



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
HC CA 9 OF 2014
CONSOLIDATED WITH HC CA 10 OF 2014

FELIX KIJAVI WAMBUA.....APPELLANT

VERSUS

CAROLINE NKATHA MUTINDA.....RESPONDENT

AND

CAROLINE NKATHA MUKINDIA.....APPELLANT

VERSUS

FELIX KITAVI WAMBUA.....RESPONDENT

JUDGEMENT

1. The appellant has appealed against the judgement of the acting Principal Magistrate of 15th April 2014 which found the appellant 100% liable in negligence to the respondent and proceeded to award general damages for pain and suffering in the sum of Kshs 800,000/-, special damages in the sum of Kshs 6,500/- together with costs and interests from the date of the said judgement.

2. The judgement is based on the evidence of the respondent who testified as PW 2 and that of the investigating Police Officer Cpl Moses Wekesa, who testified as PW 3. The respondent testified that she was a lawful fare paying passenger in the motor vehicle registration No. KBE 752E, which was driven by the appellant along Embu-Meru Road. It was also her testimony that the appellant was the owner of the said motor vehicle. She further testified that the appellant while attempting to overtake a motorcycle collided with motor vehicle registration No. KAY 861J which was driven from the opposite direction. It is also her evidence that the accident occurred on the correct lane of motor vehicle KAY 861J.

3. The evidence of the respondent is corroborated by that of Cpl Moses Wekesa (PW 3). It was his testimony that he charged the appellant with the offence of causing death by dangerous driving and the matter was still pending in court when he testified. Cpl Moses Wekesa further testified that he visited the scene of accident on the same day. He further testified that the collision occurred on the right side of the road as one faces Meru. The point of collision was on the pavement. His further testimony was that the road had a bend and there was a continuous yellow line at the scene of the accident.

4. He also testified that overtaking was not allowed at the scene of the accident due to the continuous yellow line. This witness took a statement from the respondent who told this police officer that the appellant was attempting to overtake a motorcycle. He finally testified that the accident occurred,

because the appellant was over speeding and that according to him was the reason why he was unable to control the motor vehicle. Based on his observation of the scene, he denied that it was not possible for the motorcycle to have caused the accident.

5. The evidence of the appellant was that he was driving motor vehicle registration No. KBE 752A from Embu towards Meru. While approaching a place called Ena, he suddenly saw a motorcycle emerge from a feeder road. As a result, he tried to avoid hitting it. It is at that point in time that he saw motor vehicle KAY 861J from the opposite direction and he then told the respondent that they were going to collide with the vehicle from the opposite direction. He denied that he was over speeding. While under cross-examination, he blamed the accident on the motorcycle from the feeder road. He also admitted that the respondent was a passenger in his motor vehicle.

6. The appellant has raised 7 grounds in his memorandum of appeal. In ground 1, he has faulted the trial court both in law and fact for failing to consider the evidence of the plaintiff which corroborated the evidence of the respondent. I have considered this ground of appeal and I find that the accident occurred on the correct lane of motor vehicle KAY 861J. I find that the accident occurred during broad daylight. I further find that there was a continuous yellow line and for that reason the appellant was not supposed to overtake the motorcycle. It was because of his overtaking the said motor cycle that led to the accident. The point of impact was on the pavement on the correct lane of motor vehicle KAY 861J. In the light of this evidence, the trial court rightly found that the appellant was 100% to blame for the accident. It therefore follows that this ground of appeal is without merit and is hereby dismissed.

7. In ground 2, the appellant has faulted the trial court both in law and fact for disregarding the evidence of the respondent even though the evidence of the respondent corroborated the pleadings and the evidence of the respondent. In this regard, the evidence of PW 2 is relevant. According to her evidence, the two motor vehicles had a head on collision. Her evidence was that the appellant's motor vehicle attempted to overtake a motorcycle while at that same time, there was an oncoming car from the opposite direction. While under cross-examination, PW 2 testified that there was a motorcycle ahead of the appellant's vehicle which emerged from the left hand side as they were facing Meru direction. This forced the appellant to swerve to his right hand side and in the process he collided with the motor vehicle registration No KAY 861J.

8. She testified that the weather was sunny. I have considered this evidence which I find that to be corroborative. However, I find that the appellant was over speeding in the circumstances. The reason being that the weather was sunny and therefore his visibility was not affected in any way. There was a continuous yellow line which meant that he was prohibited from overtaking. In the circumstances, the trial court was entitled to find that the appellant was 100% liable in negligence to the respondent. I therefore do not find merit in this ground of appeal and I hereby dismiss it.

9. In ground 3, the appellant has faulted the trial court both in law and fact in failing to find that the traffic police gave opinion evidence since they were not at the scene of the accident at the material time. In this regard, the evidence of No. 58468 Cpl Moses Wekesa (PW 3) is instructive. This police officer visited the scene of the accident on the same day at about 12.40 p.m. He found both motor vehicles at the sight. He also found that the collision occurred on the right hand side as one faces Meru. According to him, the point of impact was on the pavement. He also observed that the road had a bend and that there was a continuous yellow line.

10. According to him, overtaking was not allowed. He then produced the abstract as exhibit 5. Based on his evidence, he charged the appellant with the offence of dangerous driving. It is also his evidence that the accident occurred before the feeder road from Embu direction as one faces Meru. It was also his evidence that the motor vehicle KBE 752E was over speeding. The point of impact according to him was about 4.5 meters from the feeder road and he concluded that it was not possible that the motorcycle caused the accident.

11. In view of this evidence, I find that the appellant was over speeding. It was a sunny day. There was a continuous yellow line and for that reason, I find that there was evidence which was rightly believed that

the appellant was totally in the wrong as regards this accident. The fact that he was charged with causing death by dangerous driving is not evidence in itself. That is the police officer's opinion. It does not constitute evidence. In terms of **section 47A of the Evidence Act (Cap 80) Laws of Kenya**, it is only the finding of the court that a driver who has been convicted of negligent driving that constitutes evidence of negligent driving. Even then, the convicted driver is allowed to lead evidence on the issue of contributory negligence notwithstanding the said conviction on a charge of negligent driving. In view of this evidence, I find that this ground of appeal is without merit and is hereby dismissed.

12. In ground 4, the appellant has faulted the trial court both in law and fact for failing to consider and appreciate the written submissions of the appellant on record. I have considered the judgement of the trial court in this regard and I find that the submissions of the appellant's counsel both in respect of damages and on other issues were considered. The trial court made references to the authorities cited by counsel for the appellant in assessing the quantum of damages. In the circumstances, I find that this ground of appeal is lacking in merit and I hereby dismiss it.

13. In grounds 5 and 6, the appellant has faulted the trial court both in law and fact in failing to find that the plaintiff's pleadings and evidence tendered were incapable of sustaining any award of damages. In this regard, the trial court found that the respondent suffered the following injuries: left supracondyle tenderness, compound fracture of the right distal radial/ulna bone, loss of part of the distal radial bone, left femur supra supracondyle fracture with intra-articular extension, right spiral femur bone fracture and multiple metatarsal bone fracture right foot.

14. Additionally, the trial court took into account the authorities cited in support of the quantum of damages and awarded Kshs 800,000/- as general damages for the injuries sustained. It should be borne in mind that the assessment and award of damages is in the discretion of the trial court. An appellate court should not interfere with an award of the trial court merely because it could have awarded a much higher figure in terms of quantum. I have considered the authorities cited and the injuries sustained by the respondent and I find that the award was slightly on the higher side, but not to the extent warranting intervention by this court. In the circumstances, I find that there is no merit in grounds 5 and 6 which I hereby dismiss them.

15. In ground 7, the appellant has faulted the trial court both in law and fact for considering irrelevant matters in arriving at the decision in favour of the respondent. I have considered the judgement of the trial court in this regard and I find that it did not take into account extraneous matters in finding the liability and quantum in favour of the respondent. This ground of appeal is without merit and is hereby dismissed.

16. The appellant's appeal is hereby dismissed in its entirety and the costs of this appeal are hereby awarded to the respondent.

17. The respondent filed a memorandum of appeal in which she raised two grounds of appeal. In that ground one, she has faulted the trial court for erring in both law and fact in awarding her general damages in the sum of Kshs 800,000/-, which was manifestly and inordinately too low in the circumstances to the extent of amounting to an erroneous estimate of loss actually suffered by the respondent. She has also urged this court to reevaluate the evidence, consider the submissions of her counsel and the authorities relied upon and make its own conclusions by enhancing the awards of general damages.

18. As a first appeal court, I am required according to **Peters v. Sunday Post Ltd (1958) EA 424** to reassess the entire evidence and the quantum of general damages awarded by the trial court and come to my own conclusions based on the evidence tendered at trial. I have done so and I have come to the conclusion that the trial court did not err in the assessment of the quantum of damages awarded to the respondent. I therefore find that the appellant's appeal in civil appeal No. 10 of 2014 is without merit and I hereby dismiss it with costs to the respondent (Felix Kijavi Wambua).

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **4th** day of **JANUARY** **2017**.

In the absence of Mr. Kariithi for the appellant and in the presence of Mr. Kamunya holding brief for the Mr. Ogweno for the respondent .

Court clerk Njue

J.M. BWONWONGA

JUDGE

4.01.17