



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Appeal 25 of 2011**

**GEOFFREY SITUM WANYONYI**

**APPELLANT**

**VRS**

**ABIGAIL KHAVETSA SIKUKU**

**RESPONDENT**

**JUDGMENT**

**The appeal**

[1]The Appellant was aggrieved by the judgment of the trial court delivered on 24th February, 2011 in BGM CMCC No.997 of 2009, and filed this appeal. The Memorandum of Appeal and the amended Memorandum of Appeal carry the following grounds of appeal:

- 1)That the learned trial magistrate erred in law and fact in failing to dismiss the Respondent's suit in the lower court.
- 2)That the learned trial magistrate erred in law and fact in holding the Appellant 100% liable for the alleged accident when there was no sufficient evidence to that effect.
- 2 (a)That the learned trial magistrate erred in law and fact in failing to find that the Respondent was not among the injured persons.
- 3) That the learned trial magistrate erred in law and fact in failing to hold the Respondent wholly and/or substantially liable for the alleged accident.
- 4)That the learned trial magistrate erred in law and and fact in awarding the Respondent special damages of Kshs.2,700/= that were not proved.
- 5) That the learned trial magistrate erred in law and fact by awarding Kshs.10,000/= as doctor's court attendance fees when the same was not pleaded as special damages.
- 6) That the learned trial magistrate erred in law and fact by failing to evaluate the injuries sustained and on the medical chits and/or reports.
- 7) That the learned trail magistrate erred in law and fact by awarding the Plaintiff Kshs.4,000/= as police man court attendance fees when the same was not pleaded.
- 8) That the learned trial magistrate erred in law and fact in regarding relevant evidence on record hence resulting to a wrong decision.

9) That the learned trial magistrate erred in law and fact in making an award in general damages of Kshs.450,000/= that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the Respondent.

10) That the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions and legal authorities relied upon in support thereof.

11) That the learned trial magistrate's decision albeit, a discretionary one plainly wrong.

### **The facts**

[2] The facts as captured by the trial court are that: On 14/10/2007, the Plaintiff was travelling from Kimilili to Bungoma as a fare paying passenger in motor vehicle registration No.KAT 572W. Between Mayanja and Kibabii, a saloon car registration No.KAR 016 U suddenly emerged from the side of the road without any warning. Motor vehicle KAT 572 W then hit motor vehicle KAR 016 U on the door side. Several passengers in KAT 572 W including the Plaintiff were injured. The Plaintiff was treated at Elgon View Hospital where she was admitted on 14/10/2007 and discharged on 9/11/2007.

### **EVIDENCE**

#### **First appeal**

This being the first appeal, the Appellate Court should evaluate the evidence adduced before the trial court and make its own findings and conclusions on the evidence tendered. I embark on that exercise.

#### **On Liability**

[3] The Plaintiff called 4 witnesses in support of her claim for general damages for pain, suffering and loss of amenities, and special damages of Kshs.2,700/=. The Plaintiff testified as PW2 and gave an account of how the accident occurred. She told the trial court that she was seated on the 2nd seat immediately behind the driver. She confirmed that from where she was sitting she saw all that happened.

[4] The Plaintiff saw motor vehicle registration no.KAR 016U emerge suddenly from the side of the road and entered the main road without any sign or warning. According to her, the said motor vehicle reg. no.KAR 016U entered the road at about 5 meters away from KAT 572 W. She also said that the vehicle she was travelling in was not over-speeding although there was no evidence as to the speed the vehicle was doing at the time.

[5] PW3, a police officer produced the police investigation file on the accident. According to the result of the investigation, the driver of KAR 016U was to blame having turned right without warning as required.

[4] The Appellant told the trial court that when he arrived where he was to drop his friend, he slowed down and indicated to turn to the right. He then saw a matatu through his side mirror coming from behind. Within no time he had a bang.

### **COURT'S VIEW ON LIABILITY**

[6] Although the Appellant blames the driver of motor vehicle registration was KAT 572 W for the accident herein, the evidence available shows he was to blame. It is more probable than not that KAR 016U turned to the right of the road without any warning and at close range of about 5 meters from KAT 572 W which was moving. That kind of negligence on a road would attract liability of 100%. A driver should ensure that the road is clear or safe before joining the main road. The attempt by the Appellant to blame motor vehicle KAT 572W could not have succeeded for two reasons. One, there was no sufficient evidence to justify any contributory negligence or indemnity of any kind. Two, the owner or driver of motor vehicle KAT 572 W was never joined as a party to the suit through the laid down

procedure of third party notice.

[7] For those reasons, I do not see anything that would persuade me to disturb the finding by the trial magistrate of 100% liability on the part of the Appellant. I find that the Appellant was liable 100% for the accident of 14/10/2007. Therefore grounds nos.2 and 8 of the appeal fail. I also find that the Respondent was a mere passenger and it was not shown by way of evidence, how she contributed to the accident. See **Bonfance Waiti v. Michael Kariuki [2007] e KLR**. Therefore ground 3 fails.

## **EVIDENCE ON INJURIES SUSTAINED**

[8] PW2 testified on injuries she sustained. The Doctor who treated her was also called as a witness and testified as PW4. Further, the doctor who examined her and prepared a medical report was also called as a witness and testified as PW1. All medical treatment chits as well as medical report were produced as exhibits. P3 form was also produced. From the medical evidence produced the Respondent suffered the following injuries:

- a) Severe blunt injury to the head. She lost consciousness after the accident
- b) Blunt injury to the neck
- c) Severe blunt injury to the chest (bruises)
- d) Bruises to the right fore-arm
- e) Fracture of the pelvis; right superior pubic ramus
- f) Deep cut wound to the right calf muscles (4 cm)

[9] Dr. Kubasu, classified these injuries as “*Grievous Harm*”. He also opines that the Respondent will require non-steroidal anti-inflammatory agents for pain whose duration of use will be chronic due to the fracture and severity of the injuries.

## **ASSESSMENT OF QUANTUM OF DAMAGES**

[10] The Appellant submitted before the trial court that the injuries suffered “*can ordinarily attract an award of Kshs.50,000/=*”. The Appellant relied on the case of **Mombasa HCCC No.451 of 1991 George Mwashigadi & Others v. Paul Musyoka Mutemi & Others**. The extract of the authority annexed to the Appellant's submissions to the trial court was a severely reduced extract that cannot really assist the court to ascertain the extent of injuries sustained by the Plaintiff and the basis for the award of Kshs.50,000/= made by the court in that case. This is a practice that the courts have lamented over, that such severely restricted extracts of cases serve a different purpose altogether than assisting the court to assess reasonable quantum of damages. I do not think that case was or is useful to the present case.

[11] The Respondent on the other hand submitted to the trial court and humbly requested the court to make an award of Kshs.750,000/=. They relied on:

- a) **Lenson Nchogo Isavoke v Tarakueta Ltd & 3 Others – NKR HCCC No.398 of 1997.**
- b) **Peter Njuguna v Franco Paglacia & Another NBI HCCC NO.161 of 2001.**
- c) **Hassan Mohammed Adan v Tracom Ltd and Another NKU HCCC NO.508 of 1999** and
- d) **Mary Wangeci v KTDA NBI HCCC NO.2732 of 1998.**

[12] The injuries sustained by the Plaintiffs in the authorities above are numerous and quite serious with serious post traumatic complications. The severity of the injuries justified the high awards ranging from

Kshs.600,000/= to Kshs.800,000/=. In the instant case, the injuries sustained were severe but not to the extent as in the cases quoted by the Respondent. I therefore think that the trial court properly directed its mind and exercised its discretionary judiciously in awarding Kshs.450,000/=. I do not see any reason that impels me to disturb the award. It is reasonable and I uphold it. Grounds numbers 6, 9, 10 and 11 of the appeal therefore fail.

## **OTHER ISSUES**

[13] There are other issues for determination. Special damages claimed was Kshs.2,700/= but the Respondent only proved a sum of Kshs.2500/=. I therefore award a sum of Kshs.2500/= as special damages.

[14] On witness' attendance fee, I think, those are costs that a court awards as between the parties, and they need not be specifically pleaded in the pleadings. They are discretionary and are governed by the Advocates Remuneration Order. Costs of Kshs.3,000/= as for each doctor as attendance costs are not excessive in any way. I affirm the award of Kshs. 6000 as doctors' attendance costs. So ground 5 fails. With regard to ground 7 on attendance costs paid to the police officer, I am persuaded to reduce it to Kshs.2,000/= particularly on the basis that he is a public officer, and that rate would be reasonable per diem for his rank. Ground 7 partially succeeds. See **Mitchel Cotts Ltd v. Samwel Omondi [2012] e KLR.**

[15] The trial magistrate did not therefore err in not dismissing the Respondent's case and ground 1 fails. There was sufficient evidence and the Respondent proved her case on balance of probabilities.

[16] The Appellants submissions that PW2 testified that “*the driver of the matatu, hit the saloon car from behind.....*” is not entirely correct and is indefensible. Nowhere in her testimony did PW2 say the saloon car was hit from behind. PW3 gave a clearer account on the manner the accident occurred and he was the Respondent's witness. The evidence of PW3 was documentary contained in the police investigation file. PW3 was competent to produce the police file to produce the police file and was properly instructed by the Base Commander to produce file no.KAR 140/2007. That resolves the argument by the Respondent that PW3 was not a relevant witness.

[17] The police abstract produced clearly indicates that the Respondent was a passenger. The Respondent also confirmed she was a passenger in KAT 572 W and her evidence on that aspect was not controverted by evidence or through cross-examination. There is no legal necessity that in order to prove that a person was a passenger in a PSV vehicle a receipt must be produced. But in those cases where fare is paid for before boarding, or where one had paid before the accident occurred, a receipt certainly emboldens ones status as a fare paying passenger but it is not strict a strict legal requirement. That too rests the argument by the Appellant that the Respondent was not a passenger in KAT 572 W.

## **DECISION**

[18] The appeal herein fails except grounds 4 and 7 which partially succeeds, in that, special damages are reduced to Kshs.2,500/= and the attendance costs for the police officer, i.e. PW3, is reduced to Kshs.2,000/=.

[19] The award of Kshs.450,000/= as general damages for pain and suffering is hereby upheld. It was reasonable compensation given the nature of the injuries suffered. The trial court therefore exercised its discretion on the prescribed principles in assessing general damage. See **Shah v Mbogo (1968) E. A 116, John Maseno v. Dan Omase CA Civil Appeal no.320 of 2002 (Nakuru).**

[20] Costs to the Respondent, in the lower and appellate court.

**Dated, signed and delivered in open court at Bungoma this 11th day of April, 2013**

**F. GIKONYO**

**JUDGE**