



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 109 OF 2018

BETWEEN

KARORA PETER.....APPELLANT

AND

TRUPHENA NYALESO MUKABI.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. B.Kasavuli (SRM) in Winam SRMCC NO. 84 of 2016 delivered on 29th October, 2018)

JUDGMENT

1. **TRUPHENA NYALESO MUKABI (Respondent)** sued **KARORA PETER (Appellant)** in the lower court claiming damages for injuries allegedly suffered on 26th February, 2016 while Respondent was travelling in Appellant's vehicle KCF 836G (**accident motor vehicle**) allegedly due to the negligence of the Respondent, his driver and or agent.
2. The defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.
3. In a judgment delivered on **29th October, 2018**, the learned trial Magistrate found the Respondent's claim proved, apportioned liability at 100% against the Appellant and awarded the Respondent general damages in the sum of Kshs. 700,000/.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 13th May, 2019 filed the Memorandum of Appeal dated 12th November, 2018 which set out 8 grounds of appeal which I have summarized into 3 grounds to wit:

1. **The Respondent's case was not proved**
2. **Appellant's defence was not considered**
3. **The award of damages was inordinately high**

Analysis and Determination

5. As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.

6. This court has considered the parties' pleadings, evidence on record and the submissions and cited authorities and I have deduced the following issues for determination:

- 1) **Whether Respondent was involved in an accident on 26th February, 2016**
- 2) **Whether Respondent proved that she was injured**

3) Whether the awarded damages are excessive

7. I will endeavour to analyze each of the issues as hereunder.

1) Was Respondent involved in an accident on 26th February, 2016

8. PW2 testified that the Appellant's motor vehicle was involved in an accident on 26th February, 2016. The Police Abstract tendered as PEXH. 5 lists the name of the Respondent as having been a passenger in that vehicle.

9. Appellant challenges the contents of the Police Abstract on the basis that it was not supported by the Occurrence Book. I have considered the case of **Joel Muga Opija -Vs- East Africa Sea Food Ltd [2013] eKLR** where the Court of Appeal held stated as follows in relation to contents of a Police Abstract: -

“We agree that the best way to prove ownership would be to produce to the court a document from the registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.” (Emphasis added)

10. Flowing from the foregoing decision, I find that the Appellant having not raised any objection to the production of the Police Abstract, which shows that the Respondent was on 26th February, 2016 involved in an accident while travelling in Appellant's vehicle KCF 836G, is estopped from denying the contents of the said Police Abstract.

11. Consequently, I am persuaded that the Respondent was indeed involved in the accident in issue.

2. Was Respondent injured in the accident that occurred on 26th February, 2016

12. George Mwaita, a clinical officer who prepared the P3 form stated that he relied on the history as given by the Respondent and a receipt issued to her at Jaramogi Oginga Odinga Teaching and Referral Hospital. He evidently confirmed that he did not see the initial treatment notes and could therefore not confirm what injuries the Respondent had sustained.

13. DW2, a records officer from Jaramogi Oginga Odinga Teaching and Referral Hospital who testified on behalf of the Appellant conceded that the Respondent was treated at the said hospital and was issued with a receipt and a prescription. It was further his evidence that the diagnosis for which the Respondent was treated for is entered in the medical system and could be printed and availed.

14. It is trite law that "whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** states as follows:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.

1) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

15. Further **Section 109** in narrowing down to proof of particular facts stipulates:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

16. Further, **Section 110** further provides that:

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

17. Regarding the incidence of burden, **Section 108** provides that: -

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

18. It is therefore clear that the burden to prove the injuries that the Respondent sustained lay squarely upon her. In the absence of the treatment notes, the evidence contained in the P3 form cannot be authenticated and the P3 form ought to have been rejected. The finding by the trial court that the Respondent had proved her injuries by production of a receipt was with respect unfounded and cannot therefore stand.

19. As a result, I have come to the conclusion that the Respondent did not prove that she was injured and the case ought to have been dismissed.

DISPOSITION

20. In the end, I find that this appeal has merit and is allowed. It is therefore hereby ordered:

1) The Judgment and Decree dated 29th October, 2018 is set aside and substituted with an order dismissing the Respondent's suit (*Winam SRMCC NO. 84 of 2016*) with costs.

2) The Respondent is also condemned to pay the costs of this appeal.

DELIVERED AND SIGNED IN KISUMU THIS 13th DAY OF *February* 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Appellant - N/A

For the Respondent - N/A