REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 183 OF 2016

MERCY NJERI KIBANDI.....APPELLANT

VERSUS

JOHN NJOROGE KAMANDE.....1ST RESPONDENT

NJOROGE MARY.....2ND RESPONDENT

(Being an appeal from the judgment and decree Delivered on 18/7/2013 by Hon. S. N. Telewa (RM) in Thika SRMCC No. 507 of 2012)

JUDGMENT

1. By a Plaint dated 21/06/2012, the Appellant herein sued the Respondents claiming compensation for injuries she says she sustained as she was lawfully walking as a pedestrian when a vehicle allegedly owned by the Respondents was negligently driven and was involved in a Road Traffic Accident in which she sustained personal injuries. The Respondents filed a Defence denying any liability for the accident. In particular, the Respondents denied that there was any accident between themselves and the Plaintiff.

2. The Learned Trial Magistrate heard and concluded the trial and entered judgment on 18/07/2013.

3. The Learned Trial Magistrate found that the Appellant had not properly identified herself and dismissed the suit with costs.

4. The Appellant is aggrieved by that decision and has appealed to this Court. Through her advocate, she filed a Memorandum of Appeal which listed six grounds of appeal. They are as here under:

i. The Learned Magistrate erred in Law and in fact in failing to find the Respondent liable in causing the accident at all.

ii. The Learned Magistrate erred in Law and in fact by failing to appreciate and consider the evidence adduced by the Appellant.

iii. The Learned Magistrate erred in Law and in fact in failing to appreciate that the evidence adduced by the Appellant was not challenged and/or controverted by the Respondent.

iv. The Learned Magistrate erred in Law and in fact in not giving sufficient consideration to the weight of the evidence by the Appellant.

v. The Learned Magistrate erred in Law and in fact in failing to appreciate that the Appellant was not to blame for the accident.

vi. The trial in the lower court to be considered a mistrial and a fresh hearing be ordered.

5. The Respondents totally agree and concur with the judgment of the Learned Trial Magistrate dismissing the suit against them. The Respondents argue that it is a legal requirement that in a suit the parties must be properly named and identified. The Respondents' advocates also filed written submissions opposing the appeal.

6. I have read and considered the respective arguments in those submissions.

7. As a first appellate court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123***in the following terms:

*I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

8. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484.

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

9. The appropriate standard of review established in these cases can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

10. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary***

Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

11. With the above principles in mind, I will now proceed to deal with the appeal.

12. The Appellant's case was founded on the alleged negligence of the Respondents. As such, she was by law required to establish on a balance of probabilities that:

a. The Respondents owed her a duty of care;

b. The Respondents breached that duty, and;

c. She suffered injury as a result of that breach.

13. The Appellant's case, as it emerged at the trial was that on 23/3/2012 she was walking along the pavement at Kasmatt Supermarket when she was knocked down by motor vehicle registration number KBE 324L. She was injured on her right leg and elbow and was rushed to Thika District Hospital where she was treated and discharged. The accident was also reported to the police. She produced treatment notes, police abstract, P3 form, Copy of records and its receipt, hospital receipts, medical report and its receipt. The appellant testified that if she was careful when crossing the road and if she had crossed the road at the right place, the accident would not have occurred.

14. The Appellant also called Dr. George Karanja who produced the medical report. He stated that the appellant had laceration wound on right foot, bruises right shin and bruises right elbow region. He stated that the appellant had sustained harm injuries and that he relied on the

police abstract, treatment card and P3 form.

15. The driver of the said motor vehicle testified on behalf of the defence. He stated that he was driving along Kassmatt Supermarket when a lady came in front of his vehicle and that she was on phone. He tried to swerve but the lady was hit by the side mirror and she fell on the pavement. He testified that he was not driving fast and there was no zebra crossing at that point. He took the lady to the hospital and paid some bills. He stated that the appellant did not take care when crossing the road and that he was not to blame for the accident.

16. In brief, this was the evidence presented to the Court.

17. In a judgment delivered on 25/7/2013, the Learned Trial Magistrate found thus:

> *It's actually difficult for this court to establish within Mercy Njeri Kibandi, Mercy Njeri Kariithi and Mercy Njeri is the same person. For this reason this suit is dismissed with costs for lack of proper identity as the plaintiff's side.*

18. The Appellant major complaint is that the Learned Trial Magistrate erred in dismissing the suit yet the driver himself testified that the accident occurred and he took the plaintiff to the hospital and they also went to the police station together thus the Respondent knew the identity of the Appellant well.

19. On my part, I have now re-evaluated the evidence on record as I am required to do.

20. The sole reason for the Learned Trial Magistrate denying the claim was that the Plaintiff had seemed to identify herself using three different names in different documents. She variously called herself Mercy Njeri Kibandi; Mercy Njeri Kariithi and Mercy Njeri Kariuki. The Learned Trial Magistrate therefore concluded that the Plaintiff had not properly identified herself as the victim of the accident.

21. I have come to the reason conclusion that this was a misapprehension. A party to a suit not only identifies herself in the Plaint but does so in the other documents she presents as well as in oral testimony. In Appellant's pleadings, there was no contestation of the Appellant's description or serious disputation that she was not the person she claimed she was. Indeed, the Respondent puts the Appellant to strict proof of paragraphs 2 and 3 (regarding the identity of the Respondents) but not regarding paragraph 1 (regarding the Appellant's identity).

22. It is true that the various documents produced by the Appellant bore four permutations of her name: Mercy Njeri; Mercy Njeri Kibandi; Mercy Njeri Kariithi and Mercy Njeri Kariuki. She was cross-examined about that and she explained that "Kibandi" is her maiden name while "Kariithi" is her husband's name. It would appear that the name "Kariuki" which appears in the Police Abstract is simply a mistake by the Police. In any event, this line of questioning was not seriously pursued or sustained by the Respondent.

23. In his testimony, the 1st Respondent did not deny that the accident happened and that it involved the Appellant. He was straightforward in his testimony that the accident happened and that he even took the Appellant to the hospital and helped pay some bills for her. He identifies the place of the accident and the nature of the accident in exactly the same way as the Appellant. Additionally, all the documents produced in the case point to the same accident involving the same parties and the same injuries.

24. Given the harmony of the evidence from these various sources, it is my respectful view that the Appellant established on a balance of probabilities that she was involved in the accident on 23/03/2012 near Kasmatt Supermarket in Thika and that the accident involved Motor Vehicle Registration Number KBE 324L.

25. Turning to the question of liability, the parties disagree sharply. The Appellant insists that the Respondent should be held 100% liable because he was not careful in driving in a busy market place. She relied on ***Boniface Waiti & Another v Michael Kariuki Kamau [2007] eKLR***. The Respondents argue the exact opposite. They find, in the Appellant's testimony, evidence that she was not careful as she crossed the road at a place which was not designated for crossing. The Respondents think the liability should be at 100% against the Appellant – and, at worst, it should be shared equally.

26. The Learned Trial Magistrate would have apportioned liability at 60%:40% in favour of the Appellant. On my part, given the descriptions of the parties about the accident, I would apportion liability at 50%:50%. I do not fully accept the Appellant's account that she was wholly on the pavement when the Motor Vehicle hit her. If so, the nature of her injuries would have been different. It seems clear that she was crossing the road – and she was doing so at a place not designated for crossing. At the same time, it seems clear to me that the 1st Respondent was driving too fast in the circumstances. One does not need to swerve the vehicle to avoid hitting a pedestrian if one is driving at 20 Km per hour as he claimed. It appears clear that the 1st Respondent was driving at a higher speed. This was reckless in the circumstances given the busy nature of the street. This position is lent credence by the fact that the Respondent was charged with a traffic offence and was charged Kshs. 5,000/-. Being convicted with a traffic offence is not cocksure where to establish liability in a civil case, but it creates a very strong presumption of liability.

27. The parties did not disagree on the nature of the injuries suffered. The injuries were: laceration on the right foot; bruises on the right shin lateral aspect and bruises on the right elbow. There is no question that these were all soft tissue injuries.

28. The Learned Trial Magistrate, after reviewing the cases submitted by the parties, would have awarded Kshs. 100,000/-as general damages. On appeal, the Appellant suggests an enhancement to an odd figure of Kshs. 357,000/- She relies on ***Catherine Wanjiru Kingori & 3 Others v Gibson Theuri Gichubi (2005) Civil Suit No, 320 of 1998 and Shem Shituyi v Rexon Shiyonga (2014) Civil Appeal No. 108 of 2012***. In the former case the Plaintiff was awarded Kshs. 350,000/- while in the latter case an amount of Kshs. 400,000/- was awarded. I have read these cases and I have found the injuries to be more serious. They are also outliers.

29. On the other hand, the Respondents would agree with the Learned Trial Magistrate's award of Kshs. 100,000/- as an appropriate

compensation for the injuries suffered.

30. It is important to begin with stating the principles that govern an appellate Court in considering a request to review an award of general damages. It is this:

> *An Appellate Court will not disturb an award of 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 as either inordinately high or low*.

These are, of course, the celebrated words of the appropriately named Law J.A. in the case of ***Butt v Khan (1977) KAR 1***.

31. t is important to recall that I can only interfere with an award of damages if the aggrieved party satisfies one of two conditions:

i. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or

ii. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.

32. In this case, if one takes into consideration the actual injuries suffered by the Respondent – to wit soft tissue injuries to the right foot, bruises to the right shin lateral aspect and bruises to the right elbow – it seems to me that an award of Kshs. 100,000/= is neither manifestly excessive nor too low.

33. Given the policy goal of Courts to try to compensate comparable injuries as far as possible by comparable awards, and having looking these two factors call for this Court to revise the quantum awarded to the Respondent. In my view an award of Kshs. 100,000/= would be adequate to compensate for the injuries suffered in this case.

34. The upshot, then, is the following:

a. The appeal is allowed. The Court sets aside the decision by the Learned Trial Magistrate dismissing the suit and instead enters judgment at the rate of 50% contributory negligence.

b. The Court assesses quantum for general damages at Kshs. 100,000/-

c. As there has been no appeal on special damages and there is no reason to interfere with the same, the amount is left intact.

35. Orders accordingly.

Dated and delivered at Kiambu this 8th day of February, 2018.

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JOEL NGUGI

JUDGE