REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.68 OF 2010

BENSON CHARLES OCHIENG……..…..…….....……1ST APPELLANT

LEAH OTIENO……2ND APPELLANT

VERSUS

PEREZ AKINYI RANDEDE….....…..……..…….....RESPONDENT

JUDGMENT

The Respondent filed suit before the Principal Magistrate's Court, Busia seeking to be paid damages on account of injuries she alleges to have sustained while she was travelling as a passenger in motor vehicle Registration No.KAU 599V Toyota matatu. The motor vehicle was involved in an accident on 24th July 2009 along Busia – Kisumu Road. The Respondent attributed the accident to the negligence of the 1st Appellant who at the material time was the driver of the motor vehicle. The 2nd Appellant was sued in her capacity as the owner of the motor vehicle. As a result of the said accident, the Respondent pleaded that she sustained injuries which she particularized in her plaint. The Appellants duly entered appearance after being served. They filed a joint defence. They denied the allegation made by the Respondent to the effect that an accident ever occurred. In that regard, they put the Respondent to strict proof thereof. They further denied the allegation that the accident was caused by their negligence. They put the Respondent to strict proof thereof on her averment that she had been injured in the accident. The Appellants further averred that if the accident occurred, then it was caused by factors outside the control of the driver of the suit motor vehicle. After hearing the case, the trial court found in favour of the Respondent on both liability and quantum. The trial court found the Appellants solely liable for the accident. On quantum, the trial court awarded the Respondent general damages of Kshs.150,000/- for pain, suffering and loss of amenities. He awarded the Respondent special damages of Kshs.11,500/-. He also awarded the Respondent costs of the suit.

The Appellants were aggrieved by this decision. They filed an appeal to this court. In their memorandum of appeal, the Appellants faulted the trial court for awarding general damages that were inordinately high

as to constitute an erroneous estimate of the injuries sustained by the Respondent. They were aggrieved that the trial court had failed to take into consideration the principle laid down in the case of **Robinson – Vs- Oluoch** in determining the question of liability especially taking into account that there was a third party who substantially contributed to the accident. In the premises therefore, the Appellants urged the court to allow the appeal, set aside the trial court's finding on liability and quantum and proceed to apportion liability and reassess the general damages in accordance with the law. The Appellants prayed to be awarded costs of the suit.

At the hearing of the appeal, counsel for the parties to this appeal, i.e Miss Mufutu for the Appellants and Mr. Omondi for the Respondent agreed by consent that the decision of this court on liability in the test case of **Busia HC. Civil Appeal No.69 of 2010 Benson Charles Ochieng & Anor –Vs-Patricia Atieno** would apply to this appeal because the accident that is the cause of action and the subject of the appeal was the same. This court, after reevaluating the evidence adduced before the trial court, in light of the submission made on appeal, reached the finding that the trial court had properly evaluated the evidence and reached the correct determination that the Appellants were solely liable for the accident. The Appellants therefore will bear 100% liability.

As regard the appeal on quantum, the principles to be considered by this court are well settled. In **Kemfro Africa Limited t/a Meru Express Service –Vs- A.M. Lubia & Another [1987] KLR 27**, Kneller J.A held that:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango v. Manyoka [1961] E.A. 705, 709, 713, Lukenya Ranching and Farming Co-operatives Society Ltd v. Kalovoto [1970] E.A. 414, 418, 419. This court follows the same principles".

In the present appeal, medical evidence was adduced regarding the injuries that the Respondent alleged to have sustained during the accident. The injuries are as follows:

The forehead was swollen and tender with haematoma, blunt trauma to the neck which was tender, blunt trauma to the chest which was tender, cut wound on the tongue and also a cut wound on the chin, the left shoulder was swollen and tender, the right forearm was swollen and tender, the left hip was swollen and tender and the right leg was swollen and tender with a cut wound.

This court agrees with counsel for the Appellants that the injuries sustained by the Respondent were essentially soft tissue injuries. The Appellants made the choice not to refer the Respondent to be seen by a doctor of their choice for a second opinion. The only evidence on record is therefore that adduced by the doctor of the Respondent. That medical evidence is uncontroverted. In assessing general damages in a case such as the present one, the trial court was exercising judicial discretion. This court cannot interfere with the exercise of such discretion unless it is established that the discretion was exercised capriciously and without due regard to the law. In the present appeal, it was clear that the assessment of damages by the trial court on the injuries sustained by the Respondent was neither too high nor too low as to attract intervention by this court. As an appellate court, this court will not substitute its assessment, or what it

thinks should have been its assessment were it put in the place of the trial court, if no error in principle is established. An error in principle is where the trial court takes into account an irrelevant consideration or fails to take into account a relevant consideration in its assessment of damages. The trial court took into account the relevant decided cases in assessing the damages to be paid to the Respondent.

In the premises therefore, this court cannot interfere with the assessment of general damages by the trial court where there was no second medical opinion for this court to compare with the assessment of injuries that the Respondent sustained as observed by her doctor. The medical evidence of the doctor called by the Respondent was not controverted. It therefore stood unchallenged. The appeal on quantum lacks merit and is hereby dismissed. The Appellants shall pay the costs of this appeal to the Respondent. The decision of the trial court on liability and quantum is hereby upheld. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 24TH DAY OF JULY, 2013.

F. TUIYOT

JUDGE