



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.37 OF 2016**

**BETWEEN**

**JOSHUA OTIENO RATEM..... 1<sup>ST</sup> APPELLANT**

**STEVE OMONDI.....2<sup>ND</sup> APPELLANT**

**AND**

**ALICE ACHIENG OTIENO..... RESPONDENT**

(Being an appeal from the judgment of the SRM's Court at Homa Bay in

civil Case No.77 of 2013 dated 14/9/2016 – Hon. P. Mayova, SRM)

**JUDGMENT**

1. **ALICE ACHIENG OTIENO** (the Respondent) had filed a suit against **JOSHUA OTIENO RATEMO** and **STEVE OMONDI** (the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively) in the lower court seeking damages following a Road Traffic Accident involving motor vehicle Registration **No.KBQ 245L** owned by the 2<sup>nd</sup> respondent and driven by the 1<sup>st</sup> respondent.

2. The accident which occurred on 24<sup>th</sup> May 2013 was blamed on the 1<sup>st</sup> respondent's negligence as he was alleged to have carelessly and recklessly driven the said motor vehicle along **MBITA – HOMA BAY** road at **KANDIEGE** resulting in the respondent (who was a pillion passenger) getting hit by the motor vehicle and she sustained injuries.

3. The appellants denied liability putting the respondent to strictly prove ownership and control of motor vehicle by them. They blamed the respondent and the rider of the motor cycle for the accident saying there was failure to wear a reflector jacket, and helmet. Further that the respondent was an extra passenger who was intoxicated and seated at a dangerous and unsafe position. She was also blamed for failing to take reasonable care of her own safety.

4. The motorcycle rider was blamed for riding a defective vessel, and acting in total disregard of traffic rules and common prudence including failing to swerve and or take any action to avoid the collision.

He was also accused of making a sudden u turn while talking on his mobile phone.

5. At the hearing, the respondent told the trial magistrate that while travelling to Mbita along the Homa-Bay/Mbita road, as a pillion passenger on a motor cycle (which was on the left side of the road) as one faces Mbita direction, the motor vehicle aforementioned was wobbling on the road from MBITA direction and seems to have hit a pothole before colliding with the motorcycle.

She stated:-

**“the vehicle was wobbling on the road. The motor cycle could not evade it. There was a pothole. The vehicle hit us. Due to the impact the motor cycle was pushed off the road.”**

6. As a result, her left thigh bone was shattered, and she lost conscious for 7 days, having developed a clot in the brain.

7. It was her evidence that the motor vehicle driver left his side of the road and went into their lane.

8. On cross examination she indicated that the accident occurred at 8.00 p.m., and it was dark. She had worn a helmet, while the rider had a

helmet and a reflective jacket.

9. **BENARD OCHOLA** (PW2) a clinical officer at Homa Bay District Hospital prepared the medical report and also produced the Respondent's various medical records on behalf of other medical personnel. It was his evidence that the respondent underwent a CT scan which revealed hematoma in the brain membrane, with contusion and bleeding on the frontal part of the head.

10. He pointed out her injuries as fracture of the left femur, tenderness in the upper arm, hematoma in the head, broken tibia. The respondent underwent some surgery to have internal fixation of the bones, skin traction.

The left leg was shortened and she walks with a limp, and she also experienced constant pain on the left hip joint and an inability to flex the left knee joint and constant headache.

11. The 1<sup>st</sup> appellant confirmed he was driving motor vehicle **KBQ 245 L**, Toyota Probox on 24/05/13 and as he approached **KANDIEGE**, he saw a cyclist negotiating a corner from the opposite direction, but on his lane. The cyclist was just a few meters away, so 1<sup>st</sup> appellant flashed his lights on him, but the cyclist was unable to negotiate the corner and went to the vehicle's lane. The driver swerved to the left and landed in a ditch but the motor cycle followed him there and hit the front part of the motor vehicle. He blamed the rider for the collision, saying he rode on the wrong lane and also over sped.

12. On cross examination he stated he saw the cyclist 50 metres away from him, and even after he'd swerved to the right, the motorcycle followed and landed on his motor vehicle due to its high speed.

13. The trial magistrate upon considering the evidence found that the 1<sup>st</sup> appellant contradicted himself regarding which side of the road he swerved to.

He also held that it was the motor vehicle which had moved to the wrong side of the road saying if the motor vehicle driver was avoiding the motor cycle then how did the two motor vehicle meet the motor cycle on the rider's side. He found that the evidence showed no driver was to blame for the Road Traffic Accident.

14. Upon considering the injuries sustained by the respondent and the prognosis in the medical report the trial magistrate awarded general damages of Kshs.2.5 million.

15. These findings are now contested on grounds that the damages awarded are excessive, and that the trial magistrate failed to appreciate the defence offered by the appellant.

16. The appeal was canvassed through written submissions where appellant's counsel argued that there was no evidence tendered to show that the appellants were to blame for the accident, bearing in mind that the 1<sup>st</sup> respondent had not been charged with any traffic offence. On account of this alone, this court is urged to find that there was no reason for holding appellant at 100% liability.

17. The appellant's counsel also argued that the respondent's claim on quantum was a leaking ship as:-

*1) The clinical officer was not competent to produce the medical report or other medical documents as he is not a Doctor.*

*2) The trial magistrate relied on the injuries observed by the medical personnel which was a departure from the pleaded injuries, yet parties are bound by their own pleadings.*

It was submitted that the damages awarded were too high and this court should consider other decisions cited and reduce the sum awarded.

18. The respondent opposes the appeal saying the appellants' negligence was well proved by the evidence regarding which lane he swerved to. Further that in flashing his lights at the motor cycle which was only 50 metres away, and in the dark, only created confusion to the rider and he was unable to successfully negotiate the corner.

19. The respondent's counsel argued that the trial magistrate had good reasons for choosing to believe the respondent's version of events against the respondent's contradictory evidence.

The court is urged not to interfere with the award as trial magistrate duly considered:-

- 1) Nature of injuries;
- 2) The residual effects;
- 3) The medical reports;
- 4) Past decisions.

20. On the issue of the competence of the clinical officer to write a medical report – there is no basis for that proposition. There is nothing presented in court to suggest that the clinical officer lacked the required medical knowledge that would equip them with skills to write such a report.

In any event the appellants had the option of requesting the respondent to submit to a Doctor of their own choice for a second medical opinion.

21. As regards the evidence – the trial magistrate properly analyzed the same and indeed noted the contradiction in the 1<sup>st</sup> appellant’s evidence regarding how the accident occurred and what evasive action he took. I cannot fault the trial magistrate for rejecting that evidence.

22. With regard to quantum – the trial magistrate took into account the nature of injuries – a crushed thigh bone resulting in shortening of the limb and respondent now walks with a limp, remaining unconscious for 7 days as a result of a clot in the brain and which has resulted in persistent headaches, it is even fortunate that the respondent is alive – the rider who was with her on the motor cycle died from his injuries.

23. I also consider past decisions and find that the quantum of damages awarded was well considered and I hold that it is not excessive.

24. I decline to interfere with the trial magistrate’s decision – the appeal has no merit and is dismissed with costs to respondent.

**Delivered and dated this 9<sup>th</sup> day of March, 2018 at Homa Bay**

**H.A. OMONDI**

**JUDGE**

Read in open court – parties absent.

**H.A. OMONDI**

**JUDGE**