



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 55 OF 2010

NJUE PATRICK.....1ST APPELLANT

PATRIC K. NJUE.....2ND APPELLANT

KIMANI PATRICK MWAURI.....3RD APPELLANT

VERSUS

LUCY NYAMBURA NGIGE ALIAS LUCY NYAMBURA NGIGI.....1ST RESPONDENT

JOHN NZIOKI MWATU... ..2ND RESPONDENT

(Being an appeal from the original Judgment and Decree in Machakos Chief Magistrate's Court Civil Case No. 157 of 2009 by Hon. S.M. Mungai on 26/3/2010)

JUDGMENT

1. The 1st appellant was the registered owner of motor-vehicle Registration Number KBD 921P Isuzu lorry, the 2nd appellant was the beneficial owner, while the 3rd appellant was the driver.
2. On or about the 31st October 2008 the Respondent was lawfully travelling in motor-vehicle Registration Number KAV 968K along **Nairobi – Mombasa** road. While near **Mto Mawe** area the 3rd appellant in the course of his employment and/or agency to the 2nd Appellant drove, controlled and/ or managed motor-vehicle Registration Number KBD 921P so negligently, veered off its lane and remained on the lane of motor-vehicle Registration NO. KAV 968K causing a collision. As a result the 1st respondent sustained injuries. In her claim the respondent claimed for special damages in the sum of **Ksh 153,700/=**; general damages for pain, suffering and loss of amenities; provision of future medical expenses **Ksh 450,000/=**, costs of the suit and interest.
3. In their defence the 1st and 2nd appellants denied ownership of motor-vehicle Registration Number KBD 921P. Denying the occurrence of the accident they also denied an allegation that the plaintiff was travelling aboard motor-vehicle registration number KAV 968K. In the alternative they attributed negligence to the driver of motor-vehicle Registration Number KAV 968K and the respondent. They sought indemnity from the 2nd and 3rd respondents who were the owner and driver of motor-vehicle Registration Number KAV 968K respectively. The 1st and 2nd respondents in their defence denied any negligence on their part, having caused or substantially contributed to the accident and blamed the appellants and the 1st respondent for having been negligent.

4. The trial court considered evidence adduced and concluded that the appellants were 100% liable for the accident. The appellant's case against the 3rd parties was dismissed. Consequently an award of damages was made to the 1st respondent as hereunder:-

- i. Special damages - Kshs. 79,122/=
- ii. General damages - Kshs 750,000/=
- iii. Future medical expenses - Kshs. 450,000/=

Total sum - Kshs. 1,279,122/=

5. Being dissatisfied by the Judgment and Decree of the court, the appellants appealed on grounds that the learned trial magistrate erred in law and fact ;-

- i. By not finding that the motor-vehicle Registration Number KAV 968K was not to blame for the accident;
- ii. In disregarding evidence of the plaintiff witness No. 2, the Police Officer and basing his entire decision on the sketch plan that was not produced in evidence;
- iii. By finding that the plaintiff had proven her case against the defendants to the required standard;
- iv. By awarding Kshs. 750,000/= to the Respondent in general damages for pain, suffering and loss of general amenities.
- v. By awarding **Kshs. 450,000/=** to the Respondent as costs of future medication;

6. The appellants prayed that the whole judgment and decree in CMCC 159 of 2009 against the appellant be set aside and substituted thereby with an order dismissing the case and apportioning liability wholly on the third parties.

7. The appeal was opposed by the respondent. Rival submissions were filed by all parties which have been considered.

8. This being the first appeal, this court is mandated to re-evaluate the evidence adduced before the trial court as to reach its own determination bearing in mind that it neither saw nor heard the witnesses as they testified and therefore make an allowance in that respect. The High Court is not bound to follow the trial court's finding of fact if it appears either that he failed to take into account particular circumstances of probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally. (see ***Selle & Another versus Associated Motor Boat Co. Ltd & Another (1968) E.A.*** 123).

9. On the issue of liability, the burden of proof was on the plaintiff and the standard of proof was on a balance of probabilities. The 1st respondent (plaintiff) testified that she was travelling in motor-vehicle Registration Number KAV 968K, Isuzu from Nairobi. Ordinarily the motor-vehicle was expected to be on the left lane as one faces the Nairobi –Machakos –Mombasa general direction. An on coming motor-vehicle would be expected to be on the right lane. On reaching at **Mto Mawe**, according to her, there was an on coming trailer. A lorry that was behind it started overtaking it. It flashed lights and there was a bang. The motor-vehicle that collided with motor-vehicle KAV 968K was motor-vehicle Registration Number KBD 921P. **PW3, No. 66386 P.C. Isaac Ndegwa Muthee** produced in evidence police abstracts on the accident. In his testimony he blamed the driver of KAV 968K for causing the accident. On cross-examination by counsel for the appellant he stated that the driver left his lawful lane and collided head on with motor-vehicle KBD 921B .On cross-examination by counsel for the third parties he stated that on reaching the conclusion to blame the driver of KAV 968K they relied on the statements of witnesses.

10. He stated that other than **Lucy** (1st respondent) the conductor of motor-vehicle Registration Number, KAV 968K also recorded a statement stating that the driver of the lorry was at a high speed. The lorry overlapped to their lane and caused the collision. Alluding to the sketch plan, he said that the point of impact was on the right lane as one faces Mombasa direction. The court however, made an observation indicated in brackets that it was on the left lane as one faces the Mombasa direction.

11. In his testimony the 3rd appellant stated that the driver of KAV 968K is the one who was overtaking another motor-vehicle. He moved onto his lane and it hit his motor-vehicle on the left

- hand side-(passenger's side). The impact pushed his lorry to the right lane. He stated that the point of impact was on his lane.
- 12.The police issued two (2) abstracts on the accident. On the one dated 12th January, 2009, it was indicated the matter was pending investigations. On the 30th June, 2009 another abstract was issued whereby the driver of motor-vehicle Registration Number KAV 968K was to blame for the accident.
- 13.The trial magistrate analyzed evidence adduced and concluded that according to the sketch plan the point of impact was on the left hand as one faces the Mombasa direction which was evidence that the 3rd defendant was at fault. He was of the view that the second abstract was tailored to shift the blame to the driver of KAV 968K. Looking at the damage caused on the motor-vehicle it was the evidence of the 3rd appellant that the Isuzu Canter (KAV 968K) hit his motor-vehicle on the left - the passenger's side. If this was the case the only logical inference to be drawn would be that it was his motor-vehicle that moved to the left lane as one faces the Mombasa direction. He could only have done so as he overtook another motor-vehicle hence colliding with the motor-vehicle that was on its correct lane. Overtaking another vehicle without ascertaining and estimating the distance between it and the oncoming motor-vehicle is evidence of driving a vehicle without due care and attention. There was therefore no error on the part of the trial magistrate in reaching a finding that on a balance of probabilities the 3rd appellant was at fault.
- 14.On quantum of damages, principles that allow an appellate court to interfere with an award were laid down in the case of **Arrow Car Limited -versus- Elijah Shamalla Bimomo and 2 Others – Civil appeal No. 344 of 2001[2004] 2 KLR**. The Court of Appeal stated that the principles that need to be observed are *inter alia*:-
- a) **An irrelevant factor was taken into account or;**
 - b) **A relevant factor was left out or:**
 - c) **The amount awarded as damages is so inordinately low or manifestly excessive that it amounts to a wholly erroneous estimation...**
- 15.In the instant case, in awarding damages the court considered documentation produced and testimonies of the 1st respondent and the doctor who examined her. The 1st respondent testified that he had to resign from her employment. In the case of **Mariam Athumani and Salama Rashid** a minor suing through her mother and next of friend **Mariam Athumani versus Obuya express and Phillip Kipkemoi Chelule Nakuru HCCC No. 477** of 1998 the minor suffered deep cut wounds on the forehead and right temporal region; Fracture on the right femur on the lower third; soft tissue injuries on the right three joint; and bruises on the right elbow. The court awarded Kshs. 350,000/= as general damages. In another case of **Abdi Risak Ibrahim versus Attorney General Nairobi HCCC No. 2052** of 1996, the plaintiff sustained a fracture of the femur; fracture of the right collar and head injury. Kshs. 350,000/= was awarded for pain and suffering and loss of amenities.
- 16.In the instant case the injuries sustained by the plaintiff were severe as emunerated. The leaned trial magistrate was guided by decided cases prior to making the awards, which I find not being inordinately high for injuries sustained by the 1st respondent.
- 17.Consequently I have no basis of interfering with the decision of the Lower Court. The appeal is therefore dismissed with costs to the respondents.

DATED, SIGNED and delivered at MACHAKOS THIS 27th day of JANUARY, 2015.

L.N. MUTENDE

JUDGE