REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 24 OF 2015

(FORMERLY MERU HCCA NO. 21 OF 2012)

LILIAN WANJA.....APPELLANT

-VERSUS-

CYPRIAN MUGENDI IGONGA.....1ST RESPONDENT

IGNATIUS GITARI.....2ND RESPONDENT

DUNCAN MWANGI.....3RD RESPONDENT

(Being an Appeal from the judgment and decree of the Principal Magistrate's Court Chuka (N.N. Murage - SRM) delivered on 14/2/2012 in Chuka PMCC No. 62 of 2010)

J U D G M E N T

1.On 12th August, 2007, Lilian Wanja *("the Appellant")* was involved in a road traffic accident along Meru-Chuka road at Naka river with motor vehicle registration number KAG 241 Y (hereinafter *"the motor vehicle").* She filed Chuka PMCC No. 62 of 2010 against the 1st Respondent as the driver, the 2nd and 3rd Respondent as the beneficial and the registered owner of the motor vehicle, respectively. The Appellant blamed the 1st Respondent for the accident and claimed damages against the Respondents for the occurrence of the said accident. The 1st and 2nd Respondent opposed the suit and claimed contributory negligence against the Appellant. After trial, the court entered judgment on 14th February, 2012 in which it made a finding that the Appellant contributed to the occurrence of the accident by 50% and assessed damages at Kshs.203,500/-.

2. Aggrieved by the said decision, the Appellant appealed to this court setting out seven (7) grounds which can be summarised into two; that the trial court erred in apportioning liability at 50: 50 in light of the evidence tendered at the trial and secondly, that the trial court erred in assessing quantum at Kshs,200,000/- which was excessively low in the circumstances. This being a first appeal, it behoves this court to review and re-evaluate the facts afresh with a view of making its own independent findings and conclusions. See ***Selle.v. Associated Motor Boat Co. Ltd [1968] EA 123***. However, the court must at all times have in mind that it did not see the witnesses testify to gauge their demenour.

3. At the trial, the Appellant testified that on 12th August, 2007, she and her brother were walking on the left side of the road from the Embu direction to Chuka when at Naka, they were hit by the motor vehicle. The vehicle was at the time being driven by the 1st Respondent, whilst it was owned by the 3rd Respondent according to the copy of the records from the registrar of motor vehicles (PExh 1). The Appellant sustained injuries to her head, face, wrist joints and both legs. She was admitted and treated at

Chuka District Hospital and Menelik Hospital in Nairobi. She blamed the 1st Respondent for speeding and driving the motor vehicle carelessly. She produced, inter alia, the P3 form and Police Abstract that were filled on her examination and report of the accident. In cross-examination, she denied that she was walking on the main road. She confirmed that she never saw the motor vehicle before it hit her and her brother.

4. PW2 was Dr John Macharia who examined the Appellant on 29th September, 2010 and prepared a medical Report (PExh 3 (a)). According to him, the Appellant suffered swelling, tenderness and bruises on the face, swelling on the right side of the head, tenderness and swelling on the left side of the chest, the right wrist and elbows. She also suffered swollen left hip and a dislocation and fracture of the pelvis. She was admitted in hospital for four (4) days. His opinion was that the Appellant had sustained a fracture of the pelvis and dislocation of the hip and multiple soft tissue injuries which had healed. He opined that the Appellant might have experienced pain as the pelvis bears alot of weight. He charged Kshs.3,000/-for the medical report.

5. PW3 was P.C Manyara of Chuka Police Station. He produced the Police Abstract and told the court that the 1st Respondent was charged and convicted of 10 counts arising out of the accident. That on the material day, there was construction going on at the scene of the accident and that only one lane, the left one when facing Chuka direction from Embu, that was in use. That there was a warning on the road to that fact. That despite the said warning, the 1st Respondent failed to take heed and crashed into a crowd of people near Naka river. That the Appellant was a pedestrian. In cross-examination, PW3 testified that the motor vehicle veered off the road and plunged into the crowd of people. That those who were injured included people walking to and those at the scene where the police had shot a man.

6. The 1st and 2nd Respondent opposed the case through the evidence of the 1st Respondent. He testified that at the material time, he was driving the subject motor vehicle along Embu-Chuka road; that the road was under construction and that only one lane was in use. That when he was driving down towards Naka bridge, there was a CID vehicle packed on the road. That he found a crowd of people on the road who despite his hooting failed to move out. That there is nothing he could have done as either side of the road was a river. That he applied brakes but nevertheless hit the people. He denied having been careless but blamed the Appellant and her brother for being on the road. In cross-examination, he admitted that the road was under repair; that he applied the brakes but still hit the crowd; that he was charged for the accident and pleaded guilty and that since there was a corner, one was required to drive slowly, He admitted that since there were signs on the road, he knew that there was only one lane in use.

7. At the hearing, the Advocates for the parties filed their respective written submissions which they ably hi-lighted. Mr. Mwanzia learned counsel for the Appellant combined ground numbers 1, 2 and 3 as one and argued Nos.4, 5, 6 and 7 together. He submitted that the evidence at the trial showed that the subject vehicle veered off the road, hit the Appellant as well as a crowd of people killing some of them. That the 1st Respondent was charged and convicted of causing death by dangerous driving and he had not appealed against that decision. To counsel, the 1st Respondent should have been held 100% liable. Counsel submitted that in view of the injuries sustained by the Appellant, the award of Kshs.200,000/- as damages was too low and erroneous. Counsel relied on the cases of ***KSM CA NO. 256 of 2005 Gus Dulex Ltd & 2 others .v. Janet Atieno, MSA CA No. 69 of 1984*** **Robert** ***Msioki Kitavi .v. Coastal Bottlers Ltd [1985] eKLR and NKR HCCC NO***. ***109 of 2002, Stephen Kihara Gikonyo .v. Peter Kirimi Kingori& Anor*** and urged that the award be enhanced to Kshs.900,000/-.

8. On his part, Mr. Thangicia learned counsel for the 1st and 2nd Respondents submitted that since the Appellant did not connect her injuries to the negligence of the 1st Respondent, the suit should have been dismissed. That the fact that the 1st Respondent was convicted in the traffic case was not a basis to hold him exclusively liable for the occurrence of the accident. That the Appellant was the cause of the accident and the suit should therefore be dismissed. The cases of **Peter Kaibunga Nkiriti .v. John Mwenda Muraa [2011] eKLR,** and ***Robinson .v. Oluoch [1971] EA 376*** were relied in support of those submissions. Counsel further submitted that on the authority of ***Serah Wangui Kingori .v. Andrew M. Nguni, HCCC No. 403 of 1986*** (UR) the award of Kshs.200,000/- should be reduced to Kshs.100,000/-

9. The first issue, that falls for determination is Mr. Thangicia's submission that apart from dismissing the appeal, the suit should be dismissed and if not, the award of Kshs.200,000/- should be reduced to Kshs.100,000/-. At the hearing, I inquired from Mr. Thangicia whether a cross-appeal had been filed and he confirmed that none had been. In the absence of such a cross-appeal, I believe that this court will have no jurisdiction to dismiss the suit. Its jurisdiction will only be limited to either allowing or dismissing the appeal. This is so because, that is what is before it. Where a Respondent intends to urge an appellate court to either interfere with the decision of the trial court or affirm it for other reasons other than those in the judgment, such a Respondent should file a cross-appeal setting out the grounds therefor or grounds affirming the decision. Since there was no such cross-appeal in this matter, I will limit myself in determining the grounds put forth by the Appellant. In this regard, I reject Mr. Thangicia's said invitation.

10.The 1st ground was that in view of the evidence tendered, the trial court erred in apportioning liability at 50 : 50. The evidence before the trial court was that the Appellant was walking on the pedestrian path when the 1st Respondent lost control of the vehicle whereby it veered off the road, hit her and her brother and then plunged unto the crowd killing some of them. There was evidence that the road was under construction at the time and there were road signs warning about that fact. The 1st Respondent admitted this fact and stated that he knew that there was only one lane in use at the time. That the accident occurred while he was driving down towards Naka bridge, that a CID vehicle was packed on the road, that he could not swerve to either side of the road as on both sides was the river. That he had pleaded guilty to traffic charges, including one for careless driving and had been convicted accordingly. The 1st Respondent admitted that in the circumstances obtaining at the time, any driver should have been careful. That he tried to brake but nevertheless, the vehicle hit the crowd.

11. On the basis of the foregoing, the question that arises is, was the Appellant and the crowd on the road as contended by the Appellant? Did the Appellant and the 1st Respondent do enough to avoid the accident? Firstly, since there was only one lane that was in use at the time and there were police at the scene, it is unlikely that the Appellant and the crowd would be on the road. The 1st Respondent himself told the court that there was a CID vehicle that was packed on the road. If that vehicle was on the road and one lane was closed, it is unlikely that the crowd would have been on the road for the 1st Respondent to have plunged unto it. PW3 who was an independent witness gave unchallenged evidence that the 1st Respondent did not heed the warnings; that he was driving at a speed in which he could not control the vehicle and that the vehicle veered off the road and hit the Appellant and plunged into the crowd ahead. That those who were injured included people going to and those at the site of shooting which was the scene of the accident. The Appellant's testimony that she was walking on the pedestrian path at the time of the accident was not displaced in cross-examination.

12. From the foregoing, it is clear that had the 1st Respondent taken due care and proper lookout, he would have heeded to the warning signs on the road and driven at a speed in which he would have been able to control the motor vehicle. It is clear that the vehicle lost control, veered off the road and hit the Appellant before plunging into the crowd where it killed others. The Appellant was firm both in her evidence in chief and cross-examination that she was not walking on the tarmac but on the pedestrian path. In its findings, the trial court found that the Appellant was in a crowd of people who were on the bridge viewing a person who had been shot by the police. That the Appellant was right on the road which she should not have been. That were she not a mere busy body looking at the dead body, she would not have been hit by the vehicle. That she consciously exposed herself to the accident when she stood on the road *"just to look at the body."*

13. With greatest respect, those findings by the trial court are not supported by the evidence on record. The Appellant's testimony was firm that she and her brother were walking on a pedestrian path. It was neither suggested to them nor established that they were amongst the crowd that was looking at a body of a person who had been shot by the police. PW3's testimony was that;-

> ***"There was a crowd at the bridge viewing a person who had been shot by the police. The crowd included people walking to and at the scene..... It veered off the road and plunged into the crowds of people."***

14. When the firm evidence of the Appellant is taken with that of PW3 that the motor vehicle veered off the road and that the crowd that was hit included people *"walking to and those at the scene,"* the findings of the trial court that the Appellant was right on the road and a mere busy body looking at a dead body cannot stand.

15. Further, sections 107 and 108 of the Evidence Act Cap 80 Laws of Kenya, is to the effect that it is he who alleges that must prove. The 1st and 2nd Respondent pleaded a total of six (6) particulars of negligence. These were that the Appellant; was walking in the middle of the road; failed to observe personal safety while using Meru-Chuka road; attempted to cross a busy highway; refused to walk on the part designated for use by pedestrians; declined to heed the warnings of motor vehicle registration No. KAG 241 T and walked drunkenly along the subject highway. None of these particulars was proved by the 1st and 2nd Respondent. To my mind, having failed to prove any of the said particulars of negligence, it was absolutely wrong and a serious misdirection for the trial court to apportion liability at 50: 50. The Appellant was not even asked whether she heard the motor vehicle hoot Although in his defence the 1st Respondent alluded to it ! Its probative value, in my view, having not been put to the Appellant in cross-examination is minimal, if any.

16. In this regard, whilst I am in agreement with the Authority of ***Asif Sadiq .v. Mumbi Holdings Ltd & Anor [2012] eKLR*** that there still can be contributory negligence where there has been a traffic conviction, I am of the view and so hold that the 1st Respondent should have bore the greatest responsibility for the occurrence of the accident. In this regard, I will set aside the apportionment of liability at 50: 50 and allocate therefor 10%: 90% in favour of the Appellant. The first ground succeeds.

17. The next ground is that the award of Kshs.200,000/- was inordinately low as to amount to an erroneous estimate. The jurisdiction of this court as far as interferance of awards in damages is concerned was set in the case of ***Butt.v. Khan [1981] KLR 541***. This court must be satisfied that the trial court made an error on principle or misapprehended the law before it can interfere. In ***Loise Wanjiku Kagunda .v. Julius Gachau Mwangi CA No. 142 of 2003*** (UR), the court held:-

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the Judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on wrong principles.(see Mariga .v. Musila]1984] KLR 257). (Emphasis added.)***

18. I have looked at the trial court's judgment on quantum. The trial court summarised the injuries as "a fracture/dislocation of the hip and multiple soft tissue injuries". According to the medical report produced as PExh 3, the Appellant suffered injuries to the head, face, left side of the chest; right wrist and elbows, both knees left hip and the dislocation of the pelvis/hip. She was admitted in hospital for four (4) days. As at the time of examination in October, 2010, the Appellant still complained of chest, abdominal and lower pains and poor feeding. These were never challenged. To my mind the trial court did not consider all these when assessing quantum at Kshs.200,000/-. In the ***Gusii Deluxe Case*** (supra) the Court of Appeal held that injuries that had been classified as grevious harm were not mere soft tissue injuries. In the present case, the Appellant's injuries were categorised as grevious harm in PExh 2, the P3 form. The Appellant had scars on the forehead, left side of the chest, left thigh, the knees as well as the right elbow. At the time of the trial, she was a young woman of 22 years. These were never considered by the trial court. The trial court having failed to consider all these, in my view explains the meagre award of Kshs.200,000/- for the injuries. The court failed to consider material facts in arriving at its assessment of damages. The award of Kshs.200,000/- was too low in the circumstances that it amounted to an erroneous estimate.

19. Having considered the cases relied on, the injuries sustained and the comparable awards and the inflationary trends, I would asses the damages at Kshs.500,000/-

20. Accordingly, the Appeal is hereby allowed, the trial court judgment is set aside, and substituted with

Judgment for the Appellant as follows:-

a) Liability 10% : 90% in favour of the Appellant.

b) Damages Kshs.500,000/-

Specials Kshs. 3,000/-

Total Kshs. 503,500/-

The award is therefore settled at Kshs.503,500/- less 10% (Kshs.50,300/-) , Kshs.452,700/- plus interest thereon at court rate from 21st February, 2012 until payment in full. The costs of the appeal is awarded to the Appellant in any event.

It is so ordered.

DATED and Delivered at Chuka this 1st day of September, 2016.

A. MABEYA

JUDGE

Judgment read and delivered in open court in the presence of counsels for the parties.

A.MABEYA

JUDGE

1/9/2016