REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO.52 OF 2016

EDITH GICUKU MUNGAI.....APPELLANT

VERSUS

JOHN NJIRU NJERU.....1ST RESPONDENT

KENNETH GITONGA MBIJIWE.....2ND RESPONDENT

J U D G M E N T

A. Introduction

1. This appeal is against the judgement and decree of the Honourable Senior Principal Magistrate in Embu CMCC No. 133 of 2014 delivered on the 6th September 2016.

2. The 1st respondent filed suit for general damages for injuries sustained following a road traffic accident. The 2nd respondent was later enjoined as a 3rd respondent by the appellant. The trial magistrate found the appellant 100% liable for causing the accident and awarded general damages to the tune of Kenya Shillings One Million, Six Thousand Five Hundred Thousand (Kshs. 1,006,500/=), special damages of Kenya Shillings Six Thousand Five Hundred (Kshs. 6,500/=) as well as costs of the suit.

3. The appellant being dissatisfied with the judgement of the trial court filed a memorandum of appeal dated 3rd October 2016 which was based on 4 grounds that can be summarized as follows: -

> ***1) That the learned trial magistrate erred in law and in fact in the manner that he addressed the evidence on liability and in finding the appellant 100% to blame.***
>
> ***2) That the learned trial magistrate erred in law and in fact in failing to address his mind on the Third Party Proceedings that had been taken out by the appellant***
>
> ***3) That the learned trial magistrate erred in law and in fact in the manner that he assessed damages and in awarding damages that were too excessive.***

4. The parties herein agreed to dispose of the appeal by way of written submissions.

B. Appellant's Submissions

5. It is the appellant's submission that the evidence of PW1 who testified in support of the 1st respondent's case not only represented, demonstrated how the accident occurred but also reenacted the original accident accounts and as such the trial court ought to have considered the motor vehicles point of impact evidence which clearly cast doubts on the testimony of PW1 and PW2. The appellant further submits that her evidence on the point of impact was not disputed as there were no cross examinations on the same.

6. It was further submitted that the ramming onto her vehicle from behind was a strict liability offence which the trial magistrate ought to have taken notice as it imputed the 2nd respondent was in breach of section 73(4) of the Traffic Act. The appellant further submits that the 2nd respondent never called any witnesses in rebuttal to the appellant's claims of negligence and thus the same remain uncontroverted and fatal against the 2nd respondent. The appellant relies on the case of **Crispine Otieno Caleb v The Honourable Attorney General eKLR (2014).**

7. The appellant further submitted that her mere prosecution with a road traffic offence was in itself not proof of negligence as she had not been convicted of the same as envisioned by **Section 47A of the Evidence Act.** She relied on the case of **Caroline Endovelia Mugayilwa v Lucas Mbae Muthara eKLR 2016.**

8. The appellant further submitted that failure of the trial magistrate to address the issue of liability as between her and the 2nd respondent was fatal and thus rendered the judgement short of the requirements of **Order 21 Rules 4 and 5 of the Civil Procedure Rules** and thus warrant setting aside of the judgement. Further the appellant submitted that the judgement also falls short of the requirement of **Order 21 Rules 4 and 5** as it does not provide reasons for the holding of quantum granted which was neither as proposed by the appellant or the 1st respondent.

9. The appellant submitted that an award of Kenya Shillings 350,000 would be adequate compensation to the 1st respondent and relied on the cases of **Western Kenya Sugar Limited v David Luka Shirandula eKLR [2017]** and **Morris Miriti v Nahashon Muriuki and Another eKLR (2018).**

C. 1st Respondents Case

10. The 1st respondent submitted that the he had proved his case in accordance with the provisions of Sections 107 – 109 of the Evidence Act and the appellant had on her part failed to prove her case against the 2nd respondent. He relied on the case of **John Kibicho Thirima v Emmanuel Parsmei Mkoitiko [2017] eKLR** and that of **Obed Mutua Kinyili v Wells Fargo and Another [2014] eKLR.**

11. On the damages awarded, the 1st respondent submitted that they had relied on the case of **Michael Njuguna Gitonga v Serag Njuguna [2012] eKLR** where the plaintiff was awarded Kenya Shillings 1,500,000 for comparable injuries whereas the appellant relied on cases that were over 20 years old and as such the damages awarded by the trial court were not excessive. The 1st respondent further relied on the cases of **Mary Nduku Kimanthi v Rumitex (K) Limited and 2 Others [2018] eKLR** where the Plaintiff was awarded Kenya Shillings Three Million (Kshs. 3,000,000/=) for comparable injuries as well as the case of **Collins Omondi Muganda v Oceanic Oil Ltd and Another [2017] eKLR** where the plaintiff was awarded Kenya Shillings One Million (Kshs. 1,000,000/=) in general damages.

12. The 1st respondent further submitted that the appellant had failed to prove her case against the 2nd respondent and thus there was no evidence warranting the setting aside of the trial court's judgement.

D. Analysis & Determination

13. I have looked at the appellant's grounds of appeal and the parties' respective written submissions, it is clear to the court that the issues for consideration and determination are as follows;

a) Whether the appellant proved his case against the 2nd respondent and if so,

b) whether the trial court erred in apportioning liability at 100% against the appellant.

c) Whether the trial court erred by awarding damages that were excessive

14. As a first appellant court, my duty, as provided for under section 78 of the Civil Procedure Act is to approach the whole evidence on record from a fresh perspective and with an open mind. I am also enjoined to analyze, evaluate assess, weigh, interrogate and scrutinize all the evidence and arrive at my own independent conclusion bearing in mind the fact that unlike the trial court, I had no advantage of seeing or hearing the witnesses as they testified. **See Selle v Associated Motor Boat Co. Ltd [1968] EA 123.**

15. This court is equally alive to and shall be guided by the decision in the case of **Mbogo v Shah & Another [1968] EA 93,** wherein the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows: -

'' I think it is well settled that that this court will not interfere with the exercise of discretion by the inferior court unless it is settled that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.''

16. In this appeal, it has not been disputed that an accident occurred on 20th Mach, 2015 involving a collusion between the appellant's suit motor vehicle KBZ 002J and the motor vehicle KAS 692E. It is further not in dispute that the 1st respondent who was a fare paying passenger in the appellant's said motor vehicle sustained injuries in the said accident.

17. What is in contention however, is who, between the owners of the two motor vehicles was responsible/liable for the said accident. The appellant has submitted that the driver of the Motor vehicle KAS 692E, of which the 1st respondent was a fare paying customer, hit her from behind thus causing the accident. It is for this reason that she enjoined the owner of motor vehicle KAS 692E as a third party and has cited him as the 2nd respondent herein.

18. The 1st respondent testified that he was a fare paying passenger travelling in vehicle registration No. KAS 692J when the vehicle was hit by that of the defendant causing it to overturn. This evidence was corroborated by that of that of the investigating officer PW2 and partly admitted by the defendant in cross exam. The results of the investigations were that the defendant was to blame for the accident.

19. The testimony of the appellant's driver in blaming the 2nd respondent's vehicle was not sufficient to exonerate the appellant in view of the corroborated evidence of the 1st respondent.

20. It is trite law that he who alleges must prove. Under **Section 107 of the Evidence Act,** it states: -

> ***1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

21. Under Section 109 of the Evidence Act, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

22. In the instant case, it was incumbent upon the appellant to prove to the required standard, on a balance of probabilities any of the particulars of negligent acts attributed to the 2nd respondent as pleaded, which would have been responsible for the material accident. The 1st respondent was clear in his testimony which was not shaken during cross examination.

23. In the case of **Ephantus Mwangi & Geoffrey Nguyo Ngatia vs Dancun Mwangi Wambugu [1982-88] KAR 278** a principle was laid that a court on appeal will not normally interfere with a finding on 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.

24. The magistrate found the appellant fully liable for the accident. It is my considered opinion that the finding was based on cogent evidence and it is hereby upheld.

25. The Court of Appeal in Bashir ***Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR*** set out the parameters under which an appellate court will interfere with an award in general damages when it held that:

> ***"An appellate court will not disturb an award for general damages unless it is so 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 so arrived at a figure which was either inordinately high or low……."***

26. The advocate for the 1st respondent had made submissions in support of Kshs. 1,500,000/= while the advocates for the appellant had supported an award of Kshs. 165,000/=. In this appeal, the advocate for the appellant has proposed that the court increases the award to Kshs.350,000/=. The trial magistrate awarded the respondent Kshs.1,000,000/= but he did not give reasons as to how he arrived at that figure.

27. I have perused the authorities relied on by the parties and it is my opinion that the cases relied on by the 1st respondent are not comparable to the injuries sustained by the 1st respondent. I find the two cases of **Western Kenya Sugar Limited (supra)** and **Morris Miriti (supra)** relied on by the appellant more comparable.

28. The cases was decided several years ago and as such the factor of inflation ought to be taken into account in assessing damages.

29. All considered I find that the award of the trial magistrate was not based on comparable authorities and is on the higher side.

30. I therefore set aside the said quantum and replace it with an award of Kenya Shillings Five Hundred and Eighty Thousand (Kshs. 580,000/=) for general damages. The special damages were not disputed and so they remain undisturbed.

31. The appellant will meet the costs of the suit in the lower court and of this appeal in favour of the 1st respondent.

32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF APRIL, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Mugendi for Respondent