



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Civil Appeal 57 of 2007**

**JACKLINE**

**A.OPONDO.....APPELLANT**

**VERSUS**

**POSTAL CORPORATION OF KENYA**

**SAMUEL**

**OLERO.....RESPONDENT**

**J U D G E M E N T**

**JACKLYNE EUNICE ANYANGO OPONDO** the appellant filed suit against the defendants **POSTAL CORPORATION OF KENYA** and **SAMWE L OLERO** as 1st and 2nd defendants respectively in a plaint dated 28th October, 2004 on an allegation that on the 25th of September, 2004 along Kisumu-Maseno Road at Chulaimbo. (now respondents in this appeal) the 2nd respondent negligently drove the first respondent's vehicle, causing the same to collide with motor vehicle registration **No.KAG 831E** where the appellant as a result sustained injuries. The trial court after hearing the suit came to the conclusion that the appellant failed to prove her case on a balance of probability and it is against this background that this appeal was filed.

The memorandum of appeal is based on the following grounds:

- **The learned trial magistrate erred in law and fact in holding that the defendants were not wholly and/or partially liable for the occurrence of the accident;**
- **The learned trial magistrate erred in law in holding that the appellant had not proved her case on balance of probabilities in spite of the overwhelming evidence on record;**
- **The learned trial magistrate erred in law in his findings on the point of impact;**
- **The learned trial magistrate erred in law and fact in dismissing the plaintiff's case;**
- **The learned trial magistrate's findings and judgment is totally against the weight of evidence.**

This being the first appellate court ti has the duty of re-considering the evidence on record examining and analysing the same in order to arrive at an independent opinion. The evidence on record for the plaintiff's case was as follows:

**PW1 JACKLINE EUNICE ANYANGO OPUDO**, recalled that on the 25th of September,2004 she left Kisumu at 11 a.m. for her uncles burial in a saloon vehicle registration **No.KAG 831E** and on reaching Chulaimbo the vehicle was involved in an accident where as a result she lost the life of her 2 year old son and sustained injuries. It was her evidence that the driver of their vehicle swerved to avoid a head on

collision with the other vehicle but the said vehicle hit the rear side of their vehicle. She further stated that due to the injuries she received on her head, chest, left hip and thigh she was treated at New Nyanza and had her P3 form filled for Kshs.500/=. Later she was examined and a medical report prepared for Kshs.1,500/=.

**PW2 STEVE OKOTH OUKO** was the driver of motor vehicle registration **No.KAG 831E**. On the material day he confirmed that on reaching a bend at Chulaimbo an accident occurred. It was his evidence that a vehicle registration **No.KAJ 581S** attempted to overtake a lorry on the opposite direction and hit his vehicle on the left rear side and on the left side of the road where as a result the passengers in his vehicle sustained injuries and a child passenger died. It was also his evidence that the other motor vehicle rolled after the impact and landed on its left side of the road. He further stated in evidence that the right side of his vehicle was ripped off, he denied that he was overtaking as there was no vehicle ahead of him on his side of the road.

**PW3 P.C. JONATHAN NDANGILI** of Maseno Police Station. Produced the abstract form, and informed court that police investigations blamed the driver of motor vehicle registration **No.KAJ 581S** who was charged with the offence of dangerous driving but was later acquitted.

**PW4 NANCY SUSAN OPONDO**. She was also a passenger in saloon car **KAG 831E** with her sister and her sister's son. She also sustained injuries to the right cheek, right arm, chest, right hip bone and the head and was admitted to hospital for 4 days.

On their part the defence called 2 witnesses. **DW1** the driver of motor-vehicle registration **No.KAJ 581S**. It was his evidence that the other small vehicle coming from Kisumu drove on his lane as it attempted to overtake a canter and although both vehicles veered off to avoid the accident his vehicle was hit on the right front side and the impact was on the left of the road as one goes to Kisumu, it was also his evidence that he drove at 70 kph while the other vehicle was over-speeding. He further testified that he reported the matter after 6 months. He was charged but acquitted. He blamed the driver of **KAG 831E** for the accident.

**DW2 PHILOMON ODONGO ASIGO**. He recalled witnessing the accident on 25th September, 2004 at around 12.30 p.m. It was his evidence that 2 vehicles a saloon and a canter came from the direction of Kisumu, the saloon car in an attempted to overtake the canter hit another vehicle. The right front of the ford was hit. On cross-examination the witness said that he did not record a statement nor testified in the traffic case.

Having considered the evidence, the issues for determination herein are whether or not the plaintiff now respondent proved her case on a balance of probabilities, whether the 2nd respondent was negligent? And is the appellant entitled to damages?

I will take note of the fact that the traffic case was to be proved beyond reasonable doubt whereas in this case judgment will be based on a balance of probabilities meaning that each has its own standard of proof set out. Each side has blamed the other but the following facts are not disputed:

- 1. Motor-vehicle KAG 831E was headed towards Busia direction.**
- 2. Motor vehicle KAJ 581S was headed towards Kisumu side.**
- 3. Motor vehicle registration No.KAG 831E was damaged on the rear side whereas KAJ 581S on the front right.**
- 4. KAJ 581S rolled after the impact and landed on the left.**
- 5. The boy who was asleep on the left rear of the vehicle which side was ripped off was fatally injured.**

The driver of **KAJ 581S** blames the other driver for hitting the front of his car with his left rear. I do not see how this is possible as the driver of **KAG 831E** must have already passed **KAJ 581S** and the rear of the vehicle could not possibly have hit the front. The vehicles were being driven on opposite direction and therefore logically the vehicle that must have hit the other is the one that had damage to its front part which in this case was **KAJ 581S** which vehicle left its side of the road, hit the rear of the other with such impact that it ripped the same off and because of its speed the driver was unable to control it that it rolled. Having formed the said opinion I find the evidence of **PW1, PW2 & PW3** credit-worthy. I do not believe the defence evidence at all as it does not add up.

However I will not find the driver of **KAG 831E** blameless. He stated that he was alone on his side of the road, that he veered off to avoid the accident, I find that he did not do enough in the circumstance to avoid the accident although he was on his side of the road. I will therefore apportion 20% negligence upon him. I find that the 2nd respondent was substantially to blame and apportion him 80% liability. In this regard therefore I find that the appellant with the evidence on record proved her case on a balance of probabilities and the appeal therefore succeeds.

The trial magistrate erred in failing to determine quantum as required. Considering the medical record and the P3 form the appellant sustained the following injuries:

- **head injury with loss of consciousness;**
- **injuries to the left and right hand;**
- **injuries to the left knee.**

All the above were soft tissue injuries. She was treated and discharged. The same were classified as harm. The appellant's advocate in his undated submissions but filed in court on 3rd May, 2007, sought for Kshs.120,000/= on their part the defence in their submissions dated and filed 3rd May, 2007 were of the view that Kshs.60,000/= was adequate. They relied on a 2001 authority.

I find the defendants authority more comparable although the same was decided in 2001 and the inflationary trend must be considered. In my view a sum of Kshs.80,000/= plus specials of Kshs.2000/= being Kshs.500/= for the P3 form and Kshs.1500/- for the medical report less 20% contributory negligence would be a fair compensation.

The appeal having succeeded I award the same plus costs of the trial and this appeal to the appellant.

**Dated and delivered this 18th day of October 2012**

**ALI-ARONI**

**J U D G E**

In the presence of:

.....counsel for the appellant

.....counsel for the respondents

