



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 116 OF 2012

DAVID MWANGI.....APPELLANT

VERSUS

BEATRICE ATSIENO MAKHANDA.....RESPONDENT

J U D G M E N T

This appeal is pursuant to the judgment delivered by the lower court on 30-8-2012 where the respondent was awarded a sum of Kshs. 160,000/= being general damages pursuant to a road traffic accident which occurred on 1-8-2008 along Nairobi – Kisumu road where she was traveling aboard motor vehicle Reg. No. KAY 191A owned by the appellant. As a consequence of the said accident the respondent sustained bodily injuries. The trial court found that the appellant was 100% liable.

The appellant dissatisfied with the said judgment has filed this appeal which contains 10 grounds. The parties consented to filing written submissions to support their arguments.

From the grounds of appeal the first issue which ought to be determined is whether or not the respondent was actually involved in the accident. The amended defence points out that the respondent's suit was based on fraud and that although the accident occurred the respondent was not one of the victims. Paragraph 7A they state:

“Further and without prejudice to and in the alternative to the foregoing, the defendant avers that the plaintiff's claim is fraudulent and based on misrepresentations by the plaintiff that he had been involved in an accident and injured.....”

The particulars of the fraud are then set by the appellant. The consent adopted by the parties on 7-7-2011 expected that the respondent was to respond to the amended defence within 14 days. Apparently there is no evidence that the respondent traversed the amended defence.

During hearing the appellant adopted the defence evidence as presented by DW1 in PMCC Case No. 15 of 2009 which was similar as it involved the same parties save that the plaintiff's were different. I have read DW1 evidence in Case No. 15 of 2009 and according to him the respondent was not one of the victims involved in the accident. Her name never featured in the Occurrence Book (OB) at the police station which had only 14 names that were recorded in the said OB. He detailed how the OB is the primary document in which the contents thereof forms the extracts in the Police Abstract.

The said witness went further to state that the police abstract produced by the respondent was not genuine and the same had been denounced by the Base Commander who was his boss. The letter dated 7-

2-2012 produced as exhibit D1 clearly shows that the names of four people including the respondent were not appearing in the OB. The said officer went further to denounce the P3 forms which had been produced.

Interestingly, the respondent did not controvert these allegations. As earlier indicated she did not respond to the amended defence although she had been granted 14 days to do so. The respondent has argued that DW1 did not have the necessary authority to interrogate whether the OB details were valid or otherwise as he had just been two years at the station and that it was incumbent upon the Base Commander the author of the exhibit to attend. I do not think this argument holds water. DW1 I believe was a police officer who had been mandated to produce the exhibit and to testify. The respondent did not object to their production. As a matter of fact if they had any difficulty they would have insisted on calling the maker.

Where a party fails to respond to what is pleaded in the defence then it is presumed that he has no problems to the same and it amounts to an admission. I do find that the respondent admitted the fraud allegation raised in the amended defence. Coupled with the evidence by DW1 I find that there was every possibility that the respondent was not a victim of the accident. I do not find any reason why the OB contained 14 other names minus that of the respondent.

Equally, the makers of the documents, namely the traffic police denounced the alleged police abstract as well as the P3 form. The respondent did not choose to call the Base Commander but instead admitted the exhibits as produced by DW1.

This court finds that the trial court failed to reevaluate this piece of important evidence. The other issues raised in the appeal are worth considering but having found that the respondent was not a victim of the accident it would be a waste of judicial time to discuss the same.

In the premises I do find this appeal meritorious and allow it with costs.

Dated, signed and delivered at Kisumu this 26th day of June, 2014.

**H.K.
JUDGE**

CHEMITEI