



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 96 OF 2008**

**MARTHA NGETICH .....APPELLANT**

**VERSUS**

**JENNIFER WANGARI KAMAU .....1ST RESPONDENT**

**JOSEPH KAMAU KAHUNGU .....2ND RESPONDENT**

(Being an appeal from the Judgment and Decree of Gilbert Mutembei, Chief Magistrate delivered on 15th May, 2008 in Nakuru CMCC No. 1011 of 2006)

**JUDGMENT**

1. The Appellant, **Martha Ngetich**, preferred this appeal following her dissatisfaction with the decision and judgment of the Chief Magistrate at Nakuru in CMCC 1011 of 2006 in which she had sued the 1st Respondent, **Jennifer Wangari Kamau**, and the 2nd Respondent, **Joseph Kamau Kahungu**, for damages arising from a road traffic accident which occurred on the 8th of September, 2005 along Gusii road within Nakuru town involving motor vehicle registration number KAQ 227Y belonging to the 2nd Respondent and driven at the time by the 1st Respondent and the Appellant who was a pedestrian.
2. The Appellant averred that the 1st Respondent drove the said motor vehicle without due care and attention and in a negligent manner such that she lost control of the vehicle thereby knocking her down. She prayed for general damages and special damages against the Respondents jointly and severally.
3. The Respondents filed a Defence in which the allegations made against them by the Appellant in the Complaint were denied and in particular that the 2nd Respondent was the registered owner, that the 1st Respondent was the authorized driver and that the Appellant was injured under the circumstances set out in her case.
4. The Respondents contended that if the accident occurred and the Appellant was injured then she was solely to blame or substantially contributed to her own injuries by failing to observe the Highway Code.
5. The Respondents therefore prayed for the dismissal of the Appellant's suit with costs.
6. The evidence adduced at the trial court was considered by the trial magistrate who arrived at the conclusion that the Appellant's case had not been proved against the Respondents on a balance of probabilities. Consequently, the suit was dismissed and the Appellant ordered to pay costs to the Respondents.

7. It is against the dismissal order that this Appeal was filed on the basis of the grounds in the Memorandum of Appeal dated 12th June, 2008. The main grounds of appeal are as follows:

- a) The learned trial magistrate erred in law and in fact in his judgment in failing to have a concise statement of the case, the point of determination, the decision thereon and the reasons for such decisions;
- b) The learned trial magistrate erred in law and in fact in holding that the Appellant's injuries were not commensurate with the accident without analyzing the evidence and or giving reasons for such a holding;
- c) That the learned magistrate erred in law for failing to consider and analyze the evidence of the Appellant, PW4, PC Mugweru and the documentary evidence before concluding that the Appellant did not prove her case on liability;
- d) The award of Kshs.20,000/ that the learned magistrate would otherwise have awarded is inordinately low and represents an entirely erroneous estimate;
- e) The learned magistrate erred in law and fact in finding that only Kshs. 2000 had been pleaded and proved;

8. The Appellant prays that the judgment be set aside and judgment on liability be entered in favour of the Appellant against the Respondents. She further prays for an award for special damages pleaded and proved; a finding that the Appellant also sustained a fracture of the left cuneiform bone and an enhancement on the general damages payable to the Appellant.

9. At the hearing of the Appeal, the Appellant was represented by the learned counsel **Konia**, while the Respondents were represented by the learned counsel **Ms Sakari**. Both counsels agreed to present written submissions and on the 21st February, 2014 and the Appellant filed his submissions while the Respondents did likewise on 24th February, 2014.

#### **ISSUES FOR DETERMINATION**

10. After reading the respective written submissions the issues that arise for determination are;

- (i) Whether there was a causal connection between the accident and the injuries sustained by the Appellant and if so;
- (ii) Whether the Appellant is entitled to general and special damages.

#### **ANALYSIS**

11. This is a first appeal and in that regard, the duty of this court is to re-consider the evidence and draw its own independent conclusion bearing in mind that only the trial court had the advantage of seeing and hearing the witnesses. Refer to the case of **Selle and Anor. V. Associated Motor Boat Co. Ltd and Others**, [1968] EA 123.

12. The occurrence of the accident, the ownership and driver of the material motor vehicle were factors which were not substantially disputed. There was sufficient evidence from the Appellant that she was a pedestrian and due to a stationary lorry that had blocked the pedestrian walkway she was forced to walk on the road.

13. **P. C. David Mugweru (PW4)** visited the scene and confirmed the occurrence of the accident. He indicated that at the scene there was a lorry that was stationary and had blocked the pedestrian lane had also occupied part of the road. That the Appellant was injured whilst she walked past the lorry. She was hit from the rear by the 1st Respondent who was driving motor vehicle registration number KAQ 227Y.

The officer did not notice any slide marks on the road nor could he establish the point of impact and thereafter the motor vehicle was inspected for any defects.

14. With regard to liability, the particulars of negligence attributed to the 1st Respondent as the driver of the motor vehicle included that she drove a defective motor vehicle, without due care and attention and losing control of the said motor vehicle.

15. The 1st Respondent denied causing the accident. In her evidence she stated that she was driving slowly past a lorry parked by the road when she heard a bump at the rear of the car. She stopped and was approached by the Appellant who accused her of knocking her down.

16. From the evidence adduced it is apparent that a stationary lorry had obstructed the pedestrian lane therefore forcing the Appellant to walk on the road resulting in the said accident.

17. The most contentious issue is causation that is whether there is a nexus established between the accident and the Appellant's injuries. Her evidence was that she sustained injuries to the left leg and the right leg and that she was attended to and admitted at Valley Hospital from the 8<sup>th</sup> September, 2005 to the 9<sup>th</sup> September, 2005.

18. Later the Appellant states that her condition worsened and she sought treatment at Nakuru Provincial Hospital and it is the Appellants testimony that that her left leg was X-rayed and a fracture was discovered. She was admitted from the 29/09/2005 up-to the 18/10/2005 at the Annex Hospital. She produced a Discharge Summary from this Hospital.

19. On the 29/09/2005 at Annex Hospital by **Dr. Omondi (PW3)** conducted a further examination and he observed swelling on the left leg of the Appellant caused by blood clot. He states in his testimony that he admitted the Appellant because of the clot and her pregnancy. His evidence was that some of the charges raised related to maternity and others for the treatment of the clot.

20. **Dr. Wellington Kiamba (PW2)** prepared a medical report for the Appellant on the 23/03/2006. He observed that the Appellant sustained a fracture of the left cuneiform bone, sprain of the left ankle joint and bruises on both legs.

21. Counsel for the Respondent submitted there is a break in the chain of causation. He noted that the accident occurred on 8th September, 2005, the Appellant was treated the following day and was admitted three weeks after the accident. This according to counsel raises doubt whether there were other independent events that led to the Appellant been admitted other than the accident. Further counsel submitted that the injuries do not appear to be immediate and an obvious consequence of the accident. He relied on the decision in **Obwagi V. Aburi** (1995) E.A 255.

22. Counsel contended that the injuries as alleged by the Appellant were inconceivable in the circumstances and in particular the sprain to the left leg. He further submitted that the injury to the right leg was inconsistent with being hit from the back.

23. Upon perusal of the Discharge Summary Report from Valley Hospital, the first hospital that attended to the Appellant immediately after the accident, this court notes the injuries are indicated as a sprain to the left ankle joint and bruises to both legs. An X-ray was taken but the Summary does not state the results of the X-ray.

24. The evidence of **Dr. Omondi Ogada (PW3)** states that he examined the Appellant and admitted her but makes no mention of any fracture but states that he only admitted the Appellant due to her pregnancy and a swollen leg which had a blood clot.

25. **Dr. Wellington Kiamba (PW2)** testified that the Appellant went to his clinic armed with a Discharge Summary from Valley Hospital and Provincial Hospital and also had with her X-rays. The X-ray revealed a fracture of the cuneiform bone. Using these documents he compiled a medical report which he tendered

into court and it was marked as “**Pexb 6.**”

26. On reading the Plaintiff it is noted that the particulars of injuries are pleaded as follows;

- (i) Fracture of the cuneiform bone with associated displacement of the left foot;
- (ii) Sprain of the left ankle;
- (iii) Bruises on both legs

27. It is trite law that the burden of proof is upon the person making the allegations. It was then incumbent upon the Appellant to adduce evidence to prove that the injuries she sustained were connected to the accident.

28. There are three different versions of the Appellant’s injuries. One set is contained in the Discharge Summary from Valley Hospital another set is set out in the Discharge Summary of Provincial Hospital and the last in the Medical Report of Dr. Kiamba. This court observes that the Appellant’s evidence on the fracture was not corroborated by **Dr. Omondi Ogada, (PW3)** and it is interesting to note that he examined the Appellant three (3) weeks after the accident. The two (2) Discharge Summaries make no mention of the fracture and **PW2’s** evidence was that the Appellant arrived at his clinic armed with the X-ray and he too concurs that the Summaries make no mention of the fracture. The Appellant’s evidence on her injuries is therefore uncorroborated by her witnesses and not supported by her very own documents.

29. Clearly by looking at the evidence tendered by the Appellant on her injuries the trial magistrate cannot be faulted for directing his mind and making a finding that the injuries did not appear to be consequential to the accident.

30. It is an established principle of law that an appellate court will be slow to disturb an award of damages unless it is found that the trial court proceeded on wrong principles of law by taking into consideration factors that it ought not to have, or omitted to consider factors it ought to have or the award is inordinately low or high and represents an erroneous estimate of damages payable.

31. Upon re-evaluating the evidence this court is satisfied that the trial magistrate addressed the facts of the case, he gave a concise statement of what was stated in evidence, he outlined the reasons for his decision and this court is also satisfied that in reaching his conclusion the trial court did not apply wrong principles of law.

32. This court is satisfied that the Appellant failed to prove that her hospitalization at Provincial Hospital and treatment and injuries, if any, had any connection to the accident. This case is found not to be a suitable case to warrant interference with the judgment of the trial court.

### **FINDINGS:**

For the reasons stated above this court makes the following findings;

33. This court finds that there is no causal link between the accident and the Appellant’s injuries and further finds that the treatment was not consistent with the accident but more related to the pregnancy.

34. This court finds no reasons to interfere with the judgment of the trial court on the findings on general damages and special damages.

### **CONCLUSIONS:**

35. The appeal is found to be lacking in merit in its entirety and it is hereby dismissed.

36. The judgment of the trial court is upheld.

37. Costs of the Appeal granted to the Respondent

It is so Ordered

**Dated, Signed and Delivered at Nakuru this 22nd day of July, 2014.**

**A. MSHILA**

**JUDGE**