REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 214 OF 2009

PETER MAINA KWERI .....1ST APPELLANT

PETER WAINAINA MWANGI.....2ND APPELLANT

VERSUS

DONALD MIGIRO OMAIYO.....RESPONDENT/DEFENDANT

(Being an Appeal from Judgment/Decree of Hon. Njuki, Senior Resident Magistrate, Naivasha delivered on the the 18th September 2009 In Naivasha CMCC No. 594 of 2009)

JUDGMENT

1. The appeal hereof is against the trial courts findings that the Appellants, being the owner and driver of motor vehicle registration **Number KAW 281M** respectively, were to blame for the accident that occurred on the 30th September 2008 whereof the Respondent sustained injuries and was awarded a sum of Kshs.130,000/= compensation for pain and suffering.

In the Memorandum of Appeal three main grounds were preferred thus:

> 1. The learned magistrate erred in fact and in law in finding that the Defendants were liable in absence of proof that the motor vehicle the subject of the suit was owned by the defendants.
>
> 2. The learned magistrate erred in fact and in law in making a finding that the Defendant was liable and yet no evidence was led as to the Defendant's negligence.
>
> 3. The Learned trial magistrate erred in law and in fact in wholly disregarding or failing to accord due and proper consideration of the defence evidence.
>
> 4. The Learned trial magistrate erred in law and fact in wholly disregarding or failing to accord due and proper consideration upon the defence counsels' written submissions.
>
> 5. The Learned Magistrate erred in law and in fact in awarding the Plaintiff Kshs.130,000/= as general damages for soft tissue injuries.

2. In their written submissions by their Learned Counsel, the appellants abandoned their complaints on liability *perse and* faulted the trial court on issues based on documentary evidence adduced by the Respondent

3. It is **the appellants case** that the trial magistrate erred in law when he found that the treatment notes produced by the Plaintiff/now Respondent were not authentic, and a fraud, and as such the magistrate should not have relied on them in his judgment. He is further faulted for holding that a police abstract was sufficient proof of ownership of a motor vehicle.

4. I shall address the issue of **ownership** of **motor vehicle Registration No. KAW 281M** as at the date of accident, the 30th September 2008. The Respondent(Plaintiff) produced a police abstract dated 7th October 2008 that indicated that the owner of the said vehicle was the 1st Defendant, now the 1st appellant, that was being driven by the 2nd Appellant. The same abstract indicted that the 2nd appellant as the driver was charged with the offence of careless driving in **Traffic case No.2298 of 2008** at the Traffic court at Naivasha and was fined Kshs.1000/=. The police abstract was produced by the Respondent, then the plaintiff with no objection from the defence. I have perused the proceedings of the day before the trial court. No issues were raised at all to the contents found in the police abstract.

5. In their submissions, the appellants have not addressed the court on this ground. To that extent, the court shall deem that this ground has also been abandoned.

However, I shall make some observation in regard thereof.

The issue of motor vehicle ownership is now settled in several court pronouncements, that a Certificate of Search from the Registrar of motor vehicles would be the clearest proof of ownership as at date of accident. However, and as held in the case **Samuel Mukunya Kamunge vs John Mwangi** K**aruru – Civil Application No. 34 of 2002**, that is not conclusive proof of actual ownership as **Section 8 of the Traffic Act** provides that the contrary can be proved as sometimes change of ownership may not be effected on the records of the Registrar after a transfer. It also trite that an entry in a police abstract, unless challenged and proof had otherwise, on ownership of a motor vehicle, it is proof of such ownership on a balance of probability and the court must accept the information as correct – See **Lake Flowers -vs- Cila Franklyn Onyango Ngoga, Civil Appeal No 2010 of 2006, Nakuru.** That being the position in this present appeal, it was prudent that this ground was not pursued.

6. The crux of the appeal is the authenticity of the Treatment notes issued to the Respondent at the **Naivasha District Hospital.** The appellant submits that the said treatment notes have disparities in dates when the Respondent alleges to have been treated on the 30th September 2008, yet the Hospital Records Officer testified for the defence that the outpatient register did not have an entry of treatment of the Respondent on the 30th September 2008, but on the 13th October 2008. It is submitted therefore that the medical Report prepared by Dr. Obed Oyuoma, relying on such treatment notes should not have been admitted by the trial court.

7. This is the first appellate court. I have considered and evaluated the evidence before the trial court – with a view to coming up with my own independent findings and conclusion. See **Mwanasokoni vs KBS Services Limited (1985) KLR 931.**

I have revisited the evidence on record. I have looked at the treatment card for the respondent and outpatient card **No 96388.** I note it is dated 3rd October **No. 57325/08.** It shows that the patient was involved in a road traffic accident on the 30th September 2008 and treatment given. This in my mind confirms the date of the accident, and date the Respondent attended the said hospital on the 3rd October 2008. It was his testimony that after the accident he was taken to Mt. Longonont Medical Clinic. I have also looked at the Mt. Longonot Card. It was issued on the 30th September 2008 and a four days sick off given.

Dr. Obed Omuyoma's medical report is dated 10th November 2008. He confirmed having examined the Respondent on the 10th November 2008. On cross examination though in the body of the report he indicated that he had examined him on 30th September 2009 and on 17th September 2007 – but he clarified that was an error. He also stated on cross examination that he relied on the treatment card from

Naivasha District Hospital dated 30th September, 2008.

8. Due to the apparent inconsistencies in dates by the doctor, the appellant read some fraud/or mischief by the respondent and has urged the court to find that the treatment notes from Naivasha District Hospital were fake and therefore the whole claim as fake.

On the above inconsistencies, the Respondent urged the court to find that the Records Officer, Naivasha District Hospital, the only defence witness, was incompetent to produce the said records as he was not the one who made the entries, nor was it his duty to do so.

I have considered his testimony before the trial court. He confirmed that the Respondent was treated on the 3rd October 2008 vide outpatient card **No. 57325/08** which I referred to above.

Having considered the testimonies of the Respondent, the Doctor and the Records Officer and having looked at the documents produced by each of them, it is my finding that the Respondent was injured in the road traffic accident and that the treatment notes from both Mt. Longonot Medical clinic and Niavasha District Hospital are authentic and genuine.

I find no evidence of fraud at all and the chronology above is clear on this.

Having pronounced myself as above, it follow that the appeal fails on the grounds lumped up together on liability.

9. **On *quantum* of damages**, the court states that assessment of damages is at the discretion of the individual Judicial Officer so long as that discretion is exercised judiciously.

The respondent had sustained the following injuries:

- **soft tissue of the chest**
- **soft tissue of the right shoulder**
- **multiple bruises on the head**
- **multiple bruises on right knee joint**

The trial court awarded sum of Kshs.130,000/= in general damages which the appellants claim to be excessive.

For this court to interfere with the trial courts assessment of damages, it has to be satisfied that the court took into account an irrelevant factor or left out of account a relevant one or that the amount inordinately low or so high that it must be a wholly erroneous estimation of the damages. See **Kemfro Africa Ltd t/a Meru Express Services and Another -vs- Lubia & Another (1987) KLR 30**..

10. I have considered submissions tendered before the trial court and in this court, together with authorities tendered by both counsel.

The Respondent sustained soft tissue injuries. The ward of Kshs.130,000/= made by the trial court in my view, cannot be said to be excessive so as to persuade this court to interfere with that court's discretion. See **Buttler -vs- Buttler (1984) KLR 225.** The appellants have failed to show what irrelevant factors if any the trial court may have considered, thus arrived at a wrong decision.

I find no reason to interfere with the said award.

For the above reasons, the court finds no merit in the appeal. It is dismissed with costs to the Respondent.

Orders accordingly.

Dated, signed and delivered in open court this 12th day of November 2015.

JANET MULWA

JUDGE