



IN THE HIGH COURT OF KENYA

AT MURANG'A

HIGH COURT CIVIL CASE NO 193 OF 2013

(FORMERLY NYERI HCCA NO. 99 OF 2010)

(An appeal from original Decree passed on 20/05/2010 in Kandara RMCC No 170 of 2009 – E Boke, SRM)

1. THOMAS MWANGI

2. MATHEW NGIGI MACHARIA.....APPELLANTS

VERSUS

L W K.....RESPONDENT

J U D G M E N T

1. The Appellants herein, **Thomas Mwangi** and **Mathew Ngige Macharia**, were the defendants before the trial court while the Respondent, **L W K**, then a minor, was the Plaintiff. Her claim was for damages for personal injuries suffered in a road accident involving her and a motor vehicle driven by the 1st Appellant which was said to be owned by the 2nd Appellant. The trial court found for the Respondent on liability, less 30% contributory negligence. She was awarded general damages of KShs 300,000/00 and special damages of KShs 3,100/00 (both less contributory negligence of 30%) plus costs and interests.

2. The appeal is against both liability and quantum. Liability is challenged on the basis of evidence, quantum upon the basis that the award was manifestly excessive.

3. The appeal was canvassed by way of written submissions. The Appellant's submissions were file on 17/06/2016 while those of the Respondent were filed on 31/08/2016. I have considered those submissions. I have also read the record of the trial court in order to evaluate the evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have born in mind however that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

4. The Respondent herself did not testify. Her next friend (her father) testified as PW1. He was not present when the accident occurred. The Plaintiff was said to have a bad stammer and was attending a special school because of it as she could not express herself and was afraid to talk to people. At the time of the accident she was about 13 years old; at the hearing of her suit she was about 15 years old. It would have been useful if she had been able to testify.

5. At the time of the accident the Respondent had just been with her auntie J W (PW2). She had escorted her (PW2) to the matatu stage across the road from her home. The trial court found that the accident happened as she was attempting to cross the road back to her home. It did not believe the story told by

PW2 that the Plaintiff was hit by the motor vehicle as she and PW2 stood at the matatu stage beside the road. However, the trial court also found that the 1st Appellant (driver of the motor vehicle) was driving at a high speed or was otherwise unable to control his motor so as to avoid hitting the Respondent who had emerged from behind another motor vehicle at the matatu stage.

6. In his testimony the 1st Appellant (the driver) stated that the Plaintiff suddenly emerged from behind a matatu that was at the stage picking passengers and started walking in a zig-zag manner on the road and then made to cross the road. She stretched her hands and touched his vehicle upon which she was thrown back. He said he was then driving at about 60 or 70 kilometres per hour.

7. Upon my own evaluation of the evidence placed before the trial court, I find that the vehicle driven by the 1st Appellant hit the Respondent as she was attempting to cross the road back towards her home across the road. She had suddenly emerged from behind a stationary matatu that was picking passengers and obviously did not look out to see if it was safe to cross the road.

8. However, I also find that the 1st Appellant was just then driving at an unreasonable speed in the circumstances and did not keep a proper look out for just such an incident. He was approaching a matatu stage. There was a stationary matatu which was picking passengers. Any careful driver would be alive to the possibility of a pedestrian emerging from behind such a matatu and/or attempting to cross the road without first ascertaining that it was safe to do so. Such careful driver would then slow down sufficiently to be able to safely deal with such eventuality should it occur. The 1st Appellant did no such thing. He continued to drive at the speed he had been driving at, and when the eventuality occurred, he was unable to safely deal with it! I find that the 1st Appellant was negligent.

9. As for apportionment of liability, the 1st Appellant carried the heavier responsibility. He was the one behind the wheel of a potentially lethal machine. The Plaintiff was certainly also negligent. At 13 years of age she was old enough to know how to safely cross the road. But her burden of responsibility was certainly lower than that of the 1st Appellant. I therefore cannot fault the apportionment of liability by the trial court at 30% to 70% in favour of the Respondent.

10. The 2nd Appellant's complaint was that there was no acceptable evidence that he was the owner of the accident motor vehicle when the accident occurred. The best such evidence would of course have been a copy of the records from the Registrar of Motor Vehicles. In the present case the Respondent produced only a police abstract of the accident that showed that the 2nd Appellant was the owner of the motor vehicle. The police must have lifted that information from the insurance certificate on the vehicle. I have also read the statement of defence filed in the trial court by the Appellants. There is no specific denial that the 2nd Appellant was the registered owner of the accident vehicle. Apart from general denials, the only allegations that are specifically denied are the particulars of negligence attributed to the 1st Appellant and the Respondent's injuries. In these circumstances the trial court did not err in accepting the police abstract as sufficient proof of the 2nd Appellant's ownership of the accident motor vehicle.

11. Regarding the general damages awarded, I have noted that the Respondent suffered the following injuries –

- **Cut wound on the head.**
- **Fracture of right distal femur**
- **Superficial bruises of both upper and lower limbs.**

She was admitted in hospital for one week. She was in a plaster-of-paris cast for two weeks. Upon discharge from hospital she had to attend follow-up clinics.

12. I have looked at the comparable cases cited to both the lower and this court. I cannot find fault with

the award of KShs 300,000/00 for pain, suffering and loss of amenities. It is not enough that if I were the trial court I would probably have made a slightly smaller award.

13. In the result I find no merit in this appeal. It is hereby dismissed in its entirety with costs to the Respondent. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 30TH DAY OF MARCH 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 31ST DAY OF MARCH 2017