

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

CIVIL APPEAL NO.40 OF 2006

**EMMANUEL WANJALA (Minor suing through ELECTINA
WANJALA as next friend and mother).....APPELLANT**

VRS

ISAAC KUTONDO.....RESPONDENT

*(Being appeal from the Judgment and decree of the learned Senior Principal Magistrate Honourable
K. Ngomo*

in Bungoma Court in Civil Case No.374 of 2003 which was delivered and dated 30th August 2006)

RULING

There was a road accident on 25/3/2002 at Sibembe along Mumias-Bungoma Road in which vehicle registration no.KAK 259 k Peugeot 406 saloon knocked down and seriously injured the Respondent who was a minor. The suit in the subordinate court was filed by the minor through the next friend for compensation in general and special damages. The plaintiff alleged that the vehicle was being driven negligently by the Appellant or its authorized agent/servant. It was further alleged that he owned the vehicle. The Appellant in the defence denied the fact of accident, negligence and ownership. The trial court found the Appellant 100% liable in negligence for the accident and went on to determine that he pays the Respondent Ksh.1.6 million in general damages, Ksh.2,500/= in special damages and then costs and interest.

Form the evidence adduced before the trial court, there was no dispute that the accident did occur and that the Respondent was injured in the same. There was also no dispute that the Appellant was the driver of the vehicle at the time. The Appellant denied that he was negligent or that he was the owner of the vehicle. On the later issue, he sought to produce the certificate of search from the Motor Vehicle Registry to show that he was not the owner of the vehicle at the time. The court did not allow the production on the basis that the certificate had not been previously shown to the Respondent.

The Appellant was aggrieved by the whole of the judgment of the trial court and filed this appeal. The Respondent cross-appealed on the ground that the amount awarded in general damages was inadequate. Among the grounds in the appeal was the complaint that the Respondent had not proved on balance that the Appellant was the owner of the vehicle. The other complaint was that the trial court had erred in not allowing the production of the certificate from the Motor Vehicle Registry. Pending the resolution of the appeal and cross-appeal, the Appellant filed this motion under Order 41 Rules 22 (1) and 23 of the Civil Procedure Rules and section 3A of the Civil Procedure Act to be allowed to adduce additional evidence during the hearing of the appeal. The evidence sought to be adduced is the said certificate of ownership.

The court received oral submissions on the application from Mr. Kamau for the Appellant and Mr.

Onyando for the Respondent. In my view, the application was unnecessary as it is clear from the Memorandum of Appeal that the issue whether the Respondent proved that the Appellant was the owner of the vehicle as pleaded in the plaint will be up for discussion and decision thereon. Related to this, will be the issue whether or not the trial court was wrong to exclude the evidence of ownership that the Appellant sought to adduce. The determination of the two issues will settle the grievance that is contained in this application. I consequently do not allow the application, but ask that the issue of costs awaits the appeal.

Dated and delivered at Bungoma this 7th day of November, 2011 in the presence of Mr. Onchiri for the Appellant and Mr. Onyando for the Respondent and Lilian Gimose the court clerk.

A. O. MUCHELULE
JUDGE