



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OTIENO-ODEK & KANTAI, JJA)

CIVIL APPEAL NO. 93 OF 2008

BETWEEN

ROBINSON OCHOLA AWUONDA..... APPELLANT

AND

HOUSE OF MANJI RESPONDENT

(An appeal from the judgment and decree of High Court of Kenya at Nairobi (Ang'awa, J.) dated 11th February 2004

in

H.C.C.C No. 890 of 1999

JUDGMENT OF THE COURT

1. The appellant was a passenger in a motor vehicle registration no. KAB 016S owned by the respondent. A road traffic accident occurred between the said motor vehicle and vehicle registration no. KAG 111S. As a result of the accident, the appellant sustained a fracture at the neck of the humerus bone, bruises at the cervical spine, left shoulder and front chest as well as lacerations on the face and chest.
2. The appellant filed suit against the respondent for negligence claiming special and general damages. The respondent denied liability asserting that its vehicle was never involved in any traffic accident as alleged or at all; the appellant also denied negligence on its part and denied liability for any loss or injury sustained by the appellant.
3. The trial court dismissed the appellant's suit for reason that no police abstract report was produced in evidence to prove that the accident had occurred.
4. The trial court observed that in the event the suit would have succeeded, a sum of Ksh.150,000/= would have been awarded as general damages for pain and suffering and Kshs.85,000/= for future medical expenses. The trial court found that the injuries sustained by the appellant were: cerebral concussions, fracture at the neck of humerus right shoulder, bruises at the cervical spine, left shoulder, front chest as well as laceration on the face and chest.

5. Aggrieved by the judgment of the trial court, the appellant lodged this appeal citing the following grounds:

“(i) That the trial judge erred in law and fact in finding that the appellant had not proved his claim because of failure to produce a police abstract which form is not mandatory in law.

- ii. *That the appellant’s testimony proved the occurrence of the accident and this evidence was not challenged and the trial court itself made a finding that the accident was caused by the respondent’s driver who was driving at a very high speed and caused the accident.*
- iii. *That the learned judge erred in law and fact in reaching a conclusion not supported by evidence on record having found that the respondent’s driver was negligent.*
- iv. *That the learned judge erred in law in assessment of damages payable and ended up awarding manifestly law damages.”*

6. At the hearing of this appeal, learned counsel Mr. Mogoia appeared for the appellant while learned counsel Mrs. S. Samnakay appeared for the respondent. Both counsel filed written submissions.

7. The appellant urged us to find that the learned judge erred in dismissing the suit on the basis that no police abstract report had been tendered in evidence to prove that the accident occurred. It was submitted that a police abstract report is simply evidence of occurrence of an accident; that whereas the learned judge properly made a finding that the appellant was a passenger in the respondent’s vehicle, the judge erred in dismissing the suit on the basis that no police abstract report had been produced; that the trial court correctly found that the appellant was not to blame for the accident and erred in dismissing the suit.

8. Counsel for the appellant cited the case of **Mafuko Industry Limited -v-Alfred Rintari [200] eKLR** where it was stated that if there was independent overwhelming evidence to prove an accident, the absence of a police abstract report was not fatal to the claim. Counsel also cited the decision in **Simon Malonzo -v- British American Tobacco (K) Limited [2006] eKLR** where it was stated that the absence of a police abstract report does not in any way negate the evidence adduced before the trial magistrate. In **Peter Kanithi Kimunya -v- Aden Gayo Haro [104] eKLR** it was stated that a police abstract report does not prove the occurrence of the accident itself; it is proof that following an accident, the occurrence thereof was reported at a particular police station.

9. On the quantum of damages, the appellant urged this Court to enhance the amount of damages as the award by the trial court was manifestly low. The case of **Joseph Musee Mua -v- Julius Mbogo Muli [201] eKLR** was cited in support.

10. The respondent urged us to find that the appellant did not prove how the accident happened and none of the particulars of negligence was proved; that the appellant pleaded the accident happened when the respondent’s motor vehicle rammed into a stationary BMW saloon car registration no. KAG 111S but in his evidence he insisted that the respondent’s vehicle rammed into a lorry; that due to this, the evidence on record and the pleadings do not tally and it remains ambiguous as to whether the accident happened and if so, how it happened. The respondent urged this Court to independently re-evaluate the evidence and reach its own conclusions.

11. As this is a first appeal we are obliged to re-evaluate the evidence and arrive at our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123**); see also **Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 E. A. C. A. 270**).

12. The trial court dismissed the appellant’s suit because no police abstract report was produced. Persuaded by the dicta in judicial decisions quoted above, we are of the view that the learned judge erred in dismissing the appellant’s suit for lack of a police abstract report. A police abstract

report does not prove occurrence of an accident; it is proof that a report has been made to a particular police station. Proof that an accident took place requires credible testimony which may be by credible testimony of an eye-witness.

13. The other issue for us to determine is if there is credible evidence on record to prove that an accident involving the respondent's motor vehicle occurred. In his testimony, the appellant testified that he lived in Migori town and on 12th May 1996 he went to the bus stage at Migori intending to travel to Nairobi; that a motor vehicle came and the driver agreed to take him as a passenger for Kshs.500/=; that he boarded the motor vehicle registration no. KAB 0165 which was owned by the respondent and an accident occurred on the way; that the driver was travelling too fast and was over-speeding; that he was admitted at M.P. Shah Hospital in Nairobi and when he asked for his medical bill, he was informed it had been paid for by the respondent; that he was unconscious after the accident and he suffered injuries.

14. The trial court in assessing the evidence and credibility of the appellant expressed as follows:

“As a passenger, the plaintiff was not the cause of the accident. The defendant was over speeding and ran onto a stationary lorry. From the evidence therefore...I would say that indeed the defendant's driver and agent was negligent in every sense of the word as he was over speeding. The plaintiff paid for the injury.

...If per chance a police abstract was not necessary, the pleading reflect that the vehicle that collided into was a BMW saloon car and not a lorry... I am inclined to believe that an accident did indeed occur. The plaintiff sustained some injuries namely a fracture of the neck at the top of the humerus.....”

15. Our re-evaluation of the evidence turns on credibility of the testimony by the appellant. The trial court believed his testimony that the accident occurred. This Court has severally stated that it will not interfere with findings of fact based on credibility of witnesses. In **Sanitam Services (EA) Ltd. -v- Rentokil [2006] 2 KLR 70**, this Court stated that it would not lightly differ with the trial court's finding of fact unless the conclusion is based on no evidence or misapprehension or on application of the wrong principles.

16. In the instant case, the trial court not only found that an accident took place; the court established that the appellant had suffered injuries. The injuries sustained by the appellant are not in dispute; the respondent has neither challenged the quantum of special nor general damages that the trial court would have awarded if the appellant's claim succeeded. The respondent's main contention is that the appellant did not prove the particulars of negligence and there is variance in evidence as to whether the motor vehicle involved in the accident was a BMW saloon car or a lorry.

17. Judicial authorities cited indicate that absence of a police abstract report is not fatal in a claim for injuries sustained in a traffic accident if there is credible evidence proving that the accident occurred. The testimony given by the appellant before the trial court is credible evidence establishing that the accident did take place. The respondent has not established how the trial court erred in evaluating the testimony by the appellant in so far as occurrence of the accident is concerned.

18. An issue urged by the respondent is inconsistency in the record as to whether the motor vehicle involved in the accident was a BMW saloon car or a lorry. *Prima facie*, this is a material fact. The trial court in its evaluation of the evidence was satisfied that the respondent's vehicle was involved in an accident and the appellant was a passenger therein.

On these facts we have no good reason to disturb the conclusions of fact made by the trial court.

19. In the instant case, the trial court made observations on the quantum of damages that would have been awarded had the appellant's suit succeeded. We were urged to find that the quantum

suggested by the learned court was manifestly low. No reasons were given to support the submission. However, the appellant in his submissions conceded that the quantum of damages awarded by the trial court was reasonable. We hereby adopt the quantum of damages as proposed by the trial court.

20. In totality, this appeal has merit. We hereby set aside the judgment of the High Court dated 11th February 2004 and substitute in its place judgment for the appellant against the respondent. We hereby award damages for negligence in favour of the appellant against the respondent for a total sum of Kshs.264,000/= broken down as follows:

- a. *Kshs.150,000/= general damages for pain and suffering,*
- b. *Kshs.29,000/= special damages and*
- c. *Kshs.85,000/= for future medical treatment.*
- d. *Interest on the award for general damages and future medical expenses to run from the date of the judgment of the High Court on 11th February, 2004; interest on special damages to run from the date of filing the suit at the High Court on 30th April, 1999.*
- e. *The respondent to pay costs of the suit at the High Court and costs in this appeal.*

Dated and delivered at Nairobi this 31st day of July, 2015.

W. KARANJA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR