



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 540 OF 2015

JACKLINE KAMUNYI KAMAU.....APPELLANT

- V E R S U S -

SIMON KIIRU NJOKI..... RESPONDENT

(An appeal from the judgment and decree of Hon. Chesang (Mrs) RM

in Milimani CMCC No. 7996 of 2013 delivered

on 4th day of November 2015.)

JUDGEMENT

1) On 28th May 2013, Simon Kiiru Njoki, the respondent herein, was knocked down by motor vehicle registration no. KBL 725Z while crossing Waiyaki Way road in Nairobi. As a result of the accident, the respondent sustained a fracture of the right femur which was later fixed with a K-nail. The respondent filed a compensatory suit against Jackline Kamunyi Kamau, the appellant herein, the owner and driver of the aforesaid motor vehicle. Hon. Chesang, learned Resident Magistrate heard the suit and in the end, she awarded the respondent ksh.1,290,000/= for both general and special damages. Being dissatisfied, the appellant preferred this appeal.

2) On appeal, the appellant put forward the following grounds in her memorandum:

- 1. The learned trial magistrate misdirected herself and erred both in law and in fact by holding that the plaintiff had proved his case against the defendant on a balance of probabilities.***
- 2. The learned trial magistrate misdirected herself and erred both in law and in fact by holding the appellant 100% liable for the alleged accident the subject of this suit.***
- 3. The learned trial magistrate misdirected herself and erred both in law and in fact by failing to apportion liability whereas evidence on record called for apportionment of liability against the respondent.***
- 4. The learned trial magistrate misdirected herself and erred both in law and in fact by failing to consider that the plaintiff wholly and/or substantially contributed to the accident and thus arrived at an erroneous finding on liability.***
- 5. The learned trial magistrate erred both in law and in fact by not properly considering the medical report on record and hence arrived at a wrong assessment of damage that are so manifestly excessive as to be erroneous.***
- 6. The learned trial magistrate misdirected herself and erred both in law and in fact by failing to properly consider the defendant's submissions on record thus arrived at an erroneous finding on both liability and quantum.***
- 7. The learned trial magistrate erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis.***

3) When the appeal came up for hearing, learned counsels prompted the court to issue directions to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the appellant put forward a total of 7 grounds of appeal, those grounds revolve the question touching on liability and quantum.

4) On liability, there is no dispute that the appellant was wholly found liable for the accident. It is the submission of the appellant that the

learned Resident Magistrate erred to reach at such a conclusion yet the respondent had failed to present evidence to prove the particulars of negligence therefore failing to discharge the burden imposed upon him under Section 107 of the Evidence Act. It is the submission of the appellant that the respondent should shoulder liability equally. The respondent on the other hand urged this court to dismiss the appeal as against liability arguing that the appellant had failed to tender evidence to controvert that presented by the appellant before the trial court. When the suit came up for hearing, the respondent testified and also summoned a police traffic officer and a doctor to testify in support of his case. The respondent testified as PW1. He told the trial court that he was crossing the road over to the Kangema stage but the appellant's motor vehicle was moving in high speed thus knocking him down. PW1 said that it was a bright day and visibility was good. P. C. George Ogot (P.W.3) told the trial court that the accident occurred when the pedestrian (respondent) was crossing the road on a zebra crossing which was not visible. PW3 also said that the accident is still pending investigation and that the police have not blamed anyone for the accident. The record shows that the appellant did not attend court to tender evidence in support of her defence prompting the trial magistrate to close the defence case. It is therefore clear that the evidence tendered by the respondent and his witnesses were not controverted. The respondent had told the trial court that he was knocked down while crossing the road on a zebra crossing by a motor vehicle which was in high speed. The learned Resident Magistrate believed the evidence of the respondent as unshaken. On my part, I see no reason to fault the opinion of the trial court on liability. Consequently, the appeal against liability has no merit.

5) The appellant submitted that the award on damages was manifestly excessive hence it should be interfered with. The appellant further faulted the learned Resident Magistrate for failing to consider the medical reports and the submission on quantum thus arriving at a wrong decision in assessment of damages. It was pointed out that the second medical report by Dr. P. M. Wambugu indicate that the fracture has fully healed with a permanent incapacity assessed at 8% and that the metal implant would be removed at a cost of ksh.65,000/=. This court was urged to find the award of kshs.1,290,000/= was high and manifestly excessive and to further find that an award of ksh.3,000,000/= as a reasonable and sufficient award. This court was also urged to instead make an award of kshs.65,000/= instead of ksh.90,000/= for the removal of the metal implant. The respondent beseeched this court not to interfere with the awards made by the trial court arguing that the trial court considered the inflationary trends before making the award. It is not in dispute that the respondent suffered a fracture of the right femur which was fixed with a K-nail with a permanent disability assessed at 15% by Dr. Wokabi (P.W.2). According to Dr. Wokabi, the metal implant is to be removed at a cost of ksh.90,000/=. I have re-examined the decision of the trial court and it is apparent that the learned Resident Magistrate considered the inflationary trends in awarding ksh.1,290,000/= for general damages and the evidence of Dr. Wokabi (PW2) in awarding ksh.90,000/= for the removal of the metal plate. The trial magistrate further noted that the appellant did not submit on the award of ksh.90,000/=. With respect, I am persuaded by the appellant's submissions that the learned Resident Magistrate failed to take into account the submissions of the parties and the authorities submitted. This was a fatal error particularly in respect of quantum. I have now considered the submissions filed before the trial court. The record shows that the respondent had asked to be paid ksh.1,500,000/= for general damages. On this head it is also apparent that the respondent had cited past decisions showing that the courts had previously made awards on this head between ksh.700,000/= and ksh.1,300,000/=. The record also shows that the respondent had asked to be paid ksh.90,000/= for the metal implant on the basis of the evidence of Dr. Wokabi (PW2).

6) On the other hand the appellant had urged the trial court to award ksh.350,000/= as general damages for pain and suffering but did not deem it fit to submit on the costs of removing the metal situ. Having considered the submissions of the parties and the authorities cited before the trial court, I am satisfied that though the trial Resident Magistrate did not take into account the parties' submissions and the past decisions cited to her, she nevertheless arrived at the right decision on quantum. In the past, this court has made awards in respect of near similar injuries of between ksh.700,000/= and ksh.1,300,000/=. Therefore an award of ksh.1,200,000/= in my view is reasonable considering the soaring inflationary trends in this country in recent years. In conclusion I find no merit in the appeal as against quantum.

7. In the end, the appeal is ordered dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 4th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents