



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 467 OF 2011

AGNES WANDUMA WAMBUI.....APPELLANT

VERSUS

1. DANIEL KARIUKI

2. LEOJEN SUPERMARKET LIMITED

3. PRIME BANK LIMITED

4. PERIS W. NDIRANGU.....RESPONDENTS

(Appeal from the judgment and decree of Hon. Mokaya in Nairobi CMCC No. 2909 of 2008 delivered on 5th September, 2011)

JUDGMENT

1. The Appellant sued the Respondent for recovery of damages arising out of an alleged road traffic accident said to have occurred while the Appellant was travelling aboard m/v registration number KBA 342A on 18th March, 2008. The 1st Respondent was sued as the driver while the 2nd, 3rd and 4th Respondents were sued as the owners of the motor vehicle. The Appellant alleged that she sustained a cut wound on the forehead, blunt injury to the chest, frictional burns over and above the left ankle, frictional burns on the upper left thigh and pains and soft tissue injuries.
2. Doctor Mwaura (PW1), who examined the Appellant prepared a medical report which he produced receipts for the same (P. Exhibit 1a,1b and1c). The Appellant (PW2), recounted that the suit vehicle was over speeding while they were descending on the extreme side of the river after passing Muthaiga Station. That the driver changed lanes to the extreme right, he tried to get back and the accident occurred. She stated that she fell unconscious and was taken to Guru Nanak Hospital for treatment. She reported to Pangani police station where she was issued with a police abstract. She stated that she conducted a search to ascertain the ownership of the suit vehicle. The Appellant attributed the accident to the 1st Respondent's negligence.
3. P.C. Priscilla Chelimo (DW1) who was a police officer attached to criminal investigation department at Starehe denied that the Appellant was not among the passengers who were involved in the suit accident. She stated that there was no way she could have obtained a p3 form without an entry being made in the occurrence book. The officer produced an occurrence book as D. Exhibit 1. She however, acknowledged that it is possible to miss out names of victims in circumstances such as these.
4. The Appellant's suit was dismissed on account that she did not establish the link between her and the accident. She then filed this appeal on the following grounds:-

- i. *That the judgment of the honourable court was totally against the weight of the evidence adduced by the parties.*
 - ii. *That the trial magistrate erred in law and in fact in taking into account some irrelevant facts and totally ignoring the relevant facts to the case.*
 - iii. *That the trial magistrate erred in law and in fact in failing to give weight to the cardinal rule of evidence while considering the issue of the standard of proof required in civil litigation.*
 - iv. *That the trial magistrate erred in law and in fact in totally ignoring the uncontroverted evidence of the Appellant during trial.*
5. This being a first appeal I am guided by the principles laid down in **Peters v. Sunday Post (1958) E.A. 424 at 429** where it was stated:-

' It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.'

6. I have given due consideration to this appeal. In my view the major issue falling for determination is whether or not the trial court's finding that the Appellant did not establish a link between her and the accident was an error. It was DW1's evidence that she was requested to investigate whether or not the Appellant was involved in the accident. She stated that the Appellant's name did not appear in the list of the victims but admitted that it was not unique since there are times when such omissions have occurred even when one has been involved in an accident. She further stated that the Appellant's p3 form did not bear the O.B number as required. It is worth noting that it is the duty of the police officer filing the form i.e. p3 form and police abstract to ensure that the OB number is entered and not the member of the public. I have taken the liberty to scrutinise Part 1 of the p3 form, and I see nowhere that requires an entry for OB number to be filled rather there is a provision for reference number. Turning to the Police abstract, I note that there is a provision for entry of reference number and at paragraph 8, Accident register/OB number. To my surprise, the OB number entered in the Police Abstract has not been contended. Further to this, if indeed, DW1 was out to conduct proper investigation as alleged, it was prudent for her or rather the Respondents to avail the police officer who made entries pertaining to the suit accident to explain why he did not make the entry on the Appellant's p3 form or establish that the Appellant was not among the victims. Failure to bring such a vital witness brings the conclusion that the Respondents are hiding evidence that might be detrimental to them. In the circumstances, I find that the Appellant proved on a balance of probability that she was involved in the accident and that the trial magistrate erred in dismissing her claim.
7. Considering that the Appellant's claim was unrebutted, I find that the facts regarding the occurrence of the accident was true as presented by the Appellant. I am fortified by the decision in **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** where Makhandia J discussed the effect of failure to rebut evidence as follows:-

“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.”

8. In the absence of evidence in rebuttal from the Respondents, it follows that the Appellant proved his case on a balance of probabilities against the Respondents and I find them wholly liable for the accident.
9. On the issue of quantum, I have considered the principles laid down in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C.A. No. 142 of 2003 (UR)** where it was held as follows:-

“We appreciate that the assessment of damages is more like an exercise of judicial discretion

and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)

10. I see no misapprehension of facts or that the trial magistrate acted on wrong principles. I in the circumstances, will not interfere with the court's finding on damages. It follows that this appeal succeeds. The trial court's dismissal is set aside. The Appellant shall have no judgement and awards as proposed by the learned trial principal magistrate. The appellant to have costs of the appeal and those of the suit.

Dated, Signed and Delivered in open court this 31st day of August, 2015.

J. J.K. SERGON

____ **JUDGE**

In the presence of:

.....for the Appellant.

..... for the Respondents.