

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO 1 OF 2012

(From original Decree in Murang'a SPMCC No 500 of 2008 – A K Kaniaru, SPM)

JOYCE NANCY KABIRU..... APPELLANT

VERSUS

1. ASGA MOTOR LIMITED

2. STANLEY MWANIA KIMATHI

3. LYSBETH GATIRA MBAE

4. ANTONY KIMANI RESPONDENTS

J U D G M E N T

1. This is an appeal from the decree of the lower court by which the Appellant's (plaintiff's) suit (a claim for damages in negligence) was dismissed with costs. The Appellant was a passenger in the accident vehicle (**KAU 149B**), a matatu, which was involved in the accident with another vehicle (**KUV 073**) which was owned by a third party who was never sued and was never served with a third party notice.

2. It appears from the evidence that the accident vehicle had been sold by the 1st Respondent (ASGA Motor Limited) to the 3rd Respondent (Lysbeth Gatira Mbae) who was the registered owner thereof at the time of the accident. The 4th Respondent (Anthony Kimani) had possession of the vehicle and was the one operating it as a PSV at the time of the accident; the 2nd Respondent (Stanley Mwanja Kimathi) was driving the vehicle.

3. The Appellant's claim was dismissed upon the basis that she did not prove on balance that the driver of the accident vehicle (2nd Respondent) was to blame for the accident. The Appellant has attacked that finding of fact in this appeal.

4. This being a first appeal, I have read through the record of the trial court in order to appraise for myself the evidence placed before that court and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

5. The driver of the other motor vehicle involved in the accident (KUV 073) died in the accident. It is common ground that the 2nd Respondent was criminally charged with causing his death by dangerous driving under the **Traffic Act, Cap 403**. It is also common ground that he was acquitted. It appears common ground that the basis for his acquittal was that he was not to blame at all for the accident, and that it was in fact the motor vehicle that the deceased driver was driving that veered onto the lane of the 2nd Respondent's motor vehicle and hit it, despite the efforts of the 2nd Respondent to avoid the accident.

6. The trial court herein independently found, upon the testimonies of the Appellant herself (she testified as PW1), the 2nd Respondent (driver of the accident vehicle) and DW2 (conductor of the accident vehicle) that the accident was caused by the deceased driver whose vehicle came onto the lane of the accident vehicle and hit it, despite the 2nd Respondent's efforts to avoid the accident.

7. Upon my own appraisal of the evidence, I can find no fault in these findings of fact by the trial court.

They appear to have been concurrent with the findings of the criminal court that tried the 2nd Respondent for the offence of causing the death of the deceased driver by dangerous driving.

8. There is no merit in the Appellant's appeal in respect to liability. I also find no merit in the appeal against quantum as assessed by the trial court. The Appellant suffered only soft-tissue injuries which appear to have healed completely. It is not enough that this court would probably have awarded a little more than was awarded by the trial court. That would not be a proper ground for interfering with the award of the trial court.

9. In the event this appeal is dismissed in its entirety with costs to the Respondents. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 23RD DAY OF MARCH 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 24TH DAY OF MARCH 2017