



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 425 OF 2006

1. **ONDINGO LUORA**
2. **BENSON NJORE**
3. **MICHAEL GODWAR**
4. **ISKA ODIDI ONYANGO**
5. **RUTH AWUOR.....APPELLANTS**

VERSUS

KENYA BUS SERVICES LIMITED.....RESPONDENT

*(An appeal from the original judgment and decree of Mrs. C.W. Meoli in Milimani Commercial Court
CMCC No. 13407 of 2003 dated 29th May, 2006)*

JUDGMENT

1. The Appellants have filed this Appeal setting out a total of sixteen (16) grounds against the above decision. These grounds can be summarised to three (3), that is; that the trial court erred in failing to consider the evidence before it and thereby arriving at a wrong decision; that the trial court misapprehended the case before it and that the trial court erred in failing to assess the damages awardable in the circumstances of the case.

2. The Appellants had sued the Respondent in NBI CMCC No. 13407 of 2003 seeking recovery of damages. They pleaded that on 25th April, 2001 while they were lawfully travelling aboard motor vehicle registration No. KAH 645K owned by the Respondent along Kisumu-Nairobi Road, the driver of the said vehicle drove carelessly as a result of which the vehicle lost control and overturned occasioning them serious injuries. The Appellants attributed the negligence to the Respondent's driver and held the Respondent vicariously liable. The Appellants were said to have suffered injuries as follows:-

The 1st Appellant

Compound fracture right leg

The 2nd Appellant

Mild head injury

Fracture left clavicle

Chest pains

The 3rd Appellant

Amputation of the left hand

Dislocation of the right ankle

The 4th Appellant

Mild head injury

Fracture right clavicle

Fracture right leg

The 5th Appellant

Head injury

Fracture of the right clavicle

Fracture of the right leg

3. In its statement of defence, the Respondent denied the Appellants' claim in toto.

4. At the trial, a total of nine (9) witnesses testified. PC Fredrick Odera (PW1) testified that the driver of the subject motor vehicle was trying to negotiate a corner and on applying brakes the vehicle overturned. He produced the Police Abstract as P. Exhibit 1. PW2, the doctor who examined the Appellants, confirmed their injuries. He stated that the 4th Appellant's fractures were reduced at Kenyatta National Hospital where he had been admitted for a week; that the 3rd Appellant was admitted at Kenyatta National Hospital for two (2) weeks; that the 3rd Appellant's left arm was amputated below the elbow; that the 1st, 2nd and 5th Appellant were admitted at Kenyatta National Hospital for one (1) day, four (4) days and thirteen (13) days, respectively. For each Appellant, PW2 stated that he prepared a medical report at a cost of KShs. 2,500/= and he produced receipts to that effect as P. Exhibit 3 to 7. He stated that he was paid KShs. 2,500/= for court attendance to which he produced a receipt as P. Exhibit 8.

5. The 5th Appellant (PW3) testified that the accident was self involving in that, the vehicle overturned while negotiating a corner. That as a result of the accident she broke her clavicle and ankle and also sustained a cut injury on her head. On his part, the 3rd Appellant (PW4) told the court that the vehicle was travelling at a high speed when it suddenly overturned. He stated that he had informed the driver to slow down. That the road had potholes. He stated that he was admitted in hospital for about three (3) months. That he sustained an injury on the left leg and his hand was amputated after it failed to heal.

6. The 2nd Appellant (PW5) testified that he could not give an account of how the accident occurred but that the vehicle was being driven at a high speed. He stated that he felt pain on the head and chest and regained consciousness at the hospital. He testified that he had sustained head injury, fractured clavicle and chest.

7. Mr. James Ogaga (PW6), was the Medical Records Officer at the Kenyatta National Hospital. He produced hospital records and confirmed that the Appellants were admitted at the Kenyatta National Hospital and gave their admission numbers as follows:-

The 1st Appellant 0728085

The 2nd Appellant 0692321

The 3rd Appellant 0726475

The 4th Appellant 0701717

The 5th Appellant 0694772

8. The 1st Appellant (PW7) testified that when they left Nakuru, the driver was in a hurry and the passengers raised their concern with the driver. That at Muguga, the vehicle hit a wall on the right side of the road whereby the driver lost control of the vehicle, he then swerved to the left and while trying to control the vehicle to the right, it overturned. He lost consciousness which he regained at the Kenyatta National Hospital. He stated that he sustained an injury to the right leg.

9. The 4th Appellant (PW8) testified that the vehicle was not properly driven. He however stated that he did not witness the occurrence of the accident. That he sustained injuries to his head shoulders and right leg. Doctor Stephans Kamau (PW9) testified that he examined the Appellants. He confirmed the Appellants' injuries and produced the P3 forms for the Appellants as P. Exhibit 2 (a) to (e). He stated that he was paid KShs. 10,000/= for court attendance.

10. The Respondent's case was closed without calling any witness. The learned magistrate did not find in favour of the Appellants' case on the basis that they produced no receipts to prove that they were fare paying passengers on the suit vehicle; that it could not be concluded that the injuries were as a result of the alleged accident and that the investigating officer was not called to identify the Appellants.

11. This being a first appeal, this court is enjoined to re-evaluate the facts afresh, re-assess the case and make its own independent findings and conclusions. See **Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.**

12. It was submitted for the Appellants that the evidence of PW1, PW9, PW2 and PW 6 proved that the accident occurred involving the Appellants and that they sustained injuries. That the judgment was inconclusive since it never dismissed or allow the suit yet the entry at the registry was that the suit was dismissed and that no finding on quantum was made.

13. On the other hand the Respondent contended that the Appellants tendered no evidence to prove that they were involved in the accident. It was argued that the police officer who produced the police abstract was not the investigating officer and that there were discrepancies in the Appellants' testimonies relating to the alleged hospitalization at Kenyatta National Hospital. That there were no treatment notes or receipts to prove that they had been treated at the said hospital. That the documents did not bear stamps of the hospital thereby raising doubts as to their authenticity. It was further argued that the Appellants failed to prove the particulars of negligence they pleaded.

14. I have considered the case of the respective parties herein and analysed the evidence on record. What falls for determination; is the effect of the trial court's failure to assess damages; whether or not the judgment was conclusive; whether the Appellants proved on a balance of probability their case; whether or not the injuries alleged were suffered in the accident and whether or not the Respondent was liable for the accident. If the Respondent was liable, what extent of damages are the Appellant's entitled to?

15. I shall address the issues seriatim. With regard to the first issue, I reiterate the pronouncement made in **Lei Masaku v. Kalpama Builders Ltd (2014) eKLR** that:-

“It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appellable and the Appellate Court needs to know the view taken by the court of first instance on the

issue of quantum."

16. That remains the law. Neither this nor the subordinate courts while acting as courts of first instance can ignore the directive by the Court of Appeal that even if a trial court dismisses the suit on liability, it must assess damages. To the extent that the trial court failed to assess damages it had fallen into serious error.

17. As regards liability, it is worth noting that the Appellants' case was unrebutted. The effect of failure to rebut evidence is now well settled. In **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** Makhandia J (as he then was) held:-

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

18. In the present case, the Appellants appeared and testified on oath. They were thoroughly cross examined by Counsel for the Respondent. From the record, their evidence remained unshaken. The Respondent offered nothing to rebut the Appellant’s contention on oath that they were lawful passengers in the subject motor vehicle. A police officer from Kikuyu Police Station, where the accident was reported, attended court and produced police records which showed, inter alia, that the subject accident occurred; that the appellants were among those involved in the accident. He produced the Police Abstract and P3 forms. The Police Abstract Form No. A488626 dated 4/3/02 showed that the subject motor vehicle was not only involved in the accident but that it was also owned by the Respondent. It also showed that the Appellants were involved in that accident. A Police Abstract is a public document prepared in the normal course of the police duties. Both the Police Abstract and P3 forms were never disputed nor challenged. In my view, that was sufficient evidence that the Appellants had proved that they were involved in an accident involving the Respondent’s motor vehicle.

19. As regards the injuries, documents from the Kenyatta National Hospital (KNH 316), Discharge summaries were produced in evidence to show that the Appellants were admitted and treated at that facility. Indeed PW3 James Ogaga, a Records Officer from that facility attended court and testified on behalf of the Appellants. He produced medical records that were never challenged. The said records tallied with the medical reports produced by the Doctors who examined the Appellants.

20. To my mind, the foregoing established and proved on a balance of probability the Appellants’ case. The incidence of proof then shifted to the Respondent. It was upon the Respondent to tender evidence in rebuttal for the same to shift back to the Appellants. The Respondent having failed to offer any evidence in rebuttal, the trial court fell into serious error in holding that the Appellants had not proved their case.

21. The trial court may be excused for arriving at the wrong decision. The Judgment has serious flaws. Firstly, the judgment does not seem to have satisfied the provisions of Order XX of the former Civil Procedure Rules i.e. it did not set out the case, sum up the evidence and set out the issues for determination. Further, it did not make any finding upon those issues or the suit itself. Secondly, in holding that the claim had not been proved because the investigations officer was not called to testify, the court seemed to confuse between a traffic trial and a civil claim for compensation. In my view, the testimony of the police officer from the Kikuyu Police Station (PW1) on the records kept by that station relating to the accident was sufficient, under the provisions of the Evidence Act, as far as the civil claim was concerned. That evidence was unchallenged and was admitted on record. The Court could not seek to look for evidence elsewhere other than the one already on record.

22. As regards the issue of the ownership of the subject motor vehicle, I think the holding in **Jotham Mugalo v. Telkom (K) Ltd (2005) eKLR** provides an answer. In that case, it was held that:-

“Whereas it is true that it is the responsibility of the plaintiff to prove that the motor

vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence.”

23. Similarly, in **Samuel Mukunya Kamunge v. John Mwangi Kamuru (2005) eKLR** it was stated:-

“A police abstract is sufficient proof of ownership of a motor vehicle if not controverted. Though a certificate of search from the registrar of motor vehicle would show who was the registered owner of motor vehicle according to the records held by the registrar of motor vehicle, that however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved as vehicles often times change hands but the records are not amended.”

24. I fully associate myself with the foregoing decision and I accordingly apply them in this case. The police abstract produced showed that the motor vehicle that was involved in the accident belonged to the Respondent.

25. The Appellants being fare paying passengers had the expectation of being transported to their intended destination safely. Even though some Appellants did not have an account of how the accident occurred, the accident was self involving and in the absence of an explanation by the Respondent it can be safely inferred that there must have been negligence on the part of the Respondent's driver at the material time. In any event, PW3, PW5, PW7 and PW8 were categorical in their testimonies that the motor vehicle was being driven at high-speed and recklessly. This was not rebutted. In the circumstances, I find the Respondent 100% liable.

26. As regards damages, I have considered the authorities submitted by the respective parties. I have also considered the proved injuries of the respective appellants. In **Mwaura Muiruri Vs Suera Flowers Ltd & Anor (2014) eKLR** where the Plaintiff suffered multiple lacerations on the face, soft tissue injuries on the chest cage, comminuted fractures of the right humerus upper and lower thirds of the tibia and compound double fractures of the right leg upper and lower 1/3rd tibia fibula, an award of Kshs.1,450,000/= was made in 2014.

27. In the consolidated cases of **Anne Muriithi Vs The Headmistress Machakos Girls and 2 others**, the following awards were made in 2003 for the respective injuries.

- a. Deep cut lower limb, fracture of the lower end femur with 8% incapacitation – Kshs.420,000/=.
- b. Fracture of the left femur fracture of the left radius fracture of the left ulna and dislocation of left distal radio ulana joint – Kshs.1,250,000/=.
- c. Fracture of left arm, Deep cut on the face and dislocated collar bone – Kshs.340,000/=.
- d. Fracture of right leg with 5% disability – Kshs.320,000/=.

28. Taking into consideration the injuries suffered by the respective Appellants and the cited cases, I make the following assessment and onwards:-

- a. (i) Ondingo Luora (1st Appellant) – Kshs.280,000/-

- (ii) Benson Njore (2nd Appellant) – Kshs.250,000/-
(iii) Michael Godwar (3rd Appellant) – Kshs.600,000/-
(iv) Iska Odidi Onyengo (4th Appellant) – Kshs.300,000/-
(v) Ruth Awuor (5th Appellant) – Kshs.350,000/-

TOTAL – **Kshs.1,780,000/-**

b. Special damages proved – Kshs.60,600/-

Grand total – **Kshs.1,840,600/-**

29. Accordingly, the Appeal is allowed. The Judgment of the trial court is hereby set aside and judgment is entered for the appellants in terms of paragraph 28 hereinabove together with interest thereon. The costs of the suit in the lower court and the appeal are hereby awarded to the Appellants. Interest on the Judgment is at court rate from the date of the judgment of the trial court.

It is so decreed.

DATED, SIGNED and DELIVERED at Nairobi this 31st day of July, 2015

.....

A. MABEYA

JUDGE