



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 445 OF 2012

HANNAH WAITHIRA MUNGAI. APPELLANT

VERSUS

STEPHEN MUIRURI NJAU. 1ST RESPONDENT

NJERU DAVID. 2ND RESPONDENT

(Being an appeal from and against the judgment and decree delivered by the Hon. Mrs. R. A. Otieno Senior Principal Magistrate at Githunguri in Civil Case No. 17 of 2010 on 30th July, 2012)

J U D G M E N T

The Appeal herein arises from the Judgment and decree by R. A. Otieno Senior Principal Magistrate at Githunguri in Civil Case No. 17 of 2010.

The Appellant who was the Plaintiff in the lower court matter filed the plaint dated 26th February, 2010 against the Respondents seeking General Damages for pain and suffering, special damages, costs of the suit and interest. The cause of action arose from an accident that occurred on the 13th January, 2010 along Kibichoi Road when the Plaintiff was travelling in Motor vehicle KAQ 728F as a fare paying passenger. The Plaintiff averred that the accident was caused by negligence on the part of the 1st Defendant who is said to have been driving the aforesaid motor vehicle as an authorized agent of the 2nd Defendant. The particulars of negligence were set out in paragraph 4 of the plaint.

It was further pleaded that as a result of the said accident, the Plaintiff sustained serious injuries as set out in paragraph 6 of the plaint.

The Defendants filed a defence on the 1st April, 2010 which they later amended on the 3rd day of May 2011 wherein they denied that he Plaintiff was a lawful passenger in the said motor vehicle. They also denied the occurrence of the accident and the particulars of negligence attributed to the 1st Defendant.

In the alternative and without prejudice, the Defendants averred that the accident, if any as the Plaintiff may prove, was caused by negligence on the part of the Plaintiff. The particulars of such negligence are set out in paragraph 5 of the defence.

It is further pleaded that the Plaintiff's claim is based on fraud and misrepresentation and thus the same is an abuse of the court process. The particulars of fraud and misrepresentation are set out in par 5A of the defence.

The matter was heard and judgment delivered on the 30th July, 2012 dismissing the Plaintiff's suit.

The Plaintiff/Appellant appealed to this court on the 27th August, 2012 and has listed 4 grounds of Appeal as follows: -

1. That the learned Senior Principal Magistrate erred in law and fact in holding that the Appellant was not a victim of the accident subject matter against the weight of all availed evidence.
2. That the learned Senior Principal Magistrate erred in law and fact in failing to appreciate what the real issues in controversy at the trial were.
3. That the learned Senior Principal Magistrate erred in law and in fact in failing to appreciate the degree of proof required in Civil Cases and/or litigation.
4. That the learned Senior Principal Magistrate erred in law and in fact in failing to interrogate any discrepancy in the Appellant's name on the face of other documentary evidence produced in evidence by and on behalf of the Plaintiff/Appellant herein.

He has urged the court to allow the appeal and order that the judgment and decree of the lower court be set aside and/or varied.

Before the lower court, the Appellant testified as PW 3 and told the court that she was travelling as a passenger in motor vehicle KAQ 728F when it was driven so fast that the driver lost control of the same after which it rolled several times and landed at a sloppy area. As a result of the accident she sustained injury to her right leg. She was taken to Ngewa Health Centre where she was treated before she was referred to Kiambu Hospital. She reported the accident at Kibichoi Police Station where she was issued with a P3 and police abstract which she produced as exhibits together with the treatment records. She blamed the driver of the motor vehicle for the accident.

A Corporal J Muendo gave evidence as PW 2. It was his evidence that he established from his investigations that Anne Waithera Mungai was also a victim of the same road traffic accident and he issued her with a P3 form and a police abstract. On cross-examination he told the court that he was at Kibichoi Police Station when the accident occurred. The accident was reported through a phone call by A P Corporal Muchina now deceased who was also not at the scene and could not state the victims.

PW 2 proceeded to the scene but did not find the victims at the scene as they had been moved to Ngewa dispensary. At the said dispensary, he found five of the victims of the said accident had been treated and discharged while some had been referred to Kiambu Hospital. He got the names of those who had been treated at Ngewa dispensary in the outpatient register for the day. He found 4 victims at the dispensary and among the victims that he found was Anne Waithera Muigai. Further in his evidence, he said that it was not Ann Waithera he found but Monicah Njeri Ngugi. After he left the hospital he included the list of those that he found in hospital in his investigation diary which forms part of the file. However, he finally confirmed that Hannah Waithera was a victim of the accident. He investigated the case.

The defence called one witness namely CIP Jane Muvya who was the OCS in-charge of Kibichoi Police Station. She told the court that she was summoned to produce a letter dated 17th August, 2011 which was written by the former OCS Regina Mbithi from whom she took over as the OCS. The letter was in response to an enquiry which had been received with regard to the accident herein. She confirmed that the accident did occur and that it was reported at Kibichoi Police Station. She produced a list of people who were claiming but who were not involved and Anne Waithera Mungai was one of them. According to her, the police abstract which had been issued to them was wrongly issued without the knowledge of the OCS.

The appeal was disposed off by way of written submissions which this court has duly considered together with the memorandum of appeal and the proceedings of the lower court.

In my view the following are issues for determination: -

- 1) Was the Appellant involved in the Road Traffic Accident that occurred on 13th January, 2010 involving motor vehicle KAQ 728F?
- 2) Who was to blame for the accident?
- 3) Is the appellant entitled to damages and if so, what is the quantum thereof?

When dealing with this appeal, I am alive to the fact that, this being a first appeal, this court is under duty to reconsider the evidence, re-evaluate it and draw its own conclusion and that the court will only interfere with the exercise of judicial discretion where the finding is based on the misapprehension of the evidence or the magistrate is shown demonstrably to have acted on wrong principles in reaching the findings that she did.

Back to the case at hand, was the Appellate involved in the accident?

With regard to this issue, it is the Respondent's contention that the Appellant was not a victim in the accident. I have perused the proceedings of the lower court and the documents that were produced as exhibits. Exhibit 1(a) is the medical report by Dr. G. K. Mwaura wherein the name of the Appellant is given as Hannah Waithera Mungai. Exhibit No. 2 is the treatment record and the name that appears on it is Hannah Waithera Gathungu and as noted by the learned magistrate, the police abstract bears two different dates being 19th February, 2010 and 19th January, 2010. In the plaint that was filed in court the date of the accident is indicated as 13th January, 2010. The three names are different and no attempt was made by the Appellant to reconcile them and to prove to the court that they belong to the same person who is herself.

The Respondent has also alleged fraud on the part of the Appellant. This contention is based on the letter dated 17th August, 2011 produced as defence exhibit 1. The Respondent also relied on the testimony of DW 2. They averred that the Appellant was among the people listed in the said letter who were not involved in the said accident. According to DW 1 the Police Abstract and the P3 forms issued to the persons listed therein were possibly issued to the said persons without the knowledge of the OCS. It was her further evidence that in conducting investigations to establish the position, it was discovered that the records held at Kibicho Police Station where the accident was reported did not contain the Plaintiff's name. This includes the Occurrence Book where the first report was recorded. Similarly, the police file did not contain the names of the 7 people, the Appellant being one of them. DW 1 told the court that she did not know how the names came to appear in the police accident file as the contents of the file should correspond to the initial report which appears in the Occurrence Book.

DW 1 took the lower court though the process of receiving a report on road traffic accident and the investigations. It was her evidence that injury claims if people are taken to hospital and the police do not find them at the scene, their details are later included as a late entry in the occurrence book. It is the occurrence book that contains all the details and particulars of an accident. According to her, it was unusual for the occurrence book not to contain names of the victims of an accident which has been reported to the police and that if a person reported the accident, it should appear as a late entry in the occurrence book and in the investigations diary in which case, they are then issued with genuine relevant documents like the police abstract.

The investigating officer in the case was Corporal Muendo who testified as PW 2. In his testimony, he told the court that Ann Waithera Mungai was a victim of the said accident. It is worth noting that at first he had told the court that upon arrival at the scene of the accident, he learnt that the passengers had been taken to hospital and he proceeded to Ngewa dispensary where he found 4 victims at the dispensary and among them was Ann Waithera Mungai but later on in his evidence, he sought to correct what he called an error and told the court that it was not Ann Waithera that he found at Ngewa dispensary. After he left the hospital, he included the list of those he found in the hospital in the investigations diary. Though he told the court that Ann Waithera was among the victims of the accident, he did not tell the court whether she was among the victims who were treated in Kiambu District Hospital yet she was confirmed that she was not among the ones who were treated at Ngewa Dispensary as there were no records at the dispensary

to that effect.

PW 2 did not mention anywhere in his evidence that the Appellant was treated at Kiambu Hospital though the Appellant herself told the court that she was referred to Kiambu District Hospital. The court also notes that the treatment records for Kiambu Hospital were not produced as exhibits yet Dr. G K Mwaura noted in his medical report that he relied on the treatment notes from Kiambu District hospital. Looking at the said medical report, the doctor did not see the treatment notes from Ngewa Dispensary, if at all, they were there. He just noted the treatment card of Ngewa Dispensary in the accident history that was given by the patient himself who is the appellant in this case.

In the absence of the treatment cards from Kiambu District Hospital, and in view of the evidence of DW 1 and that of the Appellant herself, it is doubtful that she was involved in the accident that occurred on the 13th January, 2010. There are very many material contradictions in their evidence which raises doubts as to whether the Appellant was a victim of the accident. In my view, the evidence of DW 1 is more credible and I am convinced that she was telling the court the truth.

In the premises aforesaid, it's the finding by this Honourable Court that the learned magistrate was right in arriving at the decision that she did and I would have no reason to interfere with her finding. Her assessment of damages was also reasonable and had this court allowed the appeal, I would have also upheld the award of Ksh.400,000/- as proposed by the learned magistrate. The Appeal is hereby dismissed with costs to the Respondents.

Dated, signed and delivered at Nairobi this 6th day of October, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... *for the appellant*

..... *for the Respondent*