not proffer any submissions on damages.

16. Considering the more serious injuries sustained by the appellant in the case cited I do not consider the award of Kshs. 300,000/-, in this case, unreasonable or unduly low. I note that in that case, the appellant did not contest the award and as such we do not have the benefit of the Court of Appeal's view whether the decision was in line with comparative cases. I also observe that Counsel for the appellant, in this case, did not cite any other cases that would assist the court in arriving at a fair decision. It must be recalled that in awarding damages, the court takes into account the nature and extent of injuries in relation to awards in similar cases to ensure consistency of awards bearing in mind that no two cases are exactly alike as the Court of Appeal observed in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

17. Counsel for the appellant must therefore bear the blame if he cites only one case and the trial magistrate awards a lesser amount. In this case, I cannot say that in light of the injuries sustained by the appellant, the fact that she had healed without any disability that the award was inordinately low. I therefore affirm the award.

18. I allow the appeal to the extent that I reverse the trial court's finding on liability. I enter judgment against the appellant jointly and severally for the sum of Kshs. 300,000/- as general damages and Kshs. 4,000/- as special damages. Interest shall run on the said sum from the date of judgment before the trial court.

19. The respondents shall bear the cost of this appeal which I assess at Kshs. 40,000/- and the costs before the trial court.

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 21st day of June 2018.

A. MABEYA

JUDGE

Mr Mwanzia instructed by Muia Mwanzia & Company Advocates for the appellant.

Ms Wambugu instructed by C. B. Mwangela & Company Advocates for respondent.