



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 2 OF 2017

JOYCE MUTHONI KANGA APPELLANT

VERSUS

MICHENI JOSIAS MUSA RESPONDENT

Being an appeal from Decree of the Honourable Senior Resident Magistrate at Chuka (Hon. M. Sudi- SRM) dated 20th September 2016 in Chuka SPM CC No 72/2016.)

J U D G M E N T

1. This appeal arises out of the judgment delivered in the lower court vide ***Chuka Principal Magistrate's Court Civil Case No.72 of 2016***. In that case the appellant herein Joyce Muthoni Kanga had sued Micheni Josias Musa the Respondent herein on account of a road traffic accident where the Respondent's motor vehicle Registration No. KBZ 024F knocked down the Appellant and caused her some injuries. The Respondent had denied liability for the accident.

2. The trial court upon trial however found the Respondent 90% liable and apportioned 10% liability on the appellant finding that as a pedestrian she should have taken "***reasonable care for her own safety while on the road.***" On quantum the trial court awarded the Appellant **Kshs.280,000/-** as general damages and 4,500/- as special damages. Upon taking account of 10% contributory negligence the amount payable to the Appellant was found to be **Kshs.256,050/-** plus costs and interests.

3. The appellant felt aggrieved by the above judgment and preferred this appeal raising the following grounds namely:-

(i) That the trial magistrate erred in law and in fact in failing to find the Respondent 100% liable to the Appellant when there was sufficient evidence to prove the same.

(ii) That the learned trial magistrate erred in law and in fact in relying on unrelated and irrelevant case law and therefore misapprehending the evidence tendered in material aspect thus erroneously awarding the appellant general damages that were inordinately and manifestly low in the circumstances.

(iii) That the trial magistrate erred in law and fact in failing to appreciate the appellant's injuries and evidence tendered and thus reaching a conclusion that was plainly wrong in the circumstances.

4. In her written submissions done through counsel Ms Khan & Associates, the Appellant urged this court to reconsider the evidence tendered and re- evaluate the same with a view to drawing own conclusions.

5. The Appellant has taken issue with the trial court's finding apportioning 10% liability on her when in her view the Respondent was driving at higher speed than the restricted speed of between 20- 30 Kilometre per hour. She has further argued that she was not in control of the Respondent's motor vehicle and did nothing to contribute to the accident. It is her contention that the Respondent left his lane and drove into designated pedestrian path.

6. The Appellant has further submitted that the trial court erred by taking into account irrelevant factors and failed to take into account relevant factor that the Appellant was not to blame as she demonstrated that she was walking inside a barrier barricaded by stones and that she did so as a precaution for her safety.

7. On quantum, the Appellant has faulted the trial court for relying on a decision in ***Maritha Musango - vs- Jackson Maingi Mailu [2016] eKLR*** to award her Kshs.280,000/- in damages. She has contended that the decision relied upon was in respect of an appeal in a case that was decided in 2013 and that the trial court did not consider that 4 years have lapsed since the decision was made. It is submitted that the

appellant suffered a serious fracture in the ankle and that the trial court should have been guided by the decision of **Benjamin Shelemia -vs- Scoopy Enterprises (KISII HCCA NO. 233 of 2006)** where the court awarded **Kshs.450,000/-** for similar injuries. The Appellants contends that with the inflationary trends an award of **Kshs.500,000/-** should have been awarded given the injuries suffered and urges this court to so award the same with costs.

8. The Respondent is opposed to this appeal and has done so vide written submissions by counsel Ms Nduati & Co. Advocate. The Respondent has pointed out that the appellant through her evidence told the trial court that the road was under construction and that only half the road on the left side was usable to both motor vehicles and pedestrians. He has further contended that his evidence that the accident was caused by tyre burst was not refuted by the Appellant and that her claim on over speeding was not supported by evidence tendered as she told the trial court that she did not see the motor vehicle given that she was hit from behind.

9. On quantum, the Respondent has submitted the injuries suffered by the Appellant were well captured by the two medical reports by Dr. Maina & Dr. Njiru. He has contended that by the time of trial all the injuries had healed save for some minor pains. He has supported the trial court's findings on quantum on reliance of the decision in Maitha Musango's case (supra).

The Respondent has further cited the decision in **Richard Mungai Gichuhi - vs- Peter Ngicu Kahia & K.K. promotion Ltd (Nbi HCC No. 2654/97)** where the court made an award of Kshs.180,000/- in a situation where a plaintiff had suffered fracture of the lower tibia, fracture of the left Patella with mild displacement among other injuries.

10. The Respondent has further cited the decision in **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE -VS- A.M. LUBIA & ANOTHER** (citation not given) where the Court of Appeal gave guidelines on when an appellate court can interfere with a trial's court discretion and submitted that there is no basis for this court to interfere with the discretion exercised by the lower court in awarding the appellant Kshs.280,000/-. In the Respondent's view the award was fair and just in the circumstances.

11. This appeal is against both on the findings of the trial court on liability and quantum and I will begin with the liability.

12. It is true that this being the 1st appeal this court mandated by law to re assess the facts presented at the trial and re-evaluate the same and come up with own conclusions in order to determine whether or not the trial court arrived at the correct decision. I have considered at the evidence tendered at the trial on liability. The Appellant's case was hinged on the evidence of two witnesses, namely herself, and a police officer (PW1 Inspector Eunice Semi) who tendered police Abstract (P.Exhibit 1) to prove that the accident occurred and that the Respondent had been charged with a traffic offence of causing death by dangerous driving as well as careless driving. Apart from that there was no further evidence to show if the Respondent was found guilty and convicted of the traffic offence (s). The Appellant's blame on the Respondent was that he was speeding but I agree with the Respondent's contention that she could not possibly have seen how the motor vehicle in question was being driven simply because she was hit from behind.

13. The Appellant has submitted that she was walking off the road when the Respondent left its lane and drove into her path and that of her companion. However, I have gone through the evidence tendered and I have not found any evidence in that regard having been presented to the learned trial magistrate. The Appellant's submissions though well put are devoid of facts presented to the trial court. Had evidence of a conviction on the traffic offences preferred against the Respondent, the Appellant could have had a legitimate reason to complain that she was wrongly apportioned 10% liability. This court has considered the evidence of the traffic officer (PW1) apart from the evidence that the Respondent had been charged with a traffic offence, it is devoid of any other blame on the Respondent particularly in regard to the particulars of negligence that the Appellant in her pleadings had attributed to him.

14. This court has gone through the reasons the trial magistrate relied on to find the Respondent liable for the accident to the extent of 90% liability. The appellant did testify that a speeding motorcycle had just passed them on a section of the road that had been closed on one side due to road repairs. The Respondent was also in agreement with that state of the road and so it required of him to slow down as a precautionary measure. He told the court that he was driving between 20-30 Kilometres per hour but quite obviously at that speed he could have easily stopped or swerved to avoid the accident. The trial magistrate correctly evaluated that evidence and came to the correct conclusion that the Respondent must have been driving at higher speed than the alleged speed between 20-30 Kilometre per hour and hence the finding that he was 90% liable for the accident. The trial court found that the Respondent must have driven over the barriers (stones) over the repaired section and since the appellant did not expect a motor vehicle to use the road because of the stones barricading that lane, the accident occurred. There was no evidence that a warning to motorists had been placed to warn them on the barrier ahead and the fact that the appellant might have felt "**secured**" walking on that lane may be the reason why the trial court found her to some extent 10% liable for not having taken reasonable care for her own safety. That finding of the learned trial magistrate was informed by the evidence tendered and I disagree with the appellant's contention that the finding was preposterous. As I have noted the finding was not absurd or ridiculous as it informed by the evidence tendered and having re-assessed the same, I am unable to find any fault on the finding by the learned trial magistrate on liability.

15. On quantum, it is true that an award on damages is a discretionary matter to be applied judiciously by a trial court and being a discretionary matter, it is now well settled that an appellate court would rarely interfere and can only do so following the principles laid out in the case of **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES & GATHOGO KANINI -VS- AZIRI KAMAU MUSIKA LUBIA & ANOTHER (NBI C.A NO. 21 OF 1984)**

In that court, the C.A made the following guiding observations;

"The principles to be applied by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that 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 so inordinately low or so inordinately high that it must have been a wholly erroneous estimate of the damages."

The above decision was in my view premised on the fact that damages must be commensurate with injuries and should not appear like it is greater or conferring a benefit to a party over the injuries suffered.

16. Going by the above decision I am persuaded that the trial magistrate properly directed her mind on the medical evidence tendered in regard to the injuries suffered. I have perused through the exhibits (P Exhibit 3 and Exhibit 4) and in particular P Exhibit 4 and find that the medical expert opined that the appellant had "**no swelling or deformity**" on the ankle that had been injured. It was found that the "**fracture and other injuries have healed well. There are no permanent incapacity arising from those injuries.**" The injuries suffered therefore were commensurate in my view with the award given by the trial court.

17. The appellant have contended that the trial magistrate erred by not taking into account her authority in the decision of **Benjamin Shelemia -vs- Scooby Enterprises** and taking into account a decision in **Maita Musango's case**. That contention in my view is a misapprehension of the Court of Appeal decision in **KEMFRO AFRICA LTD**. Furthermore I do not find that the decision in **Maita Musango** was an irrelevant factor. The case in my view was relevant to the extent that the injuries though disimilar were similar in nature. I also find that the decision in **Martha Musango** is more recent than the decision in **Benjamin Shelemia's** case

18. This court has re-evaluated the evidence tendered on quantum, and going by the principles in the cited Court of Appeal's case I do not find the award to be so inordinately low given the medical reports which I have noted above. I find no basis to interfere with the learned trial magistrate's exercise of her discretion in arriving at the award given on damages.

In the premises this court finds no merit in this appeal. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Chuka this 11th day of October, 2018.

R.K. LIMO

JUDGE

11/10/2018

Judgment signed, dated and delivered in the open court in presence of Muthomi holding brief for Gatimu for Respondent and Kaimenyi holding brief for Aweno for Appellant.

R.K. LIMO

JUDGE

11/10/2018