

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 515 OF 2013

DANIEL WANYONYI BARASA & 2 OTHERS.... APPELLANTS

VERSUS

NANYCY MBONE AKOTORESPONDENT

JUDGMENT

On 16th April, 2008 a collision took place along Kiambu road involving two motor vehicles registration Nos. KAN 088J and KAN 528Q. The respondent was a passenger in motor vehicle registration No. KAN 088J and suffered some injuries following the accident. She brought a suit against the appellants jointly and severally for damages. The lower court in a judgment delivered on 20th August, 2013 found the appellants 100% liable to the respondent. The lower court proceeded to award Kshs. 520,000/= general damages, Kshs. 500,000/= cost of future medical treatment and special damages of Kshs.19, 000/=

The appellants were aggrieved by the said judgment and lodged this appeal. In the memorandum of appeal the lower court was faulted for finding the appellants wholly liable for the accident and failed to correctly relate the evidence of the injuries and the cited cases so as to arrive at reasonable compensation.

The lower court was also faulted for the awards she made and for failing to consider the appellants' submissions thereby arriving at a wrong decision. The awards were also said to be inordinately high; and the court was faulted for failing to uphold the doctrine of precedent.

I have evaluated the evidence adduced in the lower court with a view to arriving at independent conclusions. The accident took place at night between 8 p.m. and 8.30 p.m. the two vehicles were travelling from opposite directions. The drivers were not called to testify.

According to the respondent, her husband who was driving motor vehicle registration No. KAN 088J applied brakes when the other motor vehicle KAN 528Q moved towards their direction. He could not swerve because there was a slope on the left hand side.

The police officer who gave evidence during the trial, P.C. Duke Mogaka, did not investigate the accident neither did he visit the scene. In fact in his evidence he only produced the police abstract and said P.C. (W. Emily) is the one who investigated the accident. The police abstract showed the case was pending investigations an entry P.C. Duke Mogaka blamed on PC (W) Emily.

In the absence of any other evidence, it is difficult to justify how the lower court arrived at 100% liability attributable to the appellants. There was no sketch plan produced and the police file was also not available. There is no evidence to corroborate the evidence of the respondent that her husband could not swerve to the left because the road was sloppy. No one was charged following the said accident.

The fact that there was a sloppy ditch as stated by the respondent does not mean that the driver of M/V registration No. KAN 088 J could not swerve. It is difficult to absolve him totally of blame. I know that where a party does not offer any evidence, an adverse reference may be made. However, considering the occurrence as a whole, I find that the driver of motor vehicle registration No. KAN 088 J should be held responsible to the extent of 20% leaving 80% liability on the part of the appellants.

In making the awards, the trial court was guided by decided cases and this court can only interfere with

such awards if the trial court proceeded on wrong principles and also if the awards were inordinately high or too low so as to give a totally erroneous assessment.

Going by the cited cases the award of Kshs. 520,000/= made in terms of general damages is not too high so as to be interfered with. The award for future medical treatment is however not justifiable in view of the medical reports of doctor Bhanji and Doctor Wambugu Mwangi. Doctor Bhanji saw the respondent a few months after the accident while Doctor Wambugu Mwangi examined her about 3 years thereafter. She had healed well and in her own statement she stated it was a miracle that she had healed. Any future medical intervention would not prove necessary.

There is however need to have elective surgery to remove the plates and I believe going by the evidence on record, a sum of Kshs. 200, 000/= would be adequate. I therefore reduce the award for future medical costs to that figure. The total sum due and payable to the respondent adds up to Kshs. 739, 000/= which shall be reduced by 20% contributory negligence on the part of the driver in whose vehicle she was a passenger. That leaves a balance of Kshs. 591,200/=. In the end except for liability which has been reduced to 80% and reduction of future medical costs from Kshs. 500,000/= to Kshs. 200,000/= this appeal is dismissed.

The respondent shall be entitled to the cost of the appeal reduced by 20%.

Orders accordingly.

Dated, signed and delivered at Nairobi this 14th Day of December, 2016.

A. MBOGHOLI MSAGHA

JUDGE