**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 28 OF 2010**

***(An appeal arising from the Judgment of the Honourable L. O. ONYINA, Senior Resident Magistrate in Vihiga SRMCC NO. 18 OF 2008)***

**HABEL MASERO OMBUSA …..... APPELLANT**

**VERSUS**

**BUNYORE GIRLS HIGH SCHOOL …..... RESPONDENT**

**JUDGMENT**

The appellant brought proceedings in the subordinate court through a plaint dated 23/1/2008. In the said plaint he sought general damages as assessed by the court and costs of the suit as well as interest. He also asked for any other/further relief as the court might deem fit to grant. The plaint was brought through Kulecho, Musomba advocates.

In the plaint, the appellant claimed to be a casual worker of the respondent. That on 11/12/2006, while loading water containers onto a vehicle reg. KAD 561M Isuzu Canter bus belonging to the respondent, the vehicle suddenly reversed and injured him occasioning him severe bodily injuries. Particulars of breach of statutory duty and particulars of negligence against the respondent/or driver were listed. Particulars of injuries and continued effects of the injuries were also pleaded in the plaint.

The respondent filed a statement of defence and a protest through Asinuli & Associates advocates. The factual allegations of negligence given by the appellant in the plaint were denied. The respondent also listed particulars of the appellant's negligence in the said defence. The jurisdiction of the court was admitted.

During trial, only the appellant Habel Masero testified as PW1. It was his evidence that he was a casual labourer of the respondent and that the incident occurred at 5 p.m. when he was drawing water at the river Jordan, when the vehicle reversed on him. That after injury, he was rushed to Kima Mission hospital by the driver of the said vehicle. He was later transferred to New Nyanza hospital and later still to Moi Teaching and Referral hospital.

He did not have a letter of appointment but, according to him, the bill for the hospital for Ksh.126,342/= was paid by the employer, Bunyore Girls High School, the respondent. He contended that the respondent or his driver was negligent. He relied on the police abstract report and the medical report. He therefore claimed damages. He called no other witness.

Though the respondent was given an adjournment to call witnesses, they did not call any witness. Counsel for the parties then filed written submissions.

On the basis of the evidence on record and submissions, the learned trial magistrate delivered judgment. In the judgment the learned trial magistrate stated as follows -

> ***"As it stands now, there is no proof by the plaintiff herein that motor vehicle in question belonged to the defendant. He failed to discharge his onus of proof. I find liability on the part of the defendants not proved. Because the liability of the defendants was on defence on ownership of the vehicle which has not been proved, I find and hold that no liability proved on the part of the defendant in this case.***
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> ***The plaintiff, in a bid to prove that he sustained the injuries particularised in the amended plaint produced a number of medical documents by himself. Medical report is an expression of opinion and ought to be produced by the maker, unless the parties or their advocates, if on record consent to the production of the same by persons other than the maker. There was no such consent in the case. The conditions set out at Section 35 (1) of the Evidence Act have not been met. There was also indication by the plaintiff in cross examination that he had been treated for this injuries at Moi Teaching and Referral hospital on 24/4/2006 which is a date preceding the date of the accident that is the subject of this case."***

From the above observations and findings, the learned magistrate dismissed the appellant's case with costs.

The appellant being dissatisfied by the decision of the subordinate court has appealed to this court through his advocate Musomba advocate on three grounds as follows -

1. **That the learned magistrate erred in finding that the ownership of the motor vehicle had not been established by the appellant when in fact and law the plaintiff had discharged that burden.**
2. **That the learned magistrate erred in law in relying on the case of Thuranira, when the Defendant herein had not been sued as the registered owner.**
3. **That Section 35 (1) of the Evidence Act had no basis when the contents of a document are admitted or not challenged by the opposing party.**

Counsel for both the appellant and the respondent filed written submissions to the appeal. Mrs. Muleshe for the appellant and Mr. Kundu for the respondent, who appeared on the hearing date, adopted the written submissions filed.

I have perused the evidence on record, documents relied on and the judgment of the subordinate court. This being a first appeal, the court is duty bound to reconsider the evidence afresh and come to its own conclusions. In the case of ***Lake Flowers -vs- Cilla Frankline Ngonga and Josephine Mumbi Ngugi, NKR Civil Appeal No. 210 of 2006,*** the Court of Appeal in citing the case of ***Selle -vs- Associated Boat Co. Ltd. [1968] EA 123*** stated as follows -

> ***"Being a first appeal, the principles upon which this court acts are well settled in that the court must reconsider the evidence, evaluate it itself and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this court is not bound to necessarily follow the trial judge's findings of fact if it appears either that she has failed on some point to take account of particular evidence, or if the circumstances or probabilities materially to estimate the impression based on the demeanour of the witnesses is inconsistent with the case generally."***

The above are the general principles and standards to be applied by any first appellate court.

The appellant has contended that the magistrate erred in finding that the ownership of the motor

vehicle was not established. Indeed the registration records from the Registrar of Motor Vehicles were not produced in evidence. As was observed in the case of ***Samuel Mukunya Kamunge -vs- John Mwangi Kamuru, Nyeri Civil Appeal No. 34 of 2002*** (unreported) cited by the appellant's counsel herein –

> ***"it is true that a certificate of search from the Registrar of Motor Vehicles would have shown who was the registered owner of the motor vehicle according to the record . That however is not conclusive proof of ownership of the motor vehicle as Section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition that often times vehicles change hands and the records are not amended."***

I fully agree with the observations of the learned judge in the above appeal. The court has to consider the totality of the evidence tendered in determining the ownership of the motor vehicle. The appellant gave the registration Number and make of the said motor vehicle. It was a Canter bus. It was used to carry water and he was loading water into the vehicle from the river when the accident occurred. He stated that the name of the respondent was written on the side of the bus. He was at that time working for the respondent in fetching water as a casual employee.

Though the respondent raised a general denial in defence, they never gave evidence to controvert what was stated by the appellant. The police report also showed that the vehicle belonged to the respondent. On the basis of the uncontroverted evidence on the description and ownership of the vehicle as given by the appellant, it is clear in my view, that the appellant had proved the ownership of the vehicle before the trial court on the on a balance of probabilities. There was no contra evidence tendered by the respondent on the ownership of the vehicle. The general denial, or even if it was a detailed denial in the defence, is a mere allegation and is not evidence. In my view, the learned magistrate erred in finding that the ownership of the motor vehicle had not been established.

In addition to the above, ownership and control go together. Even if the vehicle was not owned by the respondent, they were certainly in control of it. The appellant was also their casual employee. Proof of ownership was therefore not necessary.

In my view, the case relied upon by the learned magistrate is valid but was not applicable in the present case. The above disposes of ground 1 and ground 2 of the appeal.

With regard to ground 3, the learned magistrate did not rely on the documents produced because they were not produced by the makers of those documents. The treatment notes and medical documents were official records. They are documents that are done or filled in the normal course of business. The learned magistrate stated that the said documents could not be relied upon unless they were produced by the makers or produced by consent of the parties. I note that the only document that the defence appears to have objected to is the invoice from Moi Teaching and Referral hospital written in the name of Bunyore Girls High School. It was marked as MFI. P2a. It was not thus produced in evidence. The rest of the documents, that is exhibits 1 from Kima Mission Hospital, Exh.3 from Moi Teaching and Referral Hospital, Exh.4 Moi Teaching and Referral hospital, Exh.5 Moi Teaching and Referral hospital, Exh.6, the abstract from Luanda Police Station, Exh.7 – medical report from Dr. Otolo, Exh.8 were all produced in court as exhibits without objection. No evidence was tendered by the respondent to controvert these documents. In those circumstances, and especially in view of the fact that the respondent was represented by an advocate, it was wrong for the trial court to hold that they were not properly produced and consider them in the judgment. I therefore find that the rejection of the said documents by the trial court was not proper.

The learned trial magistrate did not consider or assess the quantum of damages. The counsel for the appellant has now asked the court to award the appellant damages of Kshs.900,000/= plus costs of the appeal and the subordinate court.

The counsel for the respondent opposed the suggested quantum on the basis that the same were based on workmen's compensation and it was the duty of the appellant to prove the same at the trial. Therefore in counsel's view, the request for quantum of damages should be dismissed on appeal for want

of proof.

In my view, the trial magistrate should have assessed the quantum of damages even if he dismissed the appellant's case. That has been the established legal requirement emphasized over and over again by the courts. It would save time and costs. At the subordinate court, the appellant's counsel had asked for an award of general damages of Kshs.900,000/=. He relied on a case of ***Hassan Mohammed Aden vs Tracon Ltd. & Ano. Nakuru. HCCC NO. 508 of 1999*** (Unreported) where an award of Kshs.3,393,350/= was awarded.

Having found that the evidence of the appellant was not controverted by any evidence tendered by the respondent as above, and also having found that the exhibits produced should have beenconsidered by the learned trial magistrate, I find that the appellant actually suffered the injuries claimed to have suffered. He produced the treatment notes. He stated that he was not yet completely healed. His legs pained when he stood for long periods. He had a catheter to help him remove the urine. Those injuries were consistent with the accident described. In my view, the appellate court can assess damages.

In the absence of the doctor coming to explain the real impact and long term effect of the injuries suffered, the appellant in my view cannot justifiably claim an amount of Kshs.900,000/=. In my view, he was injured. But he disentitled himself from getting a higher amount in damages because he failed to call the doctor to come and give a description of the detailed nature of injuries and the effect of the injuries upon by him.

I allow the appeal, set aside the judgment of the learned magistrate.

Doing the best I can, I assess the general damages due to the appellant at Kshs.450,000/=. No special damages can be awarded, as treatment costs were paid for by the respondent. Interest on the general damages will run from today's date until payment in full.

The appellant is awarded the costs of this appeal as well as the costs of the proceedings in the subordinate court.

The appeal of the appellant is allowed to the above extent.

***Dated and delivered at Kakamega this 19th day of June, 2014***

**George Dulu**

**J U D G E**