



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 83 OF 2014

R N.....APPELLANT

VERSUS

AUGUSTINE MOGIRE MOREKA..... RESPONDENT

(Being appeal from the judgment in Kisii PM Civil Case No. 193 of 2009) (Hon. Kibet Sambu PM.)

JUDGMENT

1. This appeal was lodged on the 31st July 2014 by **R N**, a minor suing through her mother and next friend **Z K N**.

It arises from the decision and judgement of the Principal Magistrate at Kisii, in **CMCC No. 193 of 2009**, in which the appellant sued **Augustine Mogire Moreka** (herein, the respondent), for damages occasioned by a road traffic accident which occurred on the 30th June 2008, along the Sondu-Katito Road at Onyongo.

2. The accident involved a **motor vehicle Reg No. KBA 414P Toyota Matatu**, registered in the name of Francis Mwangi and driven at the time by the respondent as his authorized driver, agent and/or servant.

It was pleaded by the appellant that on the material date she was travelling in the said vehicle as a lawful passenger on a school trip when it was negligently, recklessly and/or carelessly driven by the respondent such that it lost control, veered off the road into a ditch and caused her bodily injuries.

She therefore prayed for both special and general damages against the respondent.

3. The respondent filed a statement of defence in which he denied ownership of the vehicle and occurrence of the accident and contended that if the accident indeed occurred that it was solely caused by or substantially contributed by the negligence of the pit in failing to wear or buckle the safety belt “inter-alia”.

The respondent therefore prayed for the dismissal of the suit with costs.

4. At the hearing of the suit, evidence was led by the appellant through her mother (PW 1) who indicated that the appellant was heading to Kisumu from Kisii for a drama festival aboard the respondent’s vehicle when it was involved in a road accident and caused her to suffer injuries for which she was treated at Ahero before being transferred to Kisii District Hospital.

5. The accident was reported to the police and at a later stage the present suit was filed.

The appellant blamed the respondent for the accident and demanded compensation from him as the driver and beneficial owner of the vehicle at the material time of the accident.

6. The respondent did not lead any evidence in support of his defence. He failed to appear for the hearing of the suit such that the case was closed without his evidential input.

The learned trial magistrate considered all the evidence placed before him together with the written submissions of both the appellant and respondent and arrived at the conclusion that the accident did occur but that the respondent's ownership of the material vehicle was not proved.

7. The appellant's suit was therefore dismissed with costs to the respondent.

The learned trial magistrate opined that a sum of Ksh. 40,000/= for pain, suffering and loss of amenities was adequate compensation had the appellant established her case.

8. Being dissatisfied with the decision of the learned trial magistrate the appellant preferred this appeal on the basis of the five (5) grounds contained in the memorandum of appeal dated 30th July 2014. She urges this court to allow the appeal and enhance the award of general damages proposed by the trial court.

The appeal was argued by way of written submissions which were accordingly filed by both sides through their respective advocates i.e **Messrs Ochoki & Co. Advocates**, and **Messrs E.M. Juma & Co. Advocates**.

9. Being a first appeal, this court was obliged to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, **Peters Vs. Sunday Post Ltd (1958) EA 424**, and **Selle & Another Vs. Associated Motor Boat Co. Ltd & Others (1968) EA 123**)).

10. As noted hereinabove, the only evidence availed was that of the appellant through her mother. The respondent did not avail any evidence.

Basically, the occurrence of the accident and the ownership of the material vehicle were factors which were not substantially or at all disputed.

In any event, the evidence led by the appellant was sufficient and credible in confirming the occurrence of the accident and the culpability of the respondent in respect thereof. The appellant was merely an innocent lawful passenger in the vehicle. There was no way of holding her responsible for the accident or for the injuries she suffered. No evidence was led by the respondent to show that she had failed to wear or buckle her seat belt prior to and at the material time of the accident.

11. With regard to ownership of the vehicle, which was the main reason why the appellant's suit was dismissed, there was no dispute that the respondent was in possession and control of the vehicle as an agent and/or driver of the registered owner one Francis Mwangi whose non-joinder in this suit was not fatal as implied by the learned trial magistrate.

12. Whereas the said Francis Mwangi was the registered and actual owner of the vehicle, the respondent was its beneficial owner. The appellant was at liberty to sue either of them or both of them for an action such as the present one.

An owner of a vehicle would normally be sued for purposes of vicarious liability which is pegged to the negligence of the employee/agent (See, **Ndungu Vs. Coast Bus Co. Ltd (2000) 2 EA 462**).

13. As to proof of ownership of a motor vehicle, a certificate of registration from the Registrar of Motor vehicles would be ideal but not necessarily absolute as has been held in a number of cases such as **Lake Flowers Vs. Cila Franklyne Onyango Ngonga & Others NKU Civil Appeal No. 210 of 2006 (C/A)**, where the Court of Appeal indicated that a police abstract may as well establish ownership unless there is

evidence to the contrary.

14. In **Joel Mugo Apia Vs. E.A Sea Food Ltd (2013) e KLR**, which was herein cited by the appellant, the Court of Appeal held that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be denied later. (See also, **Nancy Ayimba Ngara Vs. Abdi Ali (2010) e KLR**).

15. Herein, a police abstract (P.Ex 4) was produced to show that the respondent was the beneficial or possessory owner of the vehicle at the time of the accident while the certificate from the Registrar of Motor vehicles (P.Ex.6) showed that the actual owner was Mwangi Francis, who needed not to have been enjoined as a necessary party in this suit. The enjoinder of the respondent as his driver/agent or employee and on his own sufficed without much ado.

16. The trial court was therefore in error when it dismissed the appellant's case only on account of ownership of the vehicle when it was clear as this court now finds that not being the registered owner of the vehicle, the respondent was nonetheless, the beneficial or possessory owner of the vehicle and liable to the appellant for the consequences of his negligent acts and/or omission as the driver of the vehicle thereby causing the material accident and ultimately loss and damage to the appellant.

17. With regard to the quantum of damages, the appellant was entitled to the proven special damages in the sum of Kshs. 6,000/= and to general damages for pain, suffering and loss of amenities.

The learned trial magistrate proposed a sum of Ksh. 40,000/= general damages which was informed by the fact that the appellant suffered soft tissue injuries which had since healed.

18. The appellant made a proposal of Ksh. 180,000/= while the respondent proposed a sum of Ksh. 30,000/=. Each relied on their respective authorities.

Guided by the same authorities and considering the current standards of living and value of the Kenya Shilling vis-à-vis the US dollar or British pound, this court is of the opinion that a sum of Ksh. 150,000/= shall suffice as adequate compensation in terms of general damages.

19. This appeal is allowed to the extent that the judgement of the trial court be and is hereby set aside and substituted with a judgement in favour of the appellant against the respondent for the local sum of Ksh. 156,000/= together with costs of the suit and interest.

The appellant shall in addition have the costs of the appeal.

20. As a further order, this decision shall apply to **HC Civil Appeal No. 84 of 2014**, which relates to a different appellant but arises from circumstances similar to those in the present case and relating more or less to similar injuries suffered by the two appellants.

It is also notable that the arguments advanced by the parties in this appeal are similar to those advanced in the said Civil Appeal No. 84 of 2014.

Accordingly, this present appeal is now consolidated with Civil Appeal No. 84 of 2014.

Ordered accordingly.

J.R. KARANJAH

JUDGE

[Delivered and signed this 7th day of January 2016].