



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 125 OF 2004**

**PAUL KIPKEMEI KOREI.....APPELLANT**

**VERSUS**

**PAUL MURIUKI NDERITU.....RESPONDENT**

(Being an Appeal from the judgement and decree of the Senior Principal Magistrate (Mrs. Meoli) at Milimani Commercial Court in RMCC No. 10882 of 2001 delivered on 19<sup>th</sup> February 2004)

**JUDGEMENT**

1. By plaint dated 10/2/2001 the Appellant filed a road traffic claim seeking special damages, general damages, costs and interest.
2. The Defendant never appeared despite service thus interlocutory judgement was entered and matter went into formal prove.
3. The trial court dismissed the suit for want of prove thus the Appellant lodged the instant appeal setting out 6 grounds namely:-

**1. That the learned magistrate erred and was wrong in holding that failure by the Appellant to plead the registration number of the tractor he drove when the accident occurred but which registration number he stated in his evidence was fatal and led to his not proving the case.**

**2. That the learned magistrate was wrong and erred in holding that the failure by the Appellant to produce a police abstract form in respect of the accident was fatal and led to a failure by the Appellant to prove his case.**

**3. That the learned magistrate erred and was wrong in holding that failure by the doctor or Appellant to produce the medical treatment notes on which the doctor relied in making his medical report was fatal and led to a failure by the Appellant to prove his case.**

**4. That the learned magistrate was wrong on holding that the Appellant had formally not proved his case in the absence of any other evidence to contradict or controvert the evidence of the Appellant and the doctor.**

**5. The learned magistrate was wrong and erred in failing to assess the quantum of damages awardable to the Appellant in the event that the Appellant had succeeded in proving his claim.**

**6. The learned magistrate erred in failing to find that the Appellant had proved his case on a balance of probability.**

4. The matter was directed to be heard via submissions. Only Appellant filed the same.

**Appellant's Submissions:**

5. The Appellant submits that the magistrate dismissed the Appellant's claim on the grounds that:-

**a. No medial record (treatment) notes were produced in respect of the injuries.**

**b. Police abstract report was not produced to confirm the accident.**

**c. The plaintiff did not contain the particulars of the vehicle concerned.**

**d. There was no assertion in the plaintiff the vehicle belonged to the Defendant and there was no proof of this.**

6. The Appellant pleaded in his plaintiff that at the time the accident occurred he was on the employment of the Respondent's vehicle and he was driving the Respondent's vehicle. It is true that he does not state the number of the vehicle involved but stated that it was tractor registration number KWU775.

7. What he did not state in his plaintiff has been supplied in evidence. Can it be said that failure to state the registration number of the vehicle or tractor involved is fatal, when there is no denial of this by the Respondent who filed no reference in the claim? He submits that unless the particulars of the vehicle are denied by the other party, failure to plead its particulars which are then later disclosed are not fatal.

8. There is also the finding that without a police abstract the occurrence of the accident was not proved. True a police abstract is evidence that a road traffic accident occurred. But not all accidents are reported to police some like self-involved ones (like this one) are not reported to police.

9. Unless therefore the other party has filed a defence and denied that no accident occurred, the assertion by a driver that he was involved in an accident. (Unless he is contracted) is proof that an accident occurred. Again he submits that failure to produce a police abstract report form was not fatal to the Appellant's case.

10. Lastly, the claim was also dismissed on the ground that no hospital treatment notes were produced to confirm the Appellant's injuries notwithstanding the doctor's evidence. The doctor was not asked to state what documents he had before him before concluding that the Appellant had a fracture. He said the Appellant had been hospitalized at Kapsabet District Hospital and treated there for 15 days.

11. Unless it is claimed he was cooking up a story he must have had documents he looked at. He also physically examined the Appellant. He complained of pain on the hips while walking and standing for long. He could not lie on the right side without pain. He walked with a limp. He was tender on right hip joint.

12. Right lower hip is shorter than the left by one centimeter. This is evidence which the doctor saw when he examined the Appellant. Can it be dismissed as no evidence because of lack of treatment notes? He submits that there was sufficient medical evidence on which the court should have found that the Appellant was injured and awarded him damages.

13. Lastly, the learned magistrate did not assess any damages that would have been paid to the Appellant in the event that he finally and dismissed of the Appellant's claim we found to have been wrong in appeal. It is normal practice to do so.

#### **Evidence Adduced:**

14. PW1 Dr. Japheth Amogada stated that he holds a Bachelor Degree of Medicine and Surgery. He stated that the Appellant presented to him on 16/1/2003 for a medical report arising from an accident in 1999. He gave him the history of involvement with road traffic accident while driving a tractor. He sustained injuries and was hospitalized at Kapsabet District Hospital. There was fracture RHS hip joint. He was treated at the hospital where he was for 15 days.

15. On examining him he complained of pains on hips on walking or standing long. He could not lie on the right side due to pain. He walks with a limp and is able to continue driving the tractor with pain and strain. On examination there was tenderness on right hip joint area joint movement is restricted.

16. Right lower limb is shorter than left by one centimeter. He concluded that following road traffic accident the Appellant suffered a fracture which caused pain and walking with limp as the left limb was shortened. His prognosis was that in view of the site of the fracture arthritis could be developed. The medical report was tendered as exhibit. He charged Shs.2,000/= for it (as exhibit 1A, B).

17. PW2 Paul Kipkemoi Korei stated that since 1990 he had worked as driver with Chebut Tea Factory. On 1/11/99 he was driving Defendant's tractor KWU775. They were carrying wood for the Defendant. The tractor at some point had its steering wheel malfunction and it overturned.

18. He sustained injury on the left hip. He was admitted for 2 weeks and attended as an outpatient, for a month. His leg was fractured. He had pain when he run or bed. He still drives, but if he do so on long journeys, he feel pain. On the material date he was on his duties. The Defendant had refused to pay him. He asked for damages and costs of the suit.

#### **ISSUES:**

19. After going through evidence on record and submissions filed, I find the issues were; **whether the claim was established on balance of probabilities? What is the order as to costs?**

#### **Analysis and Determination:**

20. The Appellant testified and called one witness, the doctor who examined him. Though his evidence not controverted, trial court noted that the said doctor examined the Appellant well over 3 years since the accident.

21. The Appellant told the court that he sustained “injury” to the left hip, fracture on leg (latter not pleaded) and was admitted in hospital for 2 weeks and later attending as an outpatient.

22. No medical record was produced in respect of the initial treatment received by the Appellant. Indeed, not even a police abstract was produced herein. These matters put to question the assertions of the doctor called by the Appellant in respect of these injuries.

23. The mere assertion that the Appellant had one shorter leg is of no consequence especially as the plaint does not contain any pleadings that he sustained any leg fracture or injury.

24. There were other matters of equal concern to the court. This relate to the plaint which does not contain any particulars of the motor vehicle involved in the accident. Moreover there was no averment in the plaint to the effect that the accident vehicle belonged to the Defendant, which the Appellant asserted in his evidence, without any documentary proof.

25. In the circumstances of the case the appellant failed to prove case on balance of probabilities and I cannot see trial court fault in its findings. **i. Thus the court dismisses the appeal with no orders as to costs as respondent never filed submissions.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**