



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. 21 OF 2009

KENYA BUS SERVICES LTD.....APPELLANT

-VS-

MARY OLANDO.....RESPONDENT

JUDGMENT

This judgment is the result of the appeal against the judgment of the late Hon. Walter Nyarima, the then learned Senior Principal Magistrate vide **Kericho S.P.M.C.C.C no. 828 of 2004 Mary Alando -VS- Kenya Bus Services Ltd.** The trial court's decision was delivered on 25th May 2011. The cause of action is a road traffic accident which occurred on 12/08/2004 along Kericho-Kisumu road involving motor vehicle registration no. KAR 537S.

Mary Alando, the Respondent herein, a fare-paying passenger, who was on board the aforesaid motor vehicle was injured as a result. She sued for damages, Kenya Bus Services Ltd, the Appellant herein and Peter Ndonge Mutuku in their capacities as the registered owner of the aforementioned motor vehicle and as the driver respectively.

The learned Senior Principal Magistrate heard the case and found the appellant wholly liable. The Respondent was awarded Kshs.190,000 and Kshs.3,000 being general and special damages respectively. The appellant being dissatisfied filed this appeal and put forward the following grounds in its memorandum:

- 1. The learned trial Magistrate erred by arriving at a finding on liability, which was not supported by evidence.**
- 2. The Respondent's case was not proved on balance of probability as is required by law.**
- 3. The Respondent's injuries, the basis of which assessment of damages was made were not proved or verified as per onus on the part of the Plaintiff.**
- 4. The learned trial Magistrate's erred in law in awarding exaggerated damages for loss of earning when the same was not proved.**
- 5. The learned trial Magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.**

When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal determined by written submissions. I have re-evaluated the case that was before the trial court. I have further taken into account the written submissions. It is important to state from the outset that the appellant is challenging both the decision on liability and quantum. The appellant is of the view that it should not have been held wholly liable for the accident since the Respondent did not call for any evidence to corroborate her evidence. The appellant also pointed out that the police had indicated that the case was pending investigation and that there was a third party motor vehicle involved. The aforesaid

factors are said not to have been considered by the trial magistrate. I have re-considered the evidence tendered before the trial court and it is true that the Respondent was the only witness who testified in support of her case. It is her evidence that she boarded motor vehicle reg. no. KAR 537S on 12/08/2004 and that the same was involved in a road traffic accident due to high speed when the driver was trying to overtake another motor vehicle. It is further the evidence of the Respondent that the driver of the aforesaid motor vehicle swerved and lost control thus causing the bus to crash. She solely blamed the driver for driving on high speed and for carelessly overtaking.

The Appellant, despite having been given a chance, failed to tender evidence to controvert the Respondent's evidence. The trial magistrate, in my view, cannot be faulted when he found the appellant solely liable. After a careful re-evaluation of the recorded evidence I am convinced that the appellant's driver drove motor vehicle registration no. KAR 537S carelessly at high speed thus causing it to crash.

The Appellant also complained that the award on damages was exaggerated hence inordinately high for such injuries. I have reconsidered the medical evidence presented before the trial court and it is apparent that the Respondent suffered soft tissue injuries on the left shoulder joint, left forehead and on her left hip joint. The doctor who examined the Respondent classified the degree of injury as harm.

Again, the Appellant did not apply for the Respondent to undergo a second medical examination to controvert the injuries suffered by the Respondent. The question which this court must grapple with is whether the award of Kshs.190,000 is commensurate with the injuries suffered.

The appellant is of the view that the aforesaid figure is exorbitant. The appellant was of the view that Kshs.70,000 was a sufficient award for general damages. I have looked at awards given in other comparable cases. I think the most relevant authority that comes to my mind is the case of **Stanley Maore -VS- Geoffrey Mwenda, C.A.No. 147 of 2002**, where the court of appeal adjusted downwards an award of Kshs.300,000 to Kshs.100,000 for soft tissue injuries. Of course the aforesaid decision was made on 10th December 2004 about seven years before the decision, the subject of this appeal was made. The value of the shilling has considerably gone down hence this court is not expected to give the same figures. The record shows the Respondent had submitted authorities indicating that this court had given an award of damages for near similar injuries at Kshs.150,000.

On its part the Appellant urged this court to make an award of Kshs.40,000. The learned Senior Principal Magistrate considered the rival awards and decided to award Kshs.190,000. I am convinced by the submissions of the Appellant that the award of Kshs.190,000 was on the higher side in view of the fact that the injuries the respondent suffered had already healed. It is also not in dispute that the Respondent had not suffered any temporary nor permanent incapacity. I am satisfied that the figure given should be adjusted downwards. I will award a sum of Kshs.140,000/= as being reasonable and sufficient as general damages for such injuries.

Consequently the appeal against liability is dismissed. The appeal against quantum is allowed. The award of Kshs.190,000 is set aside and is substituted with that of Kshs.140,000. The figure of Kshs.3,000 being general damages remains undisturbed. Costs of the appeal commensurate to what was slashed off is given (i.e costs to be assessed based on the basis of Kshs.50,000) to the Appellant.

Dated and delivered this 27th day of September 2013

J.K.SERGON

JUDGE

In open court in the presence of

Mr. Langat for the Appellant

N/A for the Respondent

Mr. Koech- court clerk