



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 1 OF 2014

IRENE WAIRIMU MUTHEE.....APPELLANT

VERSUS

GITONGA MUGAMBI MUKETHA.....1ST RESPONDENT

WILSON IRUNGU MWANGI.....2ND RESPONDENT

JUDGMENT

The appellant was the plaintiff in a suit she filed against the defendants seeking special and general damages in compensation for the injuries she sustained and the loss she incurred as a result of a road traffic accident which occurred on 20th November, 2007 within Karatina town on Karatina-Sagana Road.

According to the plaintiff's plaint, the accident involved motor vehicle registration number **KAL 091T** in which she was lawfully travelling as a fare-paying passenger and another public service vehicle registration number **KAS 829 X** (Toyota Hiace Matatu).

It was the plaintiff's case that the accident was caused by the carelessness or negligence of either the defendants in that they or their servant or agent drove motor vehicle registration number **KAL 091T** so carelessly or negligently that it collided with motor vehicle registration number **KAS 829 X**. Consequently the plaintiff alleged that he sustained injuries on both her legs and therefore suffered loss and damage.

The defendants denied all aspects of the plaintiff's allegations in their joint defence they filed against her claim. Although they denied the occurrence of the accident, the defendants still laid the blame for the same accident on the driver of motor vehicle registration number **KAS 829X**. In particular this is what they said in the pertinent paragraph of their defence:-

"4. Further to paragraph 3 above the Defendants states (sic) that the accident herein was caused solely and or substantially contributed to by the negligence of the driver of motor Vehicle KAS 829X and shall at the appropriate time seek to join the driver and the owner of the said motor vehicle."

At the conclusion of the trial, the learned magistrate found for the defendants and dismissed the plaintiff's suit with costs. It is this decision that the appellant appealed against; in her memorandum of appeal, the appellant raised the following grounds:-

1. The learned magistrate erred in law and in fact in his finding that negligence had not been proved against the defendants;

2. The learned magistrate failed to analyse the evidence and the pleadings particularly paragraph 4 of the statement of defence in which the defendants blamed a third party for the accident and not that the road was slippery;
3. The learned magistrate wrongly disregarded the defendant's failure to take up third party proceedings against the driver of motor vehicle registration number **KAS 829 X** despite a successful application for adjournment for that purpose;
4. The learned magistrate erred in fact in relying solely on the evidence of PW2 Justin Karanja of Karatina police station who claimed that the respective drivers of motor vehicles **KAL 091T** and **KAS 829X** were not to blame yet he was not an eye witness.

The appellant urged this court to allow the appeal, set aside the lower court's decree and find that the defendants were solely responsible for the accident. She also asked for judgment on quantum and interest on the award together with costs of the suit and cost of this appeal.

The appellant (**PW1**) testified that she was a passenger in motor vehicle registration number **KAL 091 T** travelling from Karatina Town to Murang'a. She was seated behind the driver. While at Jambo area, the vehicle collided with another vehicle. It was her evidence that the vehicle in which she was travelling was speeding and that both vehicles landed in a ditch upon collision. She injured her shins and was taken to Karatina hospital for treatment. According to her evidence, she later developed complications and had to go to Murang'a District hospital for further treatment. She, however, reported the accident to the police on the material day and was issued with P3 form and a police abstract. These documents together with treatment cards were admitted in evidence in support of the plaintiff's case. Also admitted in evidence was a copy of records from the registrar of motor vehicles certifying that the 1st respondent was the registered owner of the motor vehicle in which the appellant was travelling at the material time.

The witness also testified that there was a drizzle and the road was wet. The accident happened on the road and according to her the vehicle in which she was travelling was speeding. She complained that her right leg aches when she walks for long.

The police who visited the scene Police Constable **Justin Karanja (PW2)** from Karatina police station testified that indeed on 20th November, 2007, a report was received at the station that a road traffic accident involving motor vehicles registration numbers **KAL 091T** and **KAS 829X** respectively had occurred.

This witness took a sketch map and also established the driver of the motor vehicle registration number **KAL 091T** to have been one **Paul Njeru Muthungu** while that of motor vehicle registration number **KAS 829X** was one **John Kinyanjui Kibaki**. The witness testified that the person who presented himself at the police station as the owner of motor vehicle registration number **KAL 091T** was the second respondent. He produced a police abstract detailing the report on the road accident.

According to the police officer, the road was wet and therefore the accident was attributable to that condition of the road; he was of the opinion that none of the drivers was to blame.

Dr Julius Kimani Mwago (PW3) testified that he examined the plaintiff on 17th March, 2008 and prepared a medical report that captured his findings on the extent of the plaintiff's injuries. According to his evidence the plaintiff sustained cuts on both her legs. The medical cards with which she presented him showed that she had been treated at Karatina hospital and Murang'a District hospital; an x-ray was done,

the wounds dressed and the patient given antibiotics and painkillers. The plaintiff complained of pain in her left leg.

The clinical officer who attended to the plaintiff immediately after the accident was **Mr Maina Ndirangu (PW4)** and in his testimony, he testified that he attended to the plaintiff on 20th November, 2007 at Karatina Hospital. According to him, his patient complained of pain in the left leg and that she walked with a limp. There was tenderness on the left leg and upon conducting an X-ray he ruled out a fracture. He cleaned and dressed the plaintiff's wounds; he also gave her painkillers and antibiotics. He prepared the treatment card which he signed. This piece of evidence was admitted in evidence.

David Mungai Mwaura (PW5) testified that he was a clinical officer attached to Murang'a District Hospital and that on 26th November, 2007, he examined the plaintiff. According to him the plaintiff was generally in a fair condition though she had sustained cut wounds on both legs. He treated her and prescribed antibiotics and painkillers for her. This witness also made notes of the treatment; they were admitted in evidence in support of the plaintiff's case. The witness testified that the wounds he dressed were fresh. According to his testimony, the plaintiff had not been treated earlier.

The only witness for the defence was the records officer from Karatina Hospital, **Peter Maingi Kimotho (DW1)**. He testified that he had been in that hospital for 10 years. He produced the hospital records for 20th November, 2007 and 26th November, 2007 to show that the plaintiff was never attended to in that hospital on either of the two dates. According to this witness, registration of patients, regardless of the nature of sickness is compulsory. The witness testified, however, that **Maina Ndirangu (PW4)** who testified as having attended the plaintiff at Karatina Hospital was an employee of the hospital and that he had worked with him there for a long time.

An assessment of the parties' pleadings and the evidence on record demonstrate that a road traffic accident involving motor vehicles registration numbers **KAL 091T** and **KAS 829X** respectively did occur on 20th November, 2007 on Karatina-Sagana Road. It is this accident that is the basis of the plaintiff's claim and she gave evidence in that behalf. Though the defendants denied it, they still alleged in their defence that the accident was caused by motor vehicle registration number **KAS 829 X**; since the defendants' allegation was not an averment in the alternative to their denial, I take it that it was an admission on their part that in fact an accident did occur at the material time and place and that it involved the two vehicles. This accident was reported at Karatina police station on the same day it occurred and the police officer who visited the scene produced a police abstract giving particulars of the accident.

The only questions for determination in my view are; who it is that was to blame for the accident; whether the appellant sustained any injuries as a result of the accident; if she sustained any injuries, what were the extent of the injuries; and whether she was entitled to any damages and if so the extent of damages payable and by whom the damages should be paid.

As to the first question, it was the plaintiff's evidence that the accident was caused by the driver of motor vehicle registration number **KAL 091T**. According to her, he was speeding. It was also her evidence that there was a drizzle and therefore the road was slippery. She testified that the vehicle in which she was travelling collided with vehicle registration number **KAS 829X**.

The only other witness who testified on how this accident occurred was the police officer who visited the scene, police constable **Justin Karanja (PW2)**. As part of his investigations, he took a sketch map of the accident scene and in his view, none of the drivers of either vehicles was to blame for the accident because the road was wet. Apart from absolving the two drivers from blame, the officer did not produce the sketch map he alleged to have drawn of the accident scene and neither did he give any evidence of how the accident occurred. His opinion, in my view, was of little value.

I should add that his evidence that none of the drivers could be blamed for the accident because the road was wet is nothing more than a misplaced opinion. If the condition of the road was what the witness described it to be, it called for the road users including the driver of motor vehicle registration number

KAL 091T to be cautious of that condition and he could not escape blame if he drove his vehicle without due regard to the condition of the road. More importantly, the driver, who only could inform the court the extent the condition of the road contributed to the accident did not testify. Without his evidence it cannot be assumed that the accident was caused by the wet road.

The defendants on their part did not call any witness who could probably testify on how the accident happened; the only person they called was a records officer from Karatina Hospital who knew nothing about the accident and particularly how it happened. In these circumstances we are left with the plaintiff's testimony as the only eye witness' account of how the accident occurred. Considering that her evidence that the vehicle in which she was travelling was speeding was not controverted, it is safe to conclude that the driver of that vehicle was solely responsible for the accident. Contrary to the learned magistrate's finding, I hold that the defendants were 100% liable for the accident.

The rest of the questions relate to the issue of injuries that the plaintiff is alleged to have sustained and therefore it is appropriate to deal with them as one question.

From the evidence on record, there are questions whether the plaintiff was injured as a result of the accident in issue or whether she could probably have been injured elsewhere on a different day.

According to the plaintiff she was treated at Karatina hospital the same day the accident occurred; this would be the 20th November, 2007. She said that she later went to Muranga district hospital because she developed complications which included pain on her left leg that in her words had a "big wound" on it.

The plaintiff was attended to at Karatina hospital by **Maina Ndirangu (PW4)** who testified that the plaintiff complained of pain in the right leg (and not the left one). He also testified that the plaintiff even underwent an x-ray and upon its examination, he ruled out a fracture. The witness treated the wounds by, amongst other things, cleaning and dressing them. He also administered painkillers and antibiotics. Thereafter, the clinical officer prepared a treatment card that captured the particulars of his treatment of the plaintiff. This card was admitted in evidence.

Another clinical officer attached to Murang'a District Hospital, **David Mungai Mwaura (PW5)**, testified that the plaintiff walked on her own to the hospital on 26th November, 2007. Upon examination, he found her to be in fair general condition though she had "*sustained painful cut wounds on pretibial area of both legs.*"

Curiously, the clinical officer administered the same treatment that the plaintiff is said to have received at Karatina hospital on 20th November, 2007; he dressed the wounds and gave the plaintiff a dose of antibiotics and painkillers. More baffling was his testimony that the wounds were fresh without any dressing and there was no evidence of previous treatment. To appreciate the nature of his testimony, it is necessary to reproduce the relevant excerpts here. The witness said:-

"On examination, fair general condition, cut wounds on both legs. I treated her. Tetanus toxoid, antibiotics, painkillers, dressing. I signed notes. I produce the same as PEX9. I charged Kshs. 3000/=. Receipt-PEX9b. I attended to her on 26.11.2007, Road traffic accident. Road traffic accident was on the same day. I personally attended to her. The wounds were fresh. I assessed her. She had no dressing. She had no earlier treatment."

What the evidence of these two witnesses, PW4 and PW5, postulates is that the plaintiff must have been involved in two different accidents on two different occasions but in each of these occasions, she sustained similar bodily injuries for which she received similar treatment by two different clinical officers in two different hospitals!

If what these testimonies show is what happened, which in my view is quite unlikely, then one cannot attribute with any certainty the injuries the plaintiff is alleged to have sustained either on the traffic accident that occurred on 20th November, 2007 or that alleged by PW5 to have occurred on 26th

November, 2007.

The plaintiff's evidence on the nature and extent of her injuries and whether those injuries can be attributed to the road traffic accident of 20th November, 2007 was anything but consistent. In a nutshell, it was not proved on a balance of probabilities that the injuries the plaintiff sustained arose out of the road traffic accident involving motor vehicle registration number **KAL 091T** in which she is said to have been travelling at the material time.

In the final analysis I hold that, much as the plaintiff may have sustained injuries, it has not been proved to the required standard that the respondents were liable for those injuries; accordingly they were not liable for any loss or damage that the plaintiff may have incurred. The appellant's appeal is therefore dismissed with costs.

Dated, signed and delivered this 30th October, 2015

Ngaah Jairus

JUDGE