REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 168 OF 2016

LILIAN CHEPKOECH.....RESPONDENT

VERSUS

THOMAS MUTHAMA MBUVI.....-APPELLANT

Being an appeal against the Judgement of Hon. C. Obulutsa – CM Eldoret dated and delivered on the 22nd February 2017 in the original Eldoret Chief Magistrate's Court Civil Case No. 990 of 2015

JUDGEMENT

By a plaint filed in the lower court on 15th December 2015 the respondent sued the appellant for special and general damages impleading that on 7th December 2015 while he was a lawful passenger in a motor vehicle Registration No. KAZ 484J the appellant driving a motor vehicle Registration No. KAU 952T rammed into a motor vehicle Registration No. FK 717HC 760422 which in turn rammed into the vehicle in which the respondent was a passenger as a result of which he sustained injuries. He claimed the accident was caused by the appellant's negligence. The respondent particularised the injuries as: -

(a) Blunt trauma to the thoracic spine resulting in displacement of metal implants.

(b) Numbness of the right lower limb.

In her statement of defence filed on 21st January 2016 the appellant denied she was the owner of motor vehicle KAU 952T and also denied the occurrence of the accident generally. In the alternative she blamed the accident on negligence on the part of the driver of the vehicle in which the respondent was travelling.

After considering and evaluating evidence from both sides the trial Magistrate found the appellant wholly negligent and hence liable for the accident. The trial Magistrate then awarded the respondent general damages in the sum of Kshs. 800,000/= and special damages of Kshs. 6,000/=.

This appeal challenges the trial Magistrate's finding on liability and the assessment of damages. The appeal is premised on the following grounds: -

"1. That the learned trial magistrate erred in law and fact in failing to dismiss the Respondent's suit in the lower court as he had not proved his case on a balance of probability.

2. That the learned trial magistrate erred in law and fact in holding the Appellant 100% liable for the accident when there was no sufficient evidence to support that finding.

3. That the learned trial magistrate erred in law and fact in awarding the Respondent a sum of Kshs. 6,000/= as special damages that were not proved to the required standards of Law.

4. That the learned trial magistrate erred in law and fact by awarding the Respondent a sum of Kshs. 800,000/= as general damages for pain and suffering that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the Respondent.

5. That the learned trial Magistrate erred in law and fact in failing to consider the appellant's submissions and legal authorities relied upon in support to the Defence thereof.

6. That the learned trial magistrate erred in law and fact in disregarding the relevant evidence on record hence resulting to a

wrong decision.

7. That the learned trial Magistrate erred in law and fact by not applying the basic principles of the law of tort in analysing the evidence before him in this suit during trial.

8. That the learned trial Magistrate erred in law and fact by overly relying on the Respondent's submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.

9. That the learned trial Magistrate's decision albeit, a discretionary one was plainly wrong."

The appeal proceeded by way of written submissions and I have fully considered the submissions as well as the cases cited therein. More importantly I have re-considered and analysed the evidence in the trial court so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses who testified.

The respondent relying on his statement annexed to the plaint testified that on the material day he was a lawful passenger in motor vehicle KAZ 484J and was travelling from Eldoret towards Maili Nne using the Eldoret – Webuye road. He stated that on reaching Equity Bank motor vehicle KAU 952T rammed into motor vehicle No. FK 717HC 760422 propelling it forward and causing it to ram into the vehicle he was in. He blamed the driver of the motor vehicle KAU 952T for **"over speeding".** This evidence was corroborated by Police Constable Cheserek Kiptoo (Pw3) who produced records to show that motor vehicle KAU 954T crossed its lane and hit an unregistered vehicle which swerved and hit motor vehicle KAZ 484J. He produced a police abstract to the effect that it was intended to charge the driver of motor vehicle KAU 952T. While the onus of proof to prove such a claim is always on the plaintiffs, the standard of proof is on a balance of probabilities. I am satisfied that the respondent discharged the burden of proof as the uncorroborated evidence of the appellant's witness did not offer any rebuttal to his evidence. The argument that the respondent should also have sued the owner of the other vehicle flies in the face of **Order 1 Rule 9** of the **Civil Procedure Rules** which states: -

"[Order 1, rule 9.] Misjoinder and non-joinder.

9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

The respondent was merely a passenger in motor vehicle KAZ 484J and as such he could not have contributed to the accident whose causation is attributable to the negligence of the appellant. If the appellant was serious that the driver of motor vehicle KAZ 484J contributed to the accident, then she ought to have enjoined him as a third party as provided under **Order 1 Rule 15** of **the Civil Procedure Rules**. The upshot is that the appeal on liability has no merit.

In regard to the damages the respondent's evidence was that he suffered blunt trauma to the thoracic spine resulting in displacement of metal implants and numbness of the right lower limb. Dr. Sokobe who examined him and prepared the medical report produced at the hearing, opined that due to the displacement and bending of implants the respondent required approximately Kshs. 600,000/= for a revision of the operation. However, the X-ray radiology report produced by Dr. Rono (Pw1) while it indicated that the respondent sustained a spinal injury, it did not make any mention of displacement of metal implants. In cross examination, Dr. Rono (Pw1) was emphatic that the respondent had a back injury and also that the X-ray done at the hospital did not mention displacement of metal implants. It is therefore perplexing that Dr. Sokobe who relied on that very X-ray alluded to such displacement of metal implants. This is even more so as the respondent himself did not adduce evidence that he had any implants in situ at the time of the accident. I am therefore persuaded that the award of Kshs. 800,000/= was inordinately high. I would accordingly set it aside and substitute it with one for Kshs. 150,000/= (one hundred and fifty thousand shillings only) to take into account the nature and extent of the injuries as well as inflation. The special damages of Kshs. 6,000/= (six thousand shillings only) shall not be disturbed. The costs of this appeal are awarded to the appellant. It is so ordered.

Signed and dated this 21st day of January 2020.

E. N. MAINA

JUDGE

Dated and delivered in Eldoret this 5th day of February 2020.

H. A. OMONDI

JUDGE