



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL NO. 18 OF 2015
(FORMERLY KISII HCCA NO. 69 OF 2011)

BETWEEN

BRITISH HIGH COMMISSION 1ST APPELLANT

POPULATION SERVICES INTERNATIONAL 2ND APPELLANT

ALFRED MAKORI 3RD APPELLANT

AND

COLLINS ODHIAMBO ODERO RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. R.Ngetich, PM at the Principle Magistrates Court at Oyugis in Civil Case No. 228 of 2009 dated 31st March 2011)

JUDGMENT

1. On 7th November 2009 at about 7.00pm, the respondent was a pillion passenger on a motor cycle riding along Kadongo-Sondu Road near Misambi when it is alleged that the 3rd appellants, who was driving motor vehicle registration number KAP 736C, hit the motorcycle causing the respondent to suffer injuries. He therefore filed suit seeking general and special damages for pain and suffering.
2. In their statement of defence, the appellants denied that the accident actually took place at pleaded location, date and time. In the alternative they claimed that the respondent and the motorcycle rider were wholly or substantially to blame for the accident.
3. After hearing the matter the learned magistrate found the appellants fully liable and awarded the respondent Kshs. 180,000/- as general damages and Kshs. 2,000/- as special damages. The appellants appeal against the judgment and decree on the grounds set out in the memorandum of appeal filed on 11th April 2011. The gravamen of the appeal is that the learned magistrate erred in finding the appellants fully liable and that the damages awarded were excessive in the circumstances.
4. In his oral submissions, Mr Ondego, learned counsel for the appellants, submitted that the 1st and

- 2nd appellant's vehicle was not involved in the accident and the learned magistrate did not appreciate the evidence produced to confirm the fact. He further submitted that even if the learned magistrate found that the vehicle was involved, the respondent did not prove negligence on the part of the driver. He urged that the award of Kshs. 180,000/- was excessive taking into account the nature of injuries and decisions cited to guide the court.
5. Ms Osoro, learned counsel for the respondent, supported the findings of the trial magistrate and urged the court to review the evidence and find that indeed the finding on liability was well founded and that the award of damages was reasonable.
 6. As this is a first appeal, the duty of the first appellate court is to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co. [1968] EA 123* and *Kiruga v Kiruga & Another [1988] KLR 348*).
 7. The respondent (PW 1) testified that the accident occurred on 7th November 2009 while he was riding a motor cycle. He stated that a motor cycle rammed into them from behind and he became unconscious and found himself on the side of the road. He reported the matter to Oyugis Police Station where he was issued with a police abstract. He sustained injuries on the back of the head, right eye, bruises on the elbow which were stitched and cuts on the lower back side. He received treatment at Rachuonyo Hospital and was issued with a medical report (P3 form).
 8. Vincent Oduor Owino (DW 1) testified on behalf of the appellants. He stated that as the regional sales manager for the second appellant and he was the one allocated motor vehicle KAP 736C which was in his custody from December 2008 to February 2010. He produced a Daily Movement Sheet Log for the month of November 2009 in which the vehicle movements are recorded. He denied that on the material day he was along the Kadongo – Misambi Road as he had used the vehicle on 6th November 2009 and parked it a Kisumu at 5pm. The recorded mileage at the ended of the journey was 325,440km. He did not use the motor vehicle on 7th and 8th November 2009 and when he resumed use of the vehicle on 9th November 2009, the mileage was 325,440km. He stated that he was the only one authorised to drive the vehicle as he had a touch key with a password which he used to operate the vehicle. He stated that he was the sole driver of the vehicle and that the organisation did not have an employee by the name of Alfred Makori.
 9. The main contention by the appellants was that its vehicle was not involved in the accident. The learned magistrate found that the entry for 6th November 2009 was altered by superimposing the number '5' and that DW 1 did not produce any other document to prove that the vehicle was parked on the material date. She found the police abstract sufficient to indicate the vehicle was involved in the accident and that the appellants did not provide a list of employees to show that they did not have a driver by the name Alfred Makori.
 10. In this case the appellants were asserting that the accident did not take place. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. **Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)**, which provides:

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

11. The evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in **sections 109 and 112 of the Act** as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular

person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

12.I have reviewed the evidence and I find that the vehicle movement log sheet showed that DW 1 was the authorised driver. It was clear that the vehicle was not used between 6th and 9th November 2011. The entry that was altered was the opening entry for 6th November. The altered entry was consistent with the closing entry for the previous day. On that day the vehicle travelled for 20 km to Ahero and returned in the evening and was not used until 9th November 2011. I find that the alteration was not material to the date as the accident occurred on 7th November 2011 when the vehicle was parked. The vehicle movement log sheet was prepared by DW 1 in the ordinary course of business, is regular on its face and was sufficient evidence to prove the movement of the vehicle. In addition, DW 1 demonstrated that he was the only one authorised to drive the vehicle and that he is the only one who had a touch key and password. The police abstract relied upon by the respondent referred to someone else as a driver of the motor vehicle and it was deficient in some important respects; it did not name the rider and registration number of the motor cycle since the accident involved two vehicles.

13.Taking the evidence together, it is likely that the accident did not happen as alleged by the respondent and the appellants proved on the balance of probabilities that the accident did not take place between its vehicle and the motorcycle the respondent was riding.

14.Notwithstanding what I have found, I accept that had the accident occurred as the respondent described, I would have found the appellants fully liable as the respondent was a pillion passenger and the rider of the motor cycle was not joined to the suit as a third party to enable the court apportion liability. Likewise on the issue of quantum, having regard to the injuries sustained and authorities cited, I am unable to say the award was too high or too low or that there was an error of principle in assessing the same. I would have affirmed the award of general damages.

15.I therefore allow the appeal and substitute the subordinate court judgment with an order dismissing the suit with costs.

16. The appellants shall have the costs of the appeal.

DATED and DELIVERED at HOMA BAY this 26th day of May 2015.

D.S. MAJANJA

JUDGE

Mr Ondego instructed by L.G. Menezes & Company Advocates for the appellants.

Mr Osoro instructed by Odero Okoyo & Company Advocates for the respondent.