REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 940 OF 2007

CHRISTALINA ABAYO.....APPELLANT

V E R S U S

PETER KIMARI KIHARA..... 1ST RESPONDENT

STEPHEN MWANGI..... 2ND RESPONDENT

(Being an appeal from the judgement of Mr. K. L. Kandet (RM) delivered on 22nd October 2007 in Civil Case no. EJ.300 of 2001 before Chief Magistrates Court Milimani Commercial Courts, Nairobi)

JUDGEMENT

1. Christalina Abayo, the appellant herein, filed an action by way of the plaint dated 22nd March 2001 before the Chief Magistrate's Court at Milimani, against Peter Kimari Kihara and Stephen Mwangi, the 1st and 2nd respondents herein. In the aforesaid plaint, the appellant sought for judgment against the respondents in the sum of ksh.339,314/= plus costs and interest. The aforesaid amount is in respect of material damage claim by the appellant for special damages arising from a road traffic accident. The respondent denied the appellants claim by filing a defence. The suit was placed before Hon. Kandet, learned Senior Resident Magistrate who heard and eventually had the same dismissed. Being aggrieved by the dismissal order, the appellant preferred this appeal.

2. On appeal, the appellant put forward the following grounds in his memorandum:

> ***1. The learned trial magistrate erred in both fact and in law by holding that the appellant had not proved liability yet certified copies of the proceedings and judgment of the traffic case that had been lodged against the 2nd respondent were tendered in evidence by the appellant.***
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> ***2. The learned trial magistrate erred in both fact and in law by failing to appreciate that by virtue of the provisions of Section 47A of the Evidence Act (Chapter 80 of the Laws of Kenya) the fact of conviction of the 2nd respondent for the offence of careless driving in traffic case no. 9540 of 1998 was conclusive proof that the 2nd respondent was guilty of the offence as charged.***
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> ***3. The learned trial magistrate erred in both fact and in law by failing to appreciate that the conviction of the 2nd respondent for the offence of careless driving gave rise to a presumption of negligence against the respondents which could only be rebutted by evidence from them to the contrary.***
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> ***4. The learned trial magistrate erred in both fact and in law by failing to appreciate that the***

respondents did not testify or tender any evidence at the hearing and that as such had neither rebutted the presumption of negligence against them arising from the 2nd respondents said conviction nor proved any contributory negligence against the driver of the appellant's motor vehicle.

5. The learned trial magistrate erred in both fact and in law by completely ignoring the decision of the Court of Appeal in the case of Chemwolo & Another –vs- Kubende (1986) KLR page 492 which ws cited and a copy availed to him by the appellants advocates through their written submissions filed therein.

6. The learned trial magistrate erred in both fact and in law by confusing the provisions of Section 47A of Evidence Act (Chapter 80 Laws of Kenya) with those of section 34(1) of the same Act thus arriving at a totally erroneous and unjust conclusion in law.

7. The learned trial magistrate erred in both fact and in law by failing to appreciate that Section 47a of the Evidence Act was concerned with the outcome of a criminal case (in this case the conviction of the 2nd respondent for the offence of careless driving) and not the proceedings thereof.

3. When the appeal came up for hearing learned counsels recorded a consent order to have the appeal disposed of by written submissions.

4. I have considered the rival written submissions. I have further re-evaluated the case that was before the trial court. It is apparent that the trial magistrate dismissed the suit because the appellant had not presented evidence to establish liability on the part of the respondents. Though the appellant had put forward a total of seven grounds of appeal, the issue which commends itself for determination is the question whether or not the appellant tendered credible evidence to establish the claim. It is the submission of the appellant that the learned Senior Resident Magistrate failed to appreciate the application of Section 47 of the Evidence Act. The appellant pointed out that he had supplied certified copies of the proceedings and ruling of the traffic case in which Stephen Mwangi the 2nd respondent was convicted for the traffic offence of driving a motor vehicle on a public road without due care and attention contrary to Section 49(1) of the traffic Act (Cap 403 Laws of Kenya). The appellant argued that he relied on the conviction of the 2nd respondent based on the provisions of Section 47A of the Evidence Act, which basically allows a court of law to treat a final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence after the lapse of the time allowed to appeal as conclusive evidence that the person so convicted of was guilty of that offence as charged.

5. The appellant further argued that the 2nd respondent did not allege that he appealed against the order of conviction hence the trial magistrate should have ruled that the conviction was conclusive proof of the 2nd respondent's negligence. The appellant further argued that the respondents did not summon any witness to tender evidence to prove contributory negligence against the appellant hence the trial court should have return a verdict making the respondents wholly liable. The appellant further faulted the trial magistrate's holding that Section 43(1) of the Evidence Act were not satisfied. It was argued that Section 34(1) of the Evidence Act provides for the mechanism of adopting evidence tendered in previous proceedings to a subsequent case while Section 47 of the same Act is concerned with the effect of a criminal judgment.

6. The respondents on the other hand are of the view that the learned trial magistrate came to the correct decision. It is pointed out that the appellant had failed to prove the ownership of the motor vehicles involved in the accident yet there was a serious contention of ownership from the beginning the appellant was therefore required to establish ownership but it miserably failed to do so. The respondents further pointed out that the appellant failed to attend court and instead summoned the evidence of a loss assessor who did not tender evidence of ownership. The appellant also summon an insurance representative who merely gave evidence on the insurance policy taken.

7. The respondents also pointed out that the 1st respondent denied that he was the owner of motor vehicle registration no. KAA 654L at the material time. It is also stated that neither the appellant nor the driver of motor vehicle registration no. KAC 802J were called to testify on the occurrence of the accident and if indeed the subject motor vehicle was owned by the appellant and that she as paid for the loss of her motor vehicle. The respondent also argued that having denied that the appellant was the owner of KAC 802J and there being no evidence to prove the same, the trial magistrate was entitled to dismiss the suit. It is also said that there was no evidence showing the 2nd respondent was driving motor vehicle registration no. KAA 654L on instructions of the 1st respondent.

8. Having considered the rival submissions over the issue, I have come to the following conclusion in the matter. There is no dispute that the appellant tendered the evidence of Fredrick Njeru Njagi (PW1), a loss assessor. PW1 presented evidence on how the sum claimed was arrived at. He was categorical that he does not know when and how the accident in question occurred. The appellant also tendered the evidence of Benard Oraro Ayuko, (PW2), the legal officer of Heritage Insurance Company, the insurer of motor vehicle registration no. KAC 802J. PW2 the trial court that the aforesaid motor vehicle was owned by Christalina Abayo (appellant) and insured under policy no. 9712MO876. PW2 also stated that the motor vehicle was involved in an accident and later declared as a write off. PW2 stated that the driver of the insured motor vehicle was the husband of the policy holder. PW2 also stated that the driver of the 1st respondent's motor vehicle was charged and convicted by the traffic court for careless driving and sentenced to pay a fine of ksh.5,000/=. PW2 produced as an exhibit in evidence the proceedings. I have already stated the manner the learned trial magistrate determined the suit. With respect, I agree with the submissions of the appellant that the learned senior resident magistrate erred when tying the Provisions of Section 34(1) and 47A of the Evidence Act. The two provisions address two totally different scenarios. The proceedings and judgment of the traffic court which convicted the 2nd respondent can be used to presume liability of the respondents for negligence pursuant to provisions of Section 47A of the Evidence Act. The respondents failed to tender evidence to prove contributory evidence on the part of the appellant hence they are wholly liable. The order dismissing the suit must therefore be set aside.

9. On quantum, there is no dispute that the appellant presented credible evidence proving the claim. Consequently judgment should be given as prayed in the plaint.

10. In the end, the appeal is allowed. The order dismissing the suit is set aside and is substituted with an order entering judgment in favour of the appellant and against the respondent as prayed in the plaint.

11. The appellant to have the costs of the appeal and the suit.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent