REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

Civil Appeal 25 of 2000

(From Busia Original SRM Civil case no.225 of 1993)

WILSON MUCHIRI……………………..…………………………….APPELLANT

VS

AHMED HERSI MOGHE…………………………………………….RESPONDENT

JUDGMENT

Wilson Muchiri Wahome, the appellant herein, filed an action against Ahmed Sadique Hersi Moghe, the Respondent herein, claiming both special and general damages for injuries he sustained when he was involved in a road traffic accident while boarding motor vehicle registration no.KAB 660L as a fare paying passenger on 16th day of October 1992 within Busia Township. At the end of the trial, the learned Senior Resident magistrate found that the appellant was 50% liable for the accident. He gave an award of Ksh.70,000/= as general and Ksh.1,500/= on account of special damages.

Being dissatisfied the appellant preferred this appeal.

The appellant put forward 3 grounds of appeal. The appellant's advocate opted to argue only one ground that is to the effect that the learned trial magistrate erred in law and infact in apportioning contributory negligence where none was pleaded nor evidence adduced upon nor proved as required by law. The appeal was strenuously opposed by the Respondent. At this stage let me review the case that was presented before the trial Court. It shows that the appellant testified without calling any witness. He told the trial Court that on 1st October 1992 at around 8.00 A.m he stopped motor vehicle registration number KAB 660 L at the road leading to Busia air strip. The motor vehicle being a matatu stopped. He said in the process of boarding the aforesaid motor vehicle, the driver started driving off thus making him fall down. In the process he got injured on the left elbow and at the left knee. The same matatu took him for medical treatment at Busia District Hospital where the appellant was treated and discharged. He was referred to Dr. Mubisi who examined him and prepared a medical report which was produced in evidence as an exhibit. The medical report showed that the appellant suffered soft tissue injuries on the left elbow, on the left knee joint and haematoma on the left upper tibia. In his evidence on cross-examination, the appellant said that he fell off before he got inside the motor vehicle. He blamed both the driver and the conductor of the matatu for the accident.

I have already stated that the parties argued only one ground on appeal. In short the appellant is of the view that the trial magistrate should not have apportioned blame on him because the issue was not pleaded and that even if it was pleaded there was no evidence to justify 50% apportionment of liability. The Respondent through Mr. Ocharo advocate was of the view that the trial Court had the discretion to decide on an unpleaded issue such as the one decided on this appeal because the same was left to the to determine.

I have considered the submissions of the learned advocates. I have also perused the pleadings and the evidence that were laid before the trial Court. The truth of the matter is that the issue touching on apportionment of blame was not raised in the pleadings. The law is well settled that a Court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to Court for decision. The record shows that the respondent's advocate cross-examined the appellant on the issue touching on who to blame for the accident and the appellant is quoted to have said ***"It is not true that I was trying to enter a moving motor vehicle."***

While submitting in his written submissions Mr. Ashioya advocate for the appellant said in part:

> *"It is the plaintiff's contention that the accident of 16th October 1992 involving the plaintiff occurred solely on account of the negligence and or recklessness of the defendant whose action he is vicariously liable."*

From the above excerpts it is quite clear that the issue of apportionment of contributory negligence was left for the trial Court to decide. The real issue remaining for my consideration is whether or not the degree of negligence was correctly assessed. The trial magistrate came to the conclusion that the appellant was 50% negligent on the basis that he did not ascertain that the motor vehicle was starting to drive off before he boarded. I have reconsidered the evidence. The record shows that the appellant stopped motor vehicle registration no.KAB no.660 L and when he boarded the same at the stairs it drove off before he entered. He blamed the driver and the conductor. On cross-examination the appellant denied that he attempted to board on a moving motor vehicle. The Respondent did not lead any evidence to shift blame to the appellant. After a careful reconsideration of the evidence tendered I am unable to agree with the decision of the trial magistrate to apportion blame on the appellant. The appellant's evidence were consistent on the fact that he boarded the motor vehicle while it was stationery but he fell down when it started moving before he was fully on board. Consequently the trial magistrate had no basis at all to apportion liability to the appellant. The evidence do not support that decision. Though the appellant had complained in the memorandum of appeal that the award given was low, the appellant's advocate did not argue that ground. The Respondent's advocate urged this court to treat that ground as abandoned. I have reconsidered the nature of injuries the appellant suffered as indicated in the medical report prepared by Doctor D. S. Mubisi. I have also perused the case law cited by the appellant's counsel in support of the proposed award. I am satisfied that the award of ksh.70,000/= is appropriate in view of the injuries suffered vis a vis past decisions. I see no reason to disturb the trial Court's discretion on assessing damages. The trial magistrate considered all the relevant factors.

The upshot is that the appeal is allowed with a consequential order that the order apportioning 50% contributory negligence on the appellant is set aside and substituted with an order making the Respondent (defendant) solely responsible for the accident.

The appeal as against quantum is dismissed. The award given by the trial magistrate on account of general and special damages shall remain save that the Respondent shall pay the same in full because this Court has found him 100% negligent. The appellant shall have costs of the appeal.

Dated and delivered this 3rd day of November 2005.

J. K. SERGON
JUDGE

Ipapu holding brief Mr. Ashioya for the Appellant.
NA Ocharo for the Respondent.