



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 32 OF 2010

MARY NAMALWA BARASA.....APPELLANT.

VERSUS

FRANCIS GITAU NJUGUNA.....RESPONDENT.

J U D G M E N T

This appeal arises from the decision and judgment of the Resident Magistrate at Kitale in SPMCC No. 525 of 2006, in which the appellant, **Mary Namalwa Barasa**, had sued the respondent, **Francis Gitau Njuguna**, for damages arising from a road traffic accident which occurred on the 20th July, 2006, within Kitale town involving the appellant as a pillion passenger and motor vehicle Reg. no. KAG 650 N Peugeot 504 belonging to and driven at the time by the respondent.

It was averred in the plaint that the respondent negligently drove, managed and/or controlled his vehicle thereby causing it to loose control, veer off the road and hit the appellant occasioning her sever injuries, loss and damage.

The appellant therefore prayed for general and special damages against the respondent who filed a statement of defence denying the allegations made against him by the appellant and contending that, if the accident occurred then it was wholly caused and/or significantly contributed to by the appellant's own negligence.

The respondent invoked the doctrine of “**Volenti non-fit injuria**”, and prayed for the dismissal of the appellant's case with costs.

At the trial, evidence was led by the appellant and the respondent in support of their respective pleadings.

In her testimony, the plaintiff **Mary Namalwa Barasa (PW2)**, said that she was a pillion passenger on a bicycle and had a sick child when she saw the defendant's motor vehicle along the main Kenyatta street. The vehicle slowed down as if to give way to the cyclist but it moved forward without any indication of stopping and hit the front part of the bicycle. The plaintiff fell down as a result of the impact and suffered injuries on her right knee and backbone. She proceeded to Kitale District Hospital where she was treated before being later examined by **Dr. Samwel Aluda (PW1)**.

The doctor (PW1) examined the plaintiff on the 21st August, 2006 on the basis of the treatment records from Kitale District Hospital. He prepared a medical report (P. Ex. 1) indicating that the plaintiff suffered soft tissue injuries.

P.C. Timothy Rumaera (PW3), of the Kitale police traffic office produced a police abstract (P. Ex. 4) and indicated that the cyclist had the right of way but the defendant failed to stop his vehicle and hit him (cyclist).

The police officer (PW3) further stated that the defendant was at fault even though he made an initial report that he had been hit by the cyclist.

In his testimony, the defendant, **Francis Gitau Njuguna (DW1)**, admitted that the material motor vehicle belonged to him and that he was driving it at the time of the material accident. He said that he was driving along Kenyatta street in Kitale town and while at a round about heard a knock at the back right side of the vehicle. He stopped, alighted from the vehicle and noted that a cyclist with two pillion passengers had hit the vehicle from the right rear side. The pillion passengers were a woman and her child and were taken to the hospital by the cyclist.

The defendant implied that he was not to blame for the accident and contended that he was hit from the rear. He further contended that the cyclist was to blame for the accident in as much as he failed to ride his bicycle in a careful manner and disregarded other road users.

The foregoing evidence was considered by the learned trial magistrate who arrived at the conclusion that the plaintiff/appellant did not discharge her burden of proof. Her case against the defendant was therefore dismissed and each party was ordered to bear own costs.

In dismissing the case, the learned trial magistrate observed that there was no independent witness to support either side of the case. That, PW3 failed to await the necessary police file containing the statements of the witnesses and the sketch map of the scene of the accident. That, the defendant did not produce an inspection report showing which side of his vehicle was hit by the cyclist. That, the plaintiff as a pillion passenger did not have a clear view of the road ahead and that she failed to avail the cyclist who was in a better position to see the road ahead.

Being dissatisfied with the decision of the learned trial magistrate, the plaintiff preferred the present appeal on the basis of the grounds contained in the memorandum of Appeal dated 17th August, 2010, filed herein on her behalf by the firm of **Gicheru & Co. Advocates**.

The said grounds were argued by learned counsel, **Mr. Onkoba**, and were opposed on behalf of the respondent by the learned counsel, **Mr. Ingosi**.

Having considered the rival submissions, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Indeed, this court has hereinabove reconsidered the evidence and in its opinion the ownership of the motor vehicle by the respondent and the occurrence of the accident are factors which were not disputed.

The issue that arose for determination by the court was whether the accident was caused by the negligence of the defendant and if so, whether the plaintiff was entitled to damages from the defendant and to what extent.

It is notable that the learned trial magistrate dealt with issues pertaining to liability and ignored the assessment of damages despite the dismissal of the plaintiff's case. This was an error which was readily conceded by the respondent.

Notwithstanding the dismissal of the plaintiff's case, the learned trial magistrate was still expected to assess damages which would have been awarded to the plaintiff had the case succeeded.

Be that as it may, on the issue of liability, the opinion of this court is that there was ample and credible evidence from the plaintiff (PW2) and her witnesses (PW1) and PW3) which established on a balance of

probabilities that the defendant was responsible for the accident by failing to give way to the cyclist. This was confirmed by the plaintiff as corroborated by the police officer (PW3).

The fact that the plaintiff suffered injuries as a direct result of the accident was confirmed by the doctor (PW1).

It could not therefore be the truth as alleged by the defendant that his vehicle was knocked or hit from behind by the cyclist. In any event, the fact was not established by cogent and corroborative evidence. The dismissal of the plaintiff's case by the learned trial magistrate was erroneous such as to warrant interference by this court which hold a strong view that the defendant was by his negligence responsible for the accident. He drove his vehicle without due care and attention and in the process hit the cyclist who was carrying the plaintiff and her child as pillion passengers thereby causing her bodily injuries.

The plaintiff/appellant would therefore be entitled to both special and general damages from the defendant/respondent.

As for special damages, the plaintiff would be entitled to Ksh. 2,200/= for the medical report and the police abstract.

As for general damages, the plaintiff/appellant suffered soft tissue injuries which did not result in any permanent disability. Considering the nature of the injuries in the light of the authorities cited by both sides in their final submissions before the trial court, it is the opinion of this court that a sum of Ksh. 120,000/= would suffice as adequate compensation in terms of general damages for pain and suffering.

Consequently, judgment is herein entered for the appellant against the respondent for the total sum of Ksh. 122,200/= together with costs.

Invariably, the judgment entered by the trial court dismissing the appellant's case is hereby set aside. In sum, the appeal is allowed.

The appellant shall have the costs of the appeal.

Ordered accordingly.

[Delivered and signed this 12th day of March, 2014.]

J.R. KARANJA.

JUDGE.