



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 25 OF 2016

RICHARD KIETI KATHUU.....APPELLANT

VERSUS

JANE MUSEE.....RESPONDENT

(Being an Appeal from the Judgment in Mwingi Senior Resident Magistrate's Court

Civil Suit No. 52 of 2012 by G. W. Kirugumi R M on 04/07/16)

J U D G M E N T

1. **Jane Musee**, the Respondent herein sued **Richard Kieti Kathuu**, the Appellant and another. He was sued in his capacity as the user, beneficial and/or insured owner of the motor-vehicle registration number **KAJ 968C, Nissan Datsun Minibus Matatu** (subject motor-vehicle) that the Respondent was travelling in. The claim was for special damages in the sum of **Kshs. 2,500/=**, general damages, costs and interest at Court rates.
2. It was pleaded that on or about the **2nd day of May, 2012** at about **3,00 p.m.**, the Respondent was travelling aboard the subject motor-vehicle when it was involved in a road traffic accident. She blamed the driver of the motor-vehicle for negligence.
3. In his statement of defence, the Appellant denied the occurrence of the accident in the manner described in the Complaint, he denied the alleged negligence on his part and averred that if the Respondent suffered injuries she was to blame for failing and/or neglecting to fasten the safety belt, hanging on the door and pulling the hand of her husband and jumping off a moving motor-vehicle.
4. The learned trial Magistrate considered evidence adduced and used **Civil Suit No. 52 of 2012 (Now HCC.A No. 26 of 2016)** as a test suit where liability was apportioned at **50:50%**. It was opined that the Respondent contributed to the accident by jumping out of the motor-vehicle.
5. On quantum of damages the Court awarded damages of **Kshs. 100,000/=** in general damages which was apportioned at **Kshs. 50,000/=** and **Kshs. 7,500/=** in special damages. Plus costs and interest.
6. Aggrieved by the Judgment, the Appellant appealed on the following grounds: The case was not proved to the required standard, apportioning liability at **50:50%** after observing that the Respondent had contributed to her own injuries was erroneous; That the learned Magistrate erred in disregarding the P3 and relying on a Medical Report that was prepared by an unqualified Medical Officer; The case was fabricated and full of contradiction; The doctrine of "*res ipsa loquider*" was not applicable; damages awarded were excessive; and the learned Magistrate was biased by disregarding the Appellant's evidence.
7. The Appeal was canvassed by way of written submissions that I have duly considered.
8. As stated in the test suit (**HCC.A 26 of 2016**) I reiterate my duty to re-evaluate the evidence, assess and make my own conclusions as stated in the case of **Selle vs. Associated Motor Boat Company Ltd (1968) EA 123 at 126**.
9. On liability, I set aside the decision of the learned trial Magistrate apportioning liability and substitute it with an order holding the Appellant and his Co-Defendant in the Lower Court, jointly and severally **100%** liable for the accident.
10. On quantum, at the outset, the Respondent was seen at **Mwingi District Hospital**. She adduced in evidence treatment notes issued. Subsequently a P3 form was filled at **Matuu District Hospital** based on the treatment notes. The only injury sustained by the Respondent was a swollen left lower limb. This was in contrast with what the findings of the questionable "**Daktari Gitau**" who opined that she

suffered blunt trauma to the left lower limb, chest and right leg. Evidence that the trial Court should have disregarded.

11. In addition to cases that persuaded me in **HCC.A No. 26 of 2016** I take into consideration the case of **Kigaraari vs. Aya (1982 – 88) I KAR 768** where it was stated as follows:

“Damages must be within the limits set out in decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed onto members of the public, the vast majority of what cannot afford the burden in the form of increased insurance and increased fees.”

12. In the case of **Chairman Agricultural Contractors Ltd vs. Fred Barasa Mutayi Civil Appeal No. 29 of 2012** where the Plaintiff sustained soft tissue injuries that were expected to heal in a period of eight (8) months, he was awarded **Kshs. 150,000/=** on appeal. A swollen leg was a minor soft tissue injury. Injuries sustained having healed completely I find a sum of **Kshs. 20,000/=** being reasonable. The sum awarded of **Kshs. 7,500/=** is not in dispute.

13. In the result, I allow the appeal partially by setting aside the award on general damages and substitute it with an award of **Kshs. 20,000/=**, special damages in the sum of **Kshs. 7,500/=**. Interest on the sum awarded shall accrue from the date of Judgment in the Lower Court.

14. The Appellant shall bear costs of the Appeal.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 14th day of November, 2018.

L. N. MUTENDE

JUDGE