REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 197 OF 2011

PHYLIS KAWINZI KITHOKA ……..……..APPELLANT

VERSUS

GRACE WAYUA MWANZA.....RESPONDENT

(An Appeal arising out of the judgment of Hon. S.A. Okato, Ag. PM delivered on 19th December 2008 in Kangundo Senior Resident Magistrate's Court Civil Case No. 61 of 2005)

JUDGMENT

Introduction

The Appellant was the original Defendant in Kangundo Senior Resident Magistrate's Court Civil Case No. 61 of 2005, and has appealed against the judgment of the learned trial Magistrate, which was delivered in the said suit on 19th December 2008. The Respondent was the original Plaintiff in the said suit, and he sued the Appellant for injuries he suffered arising out of an accident that occurred on 8th March 2005, involving motor vehicle registration number KAD 807 K. The Appellant was alleged to be the registered owner and driver of the said motor vehicle. The learned magistrate in his judgment found the Appellant 100% liable for the said accident, and awarded the Respondent a total award of Kshs 96,000/= as general and special damages.

The Appellant has appealed against the said judgment and moved this Court through a Memorandum of Appeal dated 5th December 2011. His grounds of appeal are as follows:

1. That the learned Principal Magistrate erred in law and fact in holding the Defendant liable for the accident contrary to the evidence on record.

2. That the learned Principal Magistrate erred in failing to hold that the Plaintiff had failed to prove negligence against the defendant as alleged in the Plaint.

3. That the learned Principal Magistrate erred in law and fact in awarding an excessive award on general damages which was not supported by the medical evidence produced in court so as to amount to an erroneous estimate of damages.

4. That the learned Principal Magistrate erred in failing to adequately consider the written submissions and authorities filed and cited by the Defendant's counsel.

5. That the learned Principal Magistrate erred in failing to dismiss the Plaintiffs claim wholly in view of the inconsistent evidence of the plaint vis-a-vis the pleading in the plaint.

The Facts and Evidence

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661 , Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424.**

I will therefore firstly proceed with a summary of the facts and evidence given in the trial Court. The Respondent instituted a suit in the lower court by filling a Plaint dated 10th May 2005, as further amended on 28th September 2007, wherein he claimed that on or about 8th March 2005 at 8.00am along Kangundo-Nairobi road at Koma area, the Appellant so carelessly and/or negligently drove, controlled and/or managed motor vehicle registration number KAD 807K Hyundai such that he caused the same to lose control, veer off the road and ram into the rear of motor vehicle registration number KAG 775G, a Toyota *Mata*tu, as a consequence of which the Respondent, who was lawfully travelling as a fare paying passenger in motor vehicle registration number KAG 775G sustained serious bodily injuries .

The Respondent claimed for general damages for pain, suffering, and loss of amenities and special damages of Kshs. 3,200/=.

In response, the Appellant filed a defence dated 2nd June 2005 wherein he denied the allegations that he was the driver of motor vehicle registration number KAD 807 K, that the Respondent was a passenger in motor vehicle registration number KAG 775G, or that an accident occurred on 8th March 2005 as alleged, and put the Respondent to strict proof. Further, he denied that the said accident was caused by his negligence, as well as the particulars of negligence alleged. He averred that if the accident occurred as alleged, then the same was entirely caused by and/or substantially contributed by the negligence on the part of the driver of motor vehicle registration number KAG 775G.

From the record of the trial court proceedings, the suit proceeded to full hearing on 29th August 2008, when the Respondent testified as PW1. Two witnesses Dr. Wairagu Ann (PW2) and P.C Lawrence Karisa (PW3) gave evidence for the Respondent at a further hearing on 25th September 2008, after which when the Respondent closed her case. The Appellant gave evidence on the same date as DW1 before closing his case.

The Issues and Determination

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellants' learned counsel, Muriithi & Ndonye Advocates, filed submissions dated 28th November 2016, while the Respondent's learned counsel, Mutunga & Company Advocates filed submissions dated 24th October 2016.

On the issue of liability, it was submitted by the Appellant that he was not liable for the accident which is the subject of this appeal, as the evidence adduced by the Respondent is largely contradictory. It was the Appellant's contention in this respect that PW1 testified that motor vehicle registration number KAG 775G (also referred to herein as "the *matatu*") stopped to allow children to cross the road, while PW3 testified that the investigating officer after carrying out investigations found that the Appellant intended to overtake the *matatu* but before he could do so, a lorry appeared from the opposite direction and he retreated into his lane and rammed into the rear of the *matatu*. Further, that it was the Appellant's evidence that he was trying to overtake the *matatu* that had stopped on the road to pick passengers when he saw a lorry on the opposite direction and he retreated back to his lane only to ram to *matatu*.

It is the Appellant's submissions had the *matatu* been safely parked off the road to pick passengers being that there was no bus stop at the said scene of the accident, he would not have rammed into the said vehicle and thus the driver of the *matatu* KAG 775G was partly to blame for the said accident. The Appellant also submitted that the owner of motor vehicle KAG 775G, one Jesulum Mwarania, was enjoined in the trial suit through an application dated 26th April 2006, and a third party notice was served

against him filed on 27th October 2006, but that the trial court failed to apportion liability against him despite evidence presented to court that the said *matatu* was picking up passengers at the undesignated stage.

The Respondent on the other hand submitted that she and her witnesses proved negligence against the Appellant as per the findings of the lower Court. Further, that the Appellant admitted during cross examination that had he kept the required distance between his motor vehicle registration number KAD 807K and motor vehicle registration number KAG 775G, the accident in question would not have occurred.

On the issue of quantum it was the Appellant's contention that the treatment notes clearly indicate that when the Respondent sought treatment she could not explain how she sustained the ankle injury, and that this was reiterated by PW2 during cross examination. The Court was urged to hold that Respondent sustained only posteriorly neck pains, and pain and tenderness of the low back injuries as result of the said alleged accident, and that the damages awarded by trial court were inordinately high compared with the extent of the injuries suffered .

It was submitted that an award of Ksh. 50,000 as general damages would be satisfactory in this case in view of the Doctor's assessment that the injuries suffered would heal in two weeks. Reliance was in this respect placed on the decisions in **African Highlands Produce Co. Ltd vs Francis B. Mososi (2005) eKLR**, in which the court awarded sh. 40,000 as general damages in a case where the claimant sustained soft tissue injuries that healed leaving him with only a scar and no permanent disability; and in **Samwel Waweru Wangombe vs Mohammed Abdi Asman & Another, Embu Civil Appeal No. 8 of 2008**, in which case the plaintiff was awarded Kshs.40,000/- for bruises on the right upper hand and left hand shoulder, and which injuries healed without any permanent incapacity.

The Respondent on her part argued that the award given to her was not excessive but fair in the circumstances, bearing in mind the awards given by Courts for similar injuries, and urged this Court not to interfere with the same. Reliance was placed by the Respondent on the decisions in **Tarmal Wire Products Ltd vs Ramadhan Fondo Ndegwa, Mombasa HCCA No. 243 Of 2010**; **Spin Knit vs Johnstone Otara, Nakuru HCCA No. 9 of 2004**; and **Patrick Kamuya Alias Gachau Patrick & Another vs Asaph Gatundu Wanjiku, Nyeri HCCA No. 109 Of 2012**

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that there are two issues raised that require determination. The first is whether there was a basis for finding the Appellant 100% liable for the accident that occurred on 8th March 2005. The second issue is whether the damages awarded against the Appellant were justified if they are found to be liable.

On the first issue of liability, I have evaluated the evidence given in the trial Court, and note that evidence was given by both PW1 in this respect that on 8th March 2005 she was in motor vehicle registration number KAG 775G which was travelling from Nairobi to Tala, when at Koma it stopped to allow children to pass, which is when a motor vehicle with registration number KAD rammed to the rear of their motor vehicle. Further, that when she got out of the motor vehicle she found the driver of the other vehicle trapped and bleeding. Upon cross-examination she stated that the motor vehicle she was in was on the tarmac when it was hit, and that it was not off the road.

The evidence of PW3 on the other hand as recorded in the by the trial Court was as follows:

> **"The driver of the saloon car namely Pius Kawinzi Kithoka intended to overtake the matatu, but before he overtook the matatu a lorry appeared from the opposite direction. He retreated into his lane and rammed into the rear of the matatu. The matatu was picking up passengers. It was at Koma bus stage . The driver of the Hundai saloon is to blame for the accident."**

Upon cross-examination PW3 testified that the bus stage had not been designated by the Highway Authority, and there was no space for the car to pull off the road at the stage.

The Appellant in his testimony did state that he was driving motor vehicle KAD 807K, and that the *matatu* KAG 775G stopped ahead of him as it was picking passengers on the road. He tried to overtake it and saw a lorry entering into the main road. Further, that to avoid hitting the lorry he went back to his lane and rammed into the *matatu* .

The evidence by the Respondent, PW3 and the Appellant established that it is the Appellant's vehicle registration number KAD 807K that rammed into motor vehicle registration number KAG 775G, which was at the time stationary on the main road. Therefore the Appellant was negligent for reason of not keeping a proper lookout as he was overtaking when the road was not clear to do so, and being the major cause of the accident by not being able to control his motor vehicle as a result of which it rammed into motor vehicle KAG 775G.

I however also find that the driver of motor vehicle registration number KAG 775G did contribute to the accident as he was had also stopped on the road , and therefore obstructed the smooth flow of traffic. I accordingly apportion liability at 70:30 as between the driver of motor vehicle registration number KAD 807K and the driver of motor vehicle registration number KAG 775G The trial magistrate therefore erred in finding the Appellant wholly liable for the accident, and I find that the Respondent was negligent and did contribute to the accident and apportion liability at the ratio of 70:30 in favour of the Respondent.

As regards the issue of damages, it is an established principle of law that that the Appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5)**.

The Appellant in this respect did not contest that the Respondent suffered posteriorly neck pains and pain and tenderness of the low back. However, he contested the injuries pleaded by the Respondent that she suffered on the left foot and ankle, which were pain and tenderness of left foot on stepping and swelling around the left ankle joint. The testimony by PW2 during the trial was however clear that the Respondent sustained a left ankle joint swelling which was painful. The medical report she produced in the trial Court as the Plaintiff's exhibit 7 which was dated 22nd March 2005 also confirmed this position.

I note in this respect that the judicial authority relied upon by the Appellant in **African Highlands Produce Co. Ltd vs Francis B. Mososi (supra)** was for less injuries which was a cut wound on the right ankle and in which the Plaintiff was awarded Ksh 40,000/= as general damages, and in **Samwel Waweru Wangombe vs Mohammed Abdi Asman & Another(supra)**,the Plaintiff was injured on the right hand and shoulder, and cut with glass, and was awarded Kshs 150,000/= as general damages. The judicial authorities relied upon by the Respondent did not have any comparable injuries, with the injuries therein being much more serious, and were mainly cited for the position as to when this Court can interfere with a trial Court's finding on quantum.

I therefore find that the trial magistrate did not err in awarding a sum of Kshs 90,000/= as general damages in light of the decisions cited by the Appellant. The award of Kshs 6,000/= as special damages was however in error, as the amount pleaded and proved as special damages was Kshs 3,200/=, by way of the police abstract and a receipt for the medical report of Kshs 3,000/=.

I accordingly allow the appeal to the extent of finding the driver of motor vehicle registration number KAG 775G 30% liable for contributory negligence, and reducing the award of special damages, and revise the award by the learned trial magistrate as follows:-

a) General damages for pain suffering and loss of amenities…….....Kshs. 90,000/=

To be apportioned and paid as follows:

i) By driver of motor vehicle registration

Number KAD 807K ……..... Kshs. 63,000/=

ii) By driver of motor vehicle registration

Number KAG 775G …….....Kshs. 27,000/=

b) Special damages as pleaded and proved ……...…Kshs. 3,200/=

To be apportioned and paid as follows:

i) By driver of motor vehicle registration

Number KAD 807K …….....….. Kshs. 2,240/=

ii) By driver of motor vehicle registration

Number KAG 775G ……Kshs. 960/=

TOTAL AWARD **Kshs. 93,200/=**

I accordingly aside the award of total damages of Kshs 96,000/= and substitute it with an award of total damages of Kshs 93,200/= to be apportioned as between the between the driver of motor vehicle registration number KAD 807K and the driver of motor vehicle registration number KAG 775G at the ratio of 70:30 as held in the foregoing .

Each party shall bear their costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 14TH FEBRUARY 2017.

P. NYAMWEYA

JUDGE