REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 8 OF 2015

BILHA NYAMBURA CHEGE…….....…….APPELLANT

VERSUS

CONSOLATA AKINYI AUMA…….....…….RESPONDENT

(Being an Appeal from the Judgment of the Principal Magistrate ***Hon. P.Ochieng in Maseno CMCC NO.198 of 2010 delivered on 16th January 2015)***

JUDGMENT

Consolata Akinyi Auma ***(hereinafter referred to as respondent)*** sued **Bilha Nyambura Chege** ***(hereinafter referred to as appellant)*** in the lower court claiming damages for injuries allegedly suffered on 4th April 2009 while the respondent was travelling as a fare paying passenger in appellant's motor vehicle number KAW 67B Nissan UD Bus.

The appellant/defendant filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs.

The learned Magistrate heard the parties and their witnesses and directed himself that the issues for determination were:

1. ***Whether the an accident occurred as alleged***

2. ***Whether plaintiff was a bonafide passenger and claimant***

3. ***Which of the parties was liable***

In a judgment delivered on**16th January 2015,** the learned Magistrate found that the appellant had proved her case on a balance of probability, apportioned liability at 100% as against the appellant and awarded the respondent general damages in the sum of Kshs. 70,000/-

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal. The Memorandum of Appeal dated 12th February 2015 and filed in this court on 12th February 2015 set out 6 grounds of appeal that may be summarized into two major grounds that:-

1) The Learned Magistrate erred in fact and in law in finding on liability that the plaintiff had proved her case on a balance of probability yet the case was not proved

2) The Learned Magistrate erred in fact and in law in awarding the plaintiff quantum of damages whereas she never tendered in evidence the initial treatment notes to prove any injuries related to the accident

SUBMISSIONS BY THE PARTIES

Appellant's submissions

The advocates appeared before me on 14th February 2017 and made oral submissions.Mr.Rotich,advocate for the appellant, submitted that the respondent did not seek treatment until 18 days after the accident and that the injuries she was treated for are not related to the accident that occurred on 4th April 2009. He urged the Court to allow the appeal with costs as the oral evidence adduced did not support the documents produced.

Respondent's submissions

Mr. Okeyo, advocate for the respondent, opposed the appeal and submitted that the appellant's witness had at page 34 confirmed that dates on treatment records are not necessarily the date of treatment. He urged the Court to dismiss the appeal with costs as the oral evidence adduced supported the documents produced.

This court has very carefully considered the pleadings, proceedings, exhibits, the grounds of appeal and the oral submissions by both counsels.

The evidence

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif v Ali Mohammed Solan (1955, 22 EACA 270)."***

In **Makube v Nyamuro (1983) KLR 403,** the Court of Appeal reiterated that

> ***a Court on Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.***

The respondent stated that after the accident on 4th April 2009; she suffered injuries to the scalp, left ear and right hand and was treated at Yala Sub-District Hospital as shown by treatment notes produced as PEXH.2.She further stated that she continued with treatment at the same hospital and was issued with a treatment book PEXH. 1 and a P3 form PEXH.3. She likewise stated that she was treated at Thika District Hospital but the record does not show that the treatment notes in respect thereof were tendered in evidence. Boniface Obaye, a clinical officer attached to Yala Sub-District Hospital in his testimony stated that the respondent was treated on 22nd April 2009, at Yala Sub-District Hospital for injuries that she suffered on 4th April 2009 as shown by treatment book marked PEXH. 2 and was that she was issued with reference number 14315/09.He produced respondent's P3 form as PEXH.3.

The appellant's first witness, Joy Atieno, confirmed that the respondent was treated at Yala Sub-District Hospital on 22nd April 2009 as shown by Out Patient Department Register marked DEXH. 2. The appellant's 2nd witness, Peter Kanyagia Munai, stated that the respondent was not treated at Thika District Hospital on 23rd April 2009. He produced a patient's register in support thereof.

Analysis and Determination

I have perused the entire record of appeal and considered the submissions of counsels for both parties. It is apparent that the appellant does not dispute that an accident occurred on 4th April 2009 but disputes that the respondent was injured in that accident. The appellant's appeal is mainly based on the fact that the respondent did not seek treatment until 22nd April 2009.

From the evidence on record, the appellant's first witness Joy Atieno confirmed that the respondent was treated at Yala Sub-District Hospital on 22nd April 2009 and a P3 form was filled which shows that she was injured in an accident that occurred on 4th April 2009.In cross-examination, the witness in her explanation for the non-inclusion of the respondent's name on the hospital register for 4th April 2009 stated:-

"Once in a while, we don't record on same day but patients can be referred for the next day".

The question that begs an answer is whether such evidence by the appellant's first witness, can be rubbished as non-consequential, to be ignored, relegated and subordinated to the treatment book. In my humble and sincere view,such evidence could only be doubted if there was some material evidence demonstrating differences between the date of injury and the evidence by the respondent. There is no such evidence of differences here. The probability that the treatment book was issued to the respondent on a day other than the date she was first treated was well corroborated by the evidence of the appellant's witness as stated hereinabove and the learned magistrate's finding on that fact is upheld.

The pleadings particularized the injuries suffered by the respondent as bruises to the scalp; cut wound left ear robe and bruises on right hand. Similar injuries are noted on treatment notes from Yala Sub-District Hospital; on the P3 filled on 22nd September 2009 and on the medical report dated 3rd February 2010.Treatment notes issued at Thika District Hospital were not tendered in evidence and are therefore unworthy of any analysis.

I notice that the trial magistrate did not consider or make reference to any of the cited cases or even make any comparisons in arriving at a figure a Kshs. 70,000/- general damages. He only referred to the injuries sustained by the appellant as soft tissue injuries. That notwithstanding, I find that the indeed the injuries sustained by the respondent were soft tissues and I am persuaded that there is no justification to disturb the award arrived by the lower court.

In the result and for the reasons given herein above, I find that the learned trial magistrate undoubtedly arrived at the correct decision based on facts and evidence presented before the court and hence dismiss this appeal with costs of the appeal to the respondent.

DATED AND DELIVERED THIS 16th DAY OF March, 2017

T. W. CHERERE

JUDGE