



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI

CIVIL APPEAL NO. 341 OF 2014

STEPHEN ONYANGO OTIENTO..... APPELLANT

- V E R S U S -

MIGWI ABRAHAM 1ST RESPONDENT

JAMES SILA MUSEMBI 2ND RESPONDENT

*(An appeal arising from the decision, judgment and decree made
on the 10th day of July, 2014 by Hon. M. Chesang (Mrs) Ag SRM
in CMCCC 2295 of 2012)*

CONSOLIDATED WITH

NAIROBI CIVIL APPEAL NO. 342 OF 2014

A O O (A CHILD).....APPELLANT

(Suing through Stephen Onyango Otieno (Being the next friend)

VERSUS

MIGWI ABRAHAM.....1ST RESPONDENT

JAMES SILA MUSEMBI.....2ND RESPONDENT

*(An appeal arising from the decision, judgment and decree made
on the 10th day of July, 2014 by Hon. M. Chesang (Mrs) Ag SRM
in CMCCC 2293 of 2012)*

JUDGEMENT

1. Stephen Onyango Otieno and A O O, hereinafter referred to as the 1st and 2nd appellants each filed an

action against the respondents claiming for damages for the injuries they sustained when they were allegedly knocked down by motor vehicle registration no. KAW 065Y, Isuzu bus belonging to Migwi Abraham, the 1st respondent herein, along John Saga Road on 7.11.2010.

2. The suits were filed before the Chief Magistrate's Court, Nairobi.

The respondents filed a defence to deny the appellants' claims. The two suits were consolidated, heard and eventually dismissed by Hon. Chesang, learned Resident Magistrate on 14.7.2014. Being aggrieved by the aforesaid decision, each appellant filed an appeal before this court to challenge the dismissal order. The two appeals were ordered consolidated.

3. On appeal the appellants put forward the following common grounds.

1. ***THAT this honourable magistrate erred in law and fact by dismissing the suit.***
2. ***THAT this honourable magistrate erred in law and fact by finding that liability was not established against the 1st and 2nd respondents.***
3. ***THAT this honourable magistrate erred in law and fact by finding that the evidence adduced by PW2 and PW3 are contradictory.***
4. ***THAT this honourable magistrate erred in law and fact by ignoring and failing to consider the appellant's uncontroverted evidence in entirety.***
5. ***THAT the honourable magistrate erred in law and fact by failing to assess general and special damages awardable to the appellant in this suit.***
6. ***THAT this honourable magistrate erred in law and fact by striking out the plaint.***

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

5. I have re-evaluated the case which was before the trial court. I have also considered the rival submissions. Though the appellant put forward a total of six grounds of appeal, the main ground which commends itself for consideration is whether or not there was sufficient evidence to sustain the suit. It is the submission of the appellants that there was sufficient evidence which were not controverted by the respondent which show that the respondent's motor vehicle was involved in the accident. The appellants pointed out that the evidence of P.C Florence Kioko (PW2) and Stephen Onyango Otieno (PW3) put bus registration no. KAW 065Y at the scene of the accident. The respondents on the other hand are of the view that the decision of the learned Resident Magistrate cannot be faulted because the appellants relied on hearsay evidence. It was pointed out that the good Samaritan was never summoned to testify to confirm seeing the bus cause the accident.

6. I have carefully re-evaluated the evidence presented by PW2 and PW3. It is the evidence of PW3 that he was walking besides the road while carrying his son A O O (2nd Appellant), when he was knocked from behind. PW3 further stated that a good Samaritan whose name he could not remember gave him the registration number of the motor vehicle which knocked them as KAW 065Y. It is his evidence that the accident was what is popularly known as "hit and run". P.C Florence Kioko (PW2) testified on behalf of the investigating officer. She produced as exhibits in evidence to wit the police occurrence book and two police abstract forms. The above exhibits were produced without any objection being raised by the respondents advocate. The exhibits produced by PW2 clearly show that motor vehicle registration no. KAW 065Y was identified as the motor vehicle which knocked the appellants. Those exhibits also named the 1st respondent as the owner of the motor vehicle while the 2nd respondent was named as the driver of the bus. If the production of the documents were not objected too, they cannot be objected too on appeal. The veracity of those documents were not challenged. I am convinced that the documentary

evidence produced by PW2 corroborated the evidence of attributed to the “good Samaritan” by PW3. It was therefore wrong for the learned Resident Magistrate to dismiss the suit. Consequently the order dismissing the suit is set aside and is substituted with an order of entry judgement in favour of the appellants.

7. On quantum, the learned Resident Magistrate did not make any finding. With great respect, the learned Resident Magistrate erred when she failed to assess damages. The law enjoins courts when determining such cases to assess damages they would have awarded even in cases where the suit is being dismissed. I think a fair order to make in the circumstances is to remit the file to the trial court to assess damages.

8. In the end, the appeal is found to be meritorious. Consequently, the appeal as against liability is allowed. The order dismissing the suits are set aside and is substituted with an order finding the respondents wholly liable. The file is to be remitted back to the trial court to assess damages. The assessment of damages to be done by another magistrate of competent jurisdiction other than Hon. N. Chesang learned Resident Magistrate. Costs of the appeal is awarded to the appellants.

Dated, Signed and Delivered in open court this 24th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent