



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 769 OF 2005 CONSOLIDATED
WITH NAIROBI HCCA NO. 815 OF 2005
KESHRA KANJI & SONS LTD.....APPELLANT
VERSUS
CAROLINE KANUTHU KANIU
GEORGE NJUGUNA GITAU.....RESPONDENT

JUDGMENT

These appeals are consolidated because they arose from the same incident. In civil appeal No. 769 of 2005 Keshra Kanji & Sons Limited is the appellant while Caroline Kanuthu Kaniu and George Njuguna Gitau are the respondents. In civil appeal No. 815 of 2005 Caroline Kanuthu Kaniu is the appellant while Keshra Kanji & Sons limited and George Njuguna Gitau are the respondents.

In the lower court Caroline Kanuthu Kaniu was the plaintiff while George Njuguna Gitau and Keshra Kanji and Sons Limited were 1st and 2nd defendants respectively. For clarity in these appeals, I shall maintain the titles of the parties as they appear in the lower court record. The case involved personal injuries suffered by Caroline Kanuthu Kaniu involving motor vehicle registration No. KAU 664 J owned by George Njuguna Gitau and motor vehicle registration No. KUM 093 owned by Keshra Kanji and Sons Limited.

From the facts in the pleadings and evidence adduced in court motor vehicle registration No. KAU 664 J (a matatu) overtook motor vehicle registration no. KUM 093 (a lorry) and stopped suddenly. The driver of the later motor vehicle rammed into the former motor vehicle and the plaintiff who was in the process of boarding motor vehicle registration no. KAU 664J was thrown out onto to the tarmac leading to the injuries pleaded. The learned trial magistrate assessed liability at 60% attributed to the matatu driver while the lorry driver was held to bear 40%. This appeal is both against liability and quantum. The appeals were argued by way of written submissions.

In assessing liability the learned trial magistrate concluded that the driver of motor vehicle registration no. KAU 664J was to blame to the extent of 60 % while the driver of motor vehicle KAU 093 was to bear 40% blame for the accident. On liability, it is now submitted on behalf of the 2nd defendant that the learned trial magistrate was wrong to have attributed any blame to the driver of the motor vehicle registration No. KUN 093 in view of the fact that, it is the driver of motor vehicle registration No. KAU 664 J who negligently overtook the other motor vehicle stopped suddenly with part of his motor vehicle

protruding onto the path of the lorry he had overtaken.

Under such circumstances the lorry driver could not avoid the collision due to the close proximity of that dangerous situation. Motor vehicle registration No. KUM 093 was said to be a ten tonner lorry loaded with building stones and moving at speed of about 40 kilometers per hour. It is said that as a result of the reckless driving of motor vehicle registration No. KAU 664J, he did not have room to break, swerve or in any other way control the lorry so as to avoid colliding into the other vehicle whose rear portion protruded onto the highway.

It is now contended that the learned trial magistrate correctly found the matatu caused the accident but failed to find that the situation created by the matatu did not give the lorry driver any opportunity to avoid the resultant collision because there were people at the bus stop, and vehicles on the right making it impossible for the lorry driver to swerve either way.

It is true that the plaintiff in her pleadings substantially blamed the accident upon the matatu driver but at the same time blamed the lorry driver with equal measure. It is common knowledge and the court takes judicial notice of the fact public service vehicles in this country do make sudden stops regardless of the other road users.

In this particular case, there was a bus stop and vehicles stopped thereat possibly to pick passengers and this should have been noticed by the driver of the lorry registration No. KUM O93. If it is true that the driver was driving at a speed of 40 kph, the load notwithstanding, he should have been able to control the lorry in such a way as to stop before ramming into the matatu. My assessment of the circumstances and the scene is such that the learned trial magistrate cannot be faulted in assessing liability as she did. I have no reason to disturb the same.

On quantum, I have considered the submissions by both learned counsel. The appellate court may set aside an award if it is shown to have been excessive or too low as to represent erroneous estimate of the loss. It matters not that the appellate court could have awarded a higher or lower award. In this case the learned trial magistrate awarded Kshs. 400,000/= to the plaintiff as general damages. She took into consideration 30% permanent incapacity. I note that the doctor's assessment of disability was not permanent in that he had recommended re-examination of the plaintiff after a period of six months, when a report on residual disability would be given then. This was not done.

That notwithstanding, the authorities cited and taken into consideration by learned trial magistrate were within range. I also note that the judgment herein was given about 10 years ago and the value of the shilling has considerably been diminished. I am not in a position to disturb the said award as I believe it reflected the amount awardable for such injuries.

The learned trial magistrate rejected the claim for special damages which the plaintiff Caroline Kanuthu Kaniu submits was proved. In the amended plaint dated 9th September, 2004 special damages of Kshs. 221,682.90/= was pleaded as medical expenses. The claim for 155,432 was resisted by the defendants in the lower court because the plaintiff did not have the actual payment receipt. Special damages must be specifically pleaded and strictly proved.

The appellant produced a print out of the costs of her medication issued by Aga Khan Hospital in the form of Inpatient Invoice. An entry made on 29th April, 2003 showed that a payment of Kshs. 155,432/= was made vide receipt No. 126367. She explained that the receipt was not given to her because she had a balance to pay. My assessment of that in patient invoice and the appellant's evidence is that it was plausible and presented sufficient proof to the standards required to establish payment of that sum.

I am fortified in that conclusion because the entry aforesaid clearly shows the transaction was in cash and the balance which stood at Kshs. 165,232.90/= was reduced to 9,800.90/=. Pages 48 to 57 are payment receipts for the balance and in my judgment I am satisfied that the sum of Kshs. 221,682.90/= was proved to the required standard. This should have been awarded by the learned trial magistrate.

In the end the plaintiff's Civil Appeal No. 815 of 2005 succeeds in addition to the award of special damages aforesaid while the 2nd defendants Civil Appeal No. 769 of 2005 is dismissed. The plaintiff Caroline Kanuthu Kaniu shall have the costs of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of July, 2015

A. MBOGHOLI MSAGHA

JUDGE