



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC APPEAL NO. 146 OF 2006

MARY OLANDO OGANG APPELLANT

VERSUS

LUCAS NCODE MUGUNDA RESPONDENT

(Being an appeal from the judgment of the Hon.

Mr. Mikoyan, Resident Magistrate in the original Bondo

SRMC, Civil Case No. 30 of 2005)

JUDGMENT

This is an appeal against the decision of the trial magistrate to apportion **25%** contributory negligence against the appellant in a **Road Traffic Accident** that occurred along the Ndori Luanda Kotieno road on 28th May, 2005. It is contended that the court ought to have found the Respondent wholly to blame for the self involving accident-involving his motor vehicle reg. **No. KAS 065 M** in which the plaintiff was a passenger.

Briefly, the facts of this case were that on 28th May, 2005 the plaintiff boarded the bus Reg No. KAS 065M belonging to the defendant to go to Akala market. However, at a place called Ronalo the driver attempted to overtake a Nissan at a high speed and overturned. The plaintiff sustained injuries for which she was treated at Akala Hospital. In a judgment delivered on 19th November, 2006 the trial magistrate found it a fact that the plaintiff was a fare paying passenger in the motor vehicle and that the accident was self involving. He also found that she sustained injuries. On liability he stated, “investigating officer assessment liability. I have considered that plaintiff’s contribution is entered at 25% and the defendant held liable for the accident at 75%”. Counsel for the appellant has submitted that this finding is not supported by any evidence at all and has urged this court to set it aside. He relied on 2 Court of Appeal decisions:-

1. **Isabella Wanjiru Karanja V. Washington Malele (1982-88) 1 KAR 185**
2. **Kiema Muthuku V. Kenya Cargo Handling services Limited (1991) 2(KAR 258.**

Counsel for the Respondent did not file his submissions despite being notified to do so. Nevertheless, I have reconsidered, and evaluated the evidence adduced in the lower court bearing in mind that I ought not to interfere with the trial magistrate’s finding of fact or discretion unless based on the wrong principle or on no evidence at all.

In the plaint, the accident is attributed wholly to the negligence of the driver of the motor vehicle Reg.

NO. KAS 065 M while in the statement of defence negligence is denied and indeed the occurrence of the accident is also denied. At paragraph 8 however it is averred that the plaintiff contributed to the accident for failing to wear an available seat belt. At the hearing only the plaintiff and a doctor gave evidence and although the defendant`s advocate cross-examined her she was not questioned on the use of the seat belt and no evidence was adduced that she did not wear a seat belt. Her evidence remained uncontroverted and I agree with her advocate that the trial magistrate finding on liability was not based on any evidence. The appeal is therefore allowed, the finding/ apportionment of contributory negligence against the plaintiff is set aside and substituted with a finding that the Defendant is wholly liable for the accident.

Accordingly, there shall be judgment for the appellant against the defendant as follows:

1. **Damages for pain and suffering ksh. 100,000/-**
2. **Special damages ksh. 1,700/-**
3. **Interests at court rates**
4. **Costs of the suit in the lower court and in this court.**

E.N. MAINA

JUDGE

Dated, signed and delivered at Kisumu this 9th day of April, 2015.

In the presence of: _

Mr. Olel for the Appellant

No appearance for the Respondent

Court Assistant- Moses Okumu