



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 80 OF 2014
SICILIA K.THOMAS.....APPELLANT
VERSUS
ELDORET EXPRESS.....1ST RESPONDENT
PHILIP CHANZU.....2ND RESPONDENT

(Being an appeal from the Judgment/Decree by Honourable F. Kombo Principal Magistrate Nakuru delivered on 6th June 2014)

JUDGMENT

1. The appellant was on the 7th August 2010 a fare paying passenger in motor vehicle Registration Number KBB 285W along the Nakuru-Nairobi road when it collided with another Registration No.KAR 810Y the property of the 1st Respondent and being driven by the 2nd Respondent. She sustained injuries and sued the respondents for damages arising therefrom.

Upon hearing the suit, the trial magistrate dismissed the suit with costs on grounds that the plaintiff failed to establish negligence on the part of the driver of the vehicle, the 2nd Respondent.

This appeal was filed as a result of the said dismissal of the suit.

2. The Appellant preferred four grounds of appeal. They are summarised into two, on liability and on *quantum* of damages.

The appellant's case before the trial court was urged through four witnesses.

PW2 was Dr. Obed Omuyoma. He produced a medical report on the appellants injuries prepared on the 4th March 2011. I will come to the injuries later in this judgment.

3. **PW1 was the appellant Sicilia Kerubo Thomas.**

Her evidence was that an Eldoret Express Bus hit the vehicle she was travelling in.

She produced Motor vehicle records to prove ownership of the bus as the 1s Respondent. She stated injuries and urged the court to award her damages, and blamed the bus driver for the accident.

Upon cross examination, she stated that she saw the bus hit the *matatu*.

4. A police officer **P.C. Stephen Lengopito** produced the police abstract issued to the appellant from the Nakuru Traffic Base. He testified as DW3 in this case.

He was not the investigating officer. He nevertheless told the court that driver of the vehicle was charged in **Traffic Case No. 1851 of 2010** which was not yet finalised and that the bus driver was blamed for the accident. He had with him the police file. Referring to the sketchplan, he pointed that the point of impact was slightly towards the right side of the middle of the road as one faces Nakuru direction, and that the bus swerved and hit both the *matatu* and a pedestrian as it tried to avoid hitting the pedestrian who nevertheless was knocked down fatally. He further stated that the sketch map did not indicate any skid marks before the point of impact. He produced the police file and investigation report as DExt. 1, 2 and 3.

5. Upon close of the appellants case, it is on record that upon application, and by consent of parties, proceedings in **Nakuru CMCC No. 1124 2010** was adopted in the case.

6. This is the first appellate court. I shall reconsider and reevaluate the evidence before the trial court, and find out whether the trial court's findings and conclusions are based on the said evidence. **Selle -vs- Associated Motor Board Ltd (1968) EA**. I have considered defence proceedings in **Nakuru CMCC No. 1124 OF 2010**. They are found in the supplementary Record of Appeal filed on the 18th January 2017. The parties in the said **CMCC No. 1124 of 2010** are **Melsha Moraa John -vs- Eldoret Express Ltd and Philip Chanzu**. I shall consider the defence evidence only.

7. **DW1 was the 2nd Respondent – Philip Kebo Chanzu**, the driver of the accident Bus Registration No. KAR 810Y with 62 passengers. About 8.00pm while round Mbaruk area, it was his testimony that he saw the vehicle from the opposite direction so he deemed his lights, then as the two vehicles were about to bypass each other, a pedestrian ran from the right to the left facing Nakuru. That he swerved to avoid hitting him but it was too late, he knocked him then swerved and hit the *matatu*. It was his testimony that he had not seen the pedestrian whom he blames for the accident. He testified that he was driving at a speed of 50-70 KPH and that there was a trench on the left and could not have moved to that direction as he would have killed all the passengers in the bus. He blamed the pedestrian whom he stated was a madman as reported by people at the scene of accident.

8. Upon such evidence, the trial Magistrate made a conclusion that the appellant failed to show that the accident was as a result of the 2nd respondents negligence on the reason that she failed to make any reference to the suspiciously insane pedestrian who was hit and killed by the 2nd respondent as she claimed to have witnessed the accident. According to the trial magistrate she did not prove that the vehicle was being driven at an excessive speed, and that the police office suggested that the 2nd respondent made an effort to try and evade knocking down the unnamed pedestrian who ran across the road at a short distance at the face of the 2nd respondents vehicle.

9. I have dutifully analysed the evidence above and submissions by both counsel.

There is no dispute that the 2nd Respondent swerved to the left after hitting the pedestrian, and onto the oncoming *matatu* and a collision occurred. The appellant submissions are that the Bus should have swerved to the left to avoid hitting the *matatu*. The *matatu* was on the left lane coming from Nakuru direction while the bus was coming from Nairobi towards Nakuru, so on the left lane. Both were on their correct lanes before the accident.

Given that scenario the bus ought to have swerved to the extreme left as it faces Nakuru, not to the right where it met the *matatu* that was coming from Nakuru towards Nairobi.

Explanation given by the Bus driver (2nd Respondent) was that there was a trench to the extreme left and if he did so he would have killed the 62 passengers in the bus. However, I find that had he been on the speed of 50-70 Kph as he stated, it would have been possible to slow down and avoid losing total control of the bus and hitting the *matatu* that was on its right lane.

10. The appellant who was in the *matatu* may not have seen the pedestrian who dashed onto the road hence not mentioned the pedestrian's act of dashing onto the road. She cannot be blamed for that as a passenger in a vehicle is not expected to be on a watch out of what is happening outside the vehicle and more so in front. The rationale by the trial magistrate is therefore not supported by any practical or legal arguments. **(Robert Gichuchu Maina -vs- John Kamau (2004) e KLR.**

11. It is trite that a lawful passenger, who has no control of the manner a vehicle is being driven can not be held liable for an accident involving the same vehicle unless there is something expressly demonstrated that the passenger failed to do.

Speed of a vehicle in relation to a particular road conditions is a material factor and within the control of the driver only. It is the duty of the driver to keep a proper look out for other road users, sane or insane in this case. He is however not expected to do the impossible when a person dashes onto the road at a very short distance therefore giving the driver no chance to break or swerve to avoid hitting the person, and in trying to avoid the accident, swerves one way or another, and hits another vehicle.

This seems to me to be the scenario in this case and that is confirmed by the investigation report.

See **Robert Gichuchu Maina -vs- John Kamau (2004) (Supra)** and **Ben Mangesa -vs- Edith Makungu Lande (2013) e KLR** where the court could not find how a passenger could be blamed upon occurrence of an accident unless something that the passenger did is demonstrated.

12. In the present case the appellant was not said to have been in control of the vehicle or done anything to contribute to the accident. There is no reason express or otherwise on what grounds the trial magistrate made conclusions that the appellant failed to show that the accident was as a result of the 2nd Respondents negligence.

The issue of liability ought to have been focused on the driver of the Bus (2nd respondent) and the deceased pedestrian, and could only be done by use of the investigation report, and eye witnesses.

13. The 2nd respondent was charged with the offence of dangerous driving but the case was not finalised. If the deceased had not died, he would probably have been held to have contributed to the accident.

The respondents in their submissions place the burden of proof on the appellant (**Section 107 – 109 Evidence Act**), unlike in the case cited **V.O.W. -VS- Private Safaris (E.A) 2010 e KLR** where the court could not fault the driver of the vehicle holding that an accident could be caused by many factors.

14. In the result, it is my finding that the accident was substantively caused by the 2nd respondent as the driver and agent of the 1st respondent, and the deceased pedestrian. No blame whatsoever was placed upon the driver of the *matatu* the appellant was traveling in. I find the trial Magistrate's conclusion and Judgment dismissing the appellant's case unsupported by the evidence on record nor the law. I proceed to set it aside and substitute it with a judgment that the 2nd respondent was substantially to blame for the accident to the extent of 70%.

15. **On quantum of damages**, I have considered the injuries sustained by the appellant. The proposal of Kshs.300,000/= advanced by the appellant is not supported by any cited decisions. It is but a statement. I uphold the award of Kshs.150,000/= being damages for pain and suffering as reasonable.

The above sum shall be subjected to a 30% reduction leaving a sum of Kshs.105,000/= to the appellant. Special damages were neither awarded nor appealed from.

The award on general damages above shall attract interest from the date of the trial court judgment on the 6th June 2014.

16. The appellant shall have costs of the appeal.

Dated, Signed and Delivered this 20th of July 2017.

J.N. MULWA

JUDGE