



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 120 OF 2014

BETWEEN

DAVID MAKORI ORARE.....APPELLANT

AND

GLADYS BONARERI MICHIRA ALIAS

GLADYS KEENGWE MONGARE RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.K. Sambu, PM dated 25th September 2014 at the Magistrates Court in Kisii in Civil Case No. 251 of 2014)

JUDGMENT

1. It is not in dispute that the respondent was injured in road traffic accident which occurred on 6th February 2013 along the Kisii – Marani road while she was riding a motor cycle as a pillion passenger. The motor cycle was knocked down by motor vehicle registration number KAY 468Y owned and or driven by the appellant or his driver. The respondent blamed the appellant for the accident and filed suit following the injuries she sustained.
2. In his amended defence, the appellant denied the accident or that he was negligent. He also stated in the alternative that the accident was caused wholly or substantially by the negligence of the motor cycle rider and the respondent. The appellant also averred that there was accord and satisfaction in so far as the respondent had executed a discharge voucher in which she accepted settlement of the claim and discharged the appellant from any liability.
3. After the hearing, the trial magistrate found the appellant fully liable and awarded the respondent Kshs. 400,000/- and Kshs. 53,423/- as general and special damages respectively. He dismissed the appellant's contention that discharge voucher constituted accord and satisfaction and therefore constituted a complete settlement of the claim. It is this finding that has precipitated this appeal.
4. The thrust of this appeal as contained in the memorandum of appeal dated 24th October 2014 concerns the nature and effect of the discharge voucher signed by the respondent. The appellant contends that the issue for determination is whether the discharge voucher signed by the parties herein was legally binding in light of the circumstances under which it was signed. Both parties filed written submissions in support of their respective positions.
5. The appellant submitted that the parties entered into a valid and binding agreement contained in the discharge voucher dated 26th February 2013, 20 days after the accident occurred and that the agreement satisfied all the elements of a valid contract that is; the offer, acceptance and consideration. He submitted that the respondent accepted Kshs. 25,000/- on her behalf and on behalf of her daughter as full and final settlement and signed the discharge voucher thereby releasing the appellant from all liability arising from the accident. The appellant submitted that the discharge voucher constituted a valid defence of accord and satisfaction as such the claim could not be entertained by the court.
6. The respondent agreed that parties are bound by their agreement and the court cannot re-write or reconstruct the terms of the agreement. However, she contended that there was an exception to that rule which was applicable to this case, that is the doctrine of *non est factum* where a party is not bound by a document that he or she had been misled into signing or a document which is essentially different from the one she intended to sign. The respondent case was that the respondent did not understand that nature and effect of the document she was signing hence the discharge voucher was not binding and that the trial court was right to entertain the claim and award damages.

7. The circumstances under which the discharge voucher was signed is a question of fact and since this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123, 126).

8. The evidence on the issue of the discharge voucher was as follows. In her testimony in chief, the appellant (PW 1) did not allude to the discharge voucher but in cross –examination she stated as follows:

It is true that I was paid by the owner of the motor vehicle Kshs. 25,000/-. It is true that we entered into agreement with the owner of the motor vehicle in the presence of Thomas. I was told the contents of the agreement. I was not told it was a discharge agreement. I am not aware whether an advocate witnesses the agreement. It is not evidence that indeed (sic) was paid amount towards compensation. I am still on treatment and attend clinic at Tenwek hospital.

9. The defendant called Volta Oribo (DW 1) the advocate who prepared the discharge voucher. He recalled that on 26th February 2013, PW 1 came to his office accompanied by the appellant. He prepared the discharge voucher and she signed. In cross-examination, DW 1 admitted that when he saw PW 1 at his office, she appeared blind and at the time she referred to a discharge summary which showed that she was discharged on 19th February 2013. He told the court that the discharge voucher was read back to PW 1 in English and she confirmed that she knew the contents thereof. He also further explained to PW 1 the position in relation to general damages and denied that he had colluded with the respondent. In re-examination, DW 1 stated that PW 1 was accompanied to his office by her husband and son who witnessed the agreement and that she did not appear to have sustained injuries when she appeared before him.

10. On the basis of the evidence, the trial magistrate reached the conclusion that the discharge voucher was null and void as the respondent was visually impaired. In coming to that conclusion, the trial magistrate held as follows:

It is undoubtedly and crystal clear in evidence that the plaintiff at the material time upon executing the discharge voucher in issue was apparently blind which fact was not challenged in evidence. It is therefore safe to suggest that the plaintiff although she thumb printed the executed discharge voucher was unable to read or see the terms of the entered contract, and/or understand their meaning and import, notwithstanding the fact that the same was purportedly read and explained to her. It is for this sole ground that the plaintiff in her circumstances was not seized with the legal capacity to have executed the discharge voucher in issue which discharge voucher in my considered finding and holding was vitiated and void by the plaintiff's physical handicap and impairedness (blindness) which discharge voucher and ultimately find was unenforceable in law and null and void ab initio.

11. The sole reason the trial magistrate found discharge voucher void was because the respondent was blind. In this appeal, the respondent went further and contended that although the respondent signed the discharge voucher, she did not understand its tenor and effect. Counsel for the respondent cited the case of *Josephine Mwikali Kikenye v Omar Abdalla Kombo and Another* MSA CA Civil Appeal No. 27 of 2017 [2018]eKLR where the Court of Appeal adopted the dictum in *Saunders v Anglia Building Society* [1973] 3 All ER 961 where Lord Wilberforce expressed the view that:

As to persons who are illiterate, or blind, or lacking in understanding, the law is in a dilemma. On the one hand, the law is traditionally, and rightly, ready to relieve them against hardship and imposition. On the other hand, regard has to be paid to the position of innocent third parties who cannot be expected, and often would have no means, to know the condition or status of the signer. I do not think that a defined solution can be provided for all cases. The law ought, in my opinion, to give relief if satisfied that consent was truly lacking but will require of signers even in this class that they act responsibly and carefully according to their circumstances in putting their signature to legal documents.

[Emphasis added]

12. It was not disputed that the respondent was blind at the time she executed the discharge voucher. It was also not disputed that the effect of the discharge voucher was to discharge the appellant of all liabilities arising from the accident. As was stated in *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* NRB CA Civil Appeal No. 147 of 2005 [2015] eKLR

The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.

13. As it is not in dispute that the respondent executed the discharge voucher, the question for determination is whether the respondent understood the nature and contents of the discharge voucher when she signed it. I wish to point out that the fact the respondent was blind is not in itself a ground for invalidating an agreement. The court must be satisfied that in the circumstances of the case consent was truly lacking.

14. Since it is the respondent who sought to avoid the discharge voucher, she was required to prove the reasons why the discharge voucher should be invalidated in line with **section 107(1)** of the *Evidence Act (Chapter 80 Laws of Kenya)* which states that, "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." I also note that when the issue of accord and satisfaction was raised by the appellant in the amended defence, the respondent's response in the reply to the amended defence was a bare denial.

15. In her testimony, the respondent explained that she was informed of the contents of the agreement but was not told it that it was a complete discharge. On the other hand, DW 1 told the court that he explained the contents of the agreement to her and she understood the same. Unlike the trial magistrate, I come to the conclusion that the respondent understood that nature of agreement. DW 1 testified that he explained to her the nature of the agreement and that she was accompanied by her husband and son who also witnessed the discharge voucher. It is unlikely and in fact more probable than not that they would have witnessed the discharge voucher if the respondent did not

understand its tenor and effect.

16. I therefore find that the trial magistrate erred in holding that the discharge voucher was void only on account of the respondent's blindness. I further find and hold that the respondent signed the agreement voluntarily and it is a valid discharge of all liabilities arising from the accident.

17. For the reasons, I have set out above, I allow the appeal. The judgment and decree of the subordinate court is set aside and substituted with an order dismissing the suit with costs to the appellant. The respondent shall bear the costs of this appeal which I assess at Kshs. 30,000/- only.

DATED and DELIVERED at KISII this 2nd day of JULY 2019.

D.S. MAJANJA

JUDGE

Ms Oriego instructed Kairu & McCourt Advocates for the appellant.

Mr K. Gichana instructed by Ben Gichana and Company Advocates for the respondent.