REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CIVIL APPEAL NO. 18 OF 2014

RUTH MAWEU..... APPELLANT

V E R S U S

FRANCISCAH PETER ..... RESPONDENT

(From the decision in Kyuso RMCC No. 10 of 2012 – E. M. Musyoka – RM)

JUDGMENT

This matter commenced through an amended plaint dated 24th July 2012 amending an earlier plaint dated 24th January 2012. In the amended plaint, the Respondent who was the plaintiff in the trial court alleged to have been hit by a vehicle registration GK A720M a Land Rover on 20th August 2010 at Kyuso. She alleged that the appellant was the driver of that motor vehicle, and that the said driver was negligent in driving the vehicle and as such the accident occurred. She gave particulars of the negligence of the appellant. She also gave particulars of the injuries suffered, as well as particulars of loss. She asked that the appellant be compelled to honour or comply with the terms of agreement dated 21st August 2011. She also claimed general damages for pain, suffering and loss of amenities, and also special damages and costs of the suit.

In the plaint, the respondent listed eye witnesses to the incident and claimed that the appellant had signed an agreement admitting causing the accident, and agreed to cater for her medical expenses and pay for the services of a house help.

In response to the plaint, the appellant filed a defence to the claim and denied causing the accident and the negligence alleged against her. The defence was a brief general denial. She did not file a defence to the amended plaint.

The case proceeded to hearing and judgment was delivered in which the trial court awarded to the respondent a sum of Kshs 672,161/= for breach of contract. The court also awarded Kshs 50,000/= for general damages for the said breach of contract. In addition, the court awarded costs of the suit to the respondent.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal through a Memorandum of Appeal filed on 6th November 2014 by her counsel Kinyua Mwaniki & Wainaina Advocates, on the following grounds:-

1. That the learned trial magistrate erred in law and in fact when he arrived at a decision against the weight of evidence and made an award based on speculations and his own research unsupported by evidence before him.
2. The learned trial magistrate erred and mis directed himself in law when he found and awarded

damages for breach of contract under two headings i.e damages for breach of contract and general damages for breach of contract.

3. The learned trial magistrate erred in law and fact when he showed open bias against the defendant by dismissing all her evidence and submissions.
4. The trial magistrate erred in law and fact and showed open bias by holding that the defendant (appellant) filed her submissions out of time while there was no time frame and the same having been filed more than one month before judgment was delivered.
5. The learned trial magistrate erred in law when he completely ignored the submissions of both counsels on law and quantum of damages and relied on his own irrelevant issues and convenient High Court decisions to reach decisions in law and an excessively high award, three times an ambiguous amount (sic) sought by the plaintiff in submissions.
6. The trial magistrate erred in law when he held that per the provisions of Section 7(1) (of the Government Proceedings Act) it is the Government of Kenya that should have been(sued) yet proceeds to award an excessively high award against the defendant and without explaining why the case against the defendant was sustained.
7. The learned trial magistrate erred and misdirected himself in law when he found that the suit before him was based on contract, seemingly dismissed claim for general damages for personal injuries yet awarded damages under them and supported by his own research cases in disregard of all submissions.
8. The learned trial magistrate erred in law when he in effect held that the plaintiff could sustain a claim for general damages and claim for breach of contract in the same suit against the defendant.
9. The learned trial magistrate erred in law when he found that the plaintiff had proved a claim for personal injuries while no such claim was made nor support documents like the P3, treatment notes or police abstract on road was produced.(sic)
10. The learned trial magistrate erred and misdirected himself in law and fact when he found that there was breach of contract while each of the parties denied signing the contract and none of the witnesses to the alleged agreement was called to court to testify.
11. The learned trial magistrate erred in law and fact when he failed to find that no demand letter was ever sent to the defendant and that no costs were awardable.
12. The learned trial magistrate erred in law and fact when he allowed and relied on alleged OB which was neither produced and or marked as exhibit but purportedly produced through submissions.

Parties counsel filed written submissions to the appeal. On the hearing date Mr. Kinyua learned counsel for the appellant highlighted the written submissions he relied on the 12 grounds of appeal and stated that the judgment was against the weight of the evidence as there was no proof that the appellant was the motor vehicle driver. Secondly, there was no proof of any agreement to settle the case nor was police a abstract produced. Counsel emphasized that the alleged contract was not proved by independent witnesses, and in addition the respondent actually said that the document was signed by her husband, and as such there was no contract with her.

Counsel also submitted that the trial court showed bias when the magistrate stated that the submissions of the appellant were filed out of time while no time limit had been set for filing those submissions. It was also wrong for the magistrate to say that the amended plaint should have been followed by an amended defence. Counsel submitted further that bias of the court was reflected in the fact that the appellant asked in submissions damages of Kshs 250,000/= but the magistrate went out of his way to award more than Kshs 700,000/= as damages.

Counsel also submitted that the magistrate did not consider the provisions of the Government Proceedings Act as the Government was not sued which was wrong. In the counsel's view, the appellant being an employee of Government should not be sued without the government being sued. Counsel relied in the case of ***Clement Ndungu Njuguna -vs- Stephen Sheteka and Attorney General (2004)eKLR.*** Counsel also submitted that the demand letter was important where costs were concerned. Counsel relied on a case of ***Jackson Musyoka Nduda -VS Lochap Limited – Machakos HCC No. 172 of 2001.*** Counsel submitted that the respondent herein should not have been awarded costs as no demand letter was sent.

With regard to exhibits, counsel submitted that the police officer PW3 who testified in court was not

the Investigating Officer, and infact produced no exhibit in court but merely gave out on history and walked away. However later in submissions the plaintiff alleged wrongly that the OB had been produced which was not the position. Counsel submitted that document MFI, 2,3 were marked for identification only but the magistrate wrongly found that they were produced as exhibits. According to counsel, the doctor produced only one document and the plaintiff also produced one document. Lastly, counsel submitted that the plaintiff should have elected to sue either on tort or for breach of contract, not both at the same time.

M/s. Mumbo Learned counsel for the respondent relied on the written submissions filed. Counsel elected not to make oral submissions. I have perused and considered the written submissions of the respondent.

At the trial the respondent Franciscah Muya Peter testified as PWI. It was her evidence that on 20th August 2010 at 8.30a.m she was headed to the D.C's Office Kyuso from the market and outside that office, a Government Vehicle GK A720M appeared from the Administration Police's camp and veered off the road and hit her while standing off the road. She stated that the vehicle was driven by Ruth Maweu whom she knew well. She suffered a broken right hand ulna and sustained scars. She was first taken to Kyuso Police Station and then to Kyuso District Hospital, then to Mwingi District Hospital. She was later treated at Bishop Kioko Hospital in Machakos Town.

She identified medical notes which were undated from Kyuso District Hospital in the name of Fransciscah Kilonzo. She also identified medical notes from Bishop Kioko Hospital dated 26th July 2011. She stated that she was discharged from Bishop Kioko Hospital on 2nd of April 2011, and identified the discharged documents. She stated further that she was attended at West End Medical Solutions and identified the Medical report therefrom dated 16th November 2011.

According to her, on the 21st of August 2011 the driver of the said G.K motor vehicle went to her home and they had discussions and the driver agreed to pay her medical bills and hire a house help for her. She stated that she entered into agreement with the driver in the presence of eight people including herself and the driver. She stated further that the driver signed the documents but later refused to honour the agreement. She stated further that the driver assisted her for a while and then abandoned her. She produced the agreement as exhibit No. 5. and stated that she had not fully recovered from the injuries suffered even though the incident occurred more than two years earlier. She asked for compensation and costs.

In cross examination she stated that the vehicle belonged to the Government but admitted that she had not sued the Government but only Ruth. She stated that the documents she relied upon had not being signed by any Government Officer. She admitted not having a P3 form and a police abstract. She also did not have treatment notes from Kyuso hospital. She stated that she was not sure whether investigations had been done by the police, nor did she know whether the vehicle was insured. She did not have any document to prove expenditure towards paying bills. She said that the last sentence of her agreement with Ruth was drafted by the OCS, and that it was signed by her husband because she was injured. She admitted that there was nothing to show that she paid the medical bills. She said that the vehicle swerved for about 20 metres off the road, before hitting her and that she had nothing to prove that the vehicle belonged to Government. She maintained that she wanted to be compensated.

In re-examination she stated that she intended the document, (agreement) to bind her and that was the reason why she sued the appellant. She stated that a demand letter had been written but the appellant had refused to pay.

PW2 was Dr. Peter Kilonzi who worked at Machakos General Hospital but also partly worked at Bishop Kioko Hospital, and had a private clinic called West End Clinic in Machakos. It was his evidence that Franscisa Kilonzo appeared before him for medical examination in 2011 with a history of having been hit by a motor vehicle while standing on the road side. According to this witness, the patient had a fracture on the radius and ulna and X-rays showed that the fragments arising therefrom were displaced. The history was that the patient was admitted at Bishop Kioko Hospital on the 31st of March 2011 and

discharged on 2nd April 2011. The patient underwent an operation to fix the bones, and would have to attend hospital for follow-up. He stated that an open reduction and fixation operation was conducted. He made a report dated 16th November 2011 which he produced as exhibit 4. He stated that he saw the X-rays which confirmed the fragments. He stated that the cost of preparing the medical report was Kshs 10,000/=, and costs of attending court, was Kshs 10,000/= which comprised fuel for the car was Kshs 4,000/= and accommodation and food Kshs 4,300/= which he estimated as a total cost of cost Kshs 20,000/=.

In cross examination he confirmed that the patient was admitted to Bishop Kioko hospital when he was in Government service but stated that he also did private practice. He stated that the patient consulted him at West End Clinic. He said that he had not yet been paid to come to court that day, nor for the medical report which he had prepared. He stated that he saw the patient in July of the previous year. He didn't see any discharge summary from hospital after the x-rays were taken. He also did not see any treatment notes from Kyuso hospital. Lastly, he did not see a P3 form.

He was not re-examined.

PW3 was PC Kennedy Kimathi of Crime Branch Kyuso Police Station. He testified in respect of OB no. 9.20.10 which was a report made at 9.30 am regarding a traffic injury accident. According to him, it was a report made by Ruth Maweu of Kyuso Administration Police Camp. She reported that on 20th August 2010 at 8.30 a.m as she was driving motor vehicle GK A720M make Land Rover from the Administration Police line to the DC'S office at Kyuso, and was negotiating a corner towards the DC's office, she lost control and hit a female Fransciah Maweu Kilonzo. The report was that the said woman sustained fracture of her right arm and was first rushed to Kyuso District hospital for first aid then to Mwingi District Hospital for treatment. According to the OB, the reportee was advised to report the incident to Mwingi Police Station.

In cross examination, he stated that the report was entered by PC Gedion Musyoka who had been sick for the last 2 years. He stated that no action had however been taken against any person over the offence, and that no police abstract was issued as Kyuso Police Station at that time was not issuing abstracts for traffic related cases. He stated that he was not certain whether a P3 form was issued. That was the respondent's evidence.

The appellant gave her defence as DWI. She stated that she was an Administration Police Officer in Mbooni West Sub County in Makueni County. She disagreed with the allegations of the plaintiff, and stated that on the 20th August 2010 she was at the Administration Police line when she heard that someone had been knocked down by a vehicle and needed help. She then took that lady to the police station at Kyuso, and then the lady was taken to Mwingi District Hospital and treated. She disowned the witness statement that she made in which she allegedly said that she told the defendant through an agreement that she was to pay her and get her a house girl. She complained that there was no demand letter sent to her, and stated that she had never been taken to court over the alleged accident. She stated further that she was not involved in accompanying the respondent to hospital.

In cross examination, she stated that she was then attached to the DC'S office and drove GK A720M a Land Rover. She stated that no complaint had been lodged against her and that she was not aware of the OB entry. She stated that no agreement had been made between her and the respondent. She said that she did not cater for the medical expenses of the respondent. According to her, she merely heard of the accident and went to the scene and took the respondent to Kyuso Police Station. She stated that other officers recorded issues at the police station. She admitted that she accompanied the respondent to Mwingi District Hospital but in a private vehicle and maintained did not know the driver of the vehicle which caused the accident. She also didn't know the particular driver who was assigned to that vehicle. She emphasized that nothing was addressed to her boss about that incident.

In re-examination she stated that she did not agree to paying the plaintiff's bill for medical treatment. She denied signing exhibit 5.

This is a first appeal. As a first appellate court, I am required to reconsider the evidence on record and come to my own conclusions and inferences. See the case of ***Selle -Vs- Associated Boat Company Limited (1968) EA 123.***

I have reconsidered the evidence on record. I have also considered the submissions on both sides.

The appellant contends that the trial court was biased. I have perused both the proceedings and the judgment of the trial court. I find no bias exhibited by the trial court in the matter. The learned magistrate might have come to the wrong conclusion and might have taken into consideration matters which he should not have taken into consideration. However, in my view that does not amount to bias. Bias is favouring one side and showing it in actions or in conduct. Merely coming to the wrong conclusion or taking into account irrelevant matters in my view does not amount to bias.

The burden is always on a plaintiff in a civil case to prove the liability of the defendant on the balance of probabilities. That burden has to be discharged by the plaintiff even if the matter proceeds to hearing by way of formal proof. *See the case of* ***Kirugi & Another –Vs- Kabiya & Others (1987) KLR 347.***

In the present case, the respondent alleged to have been injured in a traffic accident. She gave the date of the accident. The defendant filed a short defence. It was for the respondent to prove on the balance of probabilities that the appellant was responsible for her alleged injuries and also to establish the appellant's negligence.

Though there is a contention from the appellant's side that the Government should have been sued because the alleged accident vehicle was a Government vehicle, in my view that was not necessary. The Government might have been a possible defendant. However, a plaintiff can choose to sue one or more of possible defendants. If a defendant is not sued, it means that defendant cannot be called upon to defend himself/herself or to be penalized in the judgment.

In the present case no penalties were imposed on the Government, nor was the Government called upon to defend itself. Therefore the Government has nothing to complain about. I do not think that another party can complain on behalf of the government.

Coming to the evidence, the respondent stated that the accident occurred near the DC's office Kyuso and it was in broad day light and she was off the road. She said that she was injured but chose not to pursue the police because they had entered into agreement with the appellant for compensation for medical expenses and provisions of a house help. She produced a copy of the said handwritten agreement in evidence. It was said to have been signed by the appellant. The respondent did not sign the agreement but said that the same was signed by her husband on her behalf because her right hand was injured and she could write then.

The document was produced. The handwritten agreement was thus not signed by the respondent. In addition, none of the witness who signed it came to court testify. It was however said to have been signed by the appellant which she denied in court.

In my view an agreement such as the one alleged, is required to be signed by the one against whom it is used. I have seen the agreement and have also perused the defence of the appellant. There is no paragraph in the defence which states that the appellant did not sign the agreement. She denied being the driver of the vehicle but did not say that she did not sign an agreement. On the other hand, the respondent went into great length to refer to that agreement and give a list of people present.

Weighing the evidence of the respondent against that of the appellant, and considering that there is no legal requirement that such an agreement must be in writing, and knowing that in a civil case the burden of the plaintiff's is to prove the allegations on the balance of probabilities, I am of the view that the respondent proved that the appellant agreed to meet the expenses indicated in the document, even if the respondent did not sign the handwritten agreement. I hold that the agreement does not violate the

provisions of the Law of Contract Act (Cap. 23) and that it was a valid commitment by the appellant towards the respondent.

With regard to the occurrence of the accident and whether the appellant was the driver of the GK vehicle, I n my view the respondent also proved the allegations against the appellant on the balance of probabilities. Firstly, the accident occurred in broad daylight. There could thus be no mistake at all on the identity of the vehicle and the driver. Secondly, both the appellant and the respondent agree that they were together for sometime that morning. The respondent said that the appellant took her to hospital that day before visiting her home the next day. The appellant stated that she assisted the respondent and ***"volunteered"*** to take her both to the police station and to hospital. PW3 confirmed in evidence that the appellant, on reaching Kyuso Police Station, made a report of the accident. This oral evidence by PW3 was not seriously contested, even if the OB was not produced in evidence. In my view therefore, the respondent proved on the balance of probabilities the allegations made against the appellant regarding the occurrence of the accident, and as to who caused it and how it occurred.

I thus agree with the learned magistrate that the respondent proved the liability of the appellant on the balance of probabilities are required in civil cases – See the case of ***Kirugi & Another Vs. Kabiya & 3 others [1987] KLR 347.***

On quantum of damages, the learned magistrate made an award for breach of contract that the agreement of 21st August 2011 and general damages for the said breach of contract. The learned magistrate found that special damages had not been proved.

It has been argued for the appellant that the respondent should have chosen either to come to court for breach of contract or for compensation for injuries, not both at the same time. In my view that argument is not sustainable. Both the alleged contract or commitment by the appellant and the claim for general damages for pain and suffering may arise from the same incident as in the present case. In such event a litigant can approach the court under both leads.

On the award for breach of contract for medical expenses incurred, the documents produced in the trial court by or on behalf of the respondent did not tabulate the costs of medical treatment the respondent incurred or was to incur. The documents produced were only two, that is exhibit 4 and 5. Exhibit 4 was just a letter headed ***"medical report"*** signed on 16th November 2011 by Dr. P.K. Kilonzo confirming treatment for broken bones and stating that the patient who is the respondent, would have to undergo follow up treatment for two years after operation. It does not contain anything else.

Exhibit 5 is the agreement by appellant to pay hospital expenses and provide a house help. It does not indicate the amount or a formula of arriving at the amount to be claimed. Therefore in my view the learned magistrate was wrong in awarding damages under this head because the medical costs paid or to to be paid were not proved to in court. The costs of providing a house help were also not proved. Not even an estimate of the same was made. I will thus set aside the award of damages for breach of contract regarding the medical costs and costs of house help.

In my view the award for ***"general damages for breach of contract"*** was merely a mistake of the heading made by the trial court. In strict sense, this was an award for general damages for pain, suffering and loss of amenities. None of the parties has said that it is either too high or too low. Though the appellant contends that this was a wrong award, in my view, it was proved on the balance of probabilities that the respondent was injured, which occasioned pain and suffering. I will thus retain the amount of the award.

Consequently, I order as follows:-

1. I uphold the decision of the trial court on liability.
2. I set aside the award of damages for breach of contract, as same were not proved.
3. I uphold the award of Kshs 50,000/= which will now be under the head general damages for pain and suffering and loss of amenities.

Since the appeal has succeeded in part, I order that each party will bear their respective costs of this appeal. Orders accordingly.

Dated and delivered at Garissa this 14th day of October, 2015.

GEORGE DULU

JUDGE