



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA**

Civil Appeal 16 of 2004
(Arising from Original Busia SRM Civil Case NO.387 OF 2003)

JENNETA AKELLO OWUOR.....APPELLANT

VERSUS

1 PROTUS WAFULA

2 FREDRICK ATARO.....RESPONDENTS

JUDGMENT

The appellant herein, Jenetta Akello Owuor filed an action before the Senior Resident magistrate's court claiming for *inter alia* damages for injuries she sustained while she was traveling as a fare paying passenger in motor vehicle registration no.KAN 054 J registered in the name of Protus Wafula, the 1st respondent herein, while driven by Fredrick Ataro the 2nd Respondent.

The suit proceeded for hearing before the aforesaid Court and at the end of the trial the suit was dismissed. Being dissatisfied the appellant preferred this appeal.

When this appeal came up for hearing the Respondent's advocate did not turn up despite having knowledge of the hearing date having been served with a hearing notice.

The appellant was then given a go head to proceed to argue the appeal *ex parte*. The matter before the trial court was quite simple and straightforward. The appellant gave evidence to the effect that she boarded motor vehicle registration no.KAN O54 J at Nambale and upon reaching Busia Township she claimed the driver drove the motor vehicle at a high speed thus hitting a bump which made the appellant to be thrown up and down thus injuring her back and chest. She said she complained to the driver but she was ignored and dumped at Busia Bus Stage. She claimed a good Samaritan then took her to Busia Police Station to report the incident where she was referred to Busia district Hospital for treatment. She claimed she was admitted for 5 days before she was discharged. She produced treatment notes and a medical report before the trial magistrate. The police officer who received her complaint testified and produced the O.B. in respect of the accident of 27.11.2002. The appellant also called Dr. Mubisi who examined her to testify. He produced a medical report he prepared on 17.2.2004 which showed the appellant suffered soft tissue injuries at the chest and at the back.

On their part the Respondents denied the appellant's claim. The 2nd Respondent claimed that he drove the appellant from Mumias and upon reaching Nambale she refused to alight claiming she had a back ache. The 2nd Respondent denied driving the motor vehicle at high speed. He denied that she was injured in his motor vehicle. When being cross-examined by the 2nd Respondent he claimed he saw the appellant board the motor vehicle at Nambale. He even confirmed that she never complained of any pain as she boarded the motor vehicle. The Respondent also called for the evidence of his conductor, Saidi Fadhili Wanzala (D.W.2). D.W 2 said that the appellant boarded their motor vehicle at Nambale and upon

reaching the bus stage she complained of back ache when she got injured when the motor vehicle ran over a bump. He supported the evidence of the 2nd Respondent that the motor vehicle was not being driven at high speed.

D.W.1 (2nd respondent) and D.W2 agreed that they declined to take the appellant to hospital despite her request.

After receiving these evidence the trial magistrate found no merit in the case and proceeded to dismiss the same without assessing damages.

On appeal the appellant raised 5 main grounds which Mr. Otanga argued as two grounds. On the first ground Mr. Otanga argued that the trial magistrate erred when she held that the plaintiff had not proved her case to the standard required in Civil cases yet there was ample evidence to show that she actually established her case. The record shows that the appellant produced the treatment notes and the subsequent medical report to establish that she was injured. The appellant also called the evidence of a police officer who produced the occurrence Book which showed that the appellant indeed reported the incident at Busia Police Station. The evidence of D.W.1 and D.W2 clearly show that the appellant had complained of having got injured while traveling in motor vehicle registration no.KAN O54 J.

The learned trial resident magistrate was of the view that the appellant did not prove her case on a balance of probabilities. The learned Resident magistrate further went ahead to hold that the appellant failed to call witnesses to corroborate her evidence.

With great respect to the learned Resident magistrate, I think he misapprehended the point. He was supposed to assess the evidence tendered before him. There is no evidence that the trial magistrate disbelieved the evidence of any of the appellant's witnesses. The law does not require for the corroboration of the appellant's evidence.

The trial magistrate should have indicated in his judgment whether or not he believed the evidence tendered by the appellant and her witnesses upon observing their demeanor.

This Court being the first appellate court is bound to reassess and to re-consider the evidence presented before the trial Court. I have carefully perused the aforesaid evidence and I am satisfied that the appellant got injured while traveling in motor vehicle registration KAN 054 J. The appellant's evidence and that of the respondent and D.W2 confirm that the appellant complained while still on board of motor vehicle registration KAN 054 J that she got injured when the aforesaid motor vehicle ran over a bump while being driven by the 1st Respondent. There is also evidence of P.W.1, D.W.1 and D.W2 that the appellant had requested to be taken to Hospital but she was ignored. No one alleged before the trial Resident Magistrate that the appellant had created or faked the story regarding injuries the appellant suffered. In the absence of such a claim I see no reason why the trial magistrate did not give the appellant judgment.

In the end, I find that the appellant had proved her case to the requisite standard before the trial Court. In view of this finding, I am satisfied that the appeal should be allowed.

The second ground argued by the appellant is that the trial magistrate erred when he failed to make a finding on quantum of damages payable. The law is well settled that where a party claims general and special damages the trial Court is bound to quantify the award on damages even where the action would be dismissed. On this ground I will also allow the appeal and direct that the matter be remitted back to the trial magistrate to assess damages on the basis of the evidence presented before him.

The upshot therefore is that the appeal is allowed with the result that the order dismissing the suit is set aside and substituted with an order entering judgment in favour of the appellant (plaintiff) in which the Respondents (defendants) are held solely liable for the accident. The Deputy Registrar is directed to place the file before the trial magistrate to assess quantum of damages. The appellant shall have costs of the appeal and costs of the suit before the trial court.

Dated and delivered this 3rd day of November, 2005.

J. K. SERGON

JUDGE

In the presence of
Ipapu H/B Mr. Otanga
NA for Kasamani.