



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Appeal 410 of 2013

RACHAEL MIHAKI KIRAGU.....APPELLANT

VERSUS

KARIMI SIMON MWIHAKI.....1st RESPONDENT

SIMON GACUIRI WANJIKU.....2nd RESPONDENT

**(Appeal from the original judgment and decree of Hon. C.C Oluoch (PM) in Kiambu Courts.,
CMCC No. 277 of 2010 delivered on 3rd July, 2013)**

JUDGMENT

1. The appellant **Rachel Mwihaki Kiragu**, sued the respondent **Karimi Simon and Simon Gacuiiri**, seeking compensation following a road accident which occurred on 30th March, 2009. Upon hearing the matter, the trial court found the 2nd respondent 100% liable and 1st respondent vicariously liable for the accident. The trial magistrate further, held that on the issue of quantum, the medical report by Dr. Theophilus Wangai lay out the injuries as fracture on the left ankle with a de-gloving injury, cut wound on the scalp and a deep cut wound on the right knee. The appellant was admitted at the Kenyatta National Hospital from 30th March 2009 to 25th June 2009. at Mount Kenya hospital she had a skin grafted, a plaster of Paris was applied and she was ambulated crutches. The degree of injury was assessed as grievous harm with an estimated permanent disability at 30%. The magistrate further considered the authorities presented by the appellant and respondents and entered a judgment of Kshs 450,000/= general damages plus Kshs 75, 736/= special damages in favour of the plaintiff together with cost of the suit and interest rates.
2. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on the following grounds:
 - a. ***"That the Learned Magistrate erred in law and fact in failing to appreciate the extent of the injuries sustained by the appellant hence awarding her general damages that were very low;***
 - b. ***That the Learned Magistrate erred in law and fact by failing to consider that the appellant lost 3 teeth in addition to other injuries;***
 - c. ***That the Learned Magistrate erred in law and fact by failing to consider the degree of injury was assessed at 30% permanent disability;***
 - d. ***That the Learned Magistrate erred in law and fact by failing to award the appellant sum of Kshs 100,000/= being the cost of constructive surgery as pleaded and suggested by the doctor.***
 - e. ***That the Learned Magistrate erred in law and fact in failing to award the appellant loss of earnings as was pleaded in paragraph 7 of the amended plaint;***
 - f. ***That the Learned Magistrate erred in law and fact in reasoning that the particulars of loss of earnings and further medical expenses ought to be reflected as part of the prayers sought hence***

arriving at a wrong interpretation of what ought to be pleaded under special and general damages.

- g. That the Learned Magistrate erred in law and fact in failing to make an award of kshs 8,500/= being the doctors fee for attending court to testify in favour of the appellant in total disregard of the appellants exhibit 3 (b) and*
- h. That the Learned Magistrate erred in law and fact by disregarding and failing to apply the authorities cited by the appellant in support of the case in awarding the appellant general damages and special damages ."*

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, on 30th March, 2009, - she was standing at Maji mazuri Mwiki Kasarani stage waiting for a matatu, when a lorry registration number KWR 572 Isuzu appeared and hit her n she was taken to hospital. She suffered injuries. She sells vegetables and cereals and she is now unable to work due to the injuries she suffered and she is now disabled. On cross examination she denied having crossed the road when it was unsafe and she stated that she lost 3 teeth. On re-examination she said that she did not inform the doctor of the lost teeth but that she had asked her lawyer to plead loss of earnings.
5. The appellant also called **PW3 Jane Wangui Njoroge** who testified that she was at the stage at 11. a.m when the lorry hit the appellant who was standing at the stage. The lorry was heading to roysambu from Njiru. She stated that the lorry was behind a pickup that wanted to turn right the lorry attempted to overtake it at which point the lorry left the road and hit the appellant throwing her to the ditch. The witness others ran to her rescue an dragged her from under the lorry. They rushed her to Saint Francis hospital in Kasarani. She did not know the appellant before the accident not at Mbagathi road driving motor vehicle no. KAY 055Z, the respondent suddenly crossed the road and he hit him despite applying emergency brakes. On cross examination, he testified that; he was not drunk at the time of the accident, he was driving from city mortuary to Ngumo estate when the respondent jumped onto the road and he only saw him when he was 10 meters way. He hit the respondent at the bridge area and from his evaluation, he did not suffer serious injuries. He was on the highway driving at less than 50 km/hr, he further refuted claims that the respondent was knocked while on the road side.
6. The respondent called a **Doctor Theophilus Wangata** to testify as PW1. He stated that he examined the appellant on March, 2009. He confirmed that the respondent sustained compound fracture, engloving injury, cut wound on the scalp, deep cut wound right knee causing loss of blood. The appellant was admitted to Kenyatta hospital from 30th March 2009 to 25th June 2009 and secondly on 17th September 2009 to 20th September 2009. she had a skin grafted, a plaster of Paris was applied and she was ambulated crutches. She has been undergoing physiotherapy. He concluded all this by looking at her discharge summary (KNH), police abstract, summary from mount Kenya hospital and attendance card from Nyeri hospital. He conclude that she will need further restricting surgery to her left ankle at about kshs 100,000/= . The degree of injury was assessed as grievous harm with an estimated permanent disability at 30%. He charged Kshs 2,500/= to do the report and Kshs 8,500/= to appear in court.
7. The respondent's case was that, he was driving the lorry heading to Kasarani from Mwiki driving at 40 kph when descending a slope. On reaching dom river there was a van and minibus loading passengers. A nissan emerged from behind the minibus, he indicated and tried to overtake. The appellant emerged from the right side when he started overtaking, he applied emergency brakes causing the car to skid off the road. On cross examination, he confirmed that there was a pick up in front of him but that he was trying to overtake a matatu that was loading passengers. He later said he was overtaking the pick up.
8. The appellants and respondent's submissions are on record. I shall consider them and also the evidence on record and the law.
9. I have considered the submissions and the law. Issues of determination include:
 - i. *Whether the general damages were low;*
 - ii. *Whether the trial magistrate fully considered the evidence before him*

10. On the first issue, whether the damages were satisfactory. It is imperative to note that the parties are in agreement that there was indeed an accident where the appellant was hit by the respondent. The contention however arises where the respondent claims that the appellant contributed to the accident since she tried to cross the road when it was not safe to do so. the question of liability has not been raised. The appellant is only aggrieved by the amount of damages that she was awarded where she claims that they were very low considering the injuries that she suffered. the injuries suffered according to the doctor were compound fracture, engloving injury, cut wound on the scalp, deep cut wound right knee causing loss of blood. He added that the injuries caused the appellant to be admitted to Kenyatta hospital from 30th March 2009 to 25th June 2009 and secondly on 17th September 2009 to 20th September 2009 in Mount Kenya hospital. The appellant then had her skin grafted, a plaster of Paris was applied and she was ambulated crutches.
11. In awarding the general damages, the trial magistrate relied on authorities cited by the appellant. There was the case of **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs ugustine Munyao Kioko [2006] eKLR**, where the plaintiff was awarded Kshs 300,000/=. In the case of **Razi Aminkulaten vs Claus Kluger & ano Mombasa Civil Appeal no. 61 of 2003** where the plaintiff was awarded 600,000/= and the case of **David Monde Nguthi vs Jaswinder & ano Machakos High Court Civil Case no. 75 of 1998**; where the court awarded kshs 400,000/=for similar injuries. The magistrate took into account the fact that the injuries suffered in this case were more severe than the figure of kshs 80,000/= proposed by the respondent. I have re- evaluated the authorities relied upon as well as the doctors evidence on the 30% permanent disability and I am convinced the award of Kshs 450,000/= as general damages represents a reasonable award commensurate with the injuries suffered.
12. On the issue of loss of earnings and future medical expenses the appellant argued that the trial magistrate should have appreciated that the same ought to be reflected as part of the prayers sought hence he arrived at a wrong interpretation of what ought to be pleaded under special and general damages. I have on my part looked at the trial's court judgment and it is apparent the trial magistrate stated as follows:

"Let me observe at this point that while the plaintiff has particularized loss of earnings and cost of future medical expenses in paragraph 6 of the amended plaint, these are not reflected as part of the prayers sought. This should not have been lumped up with special damages. They must be specifically pleaded and sought as one of the prayers in paragraph 10. This is because unlike special damages, these are speculative and ought to be assessed just like general damages. I can only award general and special damages which have been specifically pleaded and proved."

13. The amended plaint has listed the loss of earnings and the future medical expenses as special damages under paragraph 6. It has particularized special damages as follows:

"Medical expenses	Kshs 73,236.00
Taxi receipts	Kshs 136,000.00
Loss of earnings	Kshs 2000.00 per day
Cost of reconstructive surgery	(to be proved at the hearing)
Medical report	Kshs 2,000.00
Police abstract	Kshs 200.00
Copy of records	Kshs 500.00
.....	
Total	..."

Firstly, the amount of cost of reconstructive surgery has not been quoted. The appellant sought to have the same quoted by the doctor in the main hearing. Can the evidence by the doctor be deemed as proof enough under special damages, I don't think so. The kshs 100,000 needed documentary proof that is lacking in this case. How then can the same fall under special damages? I believe, the reconstructive surgery should not have been included in the special damages but in the general damages sought due to the obvious fact that all special damages must be pleaded and proven. I understand the fact that the doctor later during the hearing quoted a sum of Kshs 100,000/= as an adequate amount for the surgery. It would have been accurate for this amount to be included in the general damages. However, the magistrate is bound by the pleadings and once the amount was included in the special damages, then his hands were tied forcing him to apply the law as is hence denying the constructive surgery amount, correctly so in my view.

14. On the issue of loss of earnings amounting to Kshs 2,000/= per day. The same argument as above applies. It should have been pleaded as one of the general damages. Pleading it under special damages demanded concrete proof and none was adduced to warrant issue of loss earnings. In her evidence in court, the appellant claimed that she sold vegetables and cereals for living and made profits amounting to Kshs 800/=. Despite making the 800/=, she pleaded Kshs 2,000/=. Nonetheless, there was no proof adduced to support the claim of kshs 2,000/=.

15. The appellant also claims that the magistrate did not into consideration the fact that she lost 3 teeth. I have looked at the doctors evidence. The doctor did not substantiate that claim yet he examined the appellant. He laid out the injuries suffered by appellant and loss of teeth was not one of them. In her examination in chief, the appellant stated that she lost her teeth though the same was not captured in the doctor's report on Re-examination she reiterated that though she lost the teeth, she did not inform the doctor. I therefore find that this claim was not proven and I will not disturb the judgment of the trial court on this issue.

16. In the circumstances, I agree with the findings of the trial court and uphold the judgment.

17. Costs on the appellant.

Dated, Signed and Delivered in open court this 30th of September 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent