REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 446 OF 2005

JOSEPHINE MWIKALI MUINDI...............…….....................APPELLANT

VERSUS

MATHEW W. MURAGE …..…RESPONDENT

(Appeal from the original judgment and decree of Mrs. Hellen Omondi(CM) in Milimani Courts, CMCC No. 3906 of 2000 delivered on 27th May 2005)

JUDGMENT

1. The appellant **Josephine Mwikali Muindi**, sued the respondent **Mathew W. Murage**, seeking compensation following a road accident which occurred on 2nd September 1992 within Nairobi. The appellant averred in her pleadings that the defendant on that day drove motor vehicle registration number KTQ 898 so negligently that he knocked the plaintiff who was walking off the road where she sustained severe bodily injuries. The defendant denied the claim. The trial court upon hearing the matter held that the evidence adduced by the appellant and her witnesses was contradictory and it dismissed the claim.

2. Being dissatisfied with the trial court's ruling, the appellant filed this appeal on the following grounds:

> ***1) That the Learned Magistrate erred and misdirected herself both in law and fact on liability and arrived at an erroneous conclusion in not finding the respondent liable;***
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> ***2) That the Learned Magistrate erred and misdirected herself both in law and fact by solely relying on the inconsistencies between the appellants evidence and her witnesses on liability;***
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> ***3) That the Learned Magistrate erred and misdirected herself both in law and fact in failing to find that the plaintiff witness had on a balance of probability proved the identity of the motor vehicle registration number KTQ 898;***
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> ***4) That the Learned Magistrate erred and misdirected herself both in law and fact in failing to find that the appellant was hit by motor vehicle registration number KTQ 898 from the documentary evidence produced in court;***
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> ***5) That the Learned Magistrate misdirected herself both in law and fact in failing to find that the injuries sustained by the plaintiff were consistent with the accident subject of the suit in lower court;***
>
> ***6) That the Learned Magistrate erred and misdirected herself both in law and fact in failing to award general and special damages, future medical expenses and loss of earnings and***

diminished earning capacity;

7) That the Learned Magistrate erred and misdirected herself both in law and fact in failing to consider that this was a civil matter to be considered on a balance of probabilities.

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 parties. In the civil appeal case of, **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court (Sir Clement Lestang, V.P) said:-

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

4. The appellants pleaded that on 2nd September 1992, she was walking on the road side while pushing a trolley in Kayole Nairobi when the respondent or his agent drove motor vehicle registration no. KTQ 898 so negligently that he knocked her. She claims that she was taken to Kayole medical clinic and later to Mater hospital where she was admitted, treated and thereafter was admitted at Kenyatta hospital. Due to the injuries sustained in the stomach, she suffered a miscarriage. She claimed that she thereafter went to St Mary's clinic for further treatment . She also stated that she has since suffered from recurrent urine, painful legs and back ache.

5. According to the court record, when the matter came up for hearing the appellant testified and called two witness to adduce evidence on her behalf. PW3, **Erastus Munyua** testified that he had gone to the appellants shop when he saw someone hit from behind by a mini bus. He stated that the vehicle that hit her was a KTQ 898 Canter. He claimed that he thereafter assisted the appellant by rushing her to Kayole hospital.

6. The doctor who examined PW1, **Dr. Washington Wokabi**, also testified in court. In his evidence, he stated that he examined the appellant on 11th January 1993 having been injured on 2nd September 1992. He asserted that the appellant was limping without external aid, she had tenderness on the lower back, soft tissue injuries on her back and pelvis. He further stated that according to the treatment notes, she had suffered stiff back with weakness in her legs . The x-ray showed fusion of vertebrate between L-L5, partial dislocation of the spine L4-L5. He concluded that the issue was degeneration of the injured spine, which dislocation of the spine caused the recurrent urine. He further stated that the disability would be assessed at 30%. He added that the appellant would require regular medication , physiotherapy to control the pain. He testified further that he had not seen the x-rays and would not be in a position to decipher whether she suffered any fractures. He estimated costs of the physiotherapy to be Kshs 100,000/=.

7. The respondent did not adduce any evidence in court during the trial neither did he file his submissions.

8. I have considered the appellants submissions and re-evaluated the evidence on record. It is the submissions of the appellant that the magistrate erred in holding that the appellant described the motor vehicle yet she did not at any time describe the vehicle, instead she produced the copy of search from the registrar of motor vehicles that verified that the respondent was the owner of the vehicle. She argued that this piece of evidence was imperative without necessarily taking the vehicle into consideration. The witnesses corroborated each other's evidence on the exact motor vehicle that caused the accident and that

was enough to hold the respondent liable.

9. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. I will address the first, second, third fourth and seventh grounds of appeal together since they are interrelated. The appellant claims that the learned magistrate erred and misdirected herself in relying on inconsistencies between the appellants evidence and that of PW3 and relying on the same to exonerate the respondent from liability. The magistrate in her judgment upon evaluating the evidence before her found that there were inconsistencies in the evidence of the appellant and that of PW3. She compared the evidence of PW3 where he stated that the appellant was hit from the rear to that of the appellant who stated that she was hit from the left side. She opined that PW3 may not have witnessed the accident and only got to the scene after the accident. She further alluded to the inconsistencies of identification of the type of the motor vehicle which according to her, the appellant referred to as a canter while PW3 referred to it as a pickup. It is on these grounds that the learned magistrate concluded that the appellant had not proved her case on a balance of probability. I have analysed the evidence on record. I am not convinced that there were major inconsistencies to warrant dismissal of the suit altogether. I don't see where the appellant referred to the vehicle as a canter. I also don't see in the evidence at which point PW3 referred to the vehicle as a pick up. PW3 categorically referred to the vehicle as a mini bus and later as a canter, he got the vehicle's number plate right as KTQ 898 Canter, hence not fatal. I also note that the appellant did not mention in court the make of the vehicle, she however produced the copy of records which I have looked at and have established that the vehicle that was allegedly involved in the accident was an Isuzu, type P/UP. It is therefore clear that there was no major contradiction as far as identification of the vehicle is concerned. The respondent has not denied the claim that his vehicle was involved in this accident. I note further that indeed there was contradiction as to whether the appellant was hit on the side as she claims or from the rear as alleged by PW3. In my view, whether the appellant was hit from the rear or from the side is a not a fatalcontradiction, these opposing statements, are not enough to vindicate the respondent from liability. The fact is from the evidence adduced, that the appellant was injured as a result of the accident. A closer look at the evidence of PW3, reveals that he seemed to have been at a distance when the accident happened and may not have been so clear as to how precisely the accident happened. However, he identified the car that caused the appellant to suffer injuries, which evidence has not been rebutted. Subsequently, I find that the appellant proved her case on a balance of probabilities and I hold the respondent wholly liable for the accident.

10. I will tackle the fifth, sixth and eighth grounds of appeal together. The appellant claims that, the learned magistrate misapprehended the law and facts in failing to find that the injuries sustained by the plaintiff were consistent with the accident and by failing to award damages, future medical expenses and loss of earnings and diminished earning capacity. According to the evidence of PW3, the appellant sustained injuries and they rushed her to Kayole clinic. The plaintiff further adduced, medical evidence including the evidence of PW1 who examined the appellant. PW1 stated that the appellant suffered a stiff back with weakness in her legs . He alluded to the x-ray that showed fusion of vertebrate between L-L5 and partial dislocation. He stated that the issue was degeneration of the injured spine and which dislocation of the spine that caused the recurrent urine. He further stated that the appellant was limping without external aid and that she had tenderness on the lower back, soft tissue injuries on her back and pelvis. He assessed disability at 30%. He opined that the appellant would require regular medication and physiotherapy to control the pain which estimated costs would amount to kshs 100,000/=. He dismissed any claims that she had suffered from fractures.

11. Subsequently, I find based on the evidence adduced in the trial court that indeed the appellant was injured by motor vehicle KTQ 898, which injuries were highlighted by PW1 and in the circumstances, it is only just to compensate the appellant. In the plaint, the appellant prayed for special damages amounting to kshs 7,460 together with loss of earnings of kshs 360,000/=. She also claimed future medical expenses of kshs 500,000/= and general damages, pain and suffering, loss of amenities and future diminished earning capacity. She requested that the court relies on the lower court submissions. In those submissions, she submitted that general damages of kshs 1,500,000/= would be adequate citing the authority of **Africanus O. Ojiambo vs Henry Njoroge & Another, HCCC No. 2974 of 1996**, where the plaintiff suffered fractures of the femur with malunion, fractures of ulna which failed to unite resulting in a useless appendage. The court awarded kshs 800,000/=. In this quoted authority, the injuries included; fractures

of femur and ulna. In this case however, the appellant did not suffer fractures as was categorically averred by PW1 . Therefore, this authority cannot apply. In my view, taking into account the injuries suffered by the appellant, the most appropriate authority would be **Jackson Mogaka Tongi V Moses Mabels & Daniel Sokonyi Masibo [1999] eKLR**, where the plaintiff suffered similar injuries with an addition of compression fracture of the lumbar spine with posterior displacement of lumbar II vertebral body and a diminution in the posterior aspect of the disc space between L1- L2 vertebral bodies and a spinal injury the court awarded Kshs 520,000/=. I would therefore award Kshs 450,000/= on this head.

12. The appellant pleaded special damages. She submitted that there were x-ray receipts, the medical reports receipt and police abstract receipt but none of those receipts has been annexed to this appeal. The only receipt is the receipt of copy of record of kshs 100/=. According the appellants evidence in the lower court, these receipts were not produced as exhibits. In the absence of the receipts, I hold that the special damages were not proved other than the kshs 100/=, which I therefore award.

13. On future medical expenses, PW3 submitted that kshs 100,000/= would be needed for further physiotherapy. According to his report, the doctor stated that the future medical expense was payable for five years. I will therefore award the sum of kshs 100,000 X 5 = Kshs 500,000/= under this head.

14. On the loss of earnings, the appellant claimed that she made profits of kshs 3,000/= per month. She did not tender evidence to show that she makes that much. However, am guided by the Court of appeal, in the case of ***Jacob Ayiga Maruja & Another v Simeone Obayo*** **CA Civil Appeal No. 167 of 2002 [2005]eKLR** where the court observed as follows;

> ***"We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."***

15. Therefore, taking into consideration the evidence of the appellant and that of PW3, it is apparent that she owned a shop where she sold various goods. The appellant has also highlighted the goods sold as scones, cakes and bread and how much she made in her sales including the profits. I am therefore convinced that kshs 3,000/= profit per month is reasonable. The appellant has proposed multiplier of 10 years on this head. I think that the multiplier is reasonable given that ten years after the accident, the doctor assessed permanent disability at 30%. Therefore, the sum payable on this head is 3000X12X10= 360,000/=.

16. The appellant further prayed for diminished earning capacity. She proposed that since she was involved in the accident when she was twenty nine years old , then the diminishing capacity ought to run from the date of judgment as it is claim for future lost earning. Given that she is presently 42 years, then multiplier of 12 years would be reasonable. On this head, the appellant quoted the cases of

> ***1. Mweke Ene Marona vs Shaqua Haq & Others Nairobi HCCC no. 316 of 1990,***
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> ***2. Joseph Mtunga Wambua vs Kantilal Khimji Patel & Others HCCC NO. 3452 OF 1984,***
>
> ***3. Francis Mulekye Mwania vs Joy K. Kinyua, HCCC NO. 3179 of 1995,***
>
> ***4. William Butler vs Maura Kathleen Butler Court of Appeal, case no.49 of 1983,***

to justify the use of Kshs 3,000/= as a multiplier. What these authorities have in common is that the courts awarded the plaintiffs compensation for injuries suffered despite lack of evidence of how much wages or salaries the plaintiff earned. I have considered the authorities and as stated above, I reiterate that kshs 3,000/= proposed by the appellant is reasonable. I am convinced that a multiplier of 10 years is reasonable. Hence 3,000X10X12=360,000/=

17. In summary, I enter judgment on liability for the Plaintiff against the Defendant. The judgment of the lower court is set aside and is substituted with an order entering judgment in favour of the appellant as follows:

(a) General damages for pain and suffering.........................Kshs 450,000/=

(b) General damages Loss of earnings ....Kshs. 360,000/=

(c) General damages for diminished earning capacity Kshs. 360,000/=

(d) Future Medical expenses..Kshs 500,000/=

(e) Special damages ....Kshs 100/=

(f) Costs --

Total ***Kshs. 1,670,100/=***.

Dated, Signed and Delivered in open court this 13th of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

....for the Appellant

....for the Respondent