



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 83 OF 2014

LUCAS ONYANGO OBARO.....APPELLANT

VERSUS

METISELA ALUKHABI BLASIO.....RESPONDENT

[Being an Appeal arising from the judgment and decree of the Honourable E. A. Obina,

Senior Resident Magistrate delivered on the 8th July 2014 in Kisumu CMCC No. 545 of 2012]

JUDGMENT

This appeal is against a finding of fact by the Learned Trial Magistrate which resulted in judgment being entered against the appellant for general damages in the sum of Kshs.4,000,000/=, Special damages in the sum of Kshs.14,000/= and interest from the date of judgment and costs of the suit. The bone of contention is the ownership of the accident Motor Vehicle Registration Number KAD 213M Isuzu Canter. According to the appellant it was not proved that he was the owner of the motor vehicle and the police abstract upon which the Respondent relied to prove that fact was contradicted by a copy of records and logbook which proved otherwise. His Advocate, Ms Ongira submitted that the copy of records had shown the vehicle belonged to a company which is a legal person capable of suing and being sued in its own name. She contended that the corporate veil had not been lifted in this case so as to find the Appellant and not the company liable. On this she relied on **Joseph Munyambu Karega V. Charles Ogollah Obiero [2014]eKLR**.

Although the quantum of damages was not one of the grounds in the Memorandum of Appeal she submitted on it and stated that the Trial Magistrate erred in giving a global award; that the formulae used to assess the loss of earning capacity was not explained and that an award of 630,000/= would have sufficed more so given that the other heads of damages were not proved. She urged this Court to allow the appeal.

Mr. Oluoch, Advocate for the Respondent opposed the appeal. He submitted that the appellant was sued as the insured, beneficial or registered owner of the motor vehicle; That Police Officer Kitur confirmed that he got the details of the owner from the insurance sticker on the vehicle and that the appellant confirmed that he was informed about the accident by Madison Insurance. He stated that the appellant did not however explain why Madison had called him; That he also did not respond to the demand letter to at least inform the Respondent that he was not the owner of the motor vehicle. Mr. Oluoch contended that the denial of the ownership was an after thought. About the quantum Mr. Oluoch submitted that the injuries speak for themselves and that the award was fair, equitable and sufficient in the circumstances. He prayed that the appeal be dismissed.

In reply Ms Ongira reiterated her earlier submissions, adding that they had demonstrated that the nexus between the appellant and the company that owned the vehicle is just the signature. She contended that the appellant never received the demand notice and submitted that it was the duty of the Plaintiff's Advocate to ensure that the right parties were brought on board. She wondered why he did not seek an adjournment to go and peruse the documents. She reiterated that a company is a legal person and it cannot therefore be argued that judgment could have been entered either way. Counsel urged this Court to find that the injuries in this case were not as serious as those in the cases cited by the Advocate for the Respondent.

As the first appellate Court I have reconsidered and evaluated the evidence in the Lower Court so as to arrive at my own conclusion but bearing in mind that I did not have the benefit of seeing the witnesses – (**Selle V. Associated Motor Boat Company Limited [1968]EA 123**). I am also guided by the principle that I must be cautious not to interfere with the Trial Magistrate's findings of fact unless such finding is based on no evidence or on a misapprehension of the evidence or unless it is shown he acted on a wrong principle – **Mwangi V. Wambugu [1984] KLR**.

As I stated earlier the bone of contention here is the ownership of the motor vehicle. Like the Trial Magistrate I am persuaded that the Respondent proved on a balance of probabilities that the motor vehicle belonged to the appellant. The police abstract has the appellant's name as the owner of the motor vehicle. According to the police officer who testified for the Plaintiff as PW3 the name of the owner was obtained from an insurance sticker on the vehicle itself. He also stated that the vehicle was insured by Madison Insurance. The appellant himself admitted that he was contacted about this case by Madison Insurance. Although he gave no explanation for this, one can reasonably conclude that it was because he was their insured. Why else would the Insurance Company contact him about the case if he was not connected to the vehicle? This only lends credence to PW3's testimony that he got details of the vehicle's ownership from the vehicle's Insurance sticker. The appellant attempted to dispute ownership by producing a log book and a copy of records. It is instructive however that whereas this accident occurred on 23rd March 2012 the log book is dated 2nd March 2011 and the copy of records gives details of ownership as at 16th April 2014. They are therefore not evidence that he was not the owner of the motor vehicle as at 23rd March 2012 when the accident occurred and therefore do not rebut the contents of the police abstract. Whereas this Court agrees with the appellant's submissions that a company is itself a legal person and the appellant cannot be held liable for its negligence I find that in this case there is no proof that the company and not the appellant was the owner of the motor vehicle when this accident occurred.

I am not therefore persuaded that the Trial Magistrate's finding of fact was based on no evidence, or on a misapprehension of the evidence. It must be borne in mind that the standard of proof placed on the Plaintiff in civil matter is a balance of probabilities.

As for the quantum of damages I did point out earlier that it did not form any of the grounds of appeal. However as the Respondent's Advocate responded on it I shall rule on it. The Respondent in this case sustained serious injuries and ended up with an amputation of his right lower limb. He was awarded Kshs.4,000,000/= and specials of 14,000/= which he proved. I am not persuaded that in arriving at the award the Trial Magistrate took into account an irrelevant factor or left out of account a relevant one. I am also not persuaded that the award was so high as to be a wholly erroneous estimate of the damage. (See **Kemfro Africa Limited t/a Meru Express Services [1976] & Another V. Lubia & Another (No. 2) [1987] KLR 30**). The injuries are well set out in the P3 form, the discharge summary and the testimonies of Dr. David Onyango Olima (PW2) and Clinical Officer Rhoda Okal (PW4) and there was no error of principle in the exercise of the Trial Magistrate's assessment. As was held in **Selle V. Associated Motor Boat Company Limited [1968]EA 123** it is not a matter of what this Court would have awarded. This Court finds no merit in this appeal and it is dismissed with costs to the Respondent.

Signed, dated and delivered at Kisumu this 9th day of February 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Adwar for the Appellant

Mr. Okwoyo for Netto for the Respondent

C/A: Serah Sidera