



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL APPEAL NO.41 OF 2015**

**BETWEEN**

**NICHOLAS OUMA WERE.....APPELLANT**

**VERSUS**

**VICTOR BENARD WAFULA.....RESPONDENT**

(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No. 358 of 2012 by Hon. J.N Maragia – Resident Magistrate).

**JUDGMENT**

1. The appellant herein, was the defendant in the Busia Chief Magistrate's Court Civil Case Number 358 of 2012. He had been sued by the respondent for special and general damages due to injuries he sustained following a road traffic accident which involved motor cycle KMCF 445S which knocked him down while riding a bicycle. The appellant was blamed for the accident and the injuries sustained by the respondent.

2. In her judgment, the learned trial magistrate made an award as follows:

- a. Pain and suffering Kshs. 700,000/=
- b. Special damages Kshs. 133,956/=

The total award was therefore Kshs.833, 956/=

3. The appellant was aggrieved by the judgment which was delivered on 30<sup>th</sup> September 2014 and filed this appeal. The appellant was represented by the firm of Ashioya & Company advocates. He raised the following grounds of appeal:

- a. The learned trial magistrate erred in law and in fact in failing to find that there was no prove that the appellant was in actual possession and control of motor cycle Registration number KMCF 445S, Bajaj Boxer.
- b. The learned trial magistrate erred in law and in fact in failing to note that no official search was produced to proof ownership of the accident motorcycle.
- c. The learned trial magistrate erred in law and in fact in finding the appellant liable.
- d. The learned trial magistrate erred in law and in fact in giving an excessive award.

4. The respondent was represented by the firm of Omondi & Company Advocates. He opposed the appeal on grounds that the respondent proved his claim to the required standards.

5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

6. This appeal revolve around two issues which once they are resolved, the others will automatically fall in place. These issues are that of ownership of the motor cycle Registration number KMCF 445S and the second one is whether the quantum of damages awarded was in excess.

7. In his plaint, the respondent contended that the offending motor cycle was owned by the appellant. This averment was denied in the defence. The respondent relied on the police abstract that was produced by Chief Inspector Nelson Omwenga (PW3). This witness testified that the rider of the motor cycle escaped after the accident but he was to blame for the accident. Before another person can be vicariously held liable, there must be evidence of ownership adduced to establish the same.

8. It was argued that a certificate of ownership from the Registrar of motor vehicles ought to have been produced to prove the registered owner as at the time of the accident. It is trite law that this is not the only mode of proof as was observed in the case of **In the case of Samwel Mukunya Kamunge vs. John Mwangi Kamuru Civil Application No.34 of 2002** Hon. H. M. Okwengu, J (as she then was) stated:-

**It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often time's vehicles change hands but the records are not amended.**

**I find that the trial magistrate was wrong in holding that only a certificate of search from the Registrar of motor vehicle could prove ownership of the motor-vehicle. I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A, and evidence having been adduced that letters of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent.**

Whereas I agree with the learned judge, I am not persuaded that the police abstract is such other mode of proving ownership, unless there is more to it. A police abstract is completed from the information of the person making the report. The information could be honest but mistaken. The best approach where ownership has been denied is to produce a copy of records from the registrar of motor vehicles. This would prima facie show the ownership status. The burden then would be for the said registered owner to show that ownership had passed. If this information is given at the earliest opportunity there would be no danger of suing the wrong person.

9. In this instant case, ownership was denied at the pleading stage. A notice was sent to Concord Insurance Company Limited as envisaged under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 laws of Kenya. I have noted the information in the abstract indicated that the appellant was the insured in respect the motor cycle Registration number KMCF 445S. Since this information was obtained from the insurance certificate on the motor cycle, I find that the respondent discharged his burden of establishing actual or beneficial ownership.

10. There is evidence on record that the rider of the motor cycle fled after the accident. There being evidence that he was the one in the wrong, the learned trial magistrate correctly found the appellant vicariously liable.

11. Victor Benard Wafula, the respondent sustained the following injuries:

- a. Right swollen leg with de-gloving wound
- b. Compound fractures of the right tibia and fibula proximal third.
- c. Stiff right knee with limited movement and cannot walk without clutches.

The prognosis was that though the fracture was continuing to heal, it had a deformity. This was a permanent disability. At the time of examination, he could not walk without clutches and was on a wheel chair.

12. In order to justify the interference of an award by the appellate court, certain principles must be satisfied. The Court of Appeal in **Ali vs Nyambu t/a Sisera Store [1990] KLR 534** at page 538 quoted with approval the principles laid down by the **Privy Council in Nance vs British Columbia Electric Railways Co. Ltd. 1951]AC 601** at page 613 where it held that:

**The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint vs Lovell [1935] 1KB 354) approved by the House of Lords in Davis vs Powell Duffryn Associated Collieries Ltd. [1941]AC 601.**

In the instant case I have looked at the authorities cited by the parties and I am satisfy that in view of the injuries sustained and the duration the respondent was rendered immobile, the award was not inordinately high.

13. From the foregoing analysis, I find that the appeal lacks merit. The same is dismissed with costs

**DELIVERED and SIGNED at BUSIA this 3<sup>rd</sup> day of December, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**