REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 254 OF 1996

PATRICK MUTIE KIMAU...1ST APPELLANT

MOUNT BUILDERS AND MEHANICAL ENGINEERING COMPANY LIMITED...2ND APPELLANT

AND

JUDY WAMBUI NDURUMO

Suing through her next friend CATHERINE OTANGA KIBARA...........................RESPONDENT

(Appeal from a judgment and decree of the

High Court of Kenya at Nairobi (Juma. J.)

dated 26th June, 1996

in

H.C.C.C. NO. 4169 OF 1987)

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JUDGMENT OF THE COURT:

Paragraph 5 of the respondent's further amended plaint in the superior court was in the following terms:

"5. On or about the 6th day of January, 1987 the plaintiff was lawfully walking by and/or crossing Racecourse Road within Nairobi Area when the first defendant acting as the authorised employee, servant, agent or driver of the 2nd defendant so negligently drove, managed and/or controlled motor vehicle registration number KUQ 935 that the same violently knocked down the plaintiff thereby injuring her severely."

The appellants' response to this averment in paragraphs 4 and 6 of their statement of defence the in the aforesaid court was as follows:

The defendants deny that the plaintiff was lawfully walking by Racecourse Road as alleged paragraph 5 of the plaint and state that the plaintiff wrongfully, carelessly and or recklessly disregarding all safety

precautions attempted to cross the said Racecourse Road in front of a stationary bus without taking any or any reasonable steps or measures to ensure that it was safe to do so while motor vehicle registration number KUQ 935 was moving on the said road.

The defendants further state that the said accident was caused by the sole negligence of the said Juddy Ndurumo in crossing the said road."

It is plain from the foregoing averments that besides all else, at the onset of the litigation between the respondent and the appellants in the superior court, at the root of it was the issue of responsibility for the negligence that resulted in the accident wherein the respondent was knocked down on the middle of the road referred to in those averments and thereby sustained severe head injuries. In this regard, evidence of proved or admitted facts was necessary before such responsibility could reasonably be inferred to attach to either of the parties to the litigation and on resolving this issue, the attendant consequences in respect thereof would naturally flow therefrom.

The case for the respondent in the superior court was that on 6th January, 1987 at or about 6.00 a.m. she, together with her elder sister, Catherine Otanga (P.W.1), were coming from Huruma Estate in a "matatu" and had alighted therefrom at Kariokor Bus- Stop on Racecourse Road in the direction of Nairobi Town Centre. P.W.1 was then working at Ngara Post Office as a messenger while the respondent was a shop assistant with an Asian shop-keeper and the two were reporting at their respective places of work at 7.00 a.m. According to P.W.1, on alighting from the "matatu", they both stood at the Kariokor Bus-stop and while there, a lorry driven by the first appellant veered off the road towards them and knocked down the respondent who, according to Justus Mbira (P.W.2), was thrown onto the middle of the road. She was injured on the head and mouth and was taken to Kenyatta National Hospital where she was admitted for about 3 weeks. The time of the accident was about 6.30 a.m. and when P.W.2 was cross-examined by counsel for the appellants in the superior court he said that P.W.1 and the respondent were together about to cross the road and it would appear that in the process of so doing the respondent was hit by the lorry that was being driven by the first appellant.

Consequent to this accident, the respondent sustained head injuries with loss of consciousness and one upper incisor tooth. According to Professor G. M. Sande (P.W.3), a Consultant Neurosurgeon at the Aga Khan Hospital, Nairobi and who had medically examined the respondent on 20th August, 1987, the latter had suffered a severe closed brain injury as was evidenced by a prolonged period of disturbed consciousness and a demonstrable post-traumatic amnesia or more than two weeks. From his medical examination of her, the degree of the brain injury was associated with severe residue deficits including permanent personality change and psychiatric oriented illness –post- traumatic frontal lobe syndrome – as the injury was on the frontal part of her brain. His subsequent medical examination or her on 28th March, 1991 revealed no change from his earlier conclusions in his previous medical examination referred to above. According to P.W.3 therefore, more than two years after the injury the respondent was unlikely to recover any further and had been left with a permanent personality and intellectual deficit or about 60%.

The appellants' case in the superior court was that on the material day at some minutes past seven in the morning, the first appellant, Patrick Mutie Kimau (D.W.6) was driving a lorry registration number KUQ 935 from Huruma Estate transporting workers to the second appellants' construction site at Karen, Nairobi. Opposite Kariokor Market and on three lanes one-way traffic Racecourse Road he was driving the lorry on the middle lane. At the Bus-Stop opposite the same market was a stationery KBS bus from which some passengers were disembarking. This was not a drive-in Bus-stop but was on the nearside lane of the road aforementioned. Soon after passing the stationary bus, some workers who were on top of the lorry banged the top of the driver's cabin shouting to the driver to stop as the respondent had hit the rear nearside part of the lorry and had fallen onto the middle of the road. About 20 metres from the Bus-Stop the lorry stopped. The driver together with his passengers disembarked and proceeded to where the respondent had fallen onto the middle of the road and with the assistance of a good Samaritan she was rushed to Kenyatta National Hospital where she was admitted as earlier indicated in this judgment. According to the appellants. The respondent had tried to cross the road from the front of the stationary bus without ensuring that it was safe for her to do so and was therefore to blame for the accident. Indeed, according to D.W.6 and Justus Musyimi Mbila (D.W.7), both of whom were in the driver's cabin. neither

of them saw the respondent before the accident.

Confronted by the two opposing versions as to how the accident involving the respondent and the lorry KUQ 935 had occurred, the learned trial judge in his judgment dated and delivered on 26th June, 1996 had this to say:

“If one were to believe the evidence of the defence witness, no explanation is given as to why the plaintiff should run in front of the parked Kenya Bus and hit the lorry at the rear. It would have been more probable if the plaintiff had ran infront of the bus and (had) been hit by the lorry which was just beginning to pass the bus. The Defence witnesses insist the plaintiff hit the rear of the lorry. Why did she not stop as the lorry had already passed? The evidence of P.W.2 Justus Mbira is more believable. He had no cause to favour any party."

Save for the last two sentences relating to the credibility of the evidence of P.W.2, the sense of the above quoted passage is unclear unless one was to infer from it that it would have been more probable if the respondent had ran in front of the stationery bus and was hit by the front of the lorry which was just beginning to pass the stationary bus. From the evidence available before the learned trial judge, at the time of the accident, the lorry KUQ 935 was being driven at a speed of 30 to 40 Kilometres per hour on the middle lane of the three lanes road referred to above. Unless therefore the respondent was running infront of the stationary bus at a slightly higher speed than that of the lorry KUQ 935 and both were about to pass the said bus in their respective directions at the same time, such an inference is untenable. Indeed, to query why the respondent did not stop as the lorry had already passed the stationary bus was in the events leading to the occurrence of the accidents in question unrealistic. Nonetheless, the learned trial judge proceeded to hold:

“On liability I have already stated that the evidence adduced on behalf of the plaintiff is more credible than that adduced on behalf of the Defendants. I hold that the First Defendants was wholly to blame for the accident and Second Defendant is vicariously liable as the employer……since no evidence had adduced on its behalf that the First Defendant was not driving the lorry in the course of his employment.”

The evidence acclaimed to be credible and which no doubt the learned trial judge relied on was that of P.W.2 which where pertinent was as follows:

“I saw a matatu heading to town. Two ladies alighted from it. There were about 6 people at the stage. They stood waiting to cross. A lorry came heading to town at a high speed. It lost control and hit one of the ladies. She was still standing at the stage. Before the collision there was no hooting. I heard no sound of brakes. It hit her and was thrown into the middle of the road. She was injured and there was blood on the face. The lorry stopped about 100 metres away."

If at the material time there was a stationary bus at the Bus-Stop and the lorry KUQ 935 was at that time being driven on the middle lane of the three lanes road referred to in this judgment, it is improbable that the said lorry would have the middle lane at the high speed it was alleged to have been travelling and veered across the front of the stationary bus onto the kerb of the Bus-Stop where the respondent was allegedly standing, hit her and then threw her onto the middle of the road. Such a monouvre, however ingeniously orchestrated, was certainly hard to believe.

Pursuant to his holding a liability as is set out above and bearing in mind the seriousness of the injuries sustained by the respondent in the accident in question together with their residual effects which were equally serious, the learned trial judge awarded the respondent a global sum of K.shs. 1,500,000/- as general damages for pain, suffering and loss of amenities together with a proved sum of K.shs. 7,275/- as special damages. Accordingly, he entered judgment for the respondent against the appellants jointly and severally in the total sum of K.shs. 1,507,275/- as damages with cost and interest. Dissatisfied by this decision, the appellants now appeal to this Court and have put forward 14 grounds of appeal.

At the hearing of this appeal on 10th July, 1997, counsel for the appellants, Mr. Muthoga, argued grounds 1, 2, and 3 together; grounds 4, 5 and 6 together; grounds 7, 8, 9 and 10 together; grounds 11, 12 and 13

together; and ground 14 separately. The first group of the appellants' grounds of appeal concerned the case pleaded in the superior court by the respondent and the case proved in that court. According to counsel, the negligence pleaded in the court below by the respondent is not what was proved at the trial of the suit against the appellants before that court. Indeed, to counsel, there was no proof of negligence against the appellants.

As regards the second group of the appellants' grounds of appeal, counsel complained that the learned trial judge rejected the evidence of the appellants' witnesses without assigning adequate reasons for such rejection save for the inference that the said witnesses were co-employees of the first appellant and that D.W.7 was a friend of the latter. Besides, the learned trial judge did not deal with appellants' contention in the trial before him nor did he make a full and proper appraisal of the evidence before him. Indeed, he only gave a cursory treatment of the evidence before him making no specific findings against the appellants. This latter submission by counsel was in regard to the third set of the appellants' grounds of the appeal and in respect of the fourth group of the appellants' grounds of appeal he submitted that the respondent did not discharge her primary obligation of proving negligence on the part of the appellants and the learned trial judge had a duty to make a finding on this which he too failed to discharge. Finally, on the 14th ground of the appellants' appeal which concerned the award to the respondent of Kshs. 1,500,000/- as general damages, counsel submitted that such an award had no basis and according to him, an award of between Kshs. 500,000/- and K.shs 600,000/- in this regard would have been reasonable. On the basis of the submissions outlined above, counsel sought that the appellants' appeal be allowed with costs.

Counsel for the respondent, Miss Guserwa, however, was of the view that the decision of the superior court should be upheld. According to her, the learned judge believed the evidence in support of the respondent's case before him and on the basis of that evidence he arrived at the decision now the subject-matter of the present appeal. Regarding the issue of general damages, counsel submitted that the injuries sustained by the respondent in the accident in question were such as to merit the award of K.shs. 1,500,000/-. To counsel therefore, the appellants' appeal deserved dismissal with costs.

Except for the award of general damages, at the heart of the submissions of counsel lies the issue of liability in negligence that resulted in the accident the subject-matter of the suit in the superior court. But before returning to the circumstances leading to that accident as we have endeavored to outline above, we think it necessary to emphasizes the statement in paragraph 186 of Charlesworth on Negligence, Third Edition which is as follows:

"A pedestrian owes a duty to other highway users to move with due care."

Indeed, part 1 of our own Highway Code where relevant in this regard provides:

6. Before you cross the road, stop at the Kerb, Look Right, Look Left, and Right Again. Do not cross until the road is clear; then cross at right-angles, keeping a careful look-out all the time. If there is a refuge, stop on it and look again. On one-way traffic road, stop and look towards oncoming traffic before you cross.

7. Do not cross unless you have a clear view of the road both ways. Take extra care near stationary vehicles or other obstructions, and whenever you view is limited."

The efficacy of the provisions of the Highway Code is set out in Section 68(3) of the Traffic Act, Chapter 403 of the Laws of Kenya which stipulates that:

"68. (3) A failure on the part of any person to observe any the provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."

As is set out in clause 7 of the Highway Code of Kenya which we have reproduced above, from the events leading to the accident that was the subject-matter of the litigation between the respondent and the appellants in the superior court as we have attempted to outline in this judgment, it appears to us more likely than not that the said accident occurred in the manner articulated in the appellants' defence in that litigation. The respondent, it would seem did not take extra care near the stationary bus before starting to cross the three lanes Racecourse Road infront of the said bus as was necessary under the relevant provisions of the aforesaid clause. Sympathetic as we may be to her plight, the circumstances of the accident in question leads to the conclusion that she was responsible for it. In this regard therefore, we think that the learned trial judge was in error when he held that the appellants were wholly to blame for the said accident and accordingly jointly and severally liable in damages to the respondent. On account of this, we allow this appeal and set aside the judgment entered against by the superior court in the sum of K.sh. 1,507,275/- together with costs and interest.

The appellants shall have the costs of this appeal and of the suit in the superior court.

Dated and delivered at Nairobi this 15th day of August, 1997.

J.E. GICHERU

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JUDGE OF APPEAL

P.K. TANUI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR