



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 89 OF 2014

JAMES GACHURU.....APPELLANT

VERSUS

REGINA WANGARI KIMANI.....RESPONDENT

[An appeal from the original judgment and decree of B. Ochieng, Acting Chief Magistrate, in Murang'a CMCC No. 278 of 2008 delivered on 30th August 2013]

JUDGMENT

1. The appellant is aggrieved by the judgment of the lower court dated 30th August 2013.
2. By a plaint dated 4th July 2008, the respondent pleaded that on 1st December 2007, she was a *passenger* in the appellant's lorry registration number KZW 261. The truck was being driven along the Murang'a-Kenol Road. She alleged that it was driven *carelessly* and at a *high speed*; and, that it eventually lost control and overturned. The respondent claimed that she suffered serious injuries in the accident.
3. In a statement of defence dated 5th August 2008, the appellant disputed that the respondent was a passenger in the lorry. He also denied the claim for negligence.
4. The learned trial magistrate found the appellant's driver *wholly* liable for the accident. The court assessed general damages at Kshs 400,000 and special damages in the sum of Kshs 13,000. The respondent was also granted costs of the suit.
5. The appellant filed a memorandum of appeal with *leave* on 17th October 2014. There are six grounds. They can be condensed into *three*. First, that the learned trial magistrate misapprehended the evidence; secondly, that the general damages were exorbitant; and, thirdly, that the learned trial magistrate erred because neither damages for pain and suffering nor special damages were pleaded.
6. At the hearing of this appeal, learned counsel for the appellant relied largely on written submissions filed on 9th February 2018. On 14th November 2017, both learned counsel had agreed to file written submissions. The hearing date was taken in court by *consent*. The respondent's counsel *neither* filed submissions *nor* attended the hearing of the appeal.
7. This a first appeal to the High Court. It is thus an appeal on both *facts* and the *law*. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.
8. The appellant conceded *ownership* of the truck. I will thus move straight to the issue of *negligence*. There was no cogent evidence that the lorry was speeding. But there was unanimity that the road was under construction and that the driver made a sudden turn. The lorry tipped onto its side. I thus concur with the learned trial magistrate that in all the circumstances of this case the driver was wholly liable for the accident.
9. The elephant in the room is whether the respondent was a passenger or injured in that accident. The respondent testified as PW4. She stated-

“I recall 1.12.2007. I was at home and I prepared to take a women [sic] friend to a function. My woman friend is called Wanjiku. The function was at Gaichanjiru. There were also other people to go with us. We started going to the function at noon. Our journey was from Giatu to Gaichanjiru. The friend had hired a vehicle. The vehicle was a lorry hired by Wanjiku. Its Reg. No. KZW 261. We were about 30 people. I was seated at the driver's cabin. We were 3 in the cabin. I was seated near the window. The other people were at the back.

“We did not arrive at the function. We reached Kagia. There was an accident.When the driver saw police, he turned suddenly in panic. He lost control. The vehicle overturned. The driver turned suddenly to enter the road that goes to Gaichanjiru....

“My left hand got injured near the shoulder. Also injured were 3 left ribs which got broken. I lost consciousness. I regained consciousness while at Murang’a Hospital at midnight. I stayed at Murang’a Hospital for one day and I was then taken to Thika Hospital. The owner of the lorry is Gacheru. I was admitted at Thika Hospital for 9 days. From there I started going to hospital as [an] outpatient. I [have] not completely healed. My left shoulder bone still pains.”

10. On cross examination, she conceded that she did not follow up the matter with the police until five months later in June 2008. She had x-ray films showing the fractures. But she had no out-patient records.

11. The passengers in the truck were headed to a *dowry ceremony*. They were members of a group styled *Ciakura Self-help Group*. From the evidence of DW2, Lucrea Wanjiku, the respondent was not their member and was not part of the dowry party. DW2 knew the respondent but she was emphatic that she did not accompany them. The respondent in her evidence claimed that it was DW2 who invited her to the ceremony.

12. The learned trial magistrate was alive to that discrepancy. He said that-

“DW2’s contention that the plaintiff was not a passenger cannot be relied upon considering the fact that she was travelling in the driver’s cabin and the lorry was carrying 30-50 passengers at the rear. It is highly probable that she did not know all the passengers who were on board.”

13. I think the conclusion was faulty. The passengers were about *thirty*. They boarded the lorry from a *common point* at midday heading for a *dowry function*. The respondent was *not* a member of the self-help group. Like I stated, DW2 *knew* the respondent. She is the person the respondent referred to as a “*woman friend*”. DW2 was emphatic that the respondent did not accompany them. The respondent claimed that DW2 invited her to the ceremony. DW2 said she (DW2) rode in the driver’s cabin with the driver and another *man*. The respondent’s version was that she (the respondent) was among the *three* persons riding in the driver’s cabin. Either the respondent or DW2 was lying.

14. There is then the evidence from DW2. She testified that *no* one suffered *serious injuries*; and, that immediately after the accident, *all* the passengers boarded another vehicle and proceeded for the dowry ceremony.

15. There are thus significant doubts that the respondent was a passenger in the ill-fated lorry. I am fortified further by *discrepancies* in documents produced by the respondent at the trial. Dr. Irungu (PW3) only examined the respondent on 16th June 2008 when he filled out the P3 form. That was *six months* after the accident. The P3 is dated 16th June 2006. The accident had not even occurred on that date. As the witness clarified, the error was manifest. The correct year of the examination should be 2008. The doctor testified that the respondent had x-ray films confirming the fractures.

16. Another doctor, Jane Ikonyai (PW1), only examined the respondent on 7th September 2008. The purpose was to prepare a medical report for use in this case (exhibit 1). It was *nine months* after the accident. The respondent carried the P3 form, a discharge summary from Thika Hospital, and treatment notes from Maragua Hospital. In cross examination, PW1 said she could detect the fractures even without the x-rays.

17. The respondent produced a discharge summary from Thika Hospital dated 13th December 2007 (exhibit 4c). The treatment notes were *not* produced. The police abstract form (exhibit 5) was only obtained on 25th June 2008. That was confirmed by PW3.

18. There is thus *no* doubt that the respondent suffered the injuries in question. But she *failed* to prove, on a balance of probabilities, that she suffered the injuries in the *suit accident*. See section 107 of the Evidence Act. See also *Esther Wanjiru Kiarie v Mary Wanjiru Githaka*, High Court, Eldoret, P&A Cause 244 of 2002 [2016] eKLR. The appeal on liability accordingly succeeds.

19. I will now turn to *quantum* of damages. As a general rule, an appellate court will *not* interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Akamba Public Road Services Ltd v Omambia* Court of Appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

20. In *Kennedy Kosgey v Kormoto General Agencies*, High Court, Eldoret, Civil Appeal 36 of 2011 [2014] eKLR, the appellant had suffered blunt trauma to the chest, fracture of the anterior ribs and dislocation of his shoulder. Permanent disability was assessed at 5%. An award of Kshs 400,000 was upheld. From the medical evidence of PW1 and PW3, the respondent suffered fractures to the left clavicle and ribs. There was likelihood of 10% permanent disability. I would not in the circumstances interfere with the award of general damages.

21. Regarding the award of special damages, only the sum of Kshs 3,000 for the *medical report*; and, Kshs 200 for the *Police Abstract Form* were *specifically* pleaded in the plaint. Only the receipt for Ksh 3,000 was produced in evidence. It is trite that special damages *must* be *specifically* pleaded; and, *strictly* proved. See *Kampala City Council v Nakaye* [1972] E.A 446. The special damages specifically pleaded and proved were thus Kshs 3,000. With respect, the learned trial magistrate erred by awarding special damages of Kshs 13,000.

22. But that now is all water under the bridge. The appellant having failed to establish her case on liability, this appeal must succeed.

23. I *set aside* the judgment and decree of the lower court dated 30th August 2013. I *substitute* it with an order dismissing the respondent’s case in the lower court.

24. Costs follow the event and are at the *discretion* of the court. Considering the predicament that has befallen the respondent; and, in the interests of justice, each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 17th day of July 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Gacheru for the appellant instructed by Gacheru J. & Company Advocates.

No appearance by counsel for the respondent.

Ms. Dorcas and Mr. Kiberenge, Court Clerks.