



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 479 OF 2013

GABRIEL NGANGA APPELLANT

VERSUS

RUTH WAMUHU MBURURESPONDENT

(Being an Appeal from the judgment and Order dated 12th August, 2013 by the Hon. Ogombe Learned Magistrate in KIAMBU CMCC No. 189 of 2012)

JUDGMENT

This appeal followed the judgment of lower court delivered on 12th August, 2013. The respondent had sued the appellant following a road traffic accident that took place along Kiambu – Riabai Road on 15th July 2011. The respondent blamed the appellant for the accident. At the time of the accident the appellant was the driver of Motor Vehicle registration No. KWN 185 owned by the 2nd defendant in the lower court.

The appellant denied the respondent’s claim but after the trial, the lower court found for the respondent against the appellant on liability at 100% and proceeded to award Kshs. 500,000/= general damages, plus Kshs. 26,135/= special damages bringing the total to Kshs. 526, 135/=. The respondent was also awarded costs of the suit and interest at court rates.

Aggrieved by the said judgment, the appellant filed this appeal. As the first appellate court, I have evaluated the evidence adduced in the lower with a view to arriving at an independent conclusion. The trial court rightly framed the issues and considered the evidence.

The respondent testified that she was walking along Kiambu- Kiamaiko road when she was hit by the motor vehicle from behind. Both the respondent and the motor vehicle were heading in the same direction. The respondent called a witness P.W. 3, Anna Wanjiru Ngure who testified as to the occurrence and told the court that the respondent was not crossing the road but standing. The motor vehicle hit her from behind. She blamed the accident on the driver.

On the other hand the respondent, while admitting there was an accident, blamed the respondent for suddenly crossing the road. He tried to brake but it was too late. He was never charged with any traffic offence. He blamed the respondent for crossing the road without due care and attention.

Whereas the respondent said she was walking at the time of the accident, her own witness P.W. 3 said she was standing. This is a serious contradiction. Further, although she denied she was crossing the road, in her evidence under cross-examination she said, “ I had finished crossing, I was at the edge of the road walking when I was hit”. It is clear in her own admission therefore that, she was indeed crossing the road

and the appellant was right to say that the respondent was crossing the road. She therefore contributed to the accident in the circumstances of this case.

The appellant told the court that he tried to break but it was too late, his lights were on but he was not far when he saw the respondent and two other pedestrians. He admitted however that, the police abstract blamed him as the driver of motor vehicle registration No. KWN 185 for causing the accident. My assessment of the evidence is that both the appellant and the respondent were to blame for the accident.

The circumstances however lead me to the conclusion that the appellant was more to blame and therefore apportion 80% liability on his part while the respondent shall bear 20% contributory negligence. The finding of the trial court that the appellant was to blame to the extent of 100% is set aside and substituted therewith.

Following the accident, the respondent sustained a fracture/dislocation of the right shoulder joint, (humerus), blunt injury to the hips, blunt injury to the left shoulder, chest and back, swollen, tender- left knee and pain and tenderness to the scalp. She was admitted to hospital for one week. Dislocation was reduced and shoulder supported for 4 months. She was put on analgesics and physical physiotherapy.

Going by the medical report produced as exhibit 1 (a) prepared by Doctor G.K. Mwaura, and dated 8th August, 2012, about one year from the date of the accident, she still experienced some pain to the left shoulder and reduced movement to the right shoulder. She could only perform light duties. Permanent degree of functional capacity was assessed at 30%.

The trial court made an award of Kshs. 500,000/= general damages after making reference to two cited cases. I have considered the medical report, and submissions by counsel. The appellate court will only interfere with the lower court award in the event it is too low or too high so as to reflect an erroneous appreciation of the facts and evidence adduced. Comparable injuries should attract comparable awards. Going by the material before me, I am inclined to interfere with the award made by the trial magistrate because I believe it was too high going by the injuries sustained by the respondent. The correct award should be Kshs. 400,000/= general damages. This shall be reduced by 20% contributory negligence leaving a balance of Kshs. 320,000/=. Special damages proved amounted to Kshs. 26,135/= less 20% contributory negligence leaving a balance of Kshs. 20,908/=.

Accordingly this appeal is allowed in part, and there shall be judgment for the respondent in the sum of Kshs. 320,000/= general damages plus Kshs. 20,908/= special damages. The respondent shall also have the costs of the suit and interest which shall also be reduced by 20% contributory negligence.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26TH Day of July, 2017

A. MBOGHOLI MSAGHA

JUDGE