



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 145 OF 2013

BELLITA KENNEDY1ST APPELLANT

JAPAN MOTOR EXHIBITIONS LIMITED2ND APPELLANT

VERSUS

ANGELINA KITILI MUSYOKARESPONDENT

*(Being an appeal from the Judgment of the Principal Magistrate's Court at Kangundo by Hon.
M.K.N. Nyakundi (Ag. SPM) in*

Civil Case No. 87 of 2012 dated 21st June, 2013)

JUDGMENT OF THE COURT

1. The appeal herein arises out of the judgment in the lower court suit in which the plaintiff/respondent was awarded Kshs. 350,000 (*general damages*) and Kshs. 2,000 (*special damages*) on a liability against the defendant/appellant at 100%. Not being satisfied by the court's finding on both liability and on quantum, the appellant filed this appeal raising the following grounds of appeal;

- a) The learned Magistrate erred in law and in fact in making a finding that the defendant's driver was to blame wholly for the accident.
- b) That the learned magistrate erred in law and in fact in making a finding that the plaintiff/respondent was entitled to general damages of Kshs. 352,000/- that were excessive and manifestly too high in view of the injuries suffered by plaintiff/respondent.
- c) That the learned magistrate's award of general damages was so inordinately high as to be wholly erroneous estimate of general damages and was a miscarriage of justice.
- d) That the learned magistrate erred in law and in fact in failing to rely on or accord due weight to or completely disregarded Dr. Isaac Theuri's medical report dated 21st February, 2012 which found that the plaintiff/respondent had sustained loss of two upper incisor teeth, deep cut wound on the lower lip, fractured one upper incisor tooth, swelling and tender right cheek which had healed with no permanent incapacitation.
- e) That the learned magistrate erred in fact and in law in failing to consider the defendant's submissions on quantum.

f) That the learned magistrate erred in fact and in law in failing to consider conventional awards for general damages in cases of similar injuries.

2. Parties filed submission to the appeal. The appellant's case is that in the judgment of the trial court, the learned magistrate failed to analyze the issue of liability at all. The trial magistrate failed to carefully and critically interrogate and analyze the evidence of both the PW2 and DW1 and this led him to a wrong conclusion of both fact and law. The trial magistrate concluded his findings as follows:

“The plaintiff and its witnesses testified (sic). The defendants called one witness a police officer to testify. The officer stated that the case was referred to the Insurance Company for compensation. The plaintiff being a paying passenger in motor vehicles registration No. KAS 863B Matatu liability was 100%.”

3. The appellant's defence in this case was that of *an inevitable accident* the same having been occasioned by a tyre-burst and evidence adduced on behalf of the appellants by DW1 essentially pointed this fact. As such, the appellant submitted that the conclusion by the trial court that the respondent was a fare paying passenger and therefore liability on the part of the appellants was 100% is erroneous in law. Firstly, both PW2 and DW1 testified that the accident occurred upon reaching Kakuyuni Junction. It was submitted for the appellant that this is a very important fact which ought to have been taken into consideration by the trial magistrate. It is highly unlikely that the driver would have been speeding at a junction and therefore loose control of the vehicle. PW2 categorically stated she was unable to see the speedometer and could not state categorically the speed at which the subject motor vehicle was moving. Further, the driver of the subject motor vehicle was never charged with a traffic offence of over speeding despite there being a complete police file with testimonies of passengers and eye witnesses. As such, it is the appellant's submissions that causation of the accident was not established by the respondent at all and equally the negligence of the driver of the subject motor vehicle was never established and/or demonstrated by the respondents. As such, the conclusion that the driver was 100% negligent simply because the respondent was a passenger was wrong and erroneous. It is the appellant's submission that negligence of the driver is not established and/or determined simply because the claiming party was a passenger in the subject motor vehicle.

4. Secondly, it was submitted that the evidence of the **DW1, Corporal Lawrence Karisa** was never controverted and/or disputed by the respondent and as such, the only logical conclusion with respect to his evidence is that the same was admitted. DW1 testified that the accident occurred at a junction as a result of a tyre-burst. In adducing this evidence, DW1 stated that he was relying on the police file which contained the original statements of the driver and other passengers who were in the subject motor vehicle. Is it the appellant's submissions that the evidence of DW1 on causation of the accident was very crucial and important and the said evidence was admissible as evidence of fact which ought to have been taken into consideration by the court in determining the causation of the accident and negligence. It was submitted that the trial court erred in completely disregarding this evidence. The appellant's cited the case of ***Karanja Kago v Karoki Njenga and Edward James Mungai – Nairobi C.A. No. 1/79***. In the case, the vehicle driven by the Defendant/Respondent had a tyre burst causing it to collide with another oncoming vehicle in which the Plaintiff/Appellant was travelling as a passenger. The motor vehicle was not overloaded and it was traveling at a normal speed. The trial magistrate found that there was no negligence on the part of the driver and a tyre-burst did not connote negligence of the part of the driver. The claim was dismissed in the lower court. The appeal was also dismissed. In the case of ***Joseph Musikhu Vuranje v Wanjiru Mwangi & another [2016] eKLR***, the Defendants/Respondents had denied liability asserting that the accident was due to unavoidable circumstance occasioned by the tyre burst and no allegation of overspeeding was proved against the defendants. The trial court dismissed the suit stating that the tyre burst did not connote negligence. On appeal, Meoli J. agreed with the findings of the trial court that the probable cause of the accident was the tyre burst and that the accident was inevitable. The appellant's urged the court to consider the above authorities and to allow the appeal.

5. In response, the respondents' case is that the learned trial magistrate never erred in making a finding that the defendant's driver was to blame wholly for the accident. The plaintiff and her witnesses evidence (*PC Francis Kisavi*) was unshaken and both blamed the defendant/appellant's driver for this accident

which was a self involving accident. The defence called **Corporal Karisa** who testified that the accident was caused by a tyre burst. The respondent submitted that this defence does not carry water as not all tyre bursts result in accidents. It simply depends on the speed and competence of the driver. If the speed is low then a competent driver is able to control a vehicle with a tyre burst and avoid an accident. The respondent submitted that this was confirmed by **Corporal Karisa** himself. He also said that the accident was self involving. The respondent further submitted that the issue of tyre burst is also not corroborated by any of the fourteen (14) passengers the vehicle was carrying so it is just a mere allegation by the driver himself in a futile attempt to shift blame from himself. The driver of this vehicle was never called in court to testify and he is the only one who could have clearly told the court what happened and to rebut the averment that he was careless and negligent in his driving but not a police officer who was not the investigating officer nor a passenger or eye witness to the accident. The plaintiff/respondent attributes the happening of the said accident to the negligence of the defendant's driver and holds the defendants 100% vicariously liable. The plaintiff cited the case of **Samuel Mukunya Kamunge vs John Mwangi Kamuru HCCA No. 34 of 2002 Nyeri. H.M. Okwengu, J. 23rd November, 2005.**

6. The appellant also had issue with the quantum, saying the same was excessive.

7. It is the duty of this court to re-evaluate the evidence tendered in the trial court and to reach its own conclusion on the twin issues of liability and quantum.

8. The respondent had sustained the following injures;

- a. *Loss of two upper incisor teeth.*
- b. *Deep cut wound on the lower lip.*
- c. *Fractured one upper incisor tooth.*
- d. *Swelling and tender right cheek.*
- e. *Wound on the right knee.*
- f. *Abrasion on the right side of the face.*

9. For those injuries, the appellant relied on the case of **Paul Kipsang & Another vs. Titus Osule Osore (2013) eKLR** in which the respondent suffered soft tissue injuries and loss of two teeth similar to injuries in this case. The court substituted the award of the trial court of Shs. 300,000= with an award of Kshs. 200,000=.

10. In my view, the position on liability and on quantum is as follows. On liability, a tyre burst of itself does not mean any negligence on the part of the driver. However, there are reasons which may cause a tyre burst, and these include overspeeding, and poor maintenance of tyres. If any of these elements is proved, the driver of the motor vehicle would be held liable. But, even where overspeeding is not proved, or poor maintenance of tyres is not proved, a driver of a motor vehicle is a skilled expert in driving and when a tyre burst takes place, his skills obligate him to control the vehicle to avoid any accident. In this case, it was in evidence that the tyre burst took place when the vehicle was approaching a junction. This means that the vehicle was not overspeeding, in which case the driver ought to have exercised his skills to control it and avoid any accident, the tyre burst notwithstanding. If, however, the vehicle was overspeeding, then the driver's negligence is automatically established.

11. Unfortunately, the driver of the said motor vehicle did not testify. Infact, the witnesses who testified for the defence was Lawrence Christian, the investigations officer, who never witnessed the accident. On cross-examination, the witness stated as follows:

"...we got the information of the tyre burst from the driver. No passenger mentions about the tyre burst in their statements. I have experience of five (5) years. Not all tyre bursts result at an

accident. It depends on the driver's competence, nature of the road and the speed at which the vehicle is being driven. The driver lost control and it veered off the road landing to a ditch..."

12. From the above testimony of DW1, it is clear that it was only the driver's testimony which would have removed any doubt about speed or the attempts the driver made to avoid or stop the accident. It was also the driver's sole position that the accident was caused by tyre burst. But, the said driver was not called to testify to these allegations. None of the fourteen (14) passengers who were in the motor vehicle mentioned the issue of tyre burst. The finding of this court is that the appellant was wholly liable for the accident.

13. As for quantum, I have critically looked at the injuries suffered by the respondent vis-à-vis the authorities cited. The respondent appeared to have suffered more grievous injuries which the award does not acknowledge. Be that as it may, this court will not interfere with the award of damages by the trial court.

14. For the foregoing reasons, the appeal fails and is dismissed with costs to the respondent.

THAT is the judgment of the court.

DATED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

No appearance for the parties or counsel

Court Assistant – Mr. Munyao