



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 82 OF 2011**

**BETWEEN**

**KENYA MEDICAL TRAINING COLLEGE .....1<sup>ST</sup> APPELLANT**

**JAMES ODHIAMBO OBUDHO .....2<sup>ND</sup> APPELLANT**

**AND**

**MERCY AKOTH ABUYU .....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon.C.A. Kutwa, RM dated 23<sup>rd</sup> June 2011 at the Senior Resident Magistrates Court at Tamu in Civil Case No. 80 of 2010)***

**JUDGMENT**

1. In the court below, the respondent sued the appellant for damages for injuries sustained as a result of an accident that took place along the Ahero-Katito road on 20<sup>th</sup> March 2010 while she was travelling in motor vehicle registration number KBG 115C belonging to the 1<sup>st</sup> appellant and driven by the 2<sup>nd</sup> appellant. After hearing the case, the trial magistrate found apportioned liability at 70:30 in favour of the respondent. She was awarded Kshs. 100,000/- as general damages together with costs and interest.

2. The thrust of the appellants' case, contained in the memorandum of appeal dated 1<sup>st</sup> July 2011 and submissions by the appellants' counsel, is that the trial magistrate ignored the appellants evidence which established that the respondent was not a passenger in the bus. The trial magistrate further failed to appreciate that the respondent did not know how the accident happened and why she blamed the appellants. Mr Maganda, counsel for the appellants, submitted that the appellants produced a list of passengers, which did not contain the appellant's name, while the respondent did not show that she was a passenger.

3. On the part of the respondent, Ms Nabakka submitted that the respondent proved that she was a passenger in the vehicle by producing the P3 form and police abstract which corroborated the fact that she sustained injuries in the accident.

4. From the arguments by counsel, the point of contention is whether the respondent was a passenger in the vehicle and whether the appellants were liable. The resolution of this issue depends on understanding the burden and standard of proof. Under **section 107** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, the legal burden of proof lies on the party who invokes the aid of the law and substantially asserts the affirmative of the issue. **Sections 108** and **109** of the **Act** further provide that the evidential burden that is cast on any party with the burden of proving a particular fact which he desires the court to believe in its existence (see **Bonface Witaba Shivachi v Eldoret Steel Mills Ltd ELD HCCA No. 199 of 2011**

[2014]eKLR). It is well established that the standard of proof in civil claims is on the balance of *probabilities*. This means that the Court will assess all the evidence advanced by each party and decide which case is more probable (see **Palace Investments Ltd v Geoffrey Kariuki Mwenda and Another NRB CA Civil Appeal No. 127 of 2007 [2007]eKLR**).

5. Each side called one witness. The respondent testified that on 20<sup>th</sup> March 2010, she was travelling back to Homabay from Kisumu aboard the 1<sup>st</sup> appellant's bus when it was involved in accident and she was injured. She recalled she was asleep when the accident took place. She sustained injuries on the neck, head and back and was treated at New Nyanza General Hospital. She obtained a police abstract from Ahero Police Station and was issued with a P3 form. She admitted in cross-examination that she was not a student of the 1<sup>st</sup> appellant but was permitted to go and play for the college by one George Orocho hence she was on the bus on the material day.

6. Everlyine Atieno Maina, a member of staff for the 1<sup>st</sup> appellant, recalled that on 20<sup>th</sup> March 2010 she was authorised to take care of the students during the trip. She told the court that the respondent was not among the students as she was not on the list she produced in evidence. She further told the court that she was the one admitting students into the bus and the respondent did not travel with them. In cross-examination, she stated that George Orocho was a student at the college but he did not have any role in the college. She told the court that the list of students who travelled was approved at the Principal's office.

7. The trial magistrate held the respondent was a passenger and consequently found the appellants' liable. I have evaluated the evidence before the trial court as required by the 1<sup>st</sup> appellate court (see **Selle v Associated Motor Boat Co. [1968] EA 123**). As to whether the respondent proved the appellants' negligence, I would do no better than quote **Bonface Waiti and Another v Michael Kariuki Kamau NRB HCCA No. 705 of 2003 [2007]eKLR** where the court observed;

*It is now trite law that passengers have no control over the manner of driving of a vehicle in which they are conveyed and cannot be penalised for the poor workmanship of the control of the vehicle. The explanation on causation of the accident in such circumstances lies with the driver ....*

No explanation was forthcoming from the driver as to how the accident occurred as he was in sole control of the vehicle and in the circumstances, the trial court was entitled to draw the necessary inference that the 2<sup>nd</sup> appellant drove the vehicle negligently.

8. I also find that the respondent case that she was a passenger was corroborated by the fact that she produced the police abstract, P3 form and medical reports which confirmed that she was injured in the accident that took place on 20<sup>th</sup> March 2010. It is worth noting that all these documents were produced without objection. Her case was further confirmed by the fact that DW 1 admitted that they had a student by the name George Orocho who may have invited the respondent to the bus. The fact of the list alone does not exclude that the possibility that the respondent was in the bus in light of all the other evidence I have alluded to. I therefore find and hold that the appellant was a passenger in the bus and as such the appellants were liable. Since the respondent did not cross-appeal on apportionment of liability, I will say no more on the matter.

9. The appellant contested the award of damages. Mr Maganda submitted that the award of Kshs. 100,000/- as general damages was on the higher side while Ms Nabakka was of the view the award was reasonable. The respondent suffered multiple soft tissue injuries to the chest, upper limb, back, left hip and head. There is no evidence that she would suffer any long-term condition or permanent disability resulting for the injuries. The respondent suggested a sum of Kshs. 300,000/- as general damages while the appellants were of the view that the Kshs. 60,000/- would be reasonable. The appellants relied on **Jane Wangui Kamau & 2 Others v Alice Atandi Mugamangi NKU HCCA No. 136 of 2003 (UR)**, where the court awarded Kshs. 50,000/- as general damages for multiple soft tissue injuries.

10. In dealing with an appeal on quantum, I am guided by the decision of the Court of Appeal in **Bashir**

**Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** where it held that;

*An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low ....*

11. Bearing in mind that the respondent suffered multiple soft tissue injuries, that the decision cited was fairly dated hence making an allowance for inflation, I do not think the award of Kshs. 100,000/- was outside the parameters that would invite this court's interference.

12. The appeal is dismissed with costs to the respondent which I assess at Kshs. 15,000/-.

**DATED and DELIVERED at KISUMU this 27<sup>th</sup> day of April 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Maganda instructed by L. G. Menezes and Company Advocates for the appellants.

Mr Nabakka instructed by Kuke and Company Advocates for the respondent.