



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 91 OF 2010

MONICA AWINO OWANG.....APPELLANT

VERSUS

MIDLAND EMPORIUM LTD.....RESPONDENT

J U D G M E N T

1). The appellant herein was traveling aboard motor vehicle Reg No. KMU 936 on 25-1-2004 along Gor Mahia road when it collided with motor vehicle Reg. No. KAR 770K owned by the respondent. The appellant sustained bodily injuries. She filed suit against the respondent claiming general and special damages. The same was however dismissed hence this appeal.

2). This appeal is premised on 7 grounds which can be summarised as follows:

1. **The trial magistrate erred in law and fact in failing to find that the said road traffic accident occurred as a result of the whole or partial negligence of the respondents agent and or driver.**
2. **The trial magistrate erred in law and fact in failing to find that the failure of the respondent's driver to brake in time largely contributed to the occurrence of the accident.**
3. **The learned trial magistrate failed to appreciate the appellants evidence.**

3). As to the occurrence of the accident, all parties acknowledged that the same took place. The respondent's driver was charged vide traffic case No. Kisumu CMCC Case No. 207 of 2004 and acquitted after full trial. During the trial the respondents tendered the traffic proceedings as part of its evidence but did not call any witness to testify. The trial court as stated above was unconvinced that the appellant established her case. The court concluded that:

“I find that the negligence of motor vehicle registration KAR 770K's driver was not established on a balance of probabilities. On this point, the plaintiff's suits are hereby dismissed with costs”.

4). The court fully settled the ownership of motor vehicle Reg. No. KAR 770K as belonging to the respondent. Having perused the parties submissions herein the big question to determine is whether the court was right in finding that the appellant did not establish negligence against the respondent.

5). Since the respondent relied on the traffic proceedings (supra) it is imperative to peruse the same in establishing this question of negligence. The evidence of PW2 is important to reproduce here. He said during examination in chief that:

“When we were joining Gor Mahia road near Victoria Hotel, a trailer KAR 770K crossed

the road. I was behind. We were few in the motor vehicle. The driver tried to apply brakes but he was so close to the trailer. The matatu entered the trailer and we were thrown off”. (emphasizes mine)

PW3 the traffic police officer who visited the scene told the court:

“After investigations I found that the lorry's driver was to give way before entering the main road. He just entered forcing 404 Peugeot to be damaged I charged the driver of the lorry”.

During her evidence in chief the appellant told the trial court:

“I was in motor vehicle Reg. No. KMU 936. The other motor vehicle was the one that knocked our motor vehicle. The trailer was speeding and joined the main road”.

6). Taking into consideration the totality of the evidence adduced during the traffic case as well as the case at the lower court, I easily conclude that both the drivers of the matatu and the lorry had a share of blame. I further find that there was nothing the applicant was to prove having established that the accident occurred and blamed one of the vehicles. She was not in control of either vehicles and she cannot be blamed for the poor control of either of the said vehicles. It was incumbent upon either drivers, that is of the matatu and the lorry to explain how the accident occurred.

7). Pursuant to the above observation, who was to blame them for the accident? It is not in dispute that the lorry's driver was acquitted in the traffic case, but that is merely persuasive in establishing negligence herein. Having found that both drivers were to blame for the accident, it would be safe to apportion liability therefore at 50:50 basis. This is informed by the fact that none of the drivers tendered any evidence during the hearing and the only evidence available is that of the applicant and the production of the traffic case proceedings. I'm further buttressed by the finding in the case of **Baker VS- Market Harborough Industrial Cooperative Society Ltd [1953] IW LR Denning** said:

“Once both are to blame, and there are no means of distinguishing between them, then the blame should be cast equally on each”.

8). Both drivers ought to have been careful while in control of the vehicles. It is alleged that the lorry's driver was over speeding, which contention has not been controverted, while the matatu driver failed to see the crossing lorry. In **Lakhamshi -VS- Attorney General [1971] EA , at 118, Spry V.P** said in such a situation that:

“I accept that a Judge is under a duty when confronted by conflicting evidence to reach a decision on it. I accept that in relation to most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty of negligence. I accept that in many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. I think that it is usually possible although often extremely difficult to apportion the degree of blame between two drivers both guilty of negligence but I accept that where it is not possible, it is proper to divide the blame equally between them”.

9). Consequently, and in view of the above observation I find that this is a proper case of apportioning liability equally between the appellant's driver and the respondent. In any event it is trite law that the standard of proof on civil cases is always on a balance of probability which I find that the appellant did contrary to the finding of the learned trial magistrate.

10). Having established the question of liability the other issue is on quantum. The appellant sustained the following injuries:

- a. **Injury to the forehead.**
- b. **Injury to the lower lip.**
- c. **Injury to the nose.**
- d. **Injury to the chest.**
- e. **Injury to the right knee.**
- f. **Injury to the leg.**

Dr. Nyamogo found the same to be soft tissue in nature and that they had healed. I do not find the court's award of Kshs. 150,000/= unreasonable. The authorities relied on by the parties were almost commensurate to the injuries sustained by the appellant. I shall not interfere with the same save to confirm that the applicant is hereby awarded the sum of Kshs. 150,000/= as general damages and Kshs. 1500/= as special damages.

11). In conclusion, I shall allow the appeal herein as follows:

- a. **Liability between the appellant and the respondent is shared on a 50:50 basis.**
- b. **The applicant is awarded the sum of Kshs. 151,000/= being both special and general damages, but the same is half and that in the final analysis the appellant is awarded the sum of Kshs. 75,750/= which attracts interest from the date of the lower court judgment till payment in full.**
- c. **The appellant shall have half costs at the lower court.**
- d. **The appellant shall have the cost of this appeal.**
- e. **This judgment applies to Kisumu HCCA No. 92 of 2010 Mutatis Mutantis.**

Dated, signed and delivered at Kisumu this 23rd day of July, 2014.

**H.K.
JUDGE**

CHEMITEI