



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL APPEAL CASE NO. 75 OF 2014

MARTHA AGOK.....APPELLANT

VERSUS

KAMPALA COACH.....RESPONDENT

[Being an appeal from the judgment of Hon. C. Oruo in Webuye Civil Case No. 12 of 2013].

JUDGMENT

1. This is an appeal arising from Civil Case NO. 12 of 2013, where the appellant sued the respondent for the negligence of its driver which she alleged resulted into an accident while the appellant was travelling as a fare paying passenger in its bus registration No. KBH 245Y Nissan on the 21st of June, 2011. The appellant claimed for General damages, Specials of Kshs. 1,700/= and costs.

2. In a defence dated 28th February, 2013 the respondent denied that the appellant was a lawful passenger in its bus and the negligence attributed to its driver. In the alternative the respondent attributed negligence on the plaintiff.

3. The matter went to trial where the appellant called 4 witnesses, the defence called none. The trial court delivered its judgment where it was of the view that the evidence before court did not prove negligence, further the court formed the opinion that the plaintiff did not prove ownership of the vehicle, the court also found it unnecessary to consider the issue of quantum and went ahead to dismiss the appellant's case.

4. The appellant was dissatisfied with the judgment and preferred an appeal on the grounds that;

i. The learned trial Magistrate erred in fact and law by applying wrong principles in dismissing the suit with costs.

ii. The learned trial Magistrate erred in law and fact in failing to appreciate the evidence of the appellant thereby leading to a miscarriage of justice.

iii. The learned trial Magistrate erred in fact in dismissing the appellant's case without any factual or legal basis even after tendering overwhelming and undisputed evidence against the respondent.

iv. The learned trial Magistrate erred in fact and law by failing to put into consideration the nature of injuries suffered by the appellant.

v. *The learned trial Magistrate erred in fact and law by proceeding to dismiss the suit and since the respondent did not call any witnesses.*

vi. *The learned trial Magistrate erred in fact and in law in failing to put into consideration submissions rendered on behalf of the appellant.*

vii. *The judgment was unfair and unjust.*

5. This is the first appellate court and it has a duty to consider, evaluate and analyze the evidence on record afresh in order to arrive at its own independent finding bearing in mind that the trial court saw and heard the witnesses see *Selle Vs. Associated Motor Boat Company [1968] E.A at 123.*

6. Having considered the evidence on record and submissions by counsel for the parties the issue before court is whether an accident occurred and if so whether the driver of the motor vehicle in question an employee of the respondent was negligent and if so the damages payable.

7. The appellant called 4 witnesses. Their evidence was as follows:

PW1 Martha Ajok – she recalled that on 21st June, 2011 she travelled abode motor vehicle registration number KBH 245Y from Juba to Nakuru but did not reach the destination as they were involved in an accident along Eldoret-Webuye road. The vehicle was being driven fast, she fell asleep, she had a loud bang as the vehicle lost control and rolled 3 times before coming to a halt. And as a result she sustained injuries and was taken to Webuye hospital then Nakuru Provincial hospital where she was hospitalized for 2 days. She stated further that after the accident she had lost consciousness. It was also her evidence that as a result of the injuries sustained she incurred hospital expenses. She produced receipts amounting Kshs. 7,800/=. She testified that the injuries sustained were as follows;-

- On the head
- On the mouth loosing two teeth
- On the chest
- Stomach and the back &
- Right leg on the lower section.

She was examined by Dr. S.I. Aluda and paid Kshs. 1,500/= for the medical report.

She blamed the driver of the bus for driving fast and thus losing control.

8. **PW2 Dr. Samuel Aluda** of Eldoret examined **PW1** on 30.8.2011 as a result of a traffic accident which occurred on 21.6.2011. In the report he stated as follow;-

- *The face was swollen,*
- *Had tender lacerations and cut wounds.*
- *She lost 1 incisor tooth and had a fracture on other,*
- *Had blunt trauma on the lower abdomen, the chest and body iliac region. The right leg was tender and swollen with a cut wound.*
- *He formed the opinion that the Injuries healed. They were soft tissue.*

9. **PW3 Peter Wanyama** – a clinical officer at Webuye District Hospital. He testified that **PW1** visited

their hospital on 21.6.2011 having been involved in a road traffic accident on the same day at around 4.00 a.m. She had a swollen face with hematoma, a cut wound on the lower lip, she had lost one incisor, her thorax and abdomen were tender, and the right lower limb was swollen around the mid-thigh. She was treated, her wound stitched and dressed and an x-ray done. She was renewed at the dental department. A P3 form was filled and signed on 5.8.2011.

10. **PW4 P.C. Leonard Githinji** testified that an accident occurred on 21.6.2014 at around 3 p.m at Wananchi area along Eldoret- Webuye Bungoma road involving a bus KBH 245Y Nissan – Kampala coach bus which was ferrying passengers. That the driver lost control, the bus overturned and some passengers sustained injuries.

12. No doubt from the evidence on record an accident did occur on the 24th of June, 2011 involving bus registration No. KBH 245Y where the appellant was a fare paying passenger and as a result she sustained injuries. The testimony of **PW1** was corroborated by **PW2**, **PW3** and **PW4** and not controverted by the respondent and I therefore as a matter of fact find that an accident occurred on the 21st of June, 2012 involving vehicle registration Number KBH 245V a Nissan bus where the appellant was a fare paying passenger and she sustained injuries.

12. The appellant produced an abstract form as part of her evidence (marked exhibit 5). The name of the owner is given as Kampala Coach limited. The appellant sued Kampala Coach in paragraph 2 of the plaint which description was admitted by the defendant in paragraph 1 of its defence.

13. In the case of lake **Towers Vs. Cila Frankchyln Onyango Ngonga & another Civil Appeal No. 210 of 2006 at Nakuru** the Court of Appeal Acknowledged that a police abstract is capable of establishing ownership it stated; -

“Without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver, for it was difficult for it to contest the liability blamed against it by the superior court and or attempt to partly or wholly blame the 2nd respondent for the accident on this appeal, neither can it deny the ownership of the Mitsubishi canter without any evidence to counter the police abstract produced by the 1st respondent which shows it to be the owner of the motor vehicle.”

14. The above court of appeal authority does it for this appeal. An abstract form was produced giving the name of the respondent as the owner of the vehicle which evidence was not controverted further no evidence was placed before court contrary to what the appellant and her witness stated.

15. Consequently, I do fault the judgment of the trial court on liability. As for quantum, the trial court despite dismissal on liability ought to have assessed damages which it failed.

16. The appellants counsel in submitting on damages relied on the case of Isaac **Waweru Mundia Vs. Kiilu Kakie Ndeti t/a Wikwatyo Services 2012 e KLR.** Where the plaintiff had sustained injury to the head, fracture mandible, loss of tooth, facial disfigurement and neck and dental follow-up and replacement of a tooth. Damages awarded was kshs. 1,000,000/=.

17. The appellant did not sustain any fractures or facial disfigurement and I therefore am of the view that the case quoted by the Appellant’s counsel is not a suitable comparable.

18. On its part the defence failed to address the court on the issue of quantum.

19. In **Nzoia Sugar Company Ltd. Vs. David Nalyanya Civil Appeal No. 51 of 2007 [2008] e KLR** where the respondent obtained soft tissue injuries and no fractures the court awarded damages of Kshs. 50,000/= on 12th March 2008. In **Margaret Muthoni Vs. David Mamu Muthoni & Henry Kiriimi Nyaga Nrb. HCC 148 of 2008** where the plaintiff suffered fracture in the middle half of the tooth the right and left femur, loss of two teeth and loosening of three and laceration on the face. An award was kshs.

150,000/= was made.

20. The above authorities are both fairly old and doing the best I can I will award the appellant the sum of Kshs. 350,000/=for General damage.

21. As for special damages, a party is bound by its pleadings. The appellant pleaded kshs. 1,700. I will against the receipts court award the same.

22. The award therefore is as follows:-

| | |
|------------------------|-------------------------------|
| i. General damages | Kshs. 350,000/= |
| ii. Specials | <u>Kshs. 1,700</u> |
| TOTAL | <u>Kshs. 351,700/=</u> |
| iii. Costs of the suit | |

DATED and DELIVERED at BUNGOMA this 18th day of January 2017

ALI-ARONI

JUDGE