



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 437 OF 2006

FREDRICK MBUGUA NJOROGE..... 1ST APPELLANT

RUARAKA ACADEMY LIMITED.....2ND APPELLANT

VERSUS

LUCY NJERI NGANGARESPONDENT

(An appeal from the judgment of the Learned Trial Magistrate A.N. Ongeru Principal Magistrate on 6th June 2006 in Nairobi)

JUDGMENT

1. The respondent had sued the appellant's jointly and severally for general and special damages for injuries sustained from an accident that occurred on 8th November 2001. The respondent claimed that on 8th November 2001 while lawfully travelling as a fare paying passenger in motor vehicle KAG 500V along Thika road at the junction of B.P. Petrol station at around 7 a.m. the said motor vehicle was involved in an accident with motor vehicle registration number KZL 419 (Ruaka Academy Minibus) which was being driven by the 1st appellant who is a servant and or agent of the 2nd appellant. As a result the respondent sustained the following injuries; compound fracture, right tibia and fibula, closed fracture left tibia & fibula and a deep cut wound on the right leg. She sought general damages for pain and suffering and special damages of Kshs. 198,675/-.
2. The matter proceeded to full trial and the Learned Magistrate found the 1st and 2nd defendant 100% liable and awarded the plaintiff Kshs. 400,000/- damages for pain and suffering; Kshs.50,000/- for future medical expenses, she rejected the loss of earning capacity as the same was not proved and gave the plaintiff a final award of Kshs. 450,000/-. Aggrieved by the said judgment the 1st and 2nd defendants filed this appeal and in their Memorandum of Appeal dated 29th June 2006 raised the following grounds;
 - i. That the Learned Magistrate erred in law in entering judgment against the appellants in total disregard of the issues of law and facts raised therein.
 - ii. The Learned Magistrate erred in law in dismissing the appellant's defence and entering judgment on a balance of probability of the respondent in total disregard of the issue of fact and law.
 - iii. The learned Magistrate erred in law in disregarding the evidence of the appellant in that she failed to take account of considerations which she should have taken account of.
 - iv. The Learned Magistrate erred in law by disregarding the fact that the respondent herein gave conflicting evidence that failed to establish that she was the one who was treated at the Kenyatta

- National Hospital.
- v. The Learned Magistrate erred in law by disregarding the fact that the respondent did not prove on a balance of probability that she was one and the same person who was involved in the said accident.
 - vi. The Learned Magistrate erred in law by disregarding the rules of evidence in arriving at her judgment
 - vii. The Learned Magistrate misdirected herself in evidence by finding that the appellants herein were 100% liable for the accident without any evidence establishing that fact.
 - viii. The Learned Magistrate erred in law and in fact by awarding the respondent special damages prayed for without the respondent specifically proving the same.
 - ix. The appellants prayed for the appeal to be allowed together with costs.
3. The 1st and 2nd defendants filed a joint defence dated 21st February 2005 and denied that the accident ever occurred in time, place and manner described by the plaintiff and also denied that the respondent sustained any injuries loss or damage as alleged and put the respondent to strict proof thereof. Further they denied the particulars of negligence on part of the 1st and 2nd defendant but lay blame on the 3rd defendant whom they alleged drove his motor vehicle KAG 500V careless and negligently causing it to collide with KZL 419.
 4. As a court of first appeal it is my obligation to re-evaluate the evidence adduced before the lower court and to make my own independent findings bearing in mind that it has neither seen or heard the witnesses and should make due allowance in this respect. The plaintiff testified that she was a fruit and vegetable hawker earning Kshs.400/- per day. She testified that on the 8th November 2001 at 7 a.m she boarded a Nissan matatu no KAG500V going to marikiti, Nairobi. Whilst along Thika road she saw a vehicle coming from Ruaraka belonging to Ruaraka Academy Registration number KZL 419. The vehicle was from the left side. She heard people screaming when the vehicles collided on the main road on the left hand side of the road. She was taken to Guru Nanak Hospital and then to Kenyatta National Hospital where she was admitted for 2 months. She had a cut on the leg and broke a bone. She obtained a police abstract from the police station and was examined by a doctor. She sought future medical expenses as she still has a metal in her leg. On cross examination she stated that she was 38 years old at the time of the accident and that it was her husband who took the police abstract and indicated her name as Lucy Njeri Kamau, her husband is called Kamau and Nyaga is her father. She maintained that she was a passenger in the vehicle and that the Nissan was the one on the highway going downhill and could not stop.
 5. PW2 was Doctor Ndiba Wairioko who testified that he examined the plaintiff on 27th March 2003 she was 38 years old. He noted her injuries and produced a report on her injuries.
 6. The Defence did not call any witness at the trial in the lower Court.
 7. I now turn to the submissions
 8. The appellant's submissions were limited to the issues of discrepancies of the identity of the respondent. The discrepancies referred to are in the case summary dated 4th January 2002 which referred to the patient as being a young lady in fair condition aged 28. The accident vehicle is referred to as a lorry; the P3 form that bears the accident victim's age as 28 years yet the plaintiff stated that she was 38 years, the medical report fee note and receipt referred to Lucy Njeri Ng'ang'a, the police abstract referred to Lucy Njeri Kamau and the in-patient revenue form refers to the patient as being a house wife. It was submitted that section 100 of Evidence Act (Cap 80) which provides; ***"When language in a document in plain , and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts."*** Consequently, extrinsic evidence would not be admissible to confer a different meaning to the plainly contained in the respondent's exhibits. Her Exhibits show that she is different from the person attended to by the police officer who issued the abstract, the surgeon who prepared the P3, the patient admitted at KNH and the patient examined by Dr. Warioko the plaintiff and PW1 are also different persons.
 9. The appellant relied on the following cases; ***HCCA no. 200 of 2003 Kipkebe Limited –vs- Kenry Obuya Omote*** where the Court held that the discrepancies in evidence are fatal to a suit and ***R – vs- Sarah Wanjiku Kamau 17 of 2004, where J. Khamoni held that, "A prima facie case cannot exist where there is contradictions because in such a situation, the Court cannot and come out***

with one story to confront the Accused.”

10. The respondent argued that the appellants had omitted the plaintiff's submissions from the lower court thus rendering the appeal incurably defective. Before writing this judgment the court ordered the respondent to file the said submissions and this was done in 9th December 2014.
11. In the plaintiff's evidence it was submitted that the appellant did not call any witness at trial and the plaintiff's evidence was uncontroverted and that since the appellant's informed the Court that they did not wish to call any witnesses they waived and extinguished their golden opportunity to rebut the respondent's evidence and therefore any evidence/ or exhibits were produced without calling the makers and that liability and quantum was not challenged by the appellants.
12. Learned counsel sought to explain the identity of the respondent. The rest of the submissions were on liability which is not the issue in this appeal. Lerner counsel distinguished the two cases relied on by the appellants that one case relate to criminal appeal and the case of ***Kisii Kipkebe (supra)*** dealt with the discrepancy of the date of the occurrence of the accident.
13. The main issue in this appeal is whether the respondent proved her case on a balance of probability in the lower court. The occurrence of the accident is not denied as there are pleadings to show that the 1st appellant the driver of the said school mini bus at the time of the accident was charged in the Chief Magistrate's Court and convicted of causing death through dangerous driving. On the discrepancies these are my findings. The respondent filed suit using the names Lucy Njeri Nganga the following documents she relied on in her evidence to prove her case bear the following names. Case summary from Kenyatta National Hospital – Lucy Njeri age 28 years, Invoice from Kenyatta National Hospital- Lucy Njeri, medical report by Dr. Ndiba Warioko - Lucy Njeri Ng'ang'a, Meridian Medical Center receipts – Lucy Njeri Nganga. In-patient Revenue form-C Lucy Njeri. Medical examination report (P3) - Lucy Njeri age 28 years, police abstract Lucy Njeri Kamau. It is evident that there are differences in the names used in these documents. The respondent in her evidence sought to clarify that Kamau is her husband and that he is the one who took out the police abstract and hence the names Lucy Njeri Kamau and that her father is called Ng'ang'a. I have looked at the hand written court record and the name appearing thereon is Ng'ang'a and not Nyaga as appears in the typed proceedings which appears to be a typographical error. In the discrepancy relating to her age the respondent explained that she was 38 years old at the time of the accident and not 28 years. The case summary from Kenyatta National Hospital has the age 28 and under o/e the person who saw the plaintiff stated she was a young lady in fair condition. The plaintiff during cross examination clarified that she was 38 years old and thus I will go as per her testimony. It is my view that the defendant ought to have challenged the production of the documents during trial and should have pointed out any discrepancies arising then and would have obtained any clarifications on the same from the witnesses who appeared in court during the hearing or this would have enable the plaintiff to call the maker of any document that had discrepancies to clarify the same especially on her age as she has explained the different names appearing in the documents she relied on. The defence did not object to the production of the said documents. The plaintiff has provided adequate explanation on the usage of the two names Kamau and Nganga as such I find that the appellant's grounds on inconsistency in evidence fails. I further find that the respondent had proved her case on a balance of probability and dismiss the appellant's appeal with costs. Liability was not challenged and it is apparent that the other grounds of appeal were abandoned by the appellants except the one on discrepancies. Accordingly, I find no reason to interfere with the award which was given by the trial magistrate and confirm the judgment of the trial magistrate in respect of the award of damages. The appeal is dismissed with costs to the respondent. Orders accordingly.

Dated, signed and delivered this 30th day of January 2015.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Appellants

..... For the Respondent

..... Court Clerk