REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 377 OF 2014

EDQVIST KARL.....1st APPELLANT

WANYANDEH ANDREW.....2ND APPELLANT

-V E R S U S –

VERONICA NDUTA CHEGE.....RESPONDENT

(Being an appeal from the judgment of the Hon. R. A. Oganyo (Mrs) S.P.M. delivered on 23rd July 2014 in Civil Suit No. 2978 of 2011)

JUDGEMENT

1. Veronicah Nduta Chege, the respondent herein, filed an action before the Chief Magistrate's Court, Nairobi seeking for damages against Edqvist Karl and Wanyandeh Andrew, the 1st and 2nd appellants respectively for the injuries she sustained as a result of a traffic accident that occurred on 23rd May 2011 involving motor vehicle registration no. KBM 153V along Kibiko-Wangige road. It is alleged that the aforesaid motor vehicle at the material time was owned and driven by the 1st appellant while the respondent was a passenger therein. Judgement was delivered in favour of the respondent and against the appellants. Being aggrieved, the appellants preferred this appeal.

2. On appeal, the appellants put forward the following grounds in their memorandum.

> ***1) THAT the learned magistrate erred in fact and in law in failing to find that the 1st appellant was forced off the road in an attempt to avoid a head on collision with a third party motor vehicle that had encroached onto his path of travel.***
>
> ***2) THAT the learned magistrate erred in fact and in law in failing to find that the accident arose due to the slippery road surface.***
>
> ***3) THAT the learned magistrate erred in fact and in law in failing to hold that the plaintiff was injured as a result of the 1st appellant taking quick evasive maneuver in order to avoid a head on collision that could have caused extensive injury to the occupants of both vehicles.***
>
> ***4) THAT the learned magistrate erred in fact and in law in failing to hold that the appellant's motor vehicle was controlled by use of a speed governor and thus erred in fact and in law in holding that the 1st appellant's vehicle was being driven at a high speed while the same was evidently fitted with a speed governor in the absence of evidence to the contrary.***

5) THAT the learned magistrate erred in fact and in law in holding that had the 1st appellant driven at a reasonable speed he would have escaped a head on collision by slowly swerving while there is no expert evidence to support the said proposition.

6) THAT the learned magistrate erred in fact and in law in failing to exercise the doctrine of a balance of probability in ascertaining the speed of the appellants' vehicle.

7) THAT the learned magistrate erred in fact and in law in holding that the 1st appellant 80% liable despite no proof of reach of duty of care on the part of the said appellant.

8) THAT the learned magistrate erred in fact and in law in failing to find that the Plaintiff wholly and or substantially liable for her injuries for failing to properly utilise the seat belt provided in the appellant's motor vehicle.

9) THAT the learned magistrate erred in fact and in law in awarding general damages of kshs.3,000,000/= that were excessively high in the circumstances.

10) THAT the learned magistrate's judgement on liability and special damages does not conform with the law.

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

4. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions and the authorities cited. At the trial, the respondent personally testified and summoned two other witnesses in support of her case. Veronicah Nduta (PW2) told the trial court that on 23.5.2011, she was on board of motor vehicle registration no. KBM 153V driven by Edqvist Karl. She said the motor vehicle lost control and landed in a ditch near Wangige area. She got injured and was taken to Kikuyu P.C.E.A Kikuyu Hospital, Meridian Hospital and later Nairobi West Hospital for treatment. PW2 said that the motor vehicle was in high speed before zig zagging and losing control. P.C. Alex Osoro (PW3) stated that the accident was self involving and occurred when the driver was avoiding a head on collision with another motor vehicle. Dr. Nashir Bhanji (PW1) produced a medical report he prepared showing the injuries the respondent suffered.

5. The 1st appellant (DW1) testified alone in support of the defence case (appellants). He told the trial court that on the material day he was on his way near Wangige when he saw two matatus coming towards him while competing and was trying to overtake another. DW1 said he swerve off the road to avoid hitting them making the car to slide and hit a nearby tree. DW1 said that when he regained his conscience he found the respondent missing from the motor vehicle. He said he suspected that the respondent had not worn the seat belt and that is why she was thrown out of the vehicle. DW1 confirmed in cross-examination that the motor vehicle veered off the road rolled and hit a tree on the left side of the muddy spot off the road. The learned trial Senior Principal Magistrate considered the evidence and came to the conclusion that had the respondent put on the seat belt she would not have been thrown out of the vehicle. The trial magistrate consequently found the respondent 20% liable.

6. Though the appellant put forward a total of 10 grounds of appeal, those grounds were condensed to three. Grounds 1, 2 and 3, were argued together as one ground. It is the submission of the appellants that the accident was as a result of factors beyond their control. It is argued that the 1st appellant was forced to go off the road to avoid a head on collision with a third party and that the road was slippery. The respondent is of the view that the trial magistrate took into account those factors and that is why she apportioned liability. The trial magistrate formed the opinion that the 1st appellant drove the motor vehicle in high speed and that is why the vehicle lost control when he swerve to avoid a head on collision. On my part, I have re-evaluated the evidence presented before the learned senior principal magistrate and I am convinced that the trial magistrate came to the correct decision on liability.

7. The second ground is a combination of grounds 4,5,6,7 and 8 of appeal. In these grounds the appellants are basically attacking the decision on apportionment of liability. The appellants are saying the apportionment of liability in the ratio of 80% : 20% is erroneous and contrary to the evidence tendered. The respondent is of the view that the trial magistrate properly exercised her discretion. I have re-examined the evidence tendered and the manner the trial magistrate analysed the same. It is clear from the judgment of the trial court that all the relevant evidence and factors were considered before apportioning liability at 80% against the appellants. Consequently I find no fault in the manner the learned Senior Principle Magistrate apportioned liability.

8. The third and final ground is a combination of grounds 9 and 10 in which the appellant are challenging the award on quantum. It is the submission of the appellants that the award on both special and general damages are excessively high. I have reconsidered the medical evidence tendered. There is no dispute that one of the respondent's kidneys was damages as a result of the accident. I have also looked at the past decisions in respect of such injuries. I find the award on general damages not high nor excessive. The respondent submitted credible evidence to prove special damages therefore the trial court's decision cannot be impugned.

9. In the end, I find no merit in the appeal. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 10th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent