



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

HIGH COURT CIVIL APPEAL NO. 129 OF 2010.

[Being and appeal from the judgment of E.C. Cherono [PM] in Webuye SRM'S

case No. 57 of 2008 delivered on 22nd September, 2010.

PAUL KHISAAPPELLANT

VERSUS.

EQUITORIAL NUTS PROCESSORS.....RESPONDENT

JUDGEMENT.

1. The appellant **Paul Khisa** sued the defendant **Equitorial Nut Processors** through his mother and next friend in Civil Suit No. SPMCC 57 of 2008 arising from an accident that occurred on the 31st of October, 2007 at about 4.30p.m. along Kitale-Webuye road. The suit was dismissed with costs.
2. Being dissatisfied with the Judgment the appellant preferred this appeal on the grounds that, the trial Court erred in fact and in Law in dismissing the appellant's case on the ground that the appellant had failed to provide a search certificate; the court failed to note that an original abstract form had been tendered in evidence; the issue of ownership was never raised, the trial court failed to analyze evidence on record, and the court failed to appreciate that the case had been proved on a balance of probabilities.
3. This is the first appellate court and it must consider the evidence on record afresh, analyze and evaluate the same in order to arrive at an independent decision See **Selle Vs. Associated Motor Boat Company Ltd. [1965] E.A 123.**
4. In his amended Plaintiff the appellant claimed that the defendant was the Registered owner of the vehicle registration number KAT 569E which was negligently driven and as a result it violently hit the appellant causing him injury to his right, left foot and chest. Claimed general and special damages and costs.
5. At the hearing the Appellant recalled that on 31/10/2001 at 4.30 p.m. as he was walking home from school off the road with Pius and Simon he heard a loud bang; a vehicle suddenly hit them. The vehicle did not hoot. He lost consciousness and found himself at Lugulu Mission Hospital. His mother paid Kshs.8, 879/= . He was in hospital between 31st October, and 6th November, 2007. He sustained a fracture on the right leg and left was injured. He visited Kimilili Police and was issued with a P3 Form. He also visited Dr. Njenga who prepared a medical report. He paid Kshs.1000/= for the same.

6. **PW2 Agneta Wanyonyi Nanyama** she is mother to PW1. Her son was involved in an accident on 31/10/2007. She received a phone call informing her that her son had been involved in an accident. She ran to the scene and found the headmaster had taken the children to Lugulu Mission Hospital. She went to hospital. The son had stitches on his left leg, bruised on the head and had chest pain. He was admitted for a week. She paid Kshs.8, 779/=. She reported the matter to the police. She was issued with an abstract that indicated the vehicle was owned by Equitorial Nut Processors. The vehicle was a Pick up KAT 569E. She took her son to Dr. Njenga for Medical assessment.

7. The Defence did not adduce any evidence. However the following documents were produced by Consent.

- i). Treatment notes.
- ii). Medical report, and receipt
- iii). P3 Form
- iv). Police abstract Form and receipt for Kshs.7,779/=.

8. In dismissing the case the trial Court took issue with the fact that the driver had not been enjoined as a party to the suit. He further was of the view that the Plaintiff needed strict proof that the defendant was the owner of the offending vehicle registration KAT 569 by producing a certificate of search and in absence of the same he formed the opinion that ownership had not been proved.

9. The Court of Appeal in *Wellington Ng'ang'a Muthira -Vs- Akamba Public Road Services & Another. Civil Appeal No. 260 of 2008 (Kisumu) and Lake Flowers -Vs- Cila F.O. Ng'ang'a & Another Civil Appeal NO. 2010 of 2006 e KLR* was of the view that an abstract form is proof in the absence of any other evidence of ownership on a balance of probabilities.

10. In this instant case no evidence was tendered disproving ownership as proved by the Plaintiff no questions were put in Cross – examination either to challenge the same. I do fault the findings of the trial court as I am of the view that in the absence in rebuttal ownership had been proved on the balance of probabilities.

11. The Plaintiff's evidence that he and his friends were knocked from behind was not disputed either.

12. Consequently on liability I hold that the defendant is vicariously liable for the negligent driving of his driver.

13. The appellant sustained simple fracture to the tibia fibula, the left leg was tender and was stitched and had injuries to the chest.

14. No doubt the Appellant sustained a simple fracture, a soft tissue injury to the left leg and chest. For the said injuries I will award the sum of Kshs.120,000/= together with the sum of Kshs.8,879/= as pleaded and costs.

Dated at Bungoma this 1st day of August 2016.

ALI – ARONI

JUDGE