



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 40 OF 2018

THE REGISTERED TRUSTEES CATHOLIC

ARCHDIOCESE OF NYERI.....APPELLANT

VERSUS

TERESIA WANJIRU NYAGA.....RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Hon. W. Kagendo, Chief Magistrate in Nyeri CMCC No.40 of 2018 as delivered on 14th February, 2018;

2. The cause of action arose from a traffic accident that occurred on 8th July, 2013 involving the respondent and motor vehicle registration number KAP 538R; the facts of the case are that the respondent was travelling in motor vehicle registration number KAP 538R when the accident occurred;

3. The respondent subsequently instituted legal proceedings against the appellant seeking compensation for injuries she sustained as a result of the accident; this suit was among several other similar claims arising from the same accident; the appellant had applied to have the respondent's suit made into the test suit and the application had been allowed;

4. The respondent's suit went to full trial and the Court rendered its decision where it found the appellant 100% liable for the occurrence of the accident; and in this instance the trial court awarded the respondent the sum of Kshs.400,000/= as damages for pain and suffering;

5. Being dissatisfied with the decision of the trial court, the appellant instituted this appeal seeking to have the judgment of the trial court set aside; the seven grounds of appeal as set out in the Memorandum of Appeal filed on 2nd August, 2018 are as summarized hereunder;

(i) The trial court erred in finding the appellant liable and entirely to blame for the accident; the appellant was not responsible for the accident;

(ii) The trial court erred in failing to consider the compelling evidence of the appellant; and relied on unreliable and discredited evidence; occasioning a miscarriage of justice against the appellant;

(iii) The damages awarded were unwarranted and excessive in the circumstances;

6. At the hearing hereof the appellant was represented by learned counsel Mr Mugambi and whereas the respondent was represented by learned counsel Mr. Wagiita; the parties were directed to canvass the appeal by filing and exchanging written submissions; the following is a summary of the rival submissions

APPELLANT'S CASE:

7. The appellant submitted that the respondent did not prove her case or discharge her burden of proof to the desired threshold; that the evidence of the respondent and her witnesses that is – **PW1** and **PW3** should be disregarded; **PW1** was a police officer from Nyeri Traffic Base; that **PW1** was not the Investigating Officer and therefore could not testify as to the occurrence of the accident let alone lay the blame on the appellant's driver; as for **PW3**, it is the appellant's contention that his evidence should also be disregarded as he produced a document that he had not prepared; the said doctor did not examine the respondent and therefore cannot give evidence to the injuries she suffered; the appellant also submitted that the evidence given by the respondent was full of discrepancies in that she was unable to state where the accident occurred, nor the actual cause thereof nor was she even able to state the nature of injuries she sustained; for this reason, her evidence ought to have been disregarded.

8. The appellant's contention is that the respondent did not prove negligence against the appellant in line with the acceptable legal threshold; and the burden of proof cannot ever shift to the appellant; several authorities were cited by the appellant to buttress its submissions which are....

.....type the list of authorities.....

9. The appellant submitted that the trial court misdirected itself in finding the driver was to blame for the accident with very little evidence in support; however, the appellant's submissions did not address the award made by the trial court on the quantum of damages;

10. The appellant prayed that the appeal be allowed and the decision of the trial court be set aside.

RESPONDENT'S CASE:

11. The respondent prays that the trial Court's award remains undisturbed; and submitted that she had proved her case against the appellant; that at the hearing in the lower court the appellant did not deny the occurrence of the accident nor that the respondent was injured as a result of the accident; it should also be noted that the driver was never called to testify; the appellant also failed to raise any objection on the maker and production of the documents relied on by the respondent and in particular 'PEXh.3'; which meant that the respondents case was unchallenged;

12. The respondent relied on the doctrine of '*res ipsa loquitur*' to explain the occurrence of the accident; and contends that the foregoing coupled with her evidence proved her case against the appellant;

13. With regard to the injuries sustained and the award of damages, the appellant's submissions were silent on whether the trial court proceeded on wrong principles and arrived at an inordinately high or low the award;

14. The respondent prayed that the appeal be dismissed and the lower court's award be upheld and remain undisturbed.

ISSUES FOR DETERMINATION

15. After reading the rival written submissions this court has framed the following issues for determination;

- (i) Whether the respondent discharged her burden of proof in proving negligence as against the appellant;
- (ii) Whether the respondent suffered injuries as a result thereof;
- (iii) Whether to interfere with the trial courts award for damages;

ANALYSIS

16. In considering this appeal, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; the court held that the duty of an appellate court is to evaluate and re-examine the evidence adduced in the trial court in order to reach an independent finding, taking into account the fact that the court had no opportunity of hearing or seeing the parties as they testified; in addition, the court as an appellate court, will normally not interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law; the Court of Appeal's holding is as set out hereunder;

"A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion." (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).

Whether the respondent discharged her burden of proof in proving negligence as against the appellant?

17. **PW1** – a police officer from Nyeri Traffic base gave evidence on behalf of the respondent and produced the Police Abstract and OB Extract; **PW1** testified that she was not the Investigating Officer but confirmed the occurrence of the accident and blamed the appellant's driver; under cross-examination, **PW1** confirmed that the OB extract did not indicate that the driver was blamed for the accident; she none-the-less blamed the driver for losing control of the motor vehicle; the evidence produced was an abstract and an OB extract and neither of these documents laid blame on the appellant's driver;

18. Indeed. the appellant put forward the submission to the extent that there was no basis for **PW1's** opinion; in that regard this court concurs that the documentary evidence produced by **PW1** only confirmed the occurrence of the accident and that the presence of the respondent in the vehicle;

19. The tractor was carrying coffee and 18 passengers; for it to lose control while going downhill would infer that the driver must have been driving fast in the circumstances; the record reflects that no evidence was adduced by the appellant to rebut this; the appellant's witness it is noted did not witness the accident but came upon the scene after the accident and helped take the injured to hospital; he therefore offered no evidence on the manner in which the accident occurred;

20. This court is satisfied that the respondent proved on a balance of probabilities that the accident occurred as a result of the negligence of the driver of the tractor;

21. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the respondent suffered injuries as a result thereof:

22. At the hearing the respondent testified by adopting her witness statement which stated that she was travelling on the said motor vehicle transporting coffee cherries that as they came upon a downward slope on a murrum road, the driver drove at an excessive speed, lost control and the tractor overturned; when cross-examined she reiterated that the driver of the tractor was over-speeding though she could ascertain as to what degree;

23. The appellant's witness gave evidence that the respondent was not supposed to be on the said tractor; and that her shift was over; and further, her job description meant she had no business being on that tractor;

24. Therefore, the appellant's evidence is centered on the fact that the respondent was not supposed to be on the said tractor and that she did not take proper precautions while on the tractor; therefore, the injuries she suffered were of her own making;

25. This court notes that the appellant never denied that the respondent was its employee; it was also not disputed that the respondent boarded the tractor in the course of her employment; her presence on the vehicle can only be deemed as lawful because the appellant paid for her treatment and further the documents produced by the appellant confirm that the respondent was injured while in the course of her employment for the following reasons; 'DExh.1' is a personal accident form filled at the hospital where the respondent was treated for the benefit of the appellant's insurer; there were also the statutory forms filled out in favour of the respondent and it is common knowledge that these documents are only filled out in the event an employee is injured whilst in the course of his/her employment;

26. Whether or not the respondent took proper precautions while on the trailer was not proved by the appellant and therefore this claim remains a mere allegation; further the appellant's witness gave evidence that it did not permit passengers on the tractor and that there was a Memo to that effect but the record reflects that this Memo was not produced at trial;

27. This court is satisfied that the respondent suffered injuries as a result of the accident; and finds that the appellant cannot escape being held vicariously liable for the accident as well as the injuries suffered by the respondent for which she is entitled to claim for damages;

28. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether to interfere with the trial courts award for damages:

29. On the issue of quantum, the respondent pleaded that she suffered a fracture of the right distal radius and bruises to the right cheek; these injuries were confirmed by the P3 Form and Medical Report produced by the respondent; the same injuries are also set out in the Personal Accident Claim Form produced by the appellant at trial;

30. The trial court awarded damages of Kshs.400,000/= however it is not clear from the judgment of the trial court on what basis this award was made;

31. In the case of **Butt vs Khan (1977) 1KAR** Law JA stated that:-

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low.”

32. Similarly in the case of **Kenya Breweries Ltd [1991] eKLR** it was held that,

“...It is now well established that this Court can only interfere with a trial judge's assessment of damages where it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred....”

33. In the case of **Simon Mungai Kariuki v Fatma Hassan [2017] eKLR**, the respondent sustained a hairline fracture of the styloid process on the radius of the right forearm; and the court made an award of Kshs.230,000/=;

34. In this instant case, the respondent suffered similar injuries and it is noted that the respondent did not suffer any degree of permanent incapacity as a result of the accident; based on the Medical Report by Dr. Muchai Mbugua the respondent is said to have healed from her injuries at the time of the re-examination;

35. The award of Kshs.400,000/= is therefore found to be inordinately high in the circumstances; and this court is satisfied that there is good reason to interfere with the trial court's decision; the award made shall be substitute it with one for Kshs. 280,000/=;

36. This ground of appeal is found to have merit and it is hereby allowed.

FINDINGS AND DETERMINATION

37. For the foregoing reasons this court makes the following findings and determination;

(i) The appeal is found to be partially successful;

(ii) This court finds that the respondent proved negligence of the appellant's driver to the desired threshold; judgment on liability is hereby affirmed;

(iii) This court finds the award granted to be inordinately high in the circumstances; the judgment on quantum is hereby set aside and substituted with an award of Kshs.280,000/- ;

(iv) The appellant shall bear half the costs on appeal;

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 16th day of July, 2020.

HON.A.MSHILA

JUDGE