



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 41 OF 2008

MORAA MAANGI.....APPELLANT

-VERSUS-

KERUMBE TEA ESTATE.....1ST RESPONDENT

STEPHEN MOGENI.....2ND RESPONDENT

JUDGMENT

(Being an appeal from the judgment of the Hon. Resident Magistrate Mrs. E. Olwande delivered on the 18th march, 2008 in the original Kisii CMCC.no. 306 of 2006)

The appellant, **Moraa Maangi** was walking along Nyamira-Nyamaiya road when the 2nd respondent as the driver, servant or agent of the 1st respondent allegedly, negligently drove, managed and controlled motor vehicle registration number KAP 598K, Isuzu canter that he caused the same to hit the appellant's hand thereby injuring it. This was on 29th September, 2005. As a result, the appellant sustained compound fracture of the right elbow, deep cut wound right elbow, contracture/ crushed right elbow joint and bruises to the right.

By an amended plaint dated 30th May, 2000 the appellant mounted a suit against the respondents in Chief Magistrate's court, Kisii seeking compensation for the said injuries. She claimed damages both special and general, costs of the suit and interest. She blamed the respondents for the accident and subsequent injuries on the grounds that the 2nd respondent drove the motor vehicle at an excessive speed in the circumstances, lacked proper look out or to have any sufficient regard to pedestrians walking along the side road, drove without due care and attention, failed to have effective control of the motor vehicle, failed to stop, slow down or swerve in any other way to prevent the said accident, failed to see the appellant in sufficient time to avoid knocking her and causing or permitting the motor vehicle to go off the road and knock the appellant.

The respondents filed a defence to the appellant's claim. They denied the ownership of the motor vehicle, the occurrence of the accident, the negligence and the particulars thereof attributed to them. They did not accept that the doctrine of **Res Ipsa Loquitor** applied in the circumstances. In the alternative they pleaded that if indeed there was such an accident, then the same was solely caused or substantially contributed to by the appellant. They proceeded to give the particulars of negligence they attributed to the appellant which included carelessly walking along the said road without due care and attention to her safety, failing to heed the approach warning and failing to give way to motorized traffic.

In her evidence before the trial court, she alleged that on 29th September, 2005 she was walking towards the tea buying centre carrying tea leaves in a basket along Nyamira-Nyamaiya road. She was walking on the left side of the road. As she neared a stationary matatu, another matatu was approaching her. There was yet another vehicle which was overtaking the matatu from the left. It passed her and hit her arm which broke. She fell down and was taken to Nyamira general hospital. She was treated and discharged. The vehicle which hit her aforesaid did not stop. However, she only noted its registration number as 698. It was a lorry though. She reported the accident at Nyamira police station and was issued

with a P3 form and police abstract as a result. She was later examined by **Dr, Ajuoga** who prepared a medical report whom she paid him Kshs. 3000/=. She blamed the vehicle for hitting her because it left the road and hit her while off of the road. She denied that she was walking carelessly on the road.

Cross-examined she stated that she was hit around noon to 1 p.m. The vehicle that hit her had writings on it "**Kerumbe**". She saw the vehicle before it hit her. There was a ditch on the side of the road where she had tried to move to. The people who assisted her recorded the registration number of the motor vehicle.

Dr. Ajuoga testified on behalf of the appellant. His evidence was limited to the nature and extent of the injuries sustained by the appellant as a result of the accident and the report he subsequently prepared. He examined the appellant on 22nd march, 2006. He confirmed that she had suffered compound fracture of the right elbow, deep cut wound on the right elbow and bruises on the right hand. The compound fracture had healed well and so were the bruises leaving her with no permanent incapacity. He charged her Kshs. 3000/= for the service.

The appellant also called **P.C. George Otieno** of Nyamira police station as a witness. He had with him a police abstract issued on 1st march, 2006 in respect of the appellant who alleged to have been knocked by a motor vehicle KAP 598K. He confessed though that he did not investigate the case and could not therefore tell who was to blame for the accident.

Timothy Nyambane Arasa testified on behalf of the respondents. He stated that he was driving the subject motor vehicle on the material day and was not at all involved in any accident. He had never been arrested for causing an accident and had not been charged in court with a traffic offence arising from the alleged accident. He did not also know any company by the name Kerumbe Tea Estate.

Finally, **Steven Ongenyio Mogeni**, the owner of the subject motor vehicle testified. His evidence was that on 29th September, 2005, he received no report regarding an accident involving his said motor vehicle. The vehicle belonged to him and not Kerumbe tea factory. He had no relationship with the tea factory. Indeed he had conducted a search at the companies registry and established that Kerumbe tea factory did not exist.

The learned magistrate having carefully evaluated the evidence on record and the submissions came to the conclusion that:-

"The vehicle that hit the plaintiff did not stop so we do not know how the plaintiff came to the conclusion that it was the defendant's vehicle that hit her. Given the fact that the plaintiff gave a different description from the defendant's vehicle one would say that probably it is a different vehicle with similar digits in the registration number plate that hit the plaintiff. The plaintiff is registered(sic) in prove her base on a balance of probabilities and it is my view that her evidence and that of her witnesses has failed to meet the required standard. I therefore dismiss the plaintiff's suit with costs....."

That conclusion prompted this appeal. Six grounds were advanced in support of the appeal. These are:-

"1. The learned trial magistrate erred in fact and in law, when she made a finding that the appellant herein has not proved her case on a balance of probability notwithstanding the oral and documentary evidence tendered in court by the appellant.

2. The learned trial magistrate erred in fact and in law by making a finding that the claim was fictitious when in fact no fraud was raised against any party.

3. The learned trial magistrate erred in fact and in law by holding that the appellant(sic) give a wrong description of the motor vehicle when she had the opportunity of analyzing the demeanour of the appellant who is relatively aged.

4. The learned trial magistrate erred in law and infact by failing to properly evaluate the entire evidence on record and thus reached a wrong decision

5. That the judgment and/or decision of the learned trial magistrate is contrary to the weight of the evidence on record and thus arrived at a wrong conclusion.

6. The trial magistrate erred in law and infact by failing to assess the damages she would have awarded had the appellant succeeded.....”.

When the appeal came up for directions before me on 30th November, 2010 **Mr. Ogari** learned counsel for the appellant and **Mr. Odhiambo**, learned counsel for the respondent agreed amongst other directions that the appeal be canvassed by way of written submissions. Subsequently, both parties filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

This being a first appeal, the role of this court is very clear. It is now trite law that the role of this court in such an appeal is to re-evaluate the evidence that was before the lower court and determine whether the decision is to stand or not. In the case of **Ephantus Mwangi Mwangi and Geoffrey Nguyo Ngatia .v. Duncan Mwangi Wambugu (1982-88) 1 KAR 278** , the court of appeal restated the principle that a court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles.

The learned magistrate observed in her judgment that the most crucial question that required determination was whether or not the accident occurred on the material day involving the appellant and the 2nd respondent’s motor vehicle. She returned the verdict that the appellant had not discharged her burden of proof on the issue. Essentially she was saying that the appellant was not involved in the accident on the material day and if she did it was not with the 2nd respondent’s motor vehicle. Given the pleadings and the scanty evidence on the issue, I do not think that the learned magistrate can be faulted for her conclusion. She based it on the fact that the appellant had in her testimony not given the full registration number of the motor vehicle and she had also described the motor vehicle which hit her as a lorry whereas the 2nd respondent’s motor vehicle was a pick up. This contradiction proved fatal to the appellant’s case and rightly so in my view.

It was the duty of the appellant to prove with solid and credible evidence that on the material day she was involved in an accident with respondents’ motor vehicle. In my view and just like the learned magistrate, she failed in this task. It is not enough for the appellant to merely say that she only recognized three digits of the vehicle- as 598. There are many vehicle with such digits. The appellant claimed that after the accident, some people took the registration number of the offending motor vehicle . None of these people were called to testify in her support. In any event in her own testimony, the appellant does not allude to the presence of any people at the scene of accident. I think that the purported identification of the motor vehicle by the three digits is a mere after thought and pure speculation.

Ofcourse the record shows that the appellant reported the accident at Nyamira police station and was issued with a police abstract and P3 form. The police abstract shows motor vehicle KAP 598K was involved in the accident. However, the authenticity of the police abstract was challenged during the trial. The witness who produced the police abstract could not comment on the same as he did not investigate the case. Indeed as at the time he was testifying, the case was still pending investigations. He could not therefore tell or confirm for sure whether the accident occurred and whether it involved the respondent’s vehicle and the appellant. I am keenly aware that a police abstract is an official government document and as long as it stands its contents cannot be contradicted by oral evidence. However that police abstract was impugned during the trial. From the evidence of the appellant, this was a case of hit and run. However, the appellant traced the vehicle we do not know how, and was able to know the owner and driver of the same. We all know that it is a serious offence under the **Traffic Act** to cause an accident and fail to stop. One wonders then, why the police had not charged the 2nd respondent’s driver with any traffic offence if indeed they investigated and found that there was an accident on the material day and the

2nd respondent's driver was involved. This further fortifies the respondents' case that no accident involving his motor vehicle occurred on that material day.

The appellant also connected the respondents with accident on account that the motor vehicle was Christened "**Kerumbe**" on its body. However, the appellant is an illiterate person. How did she get to know that the motor vehicle was Christened "**Kerumbe**". In any event is this the only motor vehicle Christened "**Kerumbe**"? There is no such evidence.

The appellant too has connected the respondents to the accident by virtue of the fact that the appellant was treated at Nyamira District hospital after being involved in an accident on 29th September, 2005. I do not think that the respondents have taken the position that the appellant was not involved in the accident or sustained injuries as a result. Their position is that, may be she did , but their motor vehicle was not involved.

Further the 1st respondent from the evidence of DW1 and DW2 was a fictitious entity and which in law does not exist. It could not therefore have been sued. This fact was not challenged at all during the trial and in this appeal.

But assuming that the appellant had established that the respondent's motor vehicle was involved in an accident with her on the material, I doubt very much whether liability would have attached. Her evidence was that she was walking on the verge of Nyamira-Nyamaiya road on the left side. A matatu approached from the opposite direction. Another vehicle however from the same direction as the matatu was being driven on. This means that the two vehicles were on the right side of the road and on the opposite side from the appellant. How then could she have been hit unless the same veered off the road, crossed on to the side she was on and there knocked her. There was no such evidence led by the appellant however. A vehicle driven on the opposite side which hits somebody on the other side must have been driven on the wrong side of the road. That again was not the evidence of the appellant. To my mind the appellant's story as to how she was injured simply does not add up. As correctly pointed out by counsel for the respondent, the police evidence did not even help matters either as the investigations officer was never called to testify.

The trial magistrate failed to assess damages she would otherwise have awarded had the appellant succeeded. She was bound to do so even if she dismissed the suit. It is a requirement of law. See the case of **Ann Wambui Ndiritu & Anor .v. Joseph Kiprono Ropkoi & Anor C.A.No. 345 of 2000 (UR)**. I will correct that omission though from what has fallen from my lips so far, this appeal is for dismissal.

The appellant suffered a compound fracture of the right elbow and other soft tissue injuries. In the trial court the appellant had asked for an award of Kshs. 400,000/=. She supported that proposal with appropriate authorities. In this appeal, she come down somewhat to Kshs. 300,000/=. On the other hand, the respondents had proposed an award of Kshs. 80,000/= as general damages for pain, suffering and loss of amenities. They have maintained the same position in this appeal. The authorities cited by the appellant in support of quantum consisted of much more serious injuries whereas those of the respondents had been decided many years prior to the decision when the Kenyan shilling was strong and had not taken a beating due to inflation. It is trite law that the assessment of damages is more like an exercise in discretion by the court. See **Butler .v. Butler (1981) KLR 225**. After reviewing the decided cases as relates to the injuries that the appellant sustained, and weighing one thing against the other and doing the best I can in the circumstances, I am satisfied that an award of Kshs. 200,000/= as general damages would have sufficed.

The end result of this appeal however, is for dismissal. Accordingly the appeal is dismissed with costs to the respondents.

Judgment dated, signed and delivered at Kisii this 8th April, 2011.

ASIKE-MAKHANDIA

JUDGE