



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.39 OF 2014

AL KAMAR TRADING COMPANY LIMITED.....APPELLANT

VERSUS

HARRISON OTINARESPONDENT

**[Being an Appeal from Original Judgment and Decree from Kisumu CM'S Court: L. GITARI –
CM in civil case No.572 of 2010.]**

J U D G M E N T

1. The respondent sued the appellant claiming damages as a result of a road traffic accident which occurred on 13.9.08 along Busia Kisumu road near Daraja Mbili. In the said accident the appellant was the driver of motor vehicle Reg. No.KAZ 586U prime mover lorry whereas the respondent was a passenger in motor vehicle Reg. No.KAQ 298F Nissan matatu. After full trial the court awarded the respondent the sum of Kshs.1,400,000/= as general damages and Ksh.2550/= as special damage. This has prompted this appeal

F A C T S

2. The respondent testified that he was a fare paying passenger in the said matatus and at a place called Daraja Mbili the appellant's lorry hit the matatu from behind which caused it to veer off the road and overturned. The respondent sustained injuries on his elbow and joint/shoulders, leg, head and the left hand was amputated from the palm. He spent 2 weeks at Russia (New Nyanza General Hospital). He produced the relevant treatment exhibits to support his claim and the injuries he sustained. These included the P3 form, the discharge summary and Dr. Ogonji's report. The respondent essentially blamed the driver of the lorry for the accident. According to him he was driving fast and it hit the matatu from behind.

3. **PW2 P.C. CLEOPHAS SANG** produced the police abstract on behalf of P.C. **MBUVI** and **NDIGILI** who conducted the investigation.

4. **PW3 HILLER AMOLO** produced the discharge summary from Jaramogi Oginga Odinga hospital.

5. In its defence the appellant called **INSPECTOR CHRISTOPHER KISARI** the Base Commander Maseno who testified that whereas the said accident occurred involving the said vehicles, the police file and in particular the Occurrence Book (OB) did not contain the respondent's names. The names contained therein are:

a) **RISPER ACHIENG,**

b) **MARGARET ASHIRENO,**

c) **SILVA AMOLO,**

d) **JACKTON AMUOGO.**

6. According to him the O.B and the Situation report ought to contain the names of the victims. He said that in normal situations inquiries are made concerning the victims and later the O.B. Ought to contain the said information. He concluded that in as much as the Police Abstract was produced, he did not sign it as is required of all Base Commanders to do.

7. Both the appellant and the respondent have filed written submissions in support and opposition of the appeal. The appellant has laid great emphasis on the evidence of the Base Commander. According to it the respondent was not in the accident scene but sustained the injuries elsewhere.

8. The Memorandum of Appeal contained several grounds but I think the substantive issues relates to the question of negligence. In other words who is the author of the accident. Significantly also is the question of damages. Were they excessive in the circumstances?

9. The primary ground however which I find fundamental is the question of whether the respondent was involved in the accident. Whether the accident occurred involving the above motor vehicles is settled. The respondent told the court that:

“I was on the left side in the driver's cabin, there was no motor vehicle ahead of us. I was on the seat behind the driver.”

10. Clearly this was a contradiction. How could he be on the driver's cabin then at the same breath behind the driver?

11. But was he really a victim of the accident? PW2 a police officer produced a Police abstract form which according to him showed that the respondent was a victim. The abstract form usually is the extract of the Occurrence Book(OB). This was disputed by DW1 the Base Commander who went ahead to demonstrate that the respondent was not a victim at all.

12. In light of the three documents namely the Police Abstract form, the Occurrence Book and the Situation Report which ought to be believed? I believe without hesitation that the last two are primary documents, that's the OB and the Situation Report. Infact the PW2 doubted the authenticity of the abstract when he said that:

“The comments is that the claim is false.

If that is what my boss said then I cannot dispute that as IP Kisari.”

13. This assertion is buttressed by DW1 who stated that as the Base Commander he ought to have signed the abstract form which in this case he did not. He opined that one may obtain a police abstract without being injured.

14. The burden of proof that he was involved in the accident rested squarely on the respondent. Section 107 of the Evidence Act Cap 80 states clearly that:

107(6) “ whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exists.”

2. When a person is bound to prove the existence of any fact it is said that the burden of proof

lies on that person.”

15. Having read the appellant's defence and the denials therein it was incumbent upon the respondent to prove that he was indeed a victim of the accident. Mere production of the Police abstract form which I find it as a secondary document was not sufficient. Further, the respondent perhaps ought to have incorporated other primary witness like the matatu driver or any other eye witness.

16. Having found that the respondent sustained his injuries elsewhere, the next question is whether in light of the facts herein the accident was caused by the appellant's agent or driver. There are no eye witnesses to the accident. The police did not produce anything to indicate whether the driver of either of the vehicles was charged in any court of law. The discredited P3 form cannot be relied on. Consequently it will be difficult to apportion liability on the question of negligence.

17. On quantum, it is clear that there was no evidence to support the award on costs of future treatment. Nothing at all was contributed to support this claim. Equally on the heading, loss of earning, the respondent contended that he was a driver earning Kshs.700 per month and he produced a letter from his employer. However when challenged to produce his driving licence, he said that the same was burned. A genuine driver, must have a valid driving license and anything short of this is untenable.

18. In light of the serious injuries exhibited by the respondent and assuming that he was really involved in the accident and considering the authorities submitted by the parties this court would have set aside the award of Kshs.1,400,000/= and instead awarded him Kshs.700,000/= as general damages with proven specials if any.

19. I think I have said much to show that the appeal ought to succeed. There is no cogent evidence that the respondent was involved in the accident or at all.

20. The P3 form produced was clearly filled in the normal way and the information given to the doctor including the medical report by Dr. Ogonji were pursuant to the information they received from the respondent. The lower court judgment is therefore set aside, the appeal is allowed with costs to the appellant.

Dated, signed and delivered this 29th day of October 2015

H. K. CHEMITEI

J U D G E