



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 107 OF 2018**

**MARTIN ODONGO OTIENO.....APPELLANT**

**VERSUS**

**NAOMI WESA..... RESPONDENT**

***[Being an appeal against the whole of the judgment and decree of Hon. P. Olengo PM in Nyando PMCC NO. 221 OF 2014 dated 18<sup>th</sup> October 2018]***

**JUDGMENT**

The Appellant, **MARTIN ODONGO OTIENO**, was the Plaintiff in the case which he had filed against the Respondent herein, **NAOMI WEKESA**.

1. He has lodged this appeal after the trial court dismissed his suit.
2. He believes that he had discharged the burden of proving that the accident which gave rise to the case, was caused due to the negligence of the Respondent.
3. At the very least, the Appellant believes that the Respondent was partially to blame for the accident.
4. His view was that if the trial court had given proper consideration to the evidence tendered by the parties, it would not have dismissed the suit.
5. Finally, the Appellant noted that the trial court was duty-bound to assess the quantum of damages payable to the Appellant, regardless of whether or not the court found the Respondent liable for causing the accident.
6. When canvassing the appeal, the Appellant pointed out that although the original Plaintiff cited the registration particulars of his vehicle as being **KBB 381L**, the Plaintiff was amended on 24<sup>th</sup> March 2016 to reflect the correct particulars as being **KBB 381L**, instead of **KBB 381K**.
7. According to the Appellant, his vehicle was stationary at Store Pamba, along Sondu-Katito Road, at the time of the accident.
8. When **PW1** saw the Respondent's vehicle approaching from the direction of Kisumu, he flicked his lights and hooted to alert the driver of the motor vehicle Registration **KBV 523Z**.
9. In view of the actions he took, **PW1** had expected the Respondent's driver to slow down, stop, swerve or in any other manner, manage or control his vehicle so that it could avoid ramming into the Appellant's vehicle.
10. The Appellant submitted that if the Respondent's driver had been driving at a speed of **60 KPH**, he could have controlled the vehicle sufficiently to avoid ramming into the Appellant's vehicle.
11. Furthermore, the Appellant submitted that because the Respondent's driver ran away from the scene, after the accident, the court should draw an adverse inference against him.
12. Although the Respondent's driver was not charged with a traffic offence, arising from the accident, the Appellant submitted that liability founded on negligence, in civil cases, cannot be equated to liability in traffic cases.

13. In this case, the Appellant submitted that the evidence he tendered at the trial was uncontroverted. Therefore, he stated that the Respondent ought to have been held 100% liable for the accident.
14. On the other hand, if the court did not find that the Respondent was 100% to blame, the Appellant submitted that the court should attribute 90% liability to the Respondent.
15. Finally, on the issue about the quantum of compensation, the Appellant submitted that he had proved all the claims for Special Damages totaling Kshs 296,500/=.
16. Therefore, he asked this court to award him that sum, plus General Damages and costs of the case.
17. In answer to the appeal, the Respondent submitted that the Appellant had failed to prove the allegations of negligence which he had levelled against the Respondent.
18. It was her understanding that **PW1** testified that he had no recollection of what happened prior to the accident. If **PW1** was alone at the time of the accident, and if he was unable to state what had happened prior to the accident, the Respondent submitted that there was no proof concerning the causation of the accident.
19. The Respondent also drew the attention of this court to the fact that the registration number of the Appellant's vehicle was cited as **KBB 381K**, in the Plaintiff.
20. The Respondent submitted that the particulars of the registration plates were very important, especially when a vehicle was involved in an accident.
21. Therefore, as the pleadings cited a vehicle registration number **KBB 381K**, whilst all the evidence adduced by the Appellant cited **KBB 381L**, the evidence on record did not support the Appellant's case.
22. According to the Respondent, the trial court did give to the Appellant an opportunity to amend the Plaintiff, but the Appellant failed to amend the pleadings.
23. In any event, the Appellant is said to have expressly provided information (in his pleadings and the evidence), which disclosed that he was in blatant breach of the Highway Code.
24. By stopping the public service vehicle at a bend, in order to pick-up a passenger, the Appellant is said to have violated Traffic Rules.
25. Thirdly, the Appellant was said to have failed to adduce sufficient evidence to prove the particulars of negligence which he had cited in the Plaintiff.
26. Finally, the Appellant is said to have failed to meet the threshold for proof of Special Damages.
27. In the result, the Respondent submitted that the trial court was right to have dismissed the suit.
28. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions. I do caution myself about the fact that I did not have the opportunity to observe the witnesses when they were testifying before the trial court. Therefore, when drawing my own conclusions from the re-evaluation of the evidence, I must make an appropriate allowance in that regard, if it appears that the finding by the trial court was impacted by the demeanour of any particular witness.
29. Prior to delving into the testimonies of the witnesses, I hold the view that it is prudent to ascertain the pleadings, as regards whether or not the same were amended.
30. The record of the proceedings shows that on 24<sup>th</sup> March 2016, the Plaintiff's advocate made an application for the amendment of the Plaintiff. This is a verbatim recital of the proceedings relevant to the application for amendment;

***“Nabifo: I pray that I amend the plaintiff paragraph 3 so the motor vehicle to read KBB 381L. It affects paragraph 4 and 7 of the plaintiff and paragraphs 3, 4 and 10 of the defence. Otieno Njoga: No objection.***

***Court: The amendment is hereby allowed.”***

31. In the light of the said order, which was granted after the Defendant informed the trial court that he did not have any objection, I find that the Plaintiff and the Defence were duly amended.
32. I appreciate that in most instances parties usually seek leave of the court to amend their pleadings. However, in this case, the Plaintiff specifically sought the amendment of paragraph 3, which had an impact on paragraph 4 and 7 of the Plaintiff.
33. The Plaintiff also made it clear that the amendment would affect paragraphs 3, 4 and 10 of the Defence.

34. When the trial court allowed the application, it was not necessary that thereafter, the Plaintiff would file an Amended Plaintiff, or that the Defendant would file an Amended Defence.

35. **PW1, VICTOR OMONDI OKELLO**, testified that he was employed by the Appellant, as a driver. He said that on the material date he was driving the Appellant's matatu, registration number **KBB 381L**.

36. His testimony was that his vehicle was on its right side of the road when the Respondent's lorry hit it.

37. **PW1** testified that he saw the Respondent's lorry approaching from the direction of Kisumu; and because the lorry was on the wrong side of the road, **PW1** flashed his car lights and he also hooted to alert the lorry driver.

38. He explained that the side of the road was steep, and that therefore, the matatu could have rolled if he moved the vehicle off the road.

39. **PW1** told the court that the matatu used to make about

Kshs 5,000/= to Kshs 6,000/= everyday. He produced a hand-written exercise book, wherein the earnings were being recorded.

40. **PW2, MARTIN ODONGO**, is the Appellant. He produced the logbook which proved that he was the registered proprietor of the matatu registration **KBB 381L**.

41. He also produced receipts to show that he paid Towing Charges amounting to a total of Kshs 22,000/=.

42. Apart from the two receipts for the towing charges, **PW2** produced the following exhibits;

*(a) Assessment Report .....Kshs 5,900.00*

*(b) Excess Premium .....Kshs 30,000.00*

*(c) Repair Costs .....Kshs 148,100.00*

43. During cross-examination, **PW2** conceded that whilst the receipt he produced for the cost of the repairs was for

Kshs 148,100/=, in the Plaintiff (at paragraph 6) the sum pleaded was Kshs 140,516/=.

44. His explanation was that the sum pleaded was the Assessment in the Report prepared by the Automobile Association of Kenya (Exhibit 8); whilst the actual sum paid was Kshs 148,100/=.

45. Meanwhile, as regards the earnings from his matatu, **PW2** testified that he used to get Kshs 6,000/=. He then told the court that he had lost a total of Kshs 180,000/=, considering that it took about one month to repair the vehicle.

46. After **PW2** gave his evidence he sought an adjournment in order to enable him call his remaining witness.

47. From the record of the proceedings on 24<sup>th</sup> November 2016, it is apparent that the said witness was expected to be a police officer. However, the said police officer failed to attend court on that date because he had to attend to an emergency.

48. On 13<sup>th</sup> April 2017 the Police Abstract was produced in evidence, by consent of the parties.

49. Thereafter, the Appellant closed his case.

50. On 24<sup>th</sup> May 2017, **DW1 DANCAN OUMA OLWENY**, testified.

51. He was the driver of the lorry registration number **KBV 523Z**. His employer is the Respondent herein.

52. **DW1** said that on the material evening, at about 6.30p.m, he was driving the lorry, when he got to the area near Store Pamba.

53. He saw a Nissan Matatu that was stationary on the road.

54. According to him, the matatu driver was waiting for a passenger to board the vehicle.

55. However, as **DW1** got closer to the matatu, the latter begun moving, and it suddenly blocked his path.

56. As there was a ditch to the left side of the road, **DW1** said that he could not swerve to that direction. It was in those circumstances that the collision occurred.

57. During cross-examination, **DW1** said that he was driving at **60 KPH**.

58. As regards the lighting, **DW1** said that it was “*a bit dark*”; but he emphasized that he could see clearly.

59. He confirmed that the driver of the matatu flashed his lights.

60. On his part, **DW1** said that he did nothing to try and avoid the accident. His explanation was that he did not stop because the matatu was very near.

61. After **DW1** testified, the Respondent closed her case.

62. Having re-evaluated the evidence I find that the Appellant’s matatu bore the registration number **KBB 381L**. The said particulars were incorporated into the Complaint, following the amendment which was effected on 24<sup>th</sup> March 2016.

63. It is significant to note that the Respondent expressly told the court that she had no objections to the said amendment.

64. Following the consensual amendment, the evidence tendered was not at variance with the pleadings in the Complaint. If anything, the evidence tendered in respect to the particulars of the Appellant’s motor vehicle, provided proof to support the particulars as pleaded.

65. It is common ground that the accident occurred along a narrow road, and at a bend.

66. It is further common ground that the Appellant’s matatu had stopped at that spot, to pick-up a passenger.

67. As the Respondent has submitted, pursuant to the Traffic Rules;

***“The driver of a motor omnibus or matatu shall not allow the matatu or omnibus to remain stationary on a road, except at a terminus or at a stand or place where the omnibus or matatu is specially authorized by law to stop.”***

68. The Respondent went on to submit that the matatu had halted at a place which was not a designated place, by law, for matatus to stop for purposes of picking up passengers.

69. Of course, if there was evidence that the matatu had stopped at a spot other than a designated area, that would have constituted a violation of the Traffic Rules.

70. But in this case, the Defence did not cite the alleged violation of the Traffic Rules as one of the particulars of negligence attributable to the Appellant.

71. Secondly, no evidence was led to show that the matatu had stopped at a place where matatus were not authorized to stop.

72. Thirdly, pursuant to submission by the Respondent herein;

***“The Traffic Act CAP 403 of the Laws of Kenya, under Section 68 (3) the law provides that; ‘A failure on the part of any person to observe any provision 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 on those proceedings.’”***

73. In effect, if the Respondent had intended to place reliance on the alleged violation of the Highway Code, she should have not only pleaded the particulars thereof, but she ought to have strictly proved any such particulars.

74. Logically, it is improbable that a designated parking can be located at a bend, along a highway. However, cases are not determined on the basis of hypothetical possibilities or probabilities. As the parties herein have both said, pursuant to **Section 107** of the **Evidence Act**;

***“Whoever desires any court to give any judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.”***

75. I find that the Respondent neither asserted nor proved the Appellant’s alleged violation of the Highway Code.

76. However, it is well settled that the burden of proof vested in the Plaintiff, for it is he who was expected to establish, through evidence, the elements of negligence which he had asserted against the Defendant.

77. If the Plaintiff failed to prove that he suffered a loss attributable to the negligence of the Defendant, the claim would fail.

78. In this case the Respondent’s driver confirmed having seen the Appellant’s matatu, as it was parked, waiting for a passenger to board it.

79. The Respondent’s driver testified having seen the passenger cross over from one side of the road, to the other, in order to board the matatu.

80. He confirmed that the driver of the matatu flashed his headlights, to draw attention to the presence of the matatu on the road
81. Notwithstanding all that, the Respondent's driver did absolutely nothing to try and avoid the accident.
82. I find it difficult to appreciate how the Respondent's driver could have seen the passenger crossing from one side of the road, to the other; where she boarded the matatu; which then begun moving; and all that within the short span of 10 metres between the matatu and the lorry.
83. I find that the accident was caused by the negligence of the Respondent's driver.
84. I found no evidence of contributory negligence attributable to the Appellant's driver.
85. Therefore, I conclude that the learned trial magistrate erred when he dismissed the Appellant's suit. Accordingly, I set aside the judgment of the trial court, and I substitute it with a finding that the Respondent was 100% liable for the accident.
86. On the issue of quantum of compensation, I find that the Appellant proved the Special Damages in the sum of Kshs 198,416/=. The said proof is in the nature of the claims as pleaded, coupled with the receipts verifying the payments made by the Appellant.
87. Of course, I note that in relation to the Cost of Repairs the sum claimed is Kshs 140,516/=:, whilst the receipt was for Kshs 148,100. Although the Appellant paid more than he claimed in the Complaint, he cannot be awarded more than he specified in his pleadings. It is for that reason that I find that he is entitled to the sum claimed.
88. In respect to the claim for Loss of User, the Appellant claimed the sum of Kshs 90,000/=:.
89. In the particulars of the said Loss of User, (at paragraph 7 of the Complaint), this is how the claim was summed-up;
- “a) Loss of user from 26.07.14 to 03.08.14 @ Kshs 6,000/= per day.”***
90. By my calculations, the number of days between 26<sup>th</sup> July 2014 and 3<sup>rd</sup> August 2014, is nine.
91. If the loss per day was actually Kshs 6,000/= per day, the total loss would be Kshs 54,000/=:.
92. Incidentally, in his Witness Statement which was filed in court on 8<sup>th</sup> October 2014, the Appellant indicated that the time it took to carry out the repairs was 9 days.
93. Curiously, when he testified in court the Appellant said that it took about one month to repair the motor vehicle.
94. On the other hand, at paragraph 7 of the Complaint, it was alleged that the vehicle was grounded for 15 days.
95. I find the evidence tendered on the issue of the alleged Loss of User is not only inconsistent as presented but it also does not support the claim as pleaded. It is not clear if the matatu was back on the road after 9 days or after 30 days, or after 15 days.
96. There is also no reliable evidence to prove the income which the Appellant was earning everyday. When I make reference to reliable evidence I mean such evidence as can be verifiable through records maintained as a matter of course, by other parties.
97. Bank statements, reflecting money that was banked on a daily basis, is a good start. But the best evidence is through Income Tax Returns.
98. In this case, the evidence was in the form of an exercise book, in which entries were entered by hand. Curiously, each of the said entries was rounded-off, between Kshs 2,000/= and Kshs 7,000/=:.
99. I would have expected a more realistic record, showing sums such as 3,150/=:; 4,780/=: etc.
100. And why did the Complaint cite income amounting to Kshs 6,000/= daily, whereas the book had many entries ranging from Kshs 2,000/=:?
101. I also deem it unrealistic that the matatu earned money every single day of every month.
102. In a nutshell, the evidence tendered did not support the sums claimed.
103. In the circumstances, I award to the Appellant the sum of Kshs 2,500/= per day, for 9 days; coming to a total of Kshs 22,500/=:.

104. I now allow the appeal, set aside the dismissal of the suit, and substitute it with a judgment in favour of the Appellant for;

*(a) Special Damages ..... Kshs 140,516*

*(b) General Damages ..... Kshs 22,500*

**TOTAL** **Kshs 163,016**

105. The Appellant is awarded the costs of the appeal, as well as the costs of the suit.

106. The Special Damages and the General Damages will attract interest at court rates, from the date when the learned trial magistrate delivered his judgment, on 18<sup>th</sup> October 2018.

**DATED, SIGNED AND DELIVERED AT KISUMU This 22<sup>nd</sup> day of September 2020**

**FRED A. OCHIENG**

**JUDGE**