REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

Civil Appeal 3 of 2009

DANIEL N. ONCHANGI OIRA.....1ST APPELLANT
ABEL MAKORI MATUNDA.....2ND APPELLANT

VERSUS

ESTHER NYABIAGE ONKWARE.....RESPONDENT

JUDGMENT

The respondent filed a suit against the appellants jointly and severally. She stated that on the 12th day of February, 2008, at about 8.00 a.m. she was travelling as a fare paying passenger in motor vehicle registration No. KAN 697 B along Keroka-Masimba road when at Keroka township junction an accident occurred. The said motor vehicle was alleged to be owned by the 1st appellant whereas the 2nd appellant was its authorized driver. The 2nd appellant lost control of the motor vehicle and it veered off the road and rammed into a building as a result of which the respondent sustained severe bodily injuries. The injuries were stated as follows:

(a) Injury to the head.

(b) Blunt injury to the top of the scalp leading to cerebral concussion.

(c) Blunt injury to the lower back.

(d) Blunt injury to the lower abdomen.

(e) Blunt injury to the anterior chest wall.

(f)Deep cut wound to the right fore leg.

(g) Deep cut wound to the left thigh.

The respondent stated that the said accident was caused by negligence on the part of the 2nd appellant in that he drove the motor vehicle at an excessive speed in the circumstances and without due care and attention. She sought general damages as well as special damages on account of a Medical report (Kshs. 5,000/=), Search fees (Kshs. 500/=) and medical expenses (Kshs. 34,015/=), all totaling to Kshs. 39,515/=.

The appellants filed a joint statement of defence and denied any knowledge of the alleged accident. The 1st appellant further denied that he was the registered owner of the motor vehicle at the time of the alleged accident. The appellants further denied all the respondent's claims as stated in the plaint.

Only the respondent testified during the hearing. She stated that on the material day she was a fare paying passenger in the subject motor vehicle. On reaching a place known as Ichuni near the junction to Keroka market, the vehicle increased its speed. After about two days she found herself at Hema hospital. That is when she learnt that the motor vehicle had been involved in an accident. She remained in the said hospital for two weeks. She added that her husband paid a sum of Kshs.34,015/= to the said hospital. She produced the inpatient bill as **P.**

Exh.2. She was also examined by **Doctor Ajuoga** who prepared a medical report at a cost of Kshs. 5,000/=. She produced a receipt for the said sum as an exhibit. The accident was reported at Keroka police station and the respondent was issued with a P3 form and a police abstract report.

The police abstract report shows that the 1st appellant was the owner of the motor vehicle. It also indicates that this was a self involving accident. The appellants did not tender any evidence.

The learned trial magistrate was satisfied that the respondent had proved her case on a balance of probabilities and held the appellants fully liable for the said accident. He proceeded to award general damages in the sum of Kshs. 200,000/= and special damages of Kshs.39,515/=.

The appellants, being aggrieved by the said judgment, preferred an appeal to this court against the trial magistrate's findings on both liability and quantum of damages. They further stated that the learned trial magistrate erred in law in finding that the 1st appellant was the owner of motor vehicle registration No. KAN 697 B.

When the appeal came up for hearing on 13th May, 2010, it was by consent agreed that the same be determined by way of written submissions which were to be filed by counsel. I perused the appeal file at the time of preparing the judgment and it appears that the appellants did not file their submissions, only the respondent did so.

The respondent's evidence was unchallenged. She pleaded that she was a fare paying passenger in motor vehicle registration No. KAN 697 B which was said to be owned by the 1st appellant. The only document that she produced in support thereof was a police abstract report. The respondent did not conduct a search at the motor vehicle registry to verify whether indeed the 1st appellant was the registered owner of the subject motor vehicle.

The respondent's counsel submitted that a mere allegation in the statement of defence that the 1st appellant was not the registered owner of the motor vehicle was not enough to dislodge the respondent's evidence. He pointed out that the Court of Appeal decision in **THURANIRA KARAURI –VS- AGNES NCHECHE**, Civil Appeal No. 192 of 1996 has since been varied by the same court's decision in **LAKE FLOWERS –VS- CILA FRANKLIN ONYANGO NGOGA**, Civil Appeal No. 210 of 2006 at Nakuru.

In **PIUS OMBWERA ONCHORE –VS- J. MBIU MWANGI & ANOTHER**, HCCC No. 56 of 2005 at Kisii, this court, relying on the **LAKE FLOWERS**case (above) held that:

> **"Where a party does not adduce any evidence as regards ownership of a motor vehicle that would be sufficient to counter that in a police abstract report, the court must accept the information in the police abstract report regarding ownership as correct. After all, the standard of proof in civil cases is on a balance of probabilities."**

In the case of**MWALILI –VS- EDWARD & ANOTHER**[2000] KLR 206, it was held that where the plaintiff alleges negligence on the part of a defendant who does not controvert the allegations in evidence and the plaintiff proves the allegations on a balance of probability then the defendant will be found wholly liable.

In view of the foregoing, I find and hold that the respondent proved to the required standard that the 1st appellant was the owner of motor vehicle registration No. KAN 697 B.

As regards liability, the respondent being a fare paying passenger expected to be transported to her intended destination safely. This was a self involving accident. Even though the respondent did not know exactly how the accident occurred, the principle of ***Res Ipsa***

Loquitorcan be rightly inferred in such circumstances to conclude that there must have been negligence on the part of the 2nd appellant who was driving the 1st appellant's motor vehicle. The learned trial magistrate was therefore right in holding that the appellants were fully liable for the occurrence of the accident.

The award of Kshs. 200,000/= that was made by the trial court as general damages cannot be said to be excessive considering the nature of injuries sustained by the respondent. The circumstances under which an appellate court will interfere with a trial court's exercise of discretion in assessment of damages were well stated in **BUTLER –VS- BUTLER**[1984] KLR 225. I will not therefore interfere with the said award.

As regards special damages, the respondent proved the claim for Kshs. 5,000/= for medical report and Kshs. 34,015/= for medical expenses. That amounts to Kshs. 39,015/=. She did not prove her claim of Kshs. 500/= as Search fees. The award for special damages must therefore be reduced by Kshs.500/= to Kshs.39,015/=. Save for this adjustment on special damages, the trial court's judgment has to stand.

Consequently, I dismiss this appeal but reduce the quantum payable as special damages to Kshs. 39,015/=. The appellants shall bear the costs of the appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF JUNE, 2010.

D. MUSINGA
JUDGE.
17/6/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Ogweno for Mr. Juma for the Appellant

N/A for the Respondent

Court: Judgment delivered in open court on 17th June, 2010.

D. MUSINGA
JUDGE.