



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Civil Appeal 161 of 2009

**BENARD OGONYO CHUMBE.....APPELLANT/
PLAINTIFF**

VERSUS

**SILVANUS AKORE.....RESPONDENT/
DEFENDANT**

**[APPEAL FROM ORIGINAL JUDGEMENT OF BONDO SRM'S COURT BY: E.S.OLWANDE
SRM**

**IN
CIVIL CASE NO.141 OF 2007**

J U D G E M E N T

This is an appeal arising from the judgment in **RMCC No.141 of 2007** Bondo Court, **BENARD OGONYO CHUMBE VERSUS SILVANUS AKORE**. In the said suit the plaintiff (now appellant) had sued the defendant (now respondent) arising from a road traffic accident on the 23rd December, 2006 involving motor vehicle registration number KAU 673P Toyota Hiace matatu where the appellant was a fare paying passenger and another vehicle and where the appellant blamed the driver of the matatu KAU 673P for the accident.

The appellant claimed to have sustained injuries to the left parietal region, blunt injury to the thorax, bruises on the left elbow, a fracture of the lateral malleolus (fibula), bruises on the legs and injury to the left foot.

The respondent denied the allegations in a defence filed and the alternative he pleaded for contributory negligence.

The trial court dismissed the appellant's suit where judgment had been sought for general and special damages, costs and interest.

This appeal is as a result of the appellant's dissatisfaction with the judgment on grounds that the trial magistrate erred in dismissing the suit on the ground that the appellant failed to establish ownership of the motor vehicle in question.

At the hearing of the appeal the appellant's counsel submitted that the abstract form admitted in evidence

proved ownership of the vehicle. She brought to the attention of the court Section 116 of the Evidence Act and Section 8 of the Traffic Act.

The respondent's counsel opposed the appeal on the basis that the abstract form is not conclusive evidence of ownership. Further that the appellant failed to prove the allegation of negligence.

This is the first appellate court with a duty to re-consider the evidence afresh, examine and analyse the same so as to arrive at an independent decision. The appellant is the only witness who testified at the trial. The respondent did not attend nor call any evidence so that the only evidence is that of the appellant. The statement of defence without support by way of evidence is mere denial without any evidential value.

In his evidence the appellant produced an abstract form that gave details of the respondent as the owner. Further the appellant stated that the vehicle subject matter was being driven on the wrong lane as a result of which it was involved in an accident with a third party vehicle and he blamed the driver of the vehicle in question for the accident.

The respondent did not challenge the evidence above it remains uncontraverted

In the case of **LAKE FLOWERS VERSUS CILA FRANCLY ONYANGO NGONGA & ANOTHER CIVIL APPEAL NO.210 OF 2006** at Nakuru the Court of Appeal held as follows:

“without the appellant adducing evidence at the trial to counter the 1st respondent blamed its driver for, it was difficult 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.”

The above holding by the Court of Appeal is applicable on all fours with the appeal before this court. It is also clear that the case **THURANIRA KARURI VRS AGNES NGEICHE** Court of Appeal Case No.192 of 1996 at **NYERI** relied upon by the trial court has been over-turned by more recent authorities. In this regard therefore I disagree with the trial court and find that the evidence on ownership before court was not challenged and I find therefore that the respondent in the absence of any other evidence to the contrary is the owner of the motor vehicle registration number **KAU 673P** Toyota Hiace.

Secondly as there was no evidence to challenge the evidence blaming the respondent; I find that the appellant did prove his case on a balance of probabilities and the respondent is to blame for the accident.

The trial court awarded damages of kshs.300,000/= although the authority relied upon had much serious injuries, some permanent. Most of the injuries sustained by the appellant were soft tissue injuries and the fracture was expected to unite and he had no sign of permanent disability was reported. However the said authority was a 2000 decision, 12 years old and therefore the damages may suffice in the current economic environment including the inflammatory trend experienced in the country. I will therefore award Kshs.300,000/= no specials were proven so none is awarded. Costs and interest are equally awarded.

Dated and delivered this 6th day of July 2012.

ALI-ARONI

J U D G E

In the presence of:

.....counsel for appellant

.....counsel for respondent