REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 419 OF 2008

JULIA WAMBUI GITHAGA.....PLAINTIFF

VERSUS

JOHN MUNYORI MWANGI.....DEFENDANT

J U D G M E N T

The plaintiff commenced the suit herein by way of a plaint dated the 5th day of September, 2008 and amended on 20th June, 2012 in which she has sought the following prayers:

1. Special damages of Kshs. 2,356,696.55

1A. Future medical expenses of Kshs. 1,500,000/-

2. General damages

3. Interest on (a) and (b) above at court rates from the date of filing of the suit and judgment respectively.

In the amended plaint, the plaintiff avers that, on or about the 18th day of June, 2006, She was travelling as a passenger in a motor vehicle registration number KAQ 404D along Nairobi – Thika road towards Nairobi near clay works, when the defendant, his servant, and/or agent so negligently and/or recklessly drove motor vehicle registration number KAK 464B that he caused the same to violently collide with motor vehicle KAN 539C as a result of which the said motor vehicle caused loose chippings to fly off and hit the plaintiff thereby occasioning and/or causing serious injuries to her

The particulars of the defendants, their servants and/or driver's negligence are set out in paragraph 4 of the amended plaint while those of injuries and special damages are set out in paragraph 6 of the amended plaint thereof.

The defendant filed two statements of defence, one dated 2nd December, 2008, which he filed in person and another dated 27th day of May 2009 filed by the firm of Wangari Muchemi & Co. Advocates but he did not call any evidence to support his case.

During the hearing, the plaintiff testified as PW1 and she adopted her witness statement filed on 26th day of June, 2012. It was her evidence that, on 18th day of June, 2006, she was travelling from Nyeri to Nairobi in motor vehicle KAQ 404D, a matatu, and between Githurai and Roysambu, there was an accident happening on the other side of dual carriage. She saw a stone flying through the window and she ducked instinctively but it was too late and she was injured on the face.

She was admitted at Guru Nanak Hospital but was later transferred to Aga Khan Hospital the same day where she was admitted from 22 nd day of June to 27th June, 2006. She was again admitted on 5th July, 2006 and discharged on 9th July, 2006. At Aga khan she was taken to theatre for toileting and implant. She was seen by Dr. Wokabi who prepared for her a medical report.

The plaintiff's other witness was PC John Ouko who testified as PW2. It was his evidence that they received summons in respect of an accident that occurred on the 18th day of June, 2006 involving three motor vehicles registration numbers KAN 539C, KAQ 404D and KAK 464B. The accident happened at 6pm along Thika - Nairobi Road at clay works. He stated that the investigations were carried out by Corporal Wambui who found the driver of motor vehicle registration number KAK 464B to blame for the accident and he was subsequently charged with the offence of careless driving and was fined Kshs. 5,000/-.

It was his evidence that the plaintiff was a passenger in motor vehicle KAQ 404D, a toyota matatu and she was injured in the accident.

That the plaintiff reported the accident and she was issued with a police abstract at Kasarani Police Station.

The plaintiff's third witness was Frida Njeri Githaiga who is a sister to the plaintiff.

She adopted her witness statement as her evidence in chief but applied to amend paragraph 4, the registration number of the vehicle, to read KAQ 404D instead of KAG 404D, toyota matatau. It was her evidence that, on the 18th day of June, 2006, the plaintiff and herself were travelling to Nairobi from Othaya aboard motor vehicle KAQ 404D and they were seated next to each other on the row behind the driver and near the door.

That on reaching clay works, she noticed a vehicle (matatu) on the other side of the duo carriage lose control and immediately thereafter she saw what looked like a stone fly through the widow on her right and in a split of a second, she heard the window shattered and saw pieces of glasses flying. She hide her face and she could hear the other passengers screaming and on raising her head, she realized that the plaintiff was bleeding profusely from the head.

That at this time, the matatu had stopped and there was commotion as the other passengers started alighting and with the help of other passengers, they got the plaintiff from the vehicle. That a good Samaritan took her to Guru Nanak hospital for first aid but she was later transferred to Aga Khan hospital for further treatment. She stated that while recording her statement at Kasarani Police Station, she learnt that the vehicle that had dislodged the stone that hit their vehicle was motor vehicle registration number KAK 464B and the driver was charged with the offence of careless driving.

The defendant did not call any witnesses in support of his case.

At the conclusion of the hearing, parties filed written submissions. Counsel for the plaintiff filed a list of agreed issues on the 24th November, 2009 but the defendant did not file any. In my view the following are the issues for determination:-

1. **Whether the defendant was the owner of motor vehicle registration number KAK 464B**

2. **Whether the plaintiff was travelling as a lawful passenger in motor vehicle KAQ 404D at the material time.**

3. **Whether an accident occurred on 18/06/2006 involving motor vehicle KAK 464B and KAQ 404D.**

4. **Who was to blame for the accident?**

5. **Did the plaintiff suffer any loss and/or damages as a result of the accident and if so whether she is entitled to damages.**

6. **Who should bear the costs of the suit?**

On issues nos. 2 and 3 it was the plaintiff's evidence that she was travelling as a lawful passenger in motor vehicle registration number KAQ 404D, on the 18th day of June, 2006 when the accident occurred between Githurai and Roysambu. This evidence was corroborated by that of PW3 who is her sister and who was also a passenger in the said vehicle at the same time. The defendant did not offer any evidence to the contrary and therefore, the court is satisfied with the plaintiff's evidence that she was a lawful passenger in the aforesaid motor vehicle at the material time when the accident occurred.

As to whether there was an accident involving motor vehicle registration number KAK 464B and KAQ 404D, there is sufficient evidence on record being that of PW1, PW2 and PW3. PW2 is a police officer who was stationed at Kasarani Police Station where the accident was reported. He produced the police abstract as exhibit which attest to the fact that the accident indeed occurred. This fact was not disputed by the defendant. The evidence of PW1 and PW3 also attest to the fact that there was an accident on the said date involving the aforesaid motor vehicles.

On whether the defendant was the owner of motor vehicle registration number KAK 464B, it is clear that a copy of records from the Registrar of Motor Vehicles shows that the vehicle was registered in the name of Regal Pharmaceuticals Limited as at 18th day of June, 2006. However, other documents were availed to the court for example the letter dated the 8th day of February, 2008 which was a response to the one dated 7th Day of January, 2008 exhibit 14. According to that letter, the former owner of motor vehicle KAK 464B one George N. Kamau confirms that he sold it to the defendant vide a sale agreement dated 14th day of May, 2005 which was attached to the said letter. The agreement was duly signed by both parties and the log book and a duly signed transfer form was handed to the defendant. In addition to these documents the police abstract list the defendant as both the owner and the driver of the vehicle.

Section 8 of the Traffic Act provides that,

"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle".

In this case there is some evidence to the contrary in the form of the sale agreement and the police abstract. In the case of

Samuel Mukunya Kamunye Vs. John Mwangi Kamuru Nyeri High Court Civil Appeal No. 34 of 2002 the court held

> ***"..... a police abstract report having been produced proving the respondent as the owner of motor vehicle KAH 294A, and evidence having been adduced that letters of demand sent to the respondent elicited no response from him denying ownership of the motor vehicle and the respondent having offered no evidence to the contrary at the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 263A was***

owned by the respondent"

This court therefore finds that the defendant was the owner of motor vehicle registration number KAK 464B"

On who was to blame for the accident, on record is the evidence of PW1, PW2 and PW3. According to PW1 she saw something flying outside like a stone toward the direction of their motor vehicle. She tried to evade it and in the process she heard a blow and she lost consciousness after she was hit by the object.

In cross examination, she stated that she could not tell exactly how the accident occurred.

It was the evidence of PW2 that the investigations were carried out by corporal Wambui who found the driver of motor vehicle KAK 464B to blame for the accident and subsequently the driver was charged with the offence of careless driving and was fined Kshs. 5,000/-. In cross examination he stated that he could not tell the court why the driver of motor vehicle KAK 464B was found to blame. On the part of PW3, it was her evidence that she saw the two motor vehicles collide. In her witness statement, which she adopted as her evidence, she has stated that she noticed a vehicle (matatu) on the other side of the road, lose control and immediately saw what looked like a stone fly through the window on her right. That in a split of a second, she heard the window shattered and saw pieces of glasses flying. Further, in paragraph 16 of the statement, she says that she recorded her statement at Kasarani Police Station and learnt from the police that the other vehicle that had dislodged the stone that hit her sister was vehicle registration number KAK 464B driven by the defendant herein.

Considering the evidence aforesaid, the court notes that there is no evidence connecting the defendant with the stone. There is no evidence that the stone which allegedly hit the plaintiff was dislodged by the defendant. PW3 on her part could not tell the court where the stone originated from. According to her, she learnt from the Police that the vehicle that dislodged the stone was KAK 464B. The investigating officer was not called as a witness. PW2's evidence was not of much help to the court as he could not tell the court how the defendant caused the accident that occasioned injuries to the plaintiff.

From the evidence on record, it is alleged that the accident involved three vehicles.

There was direct impact between the two of them but for motor vehicles KAK 464B and KAQ 404D, there was no contact. It was therefore incumbent upon the plaintiff to prove the nexus between the two and the injuries that she sustained. A perusal of the evidence would reveal that the only nexus was the stone that allegedly hit the plaintiff. For this court to find the defendant liable, it was the duty of the plaintiff to bring the connection which in my view, she failed to do.

The plaintiff herein has sued the defendant for negligence. Negligence is a specific tort that emanate from the common law jurisprudence. In a claim for negligence, the plaintiff ought to establish that the defendant owed him a duty of care, that there was a breach of duty of care and as a result of the breach, the plaintiff suffered damages. The principles and threshold required to sustain a claim in negligence were established by ***Lord Macmillan in Donoghue vs. Stevenson*** when he stated that

> ***"the law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty of care and where failure in that duty has caused damage. In such circumstances, carelessness assumes the legal quality of negligence and entails the consequences in law of negligence.... the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in breach of that duty"***

When it comes to remoteness of damages, the court ought to determine whether there was sufficient cause or proximate connection between the defendant's negligence and the damages suffered by the plaintiff that is recognizable as a matter of policy that the defendant should pay for the damages.

The court of appeal in addressing the issue of remoteness of damages in the case ***of Catecna Inspection S.A Vs. Items Group Training Company Ltd (2007) eKLR*** held that:-

> ***"my analysis and evaluation of the evidence, a summary of which is given above, must not only be confined to the question as to whether or not that breach of duty was the cause of the losses the respondent suffered and if so, whether the assessment of damages was properly carried out by the trial court. But first the law. What are the principles to be applied while considering the nexus between the acts of an offending party and the loss suffered by the offended party". I do agree with both learned Counsels that there must be a link between the action complained of and the loss incurred. That to me goes without saying and is a matter of common sense. It underlies the doctrine of remoteness of damages.***

The law of causation will come into play where the plaintiff must show that the damages resulted from the defendant's negligence because without proof of causation negligence cannot be actionable.

In the works of Charles ***Worth & Percy on negligence 7th Edition*** the writer states as follows:-

> ***Evidence of causation must be given on behalf of the plaintiff. Before a case can be considered either direct or circumstantial evidence must be called on behalf of the plaintiff. Whatever evidence is so called, it must tend to show how the accident happened and how, as a result he sustained his personal injuries or suffered his damage. Such evidence also must show that on a balance of probabilities the most likely cause of the damage was the negligence or breach of duty of the defendant, his servant or agent and not solely the negligence of some other person. "if he fails to establish that the defendant caused the harm, of which he complains, or some part of it, then his action must fail".***

It has been argued that the defendant was charged with the offence of careless driving, convicted and fined Kshs. 5,000/-. But was his conviction in relation to the other vehicle or in relation to the vehicle that the plaintiff was travelling and more particularly the stone and the injuries it caused her. It was important for the plaintiff to bring out this evidence but she failed to do so.

In view of the aforegoing, I find that the plaintiff did not prove her case on a balance of probability and the same is hereby dismissed but with no order as to costs.

The law requires this court to assess the quantum of damages it could have awarded the plaintiff had she succeeded. The plaintiff's injuries are set out in the medical report dated 12th day of December, 2007 by Dr. Wokabi. She was diagnosed to have sustained extensive compound fractures of the right orbit, zygomic and temporal bones. She was taken to theatre where surgical toilet was done. The deep vein blood clot was treated by being put on the blood thinning drugs. The opinion by the doctor is that she has been left significantly disfigured on the right side of the face which she has to deal with permanently. She recovered well from the complication of deep veins blood clotting after the appropriate treatment was given but Dr. Tanga Audi recommended plastic surgery.

The court has considered the plaintiffs submissions on quantum and has relied on the case of ***Terry Kangua Marangu V Wells Fargo Limited (civil suit No. 18 of 2013) where a total of Kshs. 3, 500,000 was awarded as general damages for pain and suffering***. The plaintiff in the above case sustained head injury and unconsciousness with a coma scale of 9/15, cut wound on the upper lip and loss of left upper incisors.

The defendants on their part relied on the case of ***Peter Gichuru mwangi Vs. James Kabathi Mwangi (2001) eKLR***

> ***Where the court awarded Kshs. 600,000/- general damages to a plaintiff who sustained injuries to the head, Ophthalmic injury to the right eye, severe face injuries, right zygomatic complex fractures, orbital fractures, naso ethmodial complex fracture, comminute palatal fractures with evidence of both loss on the left side compound comminuted resort "fracture causing injuries.***

The defendant also relied on the case of ***James Ngugi Gakunju Vs. William Njau Kamau & Jacinta Wanjiru Kamau (2000) eKLR*** where a Kshs. ***500,000/-*** was awarded to the plaintiff as general damages for having sustained fractures of the zygomic nasal bones, maxilla and Mandible with 50% disability in a road accident.

On future medical expenses, the plaintiff has claimed Kshs. ***1,500,000/-***and has relied on the medical report by Dr. Tanga Audi. In his report, he opines that the plaintiff would benefit from staged symmentralisation facial surgery. He put the cost of permanent up to Kshs. ***1,500,000***. Though the defendants in the submissions states that the doctors medical report was speculative on the amount to be expended for corrective surgery as he suggested Kshs. ***700,000*** as temporary one with a ceiling of Kshs. ***1,500,000/-*** for permanent correct surgery, no evidence was offered to controvert that of Dr. Tanga and therefore the court could have awarded a total of Kshs. ***1,500,000/-*** under that head.

On special damages, a total of Kshs**. 2,356,696.55** was pleaded. The receipts that were produced amounted to a total of Kshs **916,770/=** which this court could have awarded had the plaintiff succeeded on liability.

On general damages, the court could have awarded Kshs. **1, 200,000/-** being guided by the case of ***Daniel Muchemi & another Vs. Rosemary Kawira Kiambi*** but the plaintiff having failed to prove her case on a balance of probability, the case is hereby dismissed with no orders as to costs.

Dated, Signed and Delivered at Nairobi this 4th Day of April, 2019.

…….

L. NJUGUNA

JUDGE

In the Presence of

……. For the Applicant

……. For the Respondent