IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Appeal 35 of 2004

BEATRICE WAIRIMU WANDURUA *(minor suing thro' her father and next friend*

PATRICK MURAGE.....APPELLANT

AND C. DORMAN LIMITED .....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Nyeri (Juma, J.) dated 27th June, 2003

in

H.C.C.C. NO. 1 OF 2002)

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JUDGMENT OF THE COURT

This appeal arises out of a road accident along Kiganjo – Marua road which happened on 17th December, 2000 in which the appellant **Beatrice Wairimu Wandurua**, a girl who was then 14 years of age was struck by a motor vehicle registration number KAH 892 P whilst crossing the road. She was the plaintiff in the suit before the superior court. The respondent is the owner of the motor vehicle and was the defendant in the suit.

The appellant told the learned trial Judge, Juma, J. that on the material day she was traveling in a matatu from Chaka market towards Ndurua. Upon alighting she looked right and had observed the kerb – drill prior to attempting to cross the road and on being satisfied that it was clear of motor vehicles she moved to cross but she suddenly saw a motor vehicle next to her. She tried to move backwards but was hit by the vehicle. She became unconscious and when she came to, she found herself at Mathari Hospital in Nyeri.

The appellant sustained serious injuries to her legs which resulted in compound fractures of the left tibia and dislocation of the left ankle joint. She was in hospital for over three months, and unfortunately, some two years later when the trial commenced she was still in crutches. She was seen by Mr. Wokabi, a consultant surgeon a year later after the accident and his conclusion is summarised in his report dated 3rd September, 2001, as follows:-

"**She suffered extensive compound fractures of her left tibia. She also had a compound fracture dislocation of the left ankle joint. A large portion of the bone was lost in the process. There is no doubt that a lot of pain and blood was experienced. The loss of a large portion of the shin bone has complicated the treatment to a very great extent. There is a very big gap between the fractured**

segment of the left tibia. There is no way that natural process can bridge this gap. Above mentioned is going to require surgery at a later date to close the gap. The only method I can think of is transposing the fibula by staged procedure. The fibula can be cut proximally and distal and transposed to the end of the fractures of the tibia. This way the fibula will act as a spare part. This is a complicated surgery which will require patience and a lot of resources for it to succeed. It is practiced elsewhere and in good hands it can be successful considering she is of a young age. I would put this financial outlay for future surgical treatment at approximately Shs.850,000/= (eight hundred fifty). She is going to require a long period of surgical treatment to make the surgery successful. Presently she has disability which in this case I would assess at approximately 40% (forty).”

It is on record that Mr. Wokabi testified in court and was cross-examined at length. The synopsis of his evidence is that the appellant suffered serious injuries which will incapacitate her for life.

The respondent also called another consultant, Dr. Muyembe, to testify on its behalf as to the degree of the severity of the injuries suffered by the appellant. We would agree with the learned trial Judge that the two consultant surgeons are *ad idem* that the appellant did indeed sustain serious and incapacitating leg injuries which would require a long period of expensive surgical treatment in the future. What was however in dispute between them was the mode of treatment and the costs thereof.

The appellant’s evidence was to the effect that the matatu had stopped in the middle of its lane and that it had not moved from the scene at the time of the collision. She averred that she was struck while in the other lane. This testimony was in essence lent corroboration by two witnesses who were at the scene. These were James Wamunyu (PW3) and Peter Ngatia (PW4).

The respondent’s motor vehicle was driven by Dominic Githae (DW2) who testified that:

“**As I passed the matatu I suddenly saw something crossing. The matatu was on tarmac as it was muddy by the roadside. The person crossed from behind the matatu. I hooted, tried to swerve to the left but it was too sudden and quick. I hit her by front right mudguard. I was at 60 kph.”**

The learned trial Judge, on the issue of negligence, found that both the appellant and the driver of the respondent had both been contributorily negligent and apportioned liability at 75% against the appellant and 25% as against the respondent. He held that the driver of the respondent having seen the matatu parked in the middle of the road ought to have anticipated that some people were likely to come out of the matatu and that some people might blindly cross the road; and thus, in his view, the driver was expected to be more cautious. On the other hand, the learned trial Judge faulted the appellant for not having looked at both sides of the road to ensure that it was safe to cross the road before attempting to do so.

On the issue of damages, the learned trial Judge awarded the appellant Shs.350,000.00 for pain and suffering; Shs.213,000 for future medical expenses and Shs.85,165.00 for special damages, making a total of Shs.648,165.00 less 75% contribution and thus a sum total of Shs.162,042.00.

From this decision the appellant has appealed and she is represented by Mr. James N. Nderi. The grounds of appeal challenge the learned Judge’s findings of fact; his apportionment of liability and quantum of damages awarded. As regards the facts; Mr. Nderi faulted the learned Judge for holding that the appellant did cross the road without first ascertaining that it was safe to do so and by not also looking to the left side of the road where the respondent’s motor vehicle was coming from.

Let us consider the appellant’s case. Assuming for the moment that the appellant did blindly cross the road as she did, she would be guilty of some negligence to a certain degree. But there is also admission by the respondent’s driver that he was driving at 60 kph and did not attempt to brake when he saw the matatu. He also admitted that the matatu had stopped at the place it did because the roadside was muddy. In our view, a speed of 60 Kph was an unreasonably high speed in the circumstances and the learned trial Judge ought to have found so as a fact which partly contributed to the collision.

The learned trial Judge considered that the appellant had been contributorily negligent to a higher degree by suddenly darting behind the matatu into the correct lane of the driver of the respondent. The issue in this appeal is to which degree did her negligent act contribute to the accident?

It is trite law that an appellate court will not interfere with the issue of apportionment of liability unless the Judge came to a manifestly wrong decision or based his apportionment on wrong principles. See **Vyas Industries v Diocese of Meru [1982] KLR 114**. Mr Nderi submitted that this was the position here. However, in our view, there are no valid grounds for holding the respondent's driver as having been contributorily less negligent than the appellant. Had he been more careful he could have seen the appellant before the moment of impact and thus avoided the collision. He, too, was not keeping a proper look out. The learned Judge should therefore have held both the appellant and the driver of the respondent equally negligent and apportioned liability at 50% to each.

In the result, we set aside the learned Judge's finding on liability and substitute therefor a finding that the respondent was 50% liable for the accident.

The appellant asks us to find that the learned trial Judge misdirected himself on the medical evidence tendered before him and as a result arrived at an erroneous estimate of the general damages and future medical expenses which were specifically pleaded and strictly proved.

Two medical reports were presented to the learned trial Judge. They did not materially differ. They agree in essence that the appellant suffered grave leg injuries which would require future expensive surgeries. In this regard we would think that the medical report of Mr. Wokabi was the most reasonable in the circumstances and should have been accepted as a guide. On our part having considered comparable awards for such injuries as those suffered by the appellant, we are of the view that awards of Shs.350,000.00 for pain and suffering and future medical expenses of Shs.213.000.00 for a victim of 14 years whose injuries had shown no evidence of healing two years after the accident and which had given her a disability of about 40% were so inordinately low that they must be wholly erroneous estimates as to warrant interference by this Court. See **Arrow Car Limited v Elijah Shamalla Bimomo & others – [2004] 2 KLR 101** and **Zipporah Wambui Wambaira & 17 Others v Gachuru Kiogora & 2 Others [2004] e KLR**.

In view of the foregoing we allow this appeal and set aside the awards made by the superior court and substitute therefor the following:

General damages for pain,

Suffering and loss of amenities .....Shs. 550,000.00

Future medical expenses.....Shs. 850,000.00

Special damages .... Shs. 85,165.00

TOTAL Shs. 1,485,165,00

Less 50% contributory negligence

TOTAL Shs. 742,582.50

The final position therefore is that the appeal is allowed to the extent stated above. Since the appellant has partially succeeded, we award her half the costs of the appeal.

Dated and delivered at Nyeri this 10th day of July 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL_

I certify that this is a true copy of the original

DEPUTY REGISTRAR