



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 42 OF 2013

AUGUSTINE DULA SUNDAY APPELLANT

VERSUS

JOHANNES OKOTH OBONYO 1ST RESPONDENT

NANCY JOAN ONYANGO 2ND RESPONDENT

[Being an appeal from the Judgment of the Resident Magistrate in Kisumu CMCCC No. 354 of 2012

CONSOLIDATED WITH Kisumu CMCCC No. 355 of 2012 delivered on 30th May 2013]

JUDGMENT

In the lower court the Appellants herein had sued the Respondents for compensation for injuries sustained in an accident involving their motor vehicle Registration Number KAX 465W and the Respondents' motor vehicle Registration Number KAM 597S. The accident was alleged to have occurred on 18th March 2012 along the Busia Kisumu road near Kisiat Bridge. One of the cases to wit CMCC NO. 355 of 2012 **ROMANUS OJUANG OMOLLO Versus JOHANNES OKOTH OBONYO and NANCY JOAN ONYANGO** was selected as the test suit on liability. After hearing the evidence from both sides the trial magistrate found the Appellants had not proved their case on a balance of probability and dismissed the same. Being aggrieved they have appealed on grounds that:-

- “1. The learned trial magistrate erred in law and fact by basing his decision on a wrong presumption that when vehicles collide on one lane of the road they will either end up inside the road or off the road on the same side as the lane on which they collided.***
- 2. The learned trial magistrate erred in law and fact by ignoring the Plaintiff's evidence and version of the circumstances leading to the accident and basing his decision only on the defence witnesses' evidence.***
- 3. The learned trial magistrate erred in law and fact in writing a judgment which is at variance with the pleadings and against the weight of evidence.***
- 4. The learned trial magistrate erred in law by failing to assess the quantum of damages in any event.***

When the Advocates for the parties appeared before me on 29th September 2016 they consented to canvassing the appeals by way of written submissions. However only those of the appellant were received.

Each party blamed the other for the accident with the appellants stating that the Respondent's motor vehicle which was being driven in the opposite direction veered to the path of their vehicle while overtaking three other vehicles and that after the collision their vehicle landed in a ditch on the right side. On her part the 1st Respondent testified that the appellants' motor vehicle, a matatu, was racing another matatu and when it attempted to overtake that other matatu it veered into the path of her motor vehicle and a collision occurred. She conceded there were other vehicles in front of hers but denied she was overtaking. She stated that those other vehicles had gone off safely before the collision between her vehicle and that of the appellants occurred. Upon evaluating the evidence before him the trial magistrate found it a fact that the accident had occurred on the respondent's lane and that therefore the appellant was liable for the accident and dismissed the case.

I have reconsidered this evidence all the while bearing in mind that I did not see the witnesses testify. Unlike the trial magistrate I find that both drivers gave plausible accounts of how the collision occurred and that there is no concrete evidence to prove who between the two drivers was to blame as no independent witnesses were called to testify. Accordingly I find them both liable and in so finding I am fortified by the decision of the Court of Appeal in **Hussein Omar Farah Versus Lento Agencies [2006]eKLR** where it was held:-

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

Accordingly I find both drivers equally to blame and apportion liability at 50:50%.

The appellant in **Civil Appeal No. 42 of 2013 (AUGUSTINE DULA SUNDAY Versus JOHANNES OKOTH OBONYO and NANCY JOAN ONYANGO)** sustained soft tissue injuries – a cut on the face, swollen right knee, chest, face, swollen moth and loose upper incisors and I am satisfied that an award of Kshs.150,000/= would suffice. He did not plead special damages and so none will be awarded.

The appellant in **Civil Appeal No. 43 of 2013 (ROMANUS OJUANG OMOLO Versus JOHANNES OKOTH OBONYO and NANCY JOAN ONYANGO)** also suffered soft tissue injuries, to wit, blunt injury on the head, bruises on the right chin, blunt injury on the chest, tenderness and swollen right elbow joint and a swollen right knee for which I am also satisfied an award of Kshs.150,000/= will suffice. As in the other case no special damages were pleaded and so none will be awarded.

Accordingly the appeals are allowed, the judgment of the lower court is set aside and substituted with a judgment on liability for the appellants against the respondents in the ratio 50:50% and general damages for both the appellants in the sum of Kshs.150,000/= each which less their contributory negligence of 50% is Kshs. 75,000/= with interest at court rates from the date of the judgment in the lower court. As for the costs of the suit and these appeals each party shall bear their own costs. It is so ordered.

Signed, dated and delivered at Kisumu this 23rd day of February 2017

E. N. MAINA

JUDGE

In the presence of:-

N/A for the Appellants

Mr. Ouma for the Respondents (Holding brief for Mr. Yogo)

C/A: Otieno/Winnie – Court Assistants