



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 67 OF 2020

STEPHEN MACHARIA.....1ST APPELLANT

NDUNGU DAVID NJUGUNA.....2ND APPELLANT

VERSUS

VERONICA WANJIRU KIMANI.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT /DECREE OF HON. L ARIKA (SPM)

DELIVERED ON 27TH APRIL 2020 VIDE NAKURU CMCC NO. 1009 OF 2018)

JUDGEMENT

1. The respondent was involved in a road traffic accident along Solai –Maili Kumi road on **24th October 2017** while she was a pillion passenger aboard motor cycle registration number **KMDQ 951L** Boxer. The same was according to her hit from behind by motor vehicle registration number **KBF 282D** Mitsubishi lorry owned and driven by the appellants.
2. As a result of the said accident the respondent sustained the following injuries'
 - a) **Fracture of the right tibia**
 - b) **Deep cut wound on the right knee supraorbital region**
 - c) **Deep cut wound on the right knee**
 - d) **Soft tissue injuries of the right side of the chest**
 - e) **Lacerations on the hands.**
3. The respondent suffered other ailments all associated with the same as enumerated in the plaint. She thereafter filed suit at the lower court claiming both general and special damages. She accused the appellants for negligence and causing the accident.
4. The appellants on their part filed a joint defence denying that the said accident occurred and if indeed it did then the same was caused by and or contributed by the respondent. She was also blamed for riding on a motorcycle which was already having other passengers and failing to wear a helmet.
5. The matter proceeded to full trial where the respondent testified and call one other witness. The appellants closed their case without calling any witness.
6. When the matter was concluded the trial court awarded the respondent the sum of Kshs. 850,000 as general damages and Kshs. 32,360 as special damages. She was also awarded costs and interest.
7. The appellants were dissatisfied with the said judgement and have preferred this appeal where they have raised several grounds. Significantly the same revolves around two issues namely liability and quantum.

8. When the matter came up for hearing the court directed that the same be determined by way of written submissions which the parties have complied.
9. The appellant has submitted that the respondent failed to prove liability against the appellant. They submitted that the evidence as presented although the accident occurred the appellant never caused it but was largely contributed by the appellant. That the appellants witness PW2 failed to establish that it was the appellant that caused the accident.
10. PW2 according to the appellant, being a police officer failed to produce the actual file that had the details of the accident especially the sketch map of the scene as well as the statements of the rider. The vehicles inspection report was not as well produced by the said witness.
11. In the premises, the respondent failed to comply with the provisions of the **Evidence Act Section 107** of the same where it is clearly spelt out that he who alleges must prove. He relied on the case of **EVANS NYAKWANAN V. CLEOPHAS BWANA ONGARO (2015) eKLR**.
12. The appellants further poked holes into the trial court's decision which failed to appreciate the fact that even though the appellants did not tender any evidence the respondent did not prove their case on a balance of probabilities.
13. On the issue of injuries, the appellants submitted that the trial court awarded the respondent more damages which were not commensurate to the injuries she sustained. That the court failed to consider the authorities which they cited which in any event gave less damages almost equivalent to the respondent's injuries. They relied among others on the case of **HASSAN V. NATHAN MWANGI KAMAU TRANSPORTERS & 5 OTHERS NRB CACA NO. 123 OF 1985**.
14. The respondent as well in her lengthy submissions opposed the application while agreeing with the findings by the trial court. She also identified the two issues of liability and quantum as what is germane herein.
15. On liability the respondent submitted that indeed she was able to prove that she was a pillion passenger and that the accident was caused by the appellant's driver when he hit them from behind. That despite this the appellants did not tender any evidence to rebut her part of the story.
16. As regards PW2, she submitted that he was the police officer who carried out the investigation and he rightly told the court that the appellants were to blame for causing the accident. That the matter was still pending investigations.
17. The respondent further submitted that the action by the appellants to single out and attack PW2 evidence was not consequential as the failure to produce the other file did not diminish the fact that the accident occurred and the appellants were to blame.
18. The respondent submitted that the appellants failed to offer any defence counteracting the appellants' case and they cannot be heard to claim that the case was not fully established against them. The appellants in fact failed to enjoin the motorcycle rider as a third party in the case which goes to show the blameworthiness of the appellants.
19. On quantum the respondent agreed with the findings of the trial court. She submitted that the injuries she suffered were severe and the court based its decision on recent authorities and in any case the same were not raised at the trial court. That what the appellant relied on were old and not commensurate with the respondent's injuries.

ANALYSIS AND DETERMINATION

20. As deduced from the above submissions by the parties the twin issues for determination are liability and quantum. Those are also the grounds of appeal raised by the appellant in a nutshell.
21. On liability the trial court found that the appellants were 100% responsible for the accident. Despite the fact that the appellants never offered any evidence to rebut the respondent's case it is always necessary to examine the veracity of the evidence as presented by one side.
22. There is no doubt that the respondent was involved in the accident as she was being carried by the motorcycle. She said they were hit from behind by the lorry as they were being overtaken. The lorry driver did not stop after the accident. She had worn a helmet which according to her inflicted injury on her face during the accident. The same was confirmed by the trial court.
23. When cross examined she said that the accident occurred at around 10am and they were on the edge of the road and that she was the only passenger. The injuries she sustained were not disputed as is evidenced by the medical legal report produced and the other medical documents.
24. **PW2 PC JUMA KISERA** from Bahati police station testified that he was the investigating officer and he produced the police file which contained among others investigation diary, treatment notes police abstract and the statement of the plaintiff.
25. The said witness on cross examination said that there was another file which contained the motorcycle rider statement as well as the inspection reports for both the vehicle and the motorcycle. He went on to state that he did not have the sketch map of the scene although he went there later. He said that the driver of the vehicle did not stop after the accident.
26. Taking the above evidence by the respondent and her witness is it probable that the accident was caused by and or contributed by the motorcyclist? It appears in my view that the lorry driver did not stop after the accident. Nobody knows why as he did not testify and the police did not record his statement. That does not mean that the accident did not occur. The evidence of the respondent and PW2 are clear.

The police abstract produced *prima facie* is an indication that an accident occurred and the same was reported.

27. The failure by PW2 to produce another file containing the sketch plan of the scene and statements from the drivers of the two machines does not in any way diminish the fact that an accident occurred. As to who caused the accident, it was the appellant to rebut what the respondent had presented. In the absence of any defence what they are submitting to herein by attacking the evidence of PW2 does not aid them.

28. The appellants went on to submit that the traffic police withheld a crucial file which was necessary in this matter. Nothing stopped them from calling for the said file if it was going to aid their case. On the contrary they closed their case. I find this to be a lazy argument to say the least.

29. In any case they had the liberty of taking out third party proceedings against the motor cycle rider but they failed. The respondent was a mere pillion passenger. She had no control of the motorbike. The only thing she had done which was not shaken at cross examination was to have a helmet, a reflector jacket and ensure that she was the only passenger.

30. The issues raised in the defence by the appellants to the extent that no evidence was led over them remain mere denials. See **ACCELER GLOBAL LOGISTICS V. GLADYS NASAMBU WASWA & ANOTHER (2020) eKLR.**

31. For the above reasons the findings by the trial court that the appellants were 100% liable for the accident in my view was factual and this ground therefore does not stand.

32. Turning to the issue of quantum, it is true that the injuries sustained by the respondent were uncontroverted. The medical reports produced and the findings in the medical legal report were not disturbed. The only issue is whether the award by the trial court was excessive in the circumstances as claimed by the appellants. The compensation must always be fair to both the appellants as well as the respondent.

33. The appellants have submitted that the respondent is entitled to a sum of Kshs. 350,000 as a reasonable and a fair compensation. They have cited several authorities to back up the same.

34. The authorities cited by the appellants in my view are more or less similar save to state for example that in the matter at hand the respondent suffered 10% disability and she testified that she could not bend or carry heavy load. That she was a community health worker and the accident had impeded her movements.

35. The award however of Kshs. 850,000 was slightly on the higher side comparatively and noting that the authority for example of **PUBLIC ROAD SERVICE V. ABDIKADIR ADAN GALGALO (2016) eKLR** had almost similar injuries and the court awarded a sum of kshs. 500,000 for pain, suffering and loss of amenities.

36. The court is as well conscious of the fact that this is a discretionary matter and various courts have the latitude to award whatever is appropriate and commensurate. This court shall only interfere if it finds the same to be excessive, unreasonable or too low in the circumstances. In this case however and going by the cited authorities by the appellants the award was slightly on the higher side.

37. For the foregoing reasons and based on the inflationary factors, the nature of the injuries suffered by the respondent and the percentage of disability, an award of Kshs.650000 is reasonable and appropriate in the circumstances.

38. Consequently, the appeal is allowed as follows;

a) The award on liability is sustained, meaning that the appellants are 100% liable for the accident.

b) The award on quantum is set aside, in other words the sum of Kshs. 850,000 being general damages is set aside and replaced with the sum of Kshs. 650,000 as general damages for pain, suffering and loss of amenities.

c) The award Kshs. 32,360 special damages is upheld.

d) The above awards amounting to Kshs. 682,360 shall attract interest from the date of the lower court judgement till payment in full.

e) The respondent shall have half costs of this appeal.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 23RD DAY OF SEPTEMBER 2021.

H K CHEMITEI.

JUDGE