



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 25 OF 2013

ALPHONCE ONYANGO OWENGAAPPELLANT

VERSUS

SYLVIA NYANGWESO1ST RESPONDENT

OMONDI MUDA OTONDO2ND DEFENDANT

[Being an appeal from the judgment of the Senior Resident Magistrate's Court at Kisumu of

Hon. Shinyada delivered on 15th February 2013 in Kisumu CMCC No. 452 of 2011]

JUDGMENT

In this appeal the appellant who was the Plaintiff in the lower court seeks to overturn the judgment of the lower court which dismissed his claim for damages for lack of evidence.

His claim was based on negligence and briefly the facts were that on 3rd September 2010 he was a lawful passenger in Motor Vehicle KAZ 874T – a matatu belonging to the 1st Respondent and driven by the 2nd Defendant. He had boarded the motor vehicle at a place called Sondu and was headed towards Kisumu and was seated on the extreme left in the driver's cabin. The driver of the motor vehicle drove at a high speed and as a result lost control and the motor vehicle rolled. As a result he sustained injuries for which he was treated at Russia Hospital and also Nyabondo Center for the Disabled. He stated that the road was tarmacked, there were no bumps and it was shining. In cross-examination he stated that the motor vehicle collided with another motor vehicle whose registration number he could not remember. He stated that the other motor vehicle left its lane and came into the path of the vehicle he was travelling in. He conceded that the accident had been caused by the other motor vehicle and contended that the only reason he sued the Respondent is because he was in their motor vehicle.

As for the injuries his evidence was that he suffered cuts on the forehead, both the left and right fingers, the waist and fractures on both legs. It was also his evidence that he first sought medical treatment on 18th April 2012 and that he was admitted at Russia from 18th April 2012 to 23rd April 2012. In support of his case he produced a P3 form, a police abstract, discharge summary and a medical report.

The Defendant did not adduce any evidence.

In the end the trial magistrate absolved the driver of the Respondent's motor vehicle of blame and dismissed the appellant's case. On liability she found that an award of Kshs.600,000/= would have sufficed.

It is the appellant's case that there was sufficient evidence to find the Respondents liable and that an

award of Kshs.1,800,000/= would have been more appropriate.

Having myself considered the evidence so as to arrive at my own conclusion all the while bearing in mind that I did not have the benefit of seeing the witnesses – (see **Selle & Another V. Associated Motor Boat Co. Ltd [1968] EA 123**) I am not able to fault the trial magistrate in her finding of facts. The appellant himself absolved the 2nd Respondent of all blame. For the first time he admitted that the accident occurred when another motor vehicle was driven in the path of their vehicle. In cross-examination he testified that the collision was in the lane of the Respondent's motor vehicle; that it was the driver of the other motor vehicle that veered to the left lane and into their path. He is on record as stating **“It is correct to say that the driver of the other motor vehicle is the one that caused the collision. The motor vehicle I was aboard was KAZ 814T. I sued owner of KAZ cos I boarded her motor vehicle.”**

With this evidence the trial magistrate would have been in error if she found the respondents liable.

Counsel for the Appellant submitted that the evidence in the police abstract that the 2nd Respondent was charged with causing death by dangerous driving should have been considered in determining liability. It is my finding however that in the absence of proof that the driver was in fact arraigned in court, tried, found guilty and convicted a mere assertion in a police abstract cannot be proof of negligence. It is instructive that even Section 47A of the Evidence Act provides that only a final judgment of a competent court can be taken as conclusive evidence that the person so convicted was guilty of the offence charged and this upon expiry of the time limited for appeal against such judgment or after the date of the decision of any appeal therein. There was no evidence of a conviction that would have warranted the trial court and even this court to find the respondent was guilty of causing death by dangerous driving and hence liable in negligence. The trial magistrate's finding was therefore sound.

As for the quantum of damages I found the appellant's evidence that he went to hospital for the first time on 18th April 2012. Where pray may I ask was he from 3rd September 2010 when the accident occurred? My curiosity thickens more because the P3 form which he himself tendered in evidence and which was allegedly filled on 3rd March 2011 states that he suffered harm which as opposed to grievous harm and maim is the least degree of injury. The P3 form whose basis this court cannot fathom, as it is indicated the patient was never availed, makes no mention of the fractures indicated in the medical report upon which the appellant places reliance in his assertion of the inadequacy of the award. The trial magistrate assessed damages in the sum of Kshs.600,000/=. In my view she erred as the injuries were not proved. If indeed the Appellant was involved in an accident on 3rd September 2010 and sustained injuries as severe as he alleges then he would not have waited for two years to go to hospital not to mention that there is absolutely no evidence that he was ever seen, let alone admitted, at Russia (New Nyanza General Hospital). In my view there is no nexus between the injuries in the medical report of Dr. L.W. Okombo dated 27th April 2012 and this accident. The medical evidence was inconsistent and contradictory and did not prove the Appellant's case on a balance of probabilities. I find no merit in this appeal and dismiss it with costs to the Respondents.

Signed, dated and delivered at Kisumu this 24th day of January 2017

E. N. MAINA

JUDGE

In the presence of:-

Mrs Opondo for the Appellant (H/B for Ms. Kuke)

N/A for the 1st Respondent

N/A for the 2nd Respondent

C/A: Serah Sidera