



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 763 of 2007

PENINAH WANGARI MURACHIA.....APPELLANT

VERSUS

COSMOS LIMITED.....1ST RESPONDENT

FRANCIS KISIA MWANZI.....2ND RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate's Court at Nairobi (Milimani) by the Honourable Ms. Mokaya dated 6th September, 2007 in Civil Suit No. 13031 of 2004)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Magistrates Court at Milimani by Peninah Wangari Murachia, hereinafter referred to as the appellant. She had sued Cosmos Ltd. and Francis Kisia Mwanzi, hereinafter referred to the 1st and 2nd respondents. The appellant was claiming general and special damages for personal injuries suffered by her, as a result of a road traffic accident involving the 1st appellant's motor vehicle, registration No. KAL 977M hereinafter referred to as the subject vehicle. The appellant claimed that she was knocked down by the subject vehicle as a result of the negligence of the 2nd respondent who was the driver/servant or agent of the 1st respondent.
2. The respondents filed a joint defence in which it was denied that the 1st respondent was the registered owner of the subject motor vehicle or that the 2nd respondent was the driver servant, or agent of the 1st respondent. The respondents further denied the particulars of negligence attributed to the 2nd respondent. In the alternative the respondents claimed that if the accident occurred, then it was solely caused and/or contributed to by the negligence of the appellant.
3. The hearing of the case initially proceeded before M. Kaikai Resident Magistrate on 18th October, 2005 when the appellant testified and closed her case. At the request of defence counsel, the hearing was adjourned to 16th November, 2005 for the defence hearing. On the 16th November, 2005 the hearing did not proceed. It was thereafter adjourned until 9th July, 2007 when the appellant's counsel requested for the case to be heard *de novo*. No reason is stated on the record, but it would appear that Mr. Kaikai was no longer at that station. An application by the defence to have the hearing of the suit adjourned, was rejected.

4. The appellant then testified that on the material day, she was selling sodas in a shop and that she was standing at the bus stage when the subject vehicle came and knocked her. Members of the public got hold of the respondent, and the appellant was taken to Guru Nanak Hospital and given first aid. She was then taken to Milimani Police Station where she reported the accident. The appellant then took her to a doctor in Kibera before taking her to Kenyatta National hospital where her foot was plastered. The appellant produced a transfer form from Guru Nanak Hospital to Kenyatta National Hospital, treatment sheet from Kenyatta National Hospital, x-ray form, P3 form and the police abstract. She also produced a copy of the record from the motor vehicle registry, from which she claimed that the subject vehicle belonged to the 1st respondent. The appellant blamed the 2nd appellant for the accident claiming that she was just standing when the motor vehicle hit her.

5. Counsel for the appellant filed written submissions urging the Court to give judgment in favour of the appellant, and award general damages of Kshs.500,000/=. Counsel for the respondent also filed written submissions in which it was submitted that the evidence adduced by the appellant was vague and that the appellant was evasive when being cross examined. The Court was therefore urged not to rely on her testimony. It was submitted that the appellant was the author of her own misfortune. It was contended that the appellant failed to produce any medical reports to prove her injuries. The Court was therefore urged to dismiss the appellant's claim. On quantum, the defence proposed that an award of Kshs.150,000/= would be adequate compensation for pain, suffering and loss of amenities.

6. In her judgment the trial Magistrate noted that the defence did not call any witness to controvert the appellant's claim. She noted that the appellant had clearly stated how the accident occurred and given reasons why she blamed the respondent. She therefore found the respondents jointly and severally liable for the accident. The trial Magistrate awarded the appellant general damages of Kshs.100,000/= for the injuries she suffered.

7. Being dissatisfied with that award, the appellant has filed this appeal on quantum raising the following grounds:

(i) That the learned trial Magistrate erred in failing to consider sufficiently the seriousness of the appellant's injuries.

(ii) That the learned trial Magistrate erred in failing to give any or sufficient consideration to the authorities relied on in support of the amount of general damages proposed on behalf of the appellant.

(iii) That the learned Magistrate's award of Kshs.100,000/= to the plaintiff in terms of general damages for the serious injuries sustained is so inordinately low that it represents entirely erroneous estimates of general damages.

(iv) That the learned Magistrate erred in proceeding in the wrong principles and also in placing reliance on erroneous consideration thus arriving at a figure which is inordinately low.

8. Mr. Muturi who appeared for the appellant submitted that the award of Kshs.100,000/= was low, considering the injuries suffered by the appellant. She referred the Court to a medical report prepared by Dr. Kuria Kamau wherein it was indicated that the appellant suffered a close fracture of the left tibia and fibula a comminuted fracture of the distal one third tibia, transverse fracture distal one third fibular. It was submitted that the award of Kshs.100,000/= made by the trial Magistrate was even lower than the award of Kshs.150,000/= which was proposed by the respondent. It was maintained that an award of Kshs.500,000/= would have been appropriate. The Court was therefore urged to vary the award made by the lower court and increase the general damages to Kshs.500,000/=.

9. Mr. Ongegu who appeared for the respondent pointed out that the medical reports now relied upon by the appellant were never produced in evidence during the trial. It was submitted that the Court having relied on the treatment notes and P3 form exercised its discretion and awarded the sum of Kshs.100,000/=. It was submitted that the Court having done the best that it could in the circumstances, there was no reason to vary the award upwards. The Court was therefore urged to dismiss the appeal.

10. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial Magistrate. I have also considered the submissions made before the trial Court and before me. The appeal before me is only against quantum. The respondent not having appealed against the Court's finding on liability, it is not within my mandate to examine the merits of the trial Court's finding in that regard.

11. I do note from the record that the appellant was the only witness who testified in support of his case. I also note from the appellant's evidence that she did not produce any medical report nor was any medical report produced by consent of the parties. Although the appellant indicated that he was taken to Dr. Kuria Kamau, he did not call any doctor to testify in Court. The two medical reports, one signed by Dr. N. Kuria Kamau and another signed by Dr. Wambugu P.N. contained in the record of appeal were therefore a poor attempt made by the appellant to mislead this Court. The fact that the medical reports were not produced in evidence in the lower court, is confirmed by the list of plaintiff's exhibits which is part of the original record wherein the two reports are not listed as exhibits.

12. Assessment of damages is a discretionary power exercised by the trial Court. An appellate Court can only be justified in disturbing the award if it is satisfied that the award is inordinately low or so inordinately high, that it must be erroneous or the trial Court took into account an irrelevant factor (*Kemfro Africa Ltd. t/a Meru Express Services [1976] Lobia & Another [1988] KLR 30*). In this case, in the absence of any medical reports, the magnitude of the appellant's injuries could not be fully appreciated by the trial Court. In my view the trial Court was magnanimous in awarding the sum of Kshs.100,000/=. The attendance sheet and the transfer form which were produced in evidence did not show the extent of the appellant's injuries nor could the Court rely on a photocopy of the P3 form filled by a doctor who was not called to testify. The only document which appeared to be of relevance was the x-ray report from Kenyatta National Hospital. The award made by the trial Court was therefore justified.

13. In the circumstances, I find no merit in this appeal and I do therefore dismiss it with costs.

Dated and delivered this 30th day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Muturi for the appellant

Advocate for the respondent, absent

Eric, court clerk