



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 228 OF 2003

JOSEPHINE KALWENGE NZOKA.....APPELLANT

VERSUS

KENYA POWER AND LIGHTING CO. LTD.....1ST RESPONDENT

BENARD MUSAU NDENGE2ND RESPONDENT

JUDGMENT

The appellant was injured in a road traffic accident involving a motor vehicle registration No. KXL 731 owned by the first respondent and driven by the 2nd responds along Kitui - Kabati road. She filed a suit following the said injuries and blamed the 2nd responded for the accident and holding that the 1st respondent was vicariously liable for the negligence of the 2nd respondent.

The accident took place as pleaded and also as confirmed by the testimonies of witnesses. The vehicle belonged to the 1st respondent. It was being driven by the 2nd respondent at the time of the accident. The appellant was a passenger therein. Several facts stand out as being not in dispute. The appellant was injured. The injuries were a direct consequence of the said accident.

There is a dispute as to whether or not she and her husband paid any money to be ferried in this motor vehicle. That issue is in dispute but there is evidence to show that the said motor vehicle was not a public service vehicle.

There was some testimony from the defence witness to show that a notice was clearly written on this motor vehicle that it was not allowed to carry unauthorized passengers. The same notice is said to have been on the dash board inside the same motor vehicle.

The 2nd respondent was charged with the offence of carless driving before the Senior Resident Magistrate at Kitui Law Courts vide Traffic Case No. 18 of 1996. He pleaded guilty and was fined Kshs. 600 in default to serve 3 months imprisonment.

After the trial in the civil suit the learned trial magistrate found that he was liable but that since the appellant did not prove vicarious liability on the part of the 1st defendant her suit was dismissed. Aggrieved by the said judgment she filed this suit.

Both learned counsel filed written submissions and cited some authorities which I have noted. If the

appellant and other passengers who included her husband paid any fare, this would not have made any difference in the circumstances of this case. However, it is her case and that of her husband as against the 2nd respondent and his witness that fare was paid.

In his defence the 2nd respondent said that he gave a lift to the appellant and that he acted gratuitously as his motor vehicle was never meant to carry any passengers.

In that regard the 2nd defendant said he owed no duty of care to the appellant. According to the trial magistrate the appellant took a risk and she should not blame anybody for it. Strangely however the learned trial magistrate said that 2nd respondent was liable to compensate the appellant but placed that blame at zero percent.

My assessment of the evidence on record is that the 2nd respondent was negligent but he had no authority of his employer to carry any passengers leave alone the appellant. He was therefore liable to the appellant for his negligence. His employer, the 1st respondent, is not vicariously liable for the negligence of the 2nd respondent.

The appellant was injured as a result of the accident. She called doctor Maliti to give evidence on her behalf and who produced a medical report he prepared after examining the appellant.

The learned trial magistrate however, disregarded that evidence because the doctor had not examined the appellant at the time or soon after the accident. In preparing the medical report the doctor relied on medical documents produced by the appellant and also examination of the appellant.

With respect for the learned trial magistrate was wrong to disregard that report because many a times doctors have to rely on such evidence to prepare their reports. It cannot be said to be hearsay.

I have looked at the medical report prepared by doctor Maliti . It is detailed enough to give the court some guide as to damages payable to the appellant. According to the medical report the appellant sustained blunt chest injury, blunt left wrist joint injury, cut wound on the right knee and blunt pelvis injury. X-ray of the left forearm showed a simple fracture of distal radius which was reduced and demobilized in plaster of Paris for four weeks

When doctor Maliti examined her she complained of chest pain, inability to walk long distances, low back pain and difficulty in lifting objects using the left hand. The learned trial magistrate assessed damages at kshs. 40,000/= in favour of the appellant had she succeeded in her case against the respondents. That in my view was inordinately low considering the injuries sustained by the appellant. From the authorities cited the award for general damages should be Kshs.200, 000/=.

The end result is that the appellant's appeal against the first correspondent is dismissed while that against the 2nd appellant is allowed. She shall be entitled to general damages of Kshs. 200,000/=. Special damages are supposed to be pleaded specifically and strictly proved. This was not done in this case and therefore cannot be awarded. The plaintiff shall have the costs of this appeal as against the 2nd respondent only.

Orders accordingly.

Dated and delivered at Nairobi this 15th Day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE

