



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CIVIL APPEAL NO.69 OF 2010**

**BENSON CHARLES OCHIENG.....1<sup>ST</sup>**  
**APPELLANT**

**LEAH OTIENO.....2<sup>ND</sup>**  
**APPELLANT**

**VERSUS**

**PATRICIA ATIENO..... 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 24<sup>th</sup> July 2009 along Busia – Kisumu Road. The Respondent attributed the accident to the negligence of the 1<sup>st</sup> Appellant who at the material time was the driver of the motor vehicle. The 2<sup>nd</sup> 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.120,000/- 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, the parties to the appeal represented by Miss Mufutu for the Appellants and Mr. Omondi for the Respondent entered into a consent on the question of liability. They agreed that the determination by this court on the question of liability would apply in equal measure to Civil Appeals Nos.65, 66, 67, 68 and 70 of 2010. They further agreed that the issue of quantum would be determined by the court on the basis of the written submission filed by the said counsel. They further agreed that a supplementary record of appeal be admitted on record of the court.

This court heard the rival submission made by the said counsel on the question of liability and quantum. Miss Mufutu submitted that the trial court erred in making an award of general damages that did not reflect the nature of injuries that the Respondent sustained. She was of the view that the injuries sustained by the Respondent were basically soft tissue injuries which could not attract the amount of general damages that was awarded by the trial magistrate. She was of the view that the award of general damages of Kshs.120,000/- did not reflect the trend of awards made in similar cases by other courts. She urged the court to review the award to reflect the proper award. On liability, she submitted that the trial court erred in finding the Appellants solely liable in negligence yet there was evidence that the suit motor vehicle had been involved in an accident with another motor vehicle. She submitted that the Respondent should have sued the owner of the other motor vehicle so that the issue of liability be properly determined. It was the Appellants' appeal that the evidence of their witnesses had established that it was the third-party motor vehicle that was substantially responsible for causing the accident. She accused the trial court of not taking in account this evidence. She submitted that although the Appellants did not issue a third-party notice to the owners of the said motor vehicles, that fact should not have formed a basis for the court to find against them. In her view, the trial court had committed an error of principle which this court should correct by allowing the appeal on the liability.

On his part, Mr. Omondi for the Respondent opposed the appeal. He submitted that the trial court had made the correct finding both on liability and quantum. He reiterated that a party is bound by his pleadings. In this case, the Appellants were bound by the defence that they had filed. He explained that the Appellants had not pleaded the issue of contributory negligence on the part of the third-party motor vehicle nor had they sought for the court to issue third-party notice to the owners of the said third-party motor vehicle. He submitted that the trial court could not apportioned liability in favour of the Appellants against a person who was not a party to the suit. He further submitted that by dint of **Section 47A** of the **Evidence Act**, the fact that the driver of the suit motor vehicle was convicted for negligence in a traffic case was sufficient proof that the said driver was indeed negligent. He urged the court to consider the case **Robinson –Vs- Oluoch** in light of the fact that the Appellants failed plead contributory negligence and further failed to enjoin the third-party to these proceedings. It was the Respondent's case that it had established that indeed the accident was caused solely by the negligence of the driver of the suit motor vehicle. The Respondent did not in any way contribute to the accident. On quantum, Mr. Omondi submitted that the award of Kshs.120,000/- as general damages was reasonable taking into account the nature of the injuries that the Respondent sustained. He submitted that the medical evidence that was adduced established that indeed the Respondent had sustained injuries that warranted the award in general damages that was made by the trial court. He urged the court to dismiss the appeal with costs.

This being a first appeal, the duty of this court is circumscribed. In **Maore –Vs- Mwenda [2004] eKLR**, the Court of Appeal held thus:

***“This being a first appeal, it is our duty to reevaluate the evidence, assess it and make our own conclusion, remembering that we have not seen nor heard the witnesses and making due allowance for this (see Selle v.Associated Motor Boat Company Ltd [1968] E.A. 123 at page 126 and Williamson Diamonds Ltd v. Brown [1970] E.A.1”.***

In the present appeal, there are two issues for determination. The first issue is whether the trial court reached the correct finding on liability. In the present appeal, the Respondent pleaded that she was a passenger in the motor vehicle that is the subject of this appeal. From the evidence adduced, it was apparent that the suit motor vehicle, Registration No.KAU 599V was involved in an accident with motor vehicle Registration No.KAH 956H/ZB 6134. According to the witnesses of the Appellants, the said accident was caused when the third-party motor vehicle suddenly stopped as the suit motor vehicle was

being driven behind it. The driver of the suit motor vehicle was forced to swerve in order to avoid hitting the trailer from behind. This was not to be. The accident occurred resulting in the Respondent sustaining the injuries that she has pleaded in her plaint. The 1<sup>st</sup> Appellant was charged with the offence of careless driving as a result of the said accident. He pleaded guilty to the charge and was convicted and fined.

According to the Appellants, the trial court erred when it held the Appellants solely liable for the accident yet there was evidence that the accident was substantially contributed by the negligence of the third-party motor vehicle. It is trite law that a party is bound by his pleadings. In this appeal, although the Respondent did not sue the owner of the third-party motor vehicle together with the Appellants, upon being served with the suit, it was incumbent upon the Appellants to seek the leave of the trial court to issue third-party notice to the owners of the third-party motor vehicle. The Appellants did not do this. Instead, they argued that that duty was on the Respondent. This court was not persuaded by this argument. Any person who is of the view that it ought to enjoin another party to the proceedings as being the person who was responsible for the act or omission that is subject of the suit, is required to make such application before the trial court.

In this appeal, the Appellants did no such thing. In fact, the Appellants did not even plead contributory negligence on the part of the third-party in their defence. The evidence that the Appellants adduced in court was therefore not in consonance with their pleadings. The trial court could not have apportioned liability between the Appellants and a person who was not even a party to the suit. This court is unable to agree with the thrust of the Appellants' argument which was to the effect that the Respondent ought to be blamed for not enjoining the third-party into the proceedings. This cannot be because it is the Appellants who will bear the consequences of any failure to include the third-party into the proceedings. The decision of **Oluoch -Vs- Robinson [1971] E.A. 376** is not therefore of help to the Appellants where they did not plead contributory negligence and where they failed to enjoin the owners of the third-party motor vehicle as a party to the suit. The appeal against the finding by the trial court on liability therefore lacks merit and is hereby dismissed.

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, the neck was swollen and tender, blunt trauma to the chest which was tender, blunt trauma to the lumbo sacral spine which was tender, both shoulders were swollen and tender, both hip joints were swollen and tender, both knees were swollen and tender. There was a cut wound on the left leg which was tender. The doctor's prognosis was that with time the injuries would heal leaving behind no residual effect.

This court is in agreement with the submission made by the Appellants that the injuries sustained by the Respondent were essentially soft tissue injuries. The Appellants did not find it necessary to refer the Respondent to another doctor for a second opinion. This court wonders why the Appellants did not take this course of action. This court cannot purport to advise litigants on the course of action they should take prior to and during the course of the hearing of the case. Naturally, such litigants will bear the consequences of their actions or inaction. The trial court and this court is therefore left to rely on the

medical report presented to the court by the doctor called by the Respondent. For these injuries, the trial court awarded the Respondent general damages of Kshs.120,000/- for pain suffering and loss of amenities. Was this award out of the range and sync of awards made by courts when awarding general damages for similar injuries? This court does not think so. In assessing damages, the trial court was exercising judicial discretion. This court cannot interfere with the exercise of such discretion unless it is established that the award was either too high or too low as to constitute an erroneous assessment of the damages payable in such circumstances. As an appellate court, this court cannot substitute its assessment with that of the trial court unless it is established that the assessment was plainly and obviously wrong. In the present appeal, no such error or breach of principles in the assessment was established by the Appellants.

The upshot of the above reasons is that the appeal filed by the Appellants lack merit and hereby dismissed. The Appellants shall pay the cost of this appeal to the Respondent. The decision of the trial court is upheld both on liability and on quantum. It is so ordered.

**L. KIMARU**

**JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 24<sup>TH</sup> DAY OF JULY 2013.**

**F. TUIYOT**

**JUDGE**