



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 373 OF 2011

K. B. SANGHANI.....APPELLANT

V E R S U S

LYDIA WANJIKU NJUGUNA.....1ST RESPONDENT

PHILIP WANYOKIE KIBIRU..... 2NDRESPONDENT

JOHN MUIGAI KIRAGU..... 3RD RESPONDENT

(Being an appeal from the judgement and decree of Mrs. Mulekyo Principal Magistrate delivered on 22nd July 2011 in Kikuyu PMCC 186 of 2007)

JUDGEMENT

1) **Lydia Wanjiku** the respondent herein filed a compensatory suit before the Principal Magistrates court at Kikuyu against **K. B Sanghani** the appellant herein for the injuries the respondent is alleged to have sustained as a result of a road traffic accident which occurred on 24th April 2007. The appellant filed a defence to deny the respondents claim. **Hon. Doreen Mulekyo**, learned Principal Magistrate partly heard and determined the suit. She found the appellant fully liable for the accident. The respondent was awarded a sum of kshs.450,000/= as general damages and ksh.2,200/= as special damages. Being aggrieved by the decision of the trial magistrate, the appellant filed this appeal to have the decision impugned.

2) On appeal, the appellant put the following grounds in his memorandum of appeal.

- 1. The learned magistrate erred in finding that the appellant was liable for the injury despite empirical evidence that this was clearly not so.*
- 2. The learned magistrate further erred in arriving at a decision that was wholly against the weight of the evidence produced.*
- 3. The learned magistrate failed to appreciate the evidence tendered to show that the third party motor vehicle registration number KAP 055M obstructed Nissan matatu registration no. KAR 559R thereby occasioning the accident by its negligence.*
- 4. The learned magistrate failed to find that the plaintiff/respondent was not a passenger or in any way had boarded motor vehicle KAV 331F.*
- 5. The learned magistrate erred in awarding the plaintiff the sum of kshs.450,000/= general*

damages and kshs,2,200/- as special damages which sum was excessive bearing the nature of injury sustained by the plaintiff.

3) When the appeal came up for hearing, learned counsels appearing for the respondent intimated that the parties had agreed to dispose of the suit by way of written submissions and the court directed that the same be filed in court. Only the respondents put in their written submissions which I have considered. I have also re-evaluated the case that was before the trial court.

4) The appellant argued that the learned principal magistrate erred in holding the appellant liable for the injury despite evidence that that was not the case. He also contended that the magistrate erred in failing to consider the weight of the evidence and in particular that the motor vehicle registration no. KAP 055M obstructed Nissan matatu registration no. KAR 559R thereby occasioning the accident by its negligence and/or that the respondent was not aboard motor vehicle registration no. KAV 331F. On the issue of liability the respondent submitted that the appellant abandoned his appeal after he realised it had no merit. She argued that the trial court properly analysed the evidence of the plaintiff, the police and the driver of motor vehicle registration number KAP 055M all of whom corroborated each other's evidence and confirmed that the defendant's driver of motor vehicle registration no. KAV 331F was the one to blame for the accident. She averred that given the fact the driver of motor vehicle registration no. KAV 331F ran away after the accident, was indication of his guilty mind. DW1's evidence was said to be inconsistent and contradictory and that the guilt of the defendant manifested itself by the fact that he did not file any counter-claim to the plaintiff's suit. On quantum he asserted that the plaintiff sought ksh.500,000 in general damages but the court awarded ksh.450,000 which is fair and no evidence to the contrary has been adduced. She also argued that no evidence to the contrary was adduced as the appellant did not call evidence to challenge the evidence by the plaintiff and her doctor as to the extent of injuries.

5) The grounds of appeal can be summarised into two grounds, which include whether the appellant was liable and what quantum is payable. I have examined the evidence tendered before the trial court in respect of liability. The respondent **Lydia Wanjiku Njuguna** (PW2) told the trial court that on the material day she boarded motor vehicle registration no. KAR 559P at Chunga Mali heading to Kiambaa. She narrated how upon reaching acre tano, the driver slowed down to enter the stage when the lorry motor vehicle registration no. KAV 331F that was behind them rammed into the rear of their motor vehicle tossing their vehicle forward which vehicle then rammed into another motor vehicle in front of them as a result of which they landed in a ditch. She claimed that, as a result of the impact she was injured on the chest, head and cut on the leg. She also suffered a fracture on one rib on the right and five ribs on the left. She stated that she was attended to at the P.C.E.A, Kikuyu hospital where she was admitted for 3 days. She also asserted that she reported the accident to the police station and was issued with a P3 form and police abstract which documents she adduced in evidence. She testified further that she blamed the lorry's driver for the accident since the motor vehicle she was in had slowed down to enter the stage.

6) The respondent further called **Dr. George Kungu Mwaura**, who adduced evidence as PW1. The doctor gave a prognosis to the effect that the respondent had sustained multiple fractures and soft tissue injuries. He intimated that he relied on the history and physical examination and also relied on x-ray request from Kikuyu hospital, summary and the P3 form.

7) The defence called **Kennedy Kyalo Malonza** to adduce evidence as DW1. DW1 claimed that he was working for the appellant as a driver of KAV 331 on the material date. He testified that he was heading to Mombasa and upon reaching acre tano, he saw two Nissan matatus at the stage, which vehicles joined the main road following each other. He claimed that since the vehicles had suddenly joined his lane he could not veer off the road since there were people on the side of the road, he therefore squeezed between the stage and the last vehicle and in the process due to the manoeuvre, the trailer twisted and the behind wheels hit the matatu at the rear. He stated that he was not speeding since he was driving at 30kph.

8) The defence further called DW2, **P. C. Zedekiah Mhuri** who is attached to Kikuyu Traffic Base. He adduced evidence to the effect that on the material day the subject accident was reported and booked vide ob 4/24/4/07 by **P. C. Mike Cheruiyot** and **Base Commander I. Okul** involving the three motor vehicles being motor vehicle registration no. KAV 331F trailer, which hit motor vehicle registration no.

KRA 559 which subsequently rammmed into KAP 055M. He further testified that after the investigations, it was found that the cause of accident was the driver of the trailer KAV 331F.

9) Another defence witness DW3, **John Mungai Kiragu**, testified that he was driving motor vehicle registration no. KAP 055M heading to Nairobi when he stopped at acre tano to pick up passengers. He claimed that it was drizzling and foggy and he noted trailers descending towards Nairobi. He claimed that there was a trailer on the outer lane and another on the inner lane. He also stated that there was a third lorry behind approaching very fast and after seeing that it was going to crush on the 2 trailers it decided to crash on the thicket on the extreme left and it managed only that the rear wheels brushed against the rear mid left of the toyota hiace causing it to crush onto his rear as a result of which both vehicles were tossed of the road to the thicket.

10) After careful re-evaluation of the evidence, I am convinced that the learned principal magistrate was correct in her holding. There is clear evidence that the driver of motor vehicle KAV 331F was to blame for the accident. PW1, DW2 and DW3 all blame motor vehicle KAV 331F. According to DW2, the traffic police officer who adduced evidence, he intimated that the investigations revealed that the accident was caused by the trailer KAV 331F. DW3 who was driving motor vehicle KAP 055M Nissan concurred with the evidence of PW2 that vehicles KAP 055M and KAR 559P were at the stage picking up passengers when the motor vehicle KAV 331F hit the rear of KAR 559P which due to the impact hit KAP 055M on the rear. The witnesses further stated that upon being hit by the Motor vehicle registration number KAV 331F, the two vehicles were tossed of the road into the thicket. I have looked further at the documentary evidence adduced by the respondent. The police abstract shows that an accident involving motor vehicle KAR 559P and KAV 331F occurred. There is also a copy of records that shows that the owners of motor vehicle KAV 331F include the appellant herein, hence properly sued.

11) Looking at the evidence adduced, the respondent did indeed prove on a balance of probability that the appellant was liable for the accident that occurred on the material day. Other than DW1, the rest of the witnesses concurred on the happenings of that day where they blamed the appellant. I find no fault in the decision on liability and I uphold the decision of the learned Principal Magistrate.

12) The appellant also challenged the decision of the trial court on quantum. The appellant is of the view that the sum of kshs.450,000/= awarded for general damages and kshs.2,200/= awarded as special damages is excessive in comparison to the nature of injury sustained by the respondent. The respondent adduced evidence through PW1, who examined her. The doctor in his medical report dated 24th September 2007, reported that the injuries suffered included, bruised knee, 9th rib-right side was fractured and that the 5th, 6th, 7th, 8th and 9th ribs on the left side were also fractured. In his prognosis and opinion, he stated that though the healing was fair, she experiences pain on the left knee while walking, he further stated that she complains of chest pain when working and can only lift light objects. He concluded that she suffered total incapacity for 3 months and that she sustained soft tissue skeletal injuries which is grievous harm injuries. The respondent further produced evidence of having been treated at Kikuyu PCEA hospital.

13) It is evident that the respondent suffered a fracture of the ribs, bruised knee and developed chest problems especially when working. I am persuaded by the case of **Joseph Ndumia Murage vs David Kamande Ndungu Nkuru HCC no. 101 of 1996** where the plaintiff suffered fracture of six ribs and soft tissue injuries and was awarded kshs.500,000 in 2004 and also the case of **China Wu Yi company vs Andrea Githinji Gitonga (2016) eKLR** where the plaintiff who sustained multiple facial bruises, blunt injury to the right shoulder, blunt injury to the right knee, fracture of the third rib and humero-clavicuar displacement was awarded kshs.300,000/= as general damages. In this case, the respondent suffered fractured ribs, bruised knee and developed chest problems which injuries the trial considered and awarded her ksh.450,000/= which I find fair. In the case of **Butt vs Khan Civil appeal no. 40 of 1997, Law J.A** opined that an appellate court will only disturb an award of damages if it is so inordinately high or low to represent an entirely erroneous estimate. In the current case the award is comensurate to the injuries suffered and I uphold the decision of the trial court.

14) On Special Damages, the respondent pleaded Kshs 2,200/=. The respondent adduced various

receipts. There was a medical report receipt of kshs .2,000/=. I also take into consideration that the doctor who was a witness attended court where he was paid ksh.5,000. There is also a police abstract and though there is no receipt, it is public knowledge that the same is normally costs kshs 200/=. I hereby review the special damages upwards and award ksh.7,200/= as special damages.

15) In the end the Appeal is dismissed. Consequently, the respondent shall be paid the amount awarded in the trial court in terms of general damages of ksh.450,000/= and the special damages amounting to ksh.7,200/= bringing the net total to ksh.457,200/=.

16) The respondent to have costs of the suit and those of the appeal

Dated, Signed and Delivered in open court this 16th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent