



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 939 OF 2007

PHELISTA MUKAMU MAKAU.....APPELLANT

VERSUS

ELIZABETH KANINI MULUMBI.....RESPONDENT

(Appeal from the original judgment and decree of Hon. Mrs. Ireri (SRM) in Milimani Commercial Courts., CMCC No. 11307 of 2003 delivered on 17th October, 2007)

JUDGMENT

1. The appellant sued the respondent seeking compensation following a road accident which occurred on 10th August, 2003. The trial court heard the matter and dismissed it on the basis that there was material contradiction as to the date of the accident. The trial magistrate specifically stated that:-

“...the same is dismissed due to the material contradiction as the date of the road accident. Plaintiff states 10/8/03 and so does plaintiff in examination in chief however in cross-examination she states the date to have been 10/8/2004. Her case therefore fails. Since pleadings bind a party and when they are inconsistent then of course it is not the duty of the court to intervene and determine when/what is the exact position. The submissions also fail to clarify the date of the alleged road traffic accident...”

2. Being dissatisfied with the trial court’s judgment, the appellant filed this appeal on the following grounds:
 - a. ***That the Learned Magistrate erred and misdirected herself when she held that the appellant’s evidence was contradictory which was not the case;***
 - b. ***That the Learned Magistrate erred and misdirected herself when she failed to appreciate that the appellant had proved her case on a balance of probability;***
 - c. ***That the Learned Magistrate erred and misdirected herself when she failed to assess general damages for pain and suffering in favour of the plaintiff;***
 - d. ***That the Learned Magistrate erred in law and fact when she considered matters which were not relevant to the case;***
 - e. ***That the Learned Magistrate erred and misdirected herself when she failed to find in favour of the appellant when there was evidence that the respondent’s driver was charged, tried and convicted of offence of causing death by dangerous driving; and***
 - f. ***That the Learned Magistrate erred and misdirected herself by disregarding the appellant’s uncontroverted evidence.***

3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: **Peter v. Sunday Post (1958) at Pg. 429**).
4. The appellant's case was that she was on 10th August, 2003 aboard the respondent's motor vehicle registration number KAP 043R as a fare paying passenger. She was travelling along Mombasa Road in Nairobi. She testified that at Embakasi, while the driver tried to overtake another vehicle, the suit motor vehicle overturned occasioning her injuries, she stated that passengers complained but the driver failed to heed their demands. She attributed the accident to the driver's carelessness. She stated that she was taken to Kenyatta National Hospital for treatment where she incurred a cost of KShs. 750/-. On cross-examination, the appellant stated that the accident occurred in the year 2004. Upon being re-examined. She stated that she was not sure of the year the accident occurred.
5. Doctor Wangai testified that he examined the appellant on 19th February, 2004. He confirmed that the appellant sustained blunt injury to the back, right hip and left leg. He produced receipts for KShs. 1,500/- and KShs. 3000/- being for medical report and court attendance.
6. Corporal James Omaari of Industrial Area Police Station at the time confirmed that the appellant was involved in the accident. He produced a copy of occurrence book (P. Exhibit 6), p3 form (P. Exhibit 7) and Police Abstract (P. Exhibit 8) to that effect.
7. Only the respondent's submissions are on record. I shall consider them and also the evidence on record and the law.
8. The respondent submitted that the appellant's evidence was contradictory as to the date of the accident and the documents produced in evidence were of no help since she did not amend her plaint to cure the discrepancy.
9. I have considered the submissions and the law. The following issues fall for determination.

- i. *The effect of the date as pleaded vis a vis the appellant's evidence.*
- ii. *Failure to consider the driver's conviction in traffic case.*
- iii. *Whether failure to assess damages was fatal.*

10. The respondent urged that the appellant was bound by her pleadings and that her testimony on cross-examination contradicted her pleadings. I am of the view that the evidence does not prejudice the appellant's pleadings. My reasons are that it clear from the medical report and the Doctor's testimony that she was examined on 19th February, 2004 so that even if it were to be taken that the accident occurred on 10th August, 2004 as she stated on cross-examination, there is no way she could have been examined before then. It is noteworthy that the Abstract, copy of Occurrence Book and p3 form produced indicate that the accident occurred on 10th August, 2003 as pleaded. Since the appellant was giving evidence about four (4) years after the accident such a mistake was possible to occur. Furthermore the respondent did not rebut her allegations.
11. On whether or not failure to consider that the respondent's driver was convicted in a traffic case for causing death by dangerous driving. I borrow the holding in **David Kiplagat Sang v. Richard Kipkoech Langat & Another (2006) eKLR** in which the court held that as per Section 47A of the Evidence Act where a person is convicted of a traffic offence related to an accident on a charge of careless driving when a civil case is filed he cannot deny that he was careless in his driving. This means that the respondent's driver was negligent.
12. Having so found, can the respondent be said to be vicariously liable for her driver's negligence? On this point I refer to **Kenya Bus Services Limited v. Humphrey (2003) KLR 655** where it was held:

“In a case of the master's liability for his servant's torts, it is the existence of the relationship of master and servant which gives rise to vicarious liability. Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility

that it was being driven for the joint benefit of the owner and the driver.”

In the result I find the respondent vicariously liable.

13. Even if I were to be found wrong on my above analysis on liability, the consequences for failure to adduce evidence has been vastly considered by this court. In ***Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988*** Makhandia J held:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

14. In ***Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007***, Ali-Aroni j, stated:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

15. In the absence of evidence in rebuttal from the respondent, it follows that the appellant proved his case on a balance of probability.

16. On whether failure to assess damages was fatal, I hold the same opinion as Aganyanya.,J (as he then was) in ***Suleiman Hamed Adow v. Kamulat Supplies Ltd (2002) eKLR*** where he stated as follows:-

“...I do not think it is an error of law for a Magistrate or any court to fail to assess damages even if it dismissed a running down case. I would call this a guideline by the court of appeal to minimize assessment work in the event of the success of the appeal and could be a ground for an order for review, it does not come within the ambit of the grounds stipulated in Order XLIV of the Civil Procedure Code.”

17. The principles of awarding damages in cases such as the instant case were laid in ***Rahima Tayab & Others v. Anna Mary Kinanu., Civil Appeal No. 29 of 1982 (1983) KLR; 1KAR 90*** where it was stated that:-

“whereas in awarding damages, the general picture, the whole circumstances, and the effect of injuries on the particular person concern must be looked at, some degree of uniformity must be sought, and the best guide in this respect is to have regard to recent awards in comparable cases in the local courts. It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavouring to award the plaintiff a just amount, so far as money can ever compensate, and entering the realms of very high awards, which can only in the end have a deleterious effect.”

18. I have considered the reasoning above and among others the cases of ***Simon Muchemi Atako & another v. Gordon Osore (2013) eKLR*** and ***Francis Muiruri v. Samuel Njoroge Kamingi & another HCCC No. 1313 of 1987*** where the plaintiffs suffered similar injuries. I am of the considered view that an award of KShs. 150,000/- suffices as reasonable award commensurate with the injuries.. As for special damages I award KShs. 4,500/- as pleaded and proved.

19. The appeal is therefore allowed in the following terms:-

- a. The respondent is found wholly liable.

- b. General damages KShs. 150,000/-
- c. Special damages KShs. 4,500/-

Plus costs and interest at court rates from the date of judgment on appeal until full payment. Orders accordingly.

Dated, Signed and Delivered in open court this 23rd day of January, 2015.

J. K. SERGON

JUDGE

In the presence of:

Musyoki for the Appellant

Kulecho h/b Ocharo for the Respondent