



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL 398 OF 2013

REGINA KAMAU APPELLANT

VERSUS

PETER NGUNJIRI GITHINJIRESPONDENT

JUDGMENT

The respondent was injured in a road traffic accident involving a car owned by the appellant. The accident took place along Kikuyu Wangige road on 2nd June, 2010. The respondent was a pillion passenger on a motor cycle when motor vehicle registration No. KBK 166F is said to have hit the motor cycle from behind causing the respondent to suffer the injuries complained of in the plaint.

At the time of the accident the motor vehicle was been driven by one Joseph Kamau Kinyori. The respondent sued the appellant as owner of the motor vehicle and after a full trial the lower court found that the driver of the motor vehicle was 100% liable to the respondent and since the appellant was the owner of the motor vehicle she was vicariously liable for the negligence of her driver.

The learned trial magistrate proceeded to award a sum of Kshs. 500,000/= general damages, in addition to Kshs. 300,000/= cost of future medical expenses and Kshs. 53,420/= special damages. The respondent was also awarded costs of the suit and interest.

The appellant was aggrieved by the said judgment and lodged this appeal raising several grounds as set out in the memorandum of appeal dated 16th July and filed on 18th July, 2013. The summary thereof is that the learned trial magistrate erred in law and fact in failing to take into consideration the defence and submissions of the appellant and in the process finding against her. He is also faulted for basing his judgment on wrong premises given the facts of the case and for relying wholly on the plaintiff's medical report without any reason.

He is also faulted for not considering the appellant's medical report tendered in evidence. In the whole the finding of the learned trial magistrate was contrary to the evidence adduced before her and the authority cited. Above all the award of damages is said to be punitive in the circumstance.

In this appeal, I am required to go through the entire evidence adduced before the lower court, evaluate the same and come to independent conclusions. This I have done. The evidence on record shows the accident took place at about 10 p.m. There is no dispute that the motor cycle on which the respondent was a passenger was riding in front of the motor vehicle which was said to have knocked the motor cycle from behind. There is also evidence that a short distance ahead of the scene there was a turning to the right and that in denying that he was to blame for the accident, the motor vehicle driver said that the motor cycle started turning without indicating hence the collision.

In determining liability the learned trial magistrate said as follows,

“From the evidence the motor cycle and the motor vehicle were moving in the same direction. On approaching a junction the vehicle tried to overtake the motor cycle as it was turning right. The driver of the vehicle blamed the rider for failing to indicate. He also said they were reeking of alcohol. Starting with the issue of alcohol this has not been supported by any medical evidence. If indeed they were drunk and given that he is the one who rushed them to hospital he should have asked the medical personnel to collect blood samples for testing. In short drunkenness can only be proved by an expert report particularly that of a government analyst and medical officer. On the allegation that the rider did not indicate that he was turning the plaintiff was merely a passenger and was not in control of the motor cycle. If the defence wanted the court to find the rider negligent or apportion liability they should have enjoined the rider as the 3rd party otherwise I have no business whatsoever grappling with the issue of contributory negligence on the part of the rider or passenger. The allegation that he did not have the helmet is of no value to the defence as far as liability is concerned as this could not have prevented the accident. It would have only minimized injuries. The plaintiff can never be made to pay the sins of the rider if at all he was to blame to any extent. I believe the Kikuyu court that heard his personal injury claim made a decision on liability and I cannot do it again in this case at the risk of conflicting finding. I hold the defendant 100% liable for the acts of a driver.”

Both the rider and his passenger, the respondent, testified in the lower court. The driver of the motor vehicle testified for the defence. The analysis of the learned trial magistrate as to the occurrence of the collision cannot be faulted for the following reasons. The particulars of negligence alleged against the motor vehicle driver include driving at a speed that was too fast in the circumstances and without any due care and attention. He was also accused of failing to have any or any proper control of the motor vehicle and failing to have or any sufficient regard for other road users.

Further, it was alleged that he failed to break, swerve, slow down or in any other manner manage or control the said motor vehicle and therefore was reckless, careless, and drove dangerously. He was also accused of attempting to overtake the motor cycle when it was not safe to do so. The evidence of the rider and the respondent viewed against that of the motor vehicle driver carries more weight.

The motor vehicle was behind the motor cycle. There was no evidence that he hooted before he started to overtake the motor cycle. There is no evidence that he swerved or braked to avoid the collision. Considering that the motor cycle was ahead of the motor vehicle, the learned trial magistrate cannot be faulted for holding the driver solely responsible for the accident.

On quantum, the learned trial magistrate referred to some decided cases on comparable injuries. The margin was not too far to be said that he applied wrong principles. If anything the award was within the acceptable range.

On the award of Kshs. 300,000/= for future medical expenses, the figure is contained in the medical report by Doctor Bhanji. In his evidence the respondent said he had not recovered and that the wires used to manage the injury were yet to be removed. He had asked the court for medical expenses and costs for future treatment. That evidence was given by the doctor as contained in the medical report.

I am unable to fault the learned trial magistrate in both liability and quantum. The end result is that this appeal is therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 13th Day of June, 2016.

A. MBOGHOLI MSAGHA

JUDGE

