



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 56 OF 2013**

**AKAMBA PUBLIC SERVICES LIMITED ..... APPELLANT**

**VERSUS**

**PAMELA AKINYI AWITI ..... 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. 42 of 2011)

**J U D G M E N T**

The Plaintiff in this case was awarded a sum of Kshs.151,500/= as compensation for injuries she sustained following an accident involving a vehicle Registration Number KBJ 203G in which she was a passenger and the appellant's bus Registration No. KBJ 334J. The accident occurred on 4th July 2010 near Ahero Girls' School along the Ahero-Kisumu Road.

Being aggrieved the appellant has appealed both against liability and the quantum of damages awarded.

Briefly the evidence adduced in the lower Court was that the Respondent had boarded the matatu at Chemelil to go to Kisumu but on reaching Ahero the Akamba bus knocked their vehicle from behind and caused it to veer to the right side of the road. She suspected the bus must have been at a high speed because of the way it caused the matatu to veer from the left side to the right side. It was her evidence that the matatu itself was being driven at a normal speed and that as a result of the accident she sustained injuries on the face, neck, chest, back and knee. The injuries were confirmed by treatment notes from Ahero Sub-district Hospital as well as a medical report by Dr. Olima. 1

The Appellant did not adduce any evidence but her Advocate submitted and cited authorities. After considering the evidence and the authorities cited and inflation as well the trial magistrate awarded the respondent 150,000/= general damages and the proven specials of 1,500/=.

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 she was in at the rear. She also testified that she suspected 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 ipsaloquitur 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 25<sup>th</sup> day of June 2015**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Nyawir Advocate for the Appellant

N/A for Advocate for the Respondent

CC: Moses Okumu