



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 274 OF 2014

NDWIGA EMILIO NJUE.....1ST APPELLANT

JONATHAN GACUNGA.....2ND APPELLANT

- V E R S U S -

LUCY KARUNGARI.....RESPONDENT

(An appeal from the judgement and orders of Hon. R. A. Oganyo (SPM)

in Milimani CMCC No. 5749 of 2011 delivered on 18th day of June 2014.)

JUDGEMENT

1) Lucy Karungari, the respondent herein, filed a compensatory suit against Ndwiga Emilio Njue and Jonathan Gacunga, the 1st and 2nd appellants respectively for the injuries she allegedly sustained when she was hit by motor vehicle registration no. KBH 973U while lawfully walking on a pedestrian pavement along Juja road in Nairobi on 17.2.2011. The suit was heard by Hon. R. A. Oganyo, learned Senior Principal Magistrate, who in the end entered judgment in favour of the appellant. Liability was apportioned in the ratio of 10% to 90% as against the appellants. The respondent was awarded ksh.846,000/= and ksh.37,282/50 representing general and special damages respectively. The appellants felt aggrieved hence they preferred this appeal.

2) On appeal, the appellants put forward the following grounds:

- 1. The learned magistrate erred in law and fact in finding that the respondent/plaintiff had contributed only 10% against the whole weight of the plaintiff/respondent's evidence on record.***
- 2. The learned magistrate erred in law and fact failing to consider that the plaintiff/respondent was the author of her misfortune.***
- 3. The learned magistrate erred in law and fact in failing to find that the plaintiff/respondent was solely to blame for the accident and not finding her 100% liable for the accident.***
- 4. The learned magistrate erred in law by apportioning the largest blame on liability against the defendant when the evidence on record indicates that the plaintiff/respondent was the cause of the accident.***
- 5. The learned magistrate erred in law and fact by failing to consider that the plaintiff did not prove her case on a balance of probabilities as against the defendant owing to her inconsistent evidence on cross-examination.***
- 6. The learned magistrate erred in law and fact in awarding the plaintiff/respondent general damages of ksh.940,000/= which are excessive and inordinately high taking into account the kind of injuries suffered by the plaintiff/respondent.***
- 7. The learned magistrate erred in law and fact in awarding the plaintiff/respondent excessive damages in contradiction to the existing principles of award of damages.***

3) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. The respondent testified in support of her case without summoning independent witnesses. She told the trial court that on the material date she was waiting to board a

matatu at the Pangani Flyover bus stage. She produced a medical documents showing the serious injuries she suffered as a result of the accident. She stated that the matatu driver was to blame because he caused the matatu to knock her while she was walking on the pedestrian pavement. Though the appellant listed 7 grounds of appeal, those grounds revolve around the question touching on liability and quantum. It is the submission of the appellants that the learned trial magistrate erred when she failed to find the respondent wholly liable.

4) The appellants argued that the trial magistrate erred when she attributed 10% contributory negligence to the respondent yet there was evidence showing she was solely to blame for the accident.

5) The respondent is of the submission that the learned trial magistrate made the correct decision on liability hence her decision should not be disturbed. The respondent pointed out that she adduced credible evidence which was not controverted by the appellants. I have carefully examined the evidence presented by the respondent before the trial court. The respondent was categorical that she was hit by the appellants' motor vehicle registration no. KBH 973U while she was walking on the pedestrian pavement to board a matatu at Pangani Flyover bus stage. This piece of evidence was not controverted by the appellants who failed to summon any witnesses to testify in support of their defence. In fact, it is evident from the record that the respondent was consistent and her evidence was never shaken by the intense cross-examination mounted by the appellants' counsel. In the end, the trial court's decision on liability cannot be faulted.

6) On quantum, the appellants submitted that the learned Senior Principal Magistrate erred when she awarded the respondent general damages of ksh.940,000/= which amount is excessive and inordinately high taking into account the kind of injuries the respondent suffered. The appellants proposed for the award of ksh.940,000 to be reviewed downwards to ksh.250,000/=. The appellants have argued that the aforesaid figure would adequately compensate the respondent. They cited two authorities namely:-

i. **SDV Transami K. Ltd =vs= Scholastica Nyambura (2012) eKLR** where the court awarded ksh.250,000/= for similar injuries.

ii. **Hassan Noor Mohamed =vs= Tal Youn Ann (2001) eKLR** where the court awarded ksh.200,000/=.

7) The respondent was of the submission that the award on damages was reasonable and commensurate with the injuries suffered. The principles to be considered by an appellate court before interfering with an award on damages given by a trial court were restated in **Florence Njoki Mwangi =vs= Peter Chege Mbitiru (2014) eKLR** as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge..... be that it must be satisfied either that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this the amount is inordinately low or so inordinately high that it must be an erroneous estimate of damages.”

8) The medical report of Dr. C. O. Okere produced in evidence before the trial court show that the respondent suffered the following injuries:

a) *Deep cuts on the left forehead.*

b) *Deep cuts on the right elbow*

c) *Fracture of the right humerous*

d) *Fractures of the left proximal tibia and fibula*

9) The doctor assessed the respondent's degree of permanent incapacity of the right leg at 20%, the right arm at 15%. The respondent continued with physiotherapy for 2 years after the accident. I am persuaded that the case which appears to be more relevant to this case is the case of **Mwaura Muiruri =vs= Suera Flowers Ltd and Benson Maundu, Nakuru H.C.C.C no. 189 of 2009** in which the plaintiff was awarded ksh.1,900,000/= for near similar injuries.

10) In the trial court, the respondent had asked to be paid ksh.1,500,000/= but the trial magistrate found the award of kshs.940,000/= to be reasonable. With respect, I agree with the learned Senior Principal Magistrate. The record shows that the trial magistrate considered the nature of injuries and past decisions on comparable injuries and awards of injuries and I am convinced that the award on damages is commensurate with the injuries suffered. The same is neither excessive nor high.

11) In the end, I find no merit in the appeal. The same is dismissed in its entirety with costs to the 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