



REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 140 of 2010

(Appeal against the judgment of [MRS. ONG’UDI, C.M.] dated 13.10.2010 from the original Civil Case No.125 of 2009 in the Chief Magistrate’s Court at Kakamega)

BEN MENGES.....APPELLANT

V E R S U S

EDITH MAKUNGU LANDE.....RESPONDENT

J U D G M E N T

The respondent was involved in a road traffic accident on the 14.10.2007 while travelling in motor vehicle registration number KAP 164 X Nissan Sunny Saloon. She was awarded damages by the trial court. The appellant was dissatisfied with the decision of the trial court and filed this appeal. Similarly, the respondent filed a cross-appeal. The appellant’s grounds of appeal are that the trial court erred in law and fact by apportioning liability at 85% against the appellant yet there was no sufficient evidence, that the general damages awarded are manifestly excessive, that the appellant’s authorities on damages were ignored, that the respondent was the author of her own misfortune and that the appellant’s submissions were ignored for no sufficient reasons.

The respondent’s grounds of her cross-appeal are that the trial court erred in law in its apportionment of liability, that the amount of damages awarded is inordinately low compared to the injuries suffered and the same will have lifelong effect on the respondent and that her evidence was adduced by the appellant yet the respondent was found 15% to blame.

Parties agreed to proceed by way of written submissions. I have gone through the submissions of both counsels. The appellant mainly contends that the amount of damages awarded of KShs.900,000/= was on the higher side. The authority of the case of **RAPHAEL OLOO V INDUSTRIAL PLANT (E.A.) LTD.** relied by the trial court involved quite serious injuries compared to those suffered by the respondent. In the Raphael Oloo case the plaintiff apart from other injuries lost 6 teeth which was not the case in the present case. The appellant rely on the authority of **SHALIMAR FLOWERS LTD. V NOAH M. MATIANYI Nakuru HCCA No. 175 of 2008** where KShs.50,000/= was awarded.

On the part of the respondent counsel submitted that the respondent was a passenger in the accident vehicle and she ought not to have been found liable. The appellant caused the accident and should have been held 100% liable. The appellant owed duty of care to the respondent. On quantum the respondent maintains that the medical report shows that the respondent will suffer 5% permanent disability. Counsel for the respondent submitted that the award of general damages should be enhanced to KShs.1.9 million.

The record of the trial shows that three witnesses testified for the respondent’s case. No evidence was

tendered by the appellant. The respondent testified that on the 14.10.2007 she was at Majengo stage when the appellant gave her a lift in motor vehicle registration number KAP 164 X. She was together with her children. The respondent is a teacher at Kaimosi Girls School. When they reached near Mbale police post there were bumps but the driver went over the bumps and pot holes without braking. He kept on swerving but hit the pot holes. The vehicle went uphill and then started reversing. It went down and fell into the river and overturned. The respondent had her seat belt on and was assisted out of the vehicle after the accident. She was taken to hospital and blamed the driver of the vehicle for the accident.

PW2, PC OWINO ASIN, was based at the Kakamega police station. He produced the police abstract in relation to the accident. He did not investigate the case. **PW3, DR. OKETCH PROTUS**, testified that he examined the respondent on the 23.2.2009 and prepared a medical report. According to PW3 the respondent suffered blunt injury to the head, injury on the shoulders and blunt injuries to the back. X-rays showed no fractures. She was admitted for three days. She had low back pain and that was chronic. She works while on pain killers.

The main issue for determination is whether the trial court made the correct decision on both quantum and liability. On the issue of liability counsel for the appellant submitted before the trial court that the respondent failed to prove negligence. The respondent did not prove that the appellant had any duty of care against the respondent. The appellant proposed 50% contributory negligence on the part of the respondent. On her part the respondent submitted that the appellant failed to call witnesses and therefore was 100% liable.

From the evidence on record it is clear that the accident occurred while the appellant was driving the accident motor vehicle. There was no collision with any other vehicle. The respondent was a passenger in the accident vehicle although she was being assisted by the appellant that does not mean that the appellant owed no duty of care against the respondent. The respondent cannot be held to have been the author of her own misfortune as contended by the appellant. It is clear from the evidence on record that the driver of the accident motor vehicle failed to control the vehicle properly and that led to the occurrence of the accident. The trial court apportioned liability at 85% against the appellant and 15% against the respondent. The trial court also found that the appellant had a duty of care and breached that duty. While apportioning liability the trial court held that the appellant could not be blamed wholly. There is no explanation as to how the respondent was to blame in the occurrence of the accident. It is the respondent's evidence that she had her seat belt on and it is the one that saved her as she could have been thrown out of the vehicle. I do find that the trial court was wrong in blaming the respondent for the occurrence of the accident to the extent of 15%. The respondent was a passenger in the accident vehicle and was not the one controlling the vehicle. She did nothing that contributed to the occurrence of the accident. I do find that the appellant was 100% liable.

On the issue of quantum, counsel for the appellant urged the trial court to award KShs.50,000/= as general damages. The authority relied by the appellant before the trial court was the case of **PAMELA OMBIYO V KENYA BUS SERVICES – Nairobi HCCC No. 1309 of 2002**. In that case, the plaintiff sustained blunt head injury with loss of consciousness, deep cuts on the forehead and both legs, soft tissue injury to the neck, subluxation of pubic symphysis and blunt trauma to the right hip and right eye. A sum of KShs.50,000/= was awarded in 2004. In the case of **SHALIMAR FLOWERS LTD.** hereinafter cited the plaintiff sustained deep cut wound on the left wrist joint which healed leaving a scar, soft tissue to the same joint and blunt injury to the anterior chest wall. KShs.50,000/= was awarded. On her part the respondent is seeking a sum of KShs.1.9 million. Before the trial the respondent relied on the case of **RAPHAEL OLOO V INDUSTRIAL PLANT E.A. LTD. Nairobi HCCC No. 4400 of 1987** and that of **BERNICE MUTILE MAINGI V JOSEPH NDOME & ANOTHER – Nairobi HCCC No. 436 and 435 of 1999**. In the first case the plaintiff sustained injuries to the hand and lower back and lost 6 teeth. He had severe low backache and could not lift heavy objects. A sum of KShs.1 million was awarded.

The respondent herein sustained the following injuries as particularized in the plaint as well as in the submissions of both counsels before the trial court:-

- Blunt injury to the head, both shoulders.
- Blunt injury to the back
- Numbness of the lower limbs
- Tender lumbo sacral spine
- Post traumatic osteoarthritis of the lumber spine
- Injury to both legs
- Injury to the chest

The respondent was hospitalized for three days. **PW3, DR. P.W. OKETCH** attended to the respondent on the 23.2.2009, this was over one year after the accident and assessed permanent incapacity at 5%. The doctor noted that the respondent complained of persistent and recurrent low back pain and that necessitated chronic intake of painkillers. Due to the backache x-rays were taken on the 19.2.2008 which revealed degenerative changes of the disc between L5 and S1 vertebral bones with muscle spasms.

From the medical report, the respondent was 47 years old in 2009. She is a teacher at Kaimosi Girls High School. When she testified she stated that she was not able to stand or sit for a long time to do her work and that she lives on painkillers. If she sleeps badly her back and legs ache. I do find that an injury to the back is quite serious even though there was no fracture. From the evidence on record it is clear that the respondent has not recovered from the injuries she sustained. I do find that there will be no need to interfere with the award of the trial court. The authority of **RAPHAEL OLOO** was decided in the year 2001. Even though the plaintiff in that suit lost 6 teeth I do find that inflation will take care of that aspect of injury and an award of KShs.900,000/= as granted by the trial court is reasonable.

In the end, I do find that the appeal lacks merit and the same is dismissed. The cross-appeal partly succeeds on the ground of liability but the same is also dismissed on the aspect of quantum. The respondent shall have costs of the suit before the trial court. Each party shall bear his/her own costs of this appeal.

Delivered, dated and signed at Kakamega this 14th day of March 2013

SAID J. CHITEMBWE
J U D G E