



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 615 OF 2013

JOSHUA OGADAH ONYANGO.....APPELLANT

VERSUS

PAYLESS CAR HIRE & TOUR LTD.....RESPONDENT

*(Appeal from the original judgment and decree of L.Arika (PM) in Milimani Commercial Courts,
CMCC No. 2380 OF 2009, delivered on 8th February 2012)*

JUDGEMENT

1. **Joshua Ogadah Onyango** the Appellant herein, filed a compensatory suit before Chief Magistrate's court, Milimani, Nairobi, against **Payless Car Hire & Tour Ltd**, the Respondent herein, for the injuries that he is alleged to have sustained as a result of a road traffic accident which occurred on 9th October, 2007 involving motor vehicle registration no. KAR 615M. The Respondent filed a defence to deny the Appellant's claim. **Hon. L. Arika**, learned Principal Magistrate heard and determined the suit. She found that the Respondent was not liable for the accident and held further that, had she awarded damages, then she would have awarded a sum of kshs 90,000/= and kshs, 2,000/= as special damages. Being aggrieved by the aforesaid decision, the Appellants filed this appeal.
2. On appeal, the Appellants put forward the following grounds their memorandum of appeal:
 1. *That the learned trial magistrate erred in law and fact by holding that the Appellant had failed to prove his case on liability while all the evidence pointed to the fact that the Appellant had proved his case on a balance of probabilities on liability.*
 2. *That the learned trial magistrate erred in law and fact in holding that the evidence did not support the pleadings while the evidence on record clearly supports the pleadings.*
 3. *That the learned trial magistrate erred in law in introducing issues that were not disputed or denied and neither raised by the Respondent.*
 4. *That the learned trial magistrate erred in law and fact in making a finding on the plaintiff's movement direction that was unsupported by the evidence of record.*
 5. *That the learned trial magistrate erred in law and fact on liability by attaching too much weight on where the Appellant was headed to rather.*
3. The learned counsels have filed their respective submissions which I have considered. I have also re-evaluated the case that was before the trial court. The Appellant argued that the learned Resident Magistrate erred in holding that the Respondent was not liable for the accident on the basis that the evidence was contradictory. He contended that the argument by the Magistrate that it was not clear whether the Appellant was injured while going to work or coming to work was not tenable since the same was not captured in evidence. He claimed that whether or not the Appellant was out of station never came up in the proceedings and the issue to be considered is whether he

- caused the accident and whether the accident occurred as a result of the negligence on the part of the Respondent's driver. He averred that the issue as to where the Appellant was going at the time of the accident, was introduced at the submissions stage and was adopted by the Magistrate in her decision making yet evidence cannot be introduced through submissions. He asserted that the trial court erroneously relied on technicalities to dismiss the suit. He urged this court to find the Respondent liable and award quantum of kshs 90,000/= that the trial court proposed to award.
4. The Respondent on the other hand submitted that the suit in the trial court was dismissed rightly so because the Appellant pleaded in his plaint that he was coming from his place of work and adduced evidence that he was going to work, which evidence was at variance with the pleadings. It argued that parties are bound by their pleadings and the Appellant's case was contradictory. It contended that contrary to the averments by the Appellant, the Magistrate did not introduce issues into the matter but instead decided the case based on the evidence presented by the Appellant. It asserted that the trial Magistrate did not attach much weight on where the appellant was going rather on the circumstances leading to the accident. It urged the court to dismiss the appeal.
 5. The grounds of appeal can be summarised into two grounds, which include whether or not the Appellant was liable and what quantum is payable if any. I have examined the evidence tendered before the trial court in respect of liability. The Appellant, **Joshua Oganda Onyango** (PW2) told the trial court that: *"The road traffic accident occurred at 6:00 a.m. The Company vehicle picked me and others at 5:45 a.m at church house. The duty station is at City Cabanas. The vehicle started going in a zigzag manner and shortly thereafter it overturned."* On cross examination, he reiterated that he was picked at the church house and claimed that the motor vehicle started speeding upon reaching the nyayo stadium round about only to overturn at the junction of old airport north road. However, in the plaint, the Appellant pleaded that, he was travelling as passenger from his place of work in the Respondent's motor vehicle registration number KAR 615M along Mombasa road junction of City Cabbanas when the accident occurred. The reason why the trial court dismissed the suit arose from the contradiction between the evidence adduced in court and the pleadings specifically where the appellant claimed that the accident happened when he was going to work contrary to what he pleaded that he was coming from his place of work. The Appellant argues in his submissions that this contradiction was brought up in the submissions and as such it should not be considered since it was introduced as new evidence at the submission stage. This is far from the truth. It is trite law that parties are bound by their pleadings. The Appellant pleaded that the accident occurred when he was leaving his place of work and adduced evidence that it occurred when he was going to work. The Respondent pointed out the contradiction in its submissions but that does not amount to introduction of new evidence since it only pointed out what was already on record.
 6. Be as it may, the important factor to consider is whether or not the contradiction is fatal to the case. The Appellant produced a police abstract in evidence. According to the abstract, there was indeed an accident that occurred on 9th October 2007 at 6:00 a.m Mombasa road junction of City Cabanas involving motor vehicle registration number KAR 615 M Isuzu Bus and the injured parties listed therein include the appellant herein and one **James G. Mwai**. This evidence was uncontroverted by the Respondent. The appellant also adduced a copy of records from the Registrar of Motor Vehicles that lists the Respondent as the registered owner of the subject motor vehicle that caused the accident. The Appellant further adduced evidence as presented by PW1, **Dr. Kimani Mwaura** who averred that the Appellant suffered blunt traumatic injury to the spine and the pelvic region due to the accident.
 7. From the evidence adduced by the Appellant it is apparent that he was involved in accident on the material day at 6:00 a.m. In my view, whether or not he was going or leaving work does not carry much weight. What is vital, is whether or not evidence was adduced to show that he was involved in an accident from which he suffered injuries due the negligence of the part of the Respondent. The Appellant proved that this was indeed the case. He was merely a passenger in the Respondent's motor vehicle at the time of the accident and cannot be said to have contributed to the accident in any way. Consequently, I find the Respondent 100% liable.
 8. On the issue of quantum, the trial Magistrate averred that she would have awarded the Appellant kshs 92,000/= worth of damages. I have perused the Doctors medical report as produced in evidence. He stated that the Appellant suffered blunt traumatic injury to the spine and the pelvic region due to the accident and opined the injury as harm. The parties cited cases in their

submissions in the lower court to support their quantum proposals. The Appellant, quoted the case of **Flora Wamula vs Kanyingi Kibuja Mombasa, HCCC NO. 385 of 1991**, where the plaintiff who suffered a lacerated wound on the front part of her head, left knee, right side of the pelvis several other abrasions and contusions was awarded a sum of kshs 120,000/=. He proposed that a sum of kshs 180,000/= would be adequate. The Respondent on the other hand in support of his case referred to the case of **Kenneth Onyango & 4 others vs Hassan Genya and Juma & another, HCCC. NO. 3944 of 1990**, where the Plaintiff who suffered soft tissue injuries on the back, right knee and leg was awarded kshs 50,000/= and another case of **Pamela Ombiyo Okinda vs Kenya Bus services ltd, HCCC 1309 of 2002**, where the plaintiff who suffered blunt head injury, deep cuts on the forehead and both legs, soft tissue injury to the neck, subluxation of pubic symphysis and blunt trauma of hip and right eye was awarded kshs 50,000/=. The Respondent proposed a sum of kshs 60,000.

9. I have considered the injuries suffered by the Appellant and the cases cited therein. The cases by the Respondent which I find applicable in this case since they touch on the injuries suffered by the Appellant were decided long ago and in view of the inflation of time, I am convinced that the sum Magistrate averred she would award of kshs 90,000/=. had the Appellant been successful is fair. On special damages that must be specifically pleaded and strictly proved, the Appellant pleaded kshs 2,000/= for the medical report and kshs 200/= for the police abstract. He has attached the medical report receipt but not the police abstract receipt. However, since the police abstract in on record, it is public knowledge that the same is normally obtained at a cost of kshs 200/=. I will therefore award kshs 2,200/= on this head.
10. In the end, I hereby allow the appeal. The Trial Court order dismissing the suit is set aside and is substituted with an order holding the Respondent wholly liable. The quantum payable is as follows:

General damages	-ksh.90,000/=
<u>Special damages</u>	<u>-ksh. 2, 200/=</u>
Total	Kshs 92,200

11. The Appellant to have costs of the suit and that of the appeal.

Dated, Signed and Delivered in open court this 27th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent