



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 331 OF 2015

EDWARD KAMAU 1ST APPELLANT

JAMES KARANJA KINUTHIA..... 2ND APPELLANT

- V E R S U S -

HANNAH MUKUI GICHUKI 1ST RESPONDENT

GESTETNER LIMITED 2ND RESPONDENT

(An appeal from the judgement and orders of Hon. R. A. Oganyo (SPM) in Milimani CMCC No. 2724 of 2012 delivered on 20th day of November 2014.)

JUDGEMENT

1) Hannah Mukui Gichuki, the 1st respondent herein, filed a compensatory action before the Chief Magistrate's Court, Milimani Commercial Court, against Edward Kamau Kinuthia, James Karanja and Gestetner Ltd, the 1st, 2nd appellants and the 2nd respondent respectively for the injuries she sustained when she was knocked down by motor vehicle registration no. KAK 901G while she was a pillion passenger aboard motor cycle registration no. K.M.C.A 083W. The 1st respondent's claim was denied by the 2nd respondent and the appellants. The suit proceeded to hearing where the 1st respondent testified alone in support of her case while the defence summoned Edward Kamau Kinuthia as their witness to bolster their defence. Hon. R. A. Oganyo, learned Senior Principal Magistrate, heard the case and in the end she gave judgment in favour of the 1st respondent and awarded her a cumulative sum of ksh.1,625,109/49.

2) The appellants were dissatisfied with the aforesaid decision hence they preferred this appeal and put forward the following grounds:

- 1. THAT the learned magistrate erred in law and fact misdirecting herself that the appellants were 100% liable.***
- 2. THAT the learned magistrate erred in law and fact by failing to consider contributory negligence on the part of the 1st respondent and finding the appellants 100% liable.***
- 3. THAT the learned magistrate erred in law and fact by failing to scrutinize and/or evaluate the evidence tendered in support of the appellants and thereby failing to apportion liability in view of the evidence on record.***
- 4. THAT the learned magistrate erred in law and fact by failing to dismiss the 1st respondent's suit against the 2nd defendant/ appellant for want of any proof linking him with this particular accident.***
- 5. THAT the learned magistrate erred in law and fact by failing to appreciate the totality of the evidence before her and in not considering the submissions on behalf of the appellants.***
- 6. THAT the learned magistrate erred in law and fact by failing to take into account the evidence and the submissions on quantum of damages given on behalf of the appellants while considering her judgement.***
- 7. THAT the learned magistrate erred in law and fact by making an award on general damages which was manifestly excessive and inordinately high.***
- 8. THAT the learned magistrate erred in law and fact by failing to take into account the evidence and the submissions on quantum of damages given on behalf of the appellants while considering his judgement.***

9. THAT the learned magistrate erred in law and fact by making an award in favour of the plaintiff on special damages when the 1st respondent did not personally incur the expenses.

10. THAT the learned magistrate erred in law and fact by making an award on special damages of ksh.509,109 whose effect was to enrich the plaintiff and not to restore her position.

11. THAT the learned magistrate erred in law and fact by awarding loss of income in the absence of proof thereof.

12. THAT the learned magistrate erred in law and fact by making an award for medical expenses in favour of the plaintiff who in her paragraph 7 of her statement had only sought compensation for the premiums incurred to secure the medical cover.

13. THAT the learned magistrate erred in law and fact by making an award for loss of earning capacity at kshs.168,000 in the absence of specific proof of the existence of the business, bank records, returns, payments to the employees etc.

14. THAT the learned magistrate erred in law and fact by using a multiplicand of 7,000 without any proof and using a multiplier of 24 months for loss of earning capacity which was contrary to the evidence on record.

15. THAT the learned magistrate erred in law and fact by awarding future medical expenses of ksh.100,000 without any direct evidence and without any proper foundation.

16. THAT the learned magistrate erred in law and fact in failing to apply proper legal principles regarding quantum and thus arriving at a bad decision regards being to decided cases.

17. THAT the learned magistrate erred in law and fact by misdirecting herself on the principles of awarding loss of earning capacity in absence of proof.

18. THAT the learned magistrate erred in law and fact by disregarding the evidence of the appellants and considering extrinsic matters thereby basing his judgment on the same thus failing to judiciously exercise his discretion.

19. THAT the learned magistrate erred in law and fact by failing to follow and be bound by the principles of stare decisis.

3) When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submission. I have re-evaluated the case that was before the trial court. I have considered the rival written submissions. Though the appellant put forward a total of 19 grounds, those grounds appear to revolve around liability and quantum, therefore I will determine this appeal in that context without considering those grounds individually.

4) On liability, the appellants are of the submission that trial magistrate erred by failing to consider contributory negligence thus wrongly finding the appellants wholly liable. The appellants further pointed out that the 1st respondent rode on a motorcycle which was being ridden on the wrong side of the road therefore liability should be apportioned to the 1st respondent and the cyclist bearing a higher percentage of liability. The 1st respondent urged this court to reject the appeal as against the order on liability since the decision was backed by credible evidence.

5) A careful re-evaluation of the evidence presented before the trial court reveals that the evidence adduced by the 1st respondent and the driver of motor vehicle registration no. KAK 901G agree that the 1st respondent was a pillion passenger on motorcycle no. K.M.C.A 083W when the accident occurred. It is said that the 1st appellant's motor registration no. KAK 901W which was approaching from the opposite direction collided with the aforesaid motorcycle. While testifying before the trial, the driver of the aforesaid motor vehicle did not blame the motorcyclist nor the 1st respondent for the accident. I am unable to comprehend how the 1st respondent who was a pillion passenger can be held liability. The recorded evidence show that the 1st appellant pleaded guilty to the charge of reckless driving thus admitting the facts leading to the accident. I find no fault in the decision of the trial magistrate on liability. Consequently, the appeal as against the order on liability is dismissed.

6) On quantum, the appellants have argued that the award made by the trial court is exorbitant on general damages and that the same is not commensurate with the injuries suffered. Consequently, this court was invited to interfere with the award on damages. It was pointed out that the award of kshs.850,000 as general damages for pain and suffering was inordinately high. The appellants further argued that the award of ksh.168,000/= as loss of earnings was made without evidence proving that the 1st respondent incurred such expenses. The appellants also argued that the award of ksh.507,109/49 was meant at unjustly enriching the 1st respondent who admitted that her medical bills had been settled by the insurance company.

7) The 1st respondent urged this court to reject the appellants submissions on the appeal as against quantum arguing that the trial magistrate considered all relevant factors in arriving at the award. It was also pointed by the 1st respondent that the award was reasonable and commensurate with the injuries suffered.

8) There is no dispute that the 1st respondent was awarded ksh.850,000/= as general damages for pain, suffering and loss of amenities. The record shows that the learned Senior Principal Magistrate considered the cases cited and the nature of injuries suffered. The trial court considered the fact that the 1st respondent suffered a fracture of the femur and also considered the impact of inflation and found the award of ksh.850,000/= to be reasonable and commensurate. I am satisfied that the learned Senior Principal Magistrate considered the relevant facts and principles in assessing the award on this head, therefore her decision cannot be faulted. The same reasons also apply to the other

awards. In my humble view, I find no merit in the appeal as against the award on quantum. In fact the amount demanded as special damages was pleaded and specifically proved using both documentary and oral evidence.

9) In the end this appeal is found to be without merit. It is dismissed with costs to the 1st respondent.

Dated, Signed and Delivered in open court this 11th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents