REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 8 OF 2005

CIRIO DEL MONTE (KENYA) LIMITED.....APPELLANT

VERSUS

LITIA MAMU.....RESPONDENT

(Appeal from the judgment of Honourable Mr. Duke M. Morara Resident Magistrate

at Gatundu delivered on 2nd December, 2004 in RMCC No. 750 of 2003)

JUDGEMENT

1. The Respondent herein was the Plaintiff in the lower court where she filed a Plaint dated 14th November, 2003 claiming that on or about 4th August, 2003 she was lawfully travelling as a passenger in motor vehicle KAJ 763Z within Kiboko Estate, when the defendant by its authorized driver, servant and/or agent drove the said motor vehicle so carelessly and negligently that he caused it to be involved in an accident as a consequence whereby she sustained severe bodily injuries, loss and damage. The Plaintiff therefore claimed special damages of Kshs. 2,100 , general damages, costs and interest.

2. The claim was denied by the Appellant who filed a Statement of Defence dated 17th December, 2003 and denied the allegations in totality.

3. Upon hearing the case, the trial magistrate found the Appellant 100% liable for the accident and awarded the Respondent the sum of Kshs. 70,000/- in general damages and Kshs. 7,000 in special damages. Aggrieved by the judgment of the lower court, the Appellant filed this Appeal on the grounds contained in the Memorandum of Appeal dated 7th January, 2005 as follows:

(i) The learned magistrate erred in law and in fact in deciding the case contrary to the weight of evidence.

(ii) The learned magistrate erred in law and in fact and misdirected himself in assessing liability at 100% on the part of the Appellant.

(iii) The learned magistrate erred in law and in fact in awarding special damages of Kshs. 7,000 to the Respondent contrary to the pleadings on record.

(iv) The learned magistrate erred in law and in fact in failing to consider the submissions made on behalf of the Appellant and the issues raised therein.

(v) The learned magistrate erred in law and in fact in failing to consider all the issues presented for determination and thereby arriving at an erroneous decision in respect of the matters and issues which are the subject of this Appeal.

4. From the above grounds of appeal, it is apparent that the Appeal is both against the finding on liability and the quantum of damages. The issues for determination therefore are whether the Respondent proved her case on a balance of probability and whether the award on damages was excessive.

5. At the hearing of the case, the Appellant called one witness whereas the Respondent called two witnesses.

6. The first Respondent's witness was **DR. WERE** (**PW1**) who examined the Respondent on 12/8/2003 and relied on her medical history.

According to the doctor, she sustained chest injuries (blunt trauma) and abdominal injuries (blunt trauma). She had tenderness on the right renal area (kidney area) and he opined that recovery was anticipated.

7. The Respondent **LITIA MAMU** testified that she was an employee of the Appellant and that on the material day, she left work and got into their motor vehicle registration number KAJ 763 Z which got involved in an accident near Kiboko area. She told the Court that the vehicle was over speeding and she suffered chest and abdomen injuries. She was treated at the Appellant's clinic and later at Ngoliba Health Center on 8/08/2003. She stayed at home for 3 weeks after the accident.

8. Mr. Elijah Kipande, a supervisor with the Appellant testified on behalf of the Appellant, as DW1. His evidence was that he was riding a motor cycle from the opposite direction and he witnessed the subject accident. He told the court that the Vehicle swerved and entered a ditch and swung twice. He heard people screaming and went to the scene and found 20 accident victims. That the Respondent herein was among the victims and he confirmed that she was a worker at the Appellant. He stated that the vehicle was not over speeding and that the people who got injured were the ones who were not holding on to the lorry and that the Respondent herein reported to work the following day. On cross examination, DW1 testified that he only heard people say that the people who got injured are the ones that never held the lorry and he did not have any documents to show that the Respondent reported to work the following day contrary to his allegation.

9. An appellate court is tasked with the duty of re-evaluating the evidence before the lower Court and in so doing, it will not interfere with the exercise of discretion by a lower court unless the exercise of that discretion was erroneous in law. This is well captured in **Mbogo & Another -v- Shah (1968) EA 93 at 96**, where it was stated that *an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which the court should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion*.

10. On liability, the standard of proof in civil cases is on a balance of probability. Therefore in this case, all that the Plaintiff ought to have proven is that the Respondent was liable for the accident. It was upon the Respondent to adduce evidence to show that indeed the driver of the subject vehicle was negligent in his driving such that he caused the accident.

10. I have analysed the evidence of the three witnesses. PW2 and DW1 testified as to the occurrence of the accident and both agree that there was an accident involving the subject motor vehicle owned by the Appellant in which the Respondent was traveling in. The Respondent's testimony was that the driver of the vehicle was over speeding whereas the Appellant's witness stated that the driver was not over speeding. In cross examination DW1 testified that the ditch has always been there.

11. On the issue of liability a court can only make a determination based on the evidence placed before it. The evidence before this court is that there was an accident occasioned by the driver of the Appellant' vehicle in which the Respondent was travelling. It was testified that the ditch had always been there in which case, it was expected that the driver ought to have approached the same with caution. If the driver was not speeding, then I do not see the reason why he could not brake and avoid entering the ditch. It is more probable that the driver of the subject motor vehicle was driving at a high seed such that he could not control the vehicle when he noticed the ditch. It is unfortunate that the driver was not called as a witness to shed some light on the actual cause of the accident. He was better placed than DW1 who was not on the steering wheel.

12. In the case of **Ignatius Makau Mutisya Vs Reuben Musyoki Muli [2015] eKLR** relied on by the Respondent, **Lord Denning** was quoted in the case of **Miller –vs.- Minister of Pensions [1947]2 All ER 372.** discussing the burden of proof where he said:-

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

13. From the evidence on record and the testimonies of the Appellant and the Respondent witnesses, the only conclusion is that the Respondent proved her case on a balance of probability and that the accident was as a result of negligence of the driver of the Appellant's vehicle. I find that the magistrate was therefore not in error in finding the Appellant 100% liable for the accident. Still on liability it is on record that the Respondent was at work on 4th day of August, 2003 when the accident occurred. No evidence was tendered before the court to show that she did not board the Appellant's vehicle. The evidence by DW1 that the Respondent did report on duty the following day i.e. on 5th August, 2003 was not supported by any documentary evidence and therefore not convincing.

14. The court has also been asked to fault the judgment of the learned magistrate for failing to apportion blame on the Respondent for failing to take precautions for her own safety by not holding on to the lorry. In this regard, we have the evidence of DW1 who stated *"The people who got injured are the ones who were not holding on the motor vehicle"* This was part of his evidence in chief. However, in cross-examination, he stated that he was not in the vehicle and he only heard people say that the ones who got injured are those that never held the lorry. Those people were not called as witnesses to support his evidence and for that reason, his evidence is at best hearsay evidence which needed corroboration but was not corroborated. In any event, a clear perusal of the defence reveals that the defendant did not plead contributory negligence on the part of the Respondent. It is trite law that a party is bound by its pleadings.

15. The Appellant also took issue with the Respondent's different names being Lydia Mamu and Litia Mamu. The police abstract, the P3 form and one of the treatment cards bears the name Litia Mamu. As rightly submitted by the Counsel for the Respondent, the spelling in the name Lydia and Litia could have been caused by our diversity. In any event the Respondent was well known to the Appellant's witness, DW1 as he was an employee of the Appellant. It is also noted that the issue was not raised in the Lower court and its being raised for the first time, in this Appeal. This is highly prejudicial to the Respondent as she ought to have been given a chance to respond to it in the lower court.

16. On general damages the trial magistrate awarded the Respondent a sum of Kshs.70,000/-. According to the medical report, the main injury was blunt trauma to the chest and to the abdomen. In PW1's opinion she sustained soft tissue trauma with complete recovery anticipated in the course. The report is dated 12th August 2003 which was more than 15 years ago. It is expected that the Respondent has todate, fully recovered. The award, in my view was not excessive in view of decided authorities on similar injuries.

17. In **Kiwanjani Hardware Ltd & Another V Nicholas Mule Mutinda [2008] Eklr** the Respondent was involved in an accident in the year 2005 and suffered blunt injury to the head without loss of consciousness; blunt injury to the neck; a cut to the throat; blunt injury to the left shoulder and back; blunt injury to the chest; blunt injury to the right forearm; deep penetrating would on the left leg with cuts and bruises on the same leg and the court awarded Kshs. 170,000 in general damages.

18. I therefore, find that the award on general damages was not excessive but was in line with the injuries sustained by the Respondent.

19. The law on special damages is trite that special damages must be specifically pleaded and proven. PW1 produced receipts for medical report and court attendance fee of Kshs. 2000 and 5,000/- respectively. The two receipts are on record but in the plaint, the Respondent had prayed for special damages in the sum of Kshs 2,100 including Kshs. 100 for the police abstract. There is no evidence on record to show that the Kshs. 100 was paid for. Therefore, though the receipts on record are for a total sum of Kshs. 7,000 only Kshs.2,100 was proved. Special damages are therefore reduced to Kshs.,2000/- only.

20. The upshot of the above is that, the court finds that the Appeal lacks merit save for the award of Special damages. The Appeal is dismissed with costs to the Respondent.

Dated, Signed and Delivered at Nairobi this 20th day of September, 2018

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L. NJUGUNA

JUDGE

In the presence of:

*****.....For the Appellant***

*****.....For the Respondent***