



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 62 OF 2013

AKAMBA PUBLIC SERVICES LIMITED APPELLANT

VERSUS

ERICK OCHIENG OUMA RESPONDENT

(Being an Appeal from the Judgement of Hon. D. Chepkwony Senior Principal Magistrate delivered on the 10/07/2013 in the Original Nyando Civil Suit No. 43 of 2011)

J U D G M E N T

By a judgment delivered on 9th July 2013 the respondent was awarded a sum of Kshs.105,000/= being general and special damages for injuries he allegedly sustained on 4th July, 2010 following an accident between M/V Registration No. KBJ 204G and a bus Registration No. KBJ 334J, belonging to the appellant. The appellant was aggrieved by this award of damages and has appealed. The gist of her appeal is that the Respondent did not prove negligence against the driver of the bus.

Briefly the evidence given at the hearing was that on the material day the Respondent was travelling in Motor vehicle KBJ 204J as a fare paying passenger. He was going to Kisumu from Ahero but on reaching near Ahero Girls their vehicle was hit at the rear by the appellant's bus. He sustained a fracture on the right leg and also suffered injury to his back. He blamed the driver of the bus for driving at a high speed and hitting them at the rear. However upon being cross-examined he stated that he could not tell the exact speed the bus was being driven at and that he did not know what caused the accident to happen. This last statement is the bone of contention. The appellant herself did not adduce evidence at the hearing.

This appeal was canvassed by way of written submissions. As the first appellate Court I have considered and analyzed the evidence adduced at the hearing so as to arrive at my own conclusion. I have done so bearing in mind that I did not have the benefit of observing the witnesses (**see *Selle & Another V. Associated Motor Boat Company Ltd.*[1968] E.A. 123, *Mwangi V. Wambugu* [1984] KLR 453**).

The Respondent testified that the appellant's bus rammed the vehicle he was in at the rear. He also testified that the bus was being driven at a high speed all factors that certainly prove blameworthiness on the driver's bus. This evidence was not rebutted and with due respect it cannot be said that the questions asked in cross-examination are evidence. As was held in ***Ogol V. Muriithi* [1985] KLR 359:-**

"It was proved that the appellant was hit while on the pedestrian crossing, an accident blamable on the respondent was disclosed and at that juncture the burden of proof was on the respondent to explain and demonstrate that the accident was not due to his fault. The Respondent in this case did not discharge the onus which lay on him to show on the balance of probabilities that the accident was not done due to his fault".

Applying that principle to this case once it was proved that it is the appellant's bus that hit the vehicle the respondent was in at the rear then the onus shifted on the appellant to prove on a balance of probabilities that her driver was not negligent. As stated by Hancox JA, as he then was in **Ogol V. Murithi (Supra)**:-

"..... in the absence of any explanation a finding of negligence was inevitable once it was shown that the doctrine of res ipsa loquitur applied, as it did in this case."

As I have stated I am not persuaded that the answers given in cross-examination could be counted as the appellant's evidence hence explanation. On this point I am satisfied that negligence was proved against the appellant on a balance of probabilities.

As for the quantum of damages the appellant's contention is that the Learned Magistrate did not take into account the sum proposed by his Advocate and that the sum awarded for the soft tissue injury was very high. In awarding damages the trial magistrate relied on the medical report of Dr. Olima D.O. but not on the plaint or even the evidence of the respondent which somewhat exaggerated the injuries. She considered not just the nature of the injuries vis a vis the authorities cited but also inflation and arrived at an award of Kshs.100,000/=. I am not persuaded that she was demonstrably wrong or that she acted on a wrong principle and clearly the award is not excessive.

Accordingly this appeal is dismissed and the appellant ordered to pay the costs.

Signed, dated and delivered at Kisumu this ...25th.... day ofJune..... 2015

E. N. MAINA

JUDGE

In the presence of:-

Nyawiri Advocate for the Appellant

N/A for Advocate for the Respondent

CC: Moses Okumu