IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 61 OF 1998

OSERIAN DEVELOPMENT CO. LTD.

(HEZRON OKOTH)……..….APPELLANT

VERSUS

TINGA OLE NGAYANI……..…...RESPONDENT

JUDGMENT

The appellants have appealed against the Judgment of the Resident Magistrate in Nakuru Chief Magistrate's Civil Case No. 3176 of 1997. During the appeal, the appellants were represented by Mrs. Oduol while the respondents were represented by Mr. Muthanwa.

Mrs. Oduol narrowed the grounds of appeal to only two. The first ground is that the learned trial Magistrate erred in finding that the contribution against the plaintiff was only 10%. In order to demonstrate her point, Mr. Oduol referred the Court to Paragraph (5) of the Plaint which states that the plaintiff was aboard the tractor at the material time. However, in the evidence of the plaintiff he stated that the accident occurred when he was boarding the tractor. Mrs. Oduol concluded that the above evidence was inconsistent with the pleadings of the plaintiff. That is despite the fact that parties are bound by their pleadings.

Secondly, Mrs. Oduol submitted that assuming that the Court goes by the evidence on record that the Plaintiff fell while boarding the tractor in motion and that he did not know that it was dangerous to board a vehicle in motion – then the case was that of vilenti non fit injuria – because any sane person knows that it is dangerous to board a moving vehicle. Then that means that the plaintiff was 100% liable. According to Mrs. Oduol, the evidence of the defendant is consistent with the pleadings, since the plaintiff was a passenger for a long period of time on the tractor. She also took issue with the fact that instead of the plaintiff sitting inside the tractor he sat on the rail of the trailer at the rear. That was instead of sitting on the floor of the trailer. Mrs. Oduol also recalled the evidence of the DW1 who had earlier warned the plaintiff not to sit on the rail. Later on, when the DW1 braked, the plaintiff fell down.

On liability, Mrs. Oduol submitted that, though the learned Magistrate had acknowledged that the plaintiff had contributed to the accident at Page 11, she never addressed her mind fully to the evidence on record. Mrs. Oduol invited the Court to interfere with the findings of the learned Magistrate. In support of her submissions, she quoted the case of:

Shimo Ltd. Vs Thomas Imanah

Nyabwanga Nakuru Civil Appeal No. 34 of 2000

As far as quantum is concerned, Mrs. Oduol lamented that though they had submitted similar authorities, the learned Magistrate had ignored them. Instead she awarded a higher figure of Kshs.150,000 which was excessive. It is due to the above grounds that the appellant's Counsel has pleaded with this Court to allow the appeal and reduce the award.

On the other hand, Mr. Muthanwa has opposed the appeal. He has also pleaded with the Court not to interfere with the findings on liability and quantum. On procedure, Mr. Muthanwa submitted that Oserian Development Company Ltd. has been marked as the 1st appellant. He explained that the name had been

substituted by the consent of the parties. The defendant was named as Pieve Ltd. He also pointed out that the 2nd appellant appears as Hezron Okoth on Page 1 of record of appeal – though an amendment had been done on Page 8 of the record to read Joshua Otieno.

Mr. Muthanwa also referred the Court to Page 6 of the defence that named Joshua Otieno as the 1st defendant. He further pointed out that it was Joshua Otieno Owiti who was called as the first witness for the defence. Mr. Muthanwa concluded by stating that the present appellants are strangers and hence the whole appeal should be struck out. On liability, Mr. Muthanwa submitted that I should not interfere with the pleadings since they are supported by the evidence that has been adduced. He further submitted that the story of the plaintiff was confirmed by the DW1 who explained that he had seen a manager and he feared being asked why some people were sitting on the rail. On quantum, he submitted that the fact that same was closer to their submission is not relevant.

> This Court has carefully perused the submissions by both Counsels together with the record of appeal that includes the judgment. As the first appellate Court, I have a duty to analyze and re-evaluate the evidence again before I reach my own independent conclusion. According to the evidence of the plaintiff, he stated as follows:
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> **"While I was boarding again, the driver started off, when he braked I fell down. I was in the process of climbing. He knew that I was boarding then he started driving off…"**

From the above evidence, it is clear that the accident occurred when the tractor was actually in motion. Any prudent and careful person would either have stopped the driver or alternatively avoid climbing a tractor in motion due to the inherent dangers. Though the learned Magistrate acknowledged he contribution of negligence by the plaintiff, his assessment of the same at 10% was completely negligible and unreasonable. Both the plaintiff and defendant contributed to the accident equally.

I am of the considered opinion that each of them contributed to the accident at 50%. In view of the above, I hereby reduce the general damages awarded to the plaintiff from Kshs.135,000 to Kshs.76,000. Each party to bear the costs at 50%.

It is only to that extent that the appeal succeeds.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of Mrs. Oduol for appellant and Mr. Kahiga for Mr. Muthanwa for the respondent.

MUGA APONDI

JUDGE

3RD FEBRUARY, 2005