REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 6 OF 2008

SHAGGY INVESTMENTS COMPANY LIMITED

MUSA IMBUKHA..... APPELLANTS

VERSUS

PETER KAMAU NGUGI..... RESPONDENT

(***An Appeal from the Ruling of the Acting Principal magistrate, Naivasha, Honourable N. Njagi, in Naivasha SPMCC Number 90 of 2001, delivered on the 7th December, 2007)***

JUDGEMENT

1. This is an appeal from the Ruling of the trial Magistrate in **Naivasha SPMC Case No. 90 of 2001** delivered on the 7th December 2007. Judgment was delivered in the case on the 19th September 2007. I have perused the said Judgment. The trial court found the appellants wholly liable in negligence and damages to the respondent and awarded him Kshs.200,000/= for general damages and Kshs.3,000/= special damages plus costs and interest. This was a claim arising from a road traffic accident wherein the respondent, a fare paying passenger in the Appellants vehicle KAL 869H was involved in a self involving accident.

2. The appellants denied that the vehicle belonged to the 1st appellant nor was it being driven by the 2nd appellant, and further denied occurrence of the accident and the particulars of negligence and injuries.

3. In his evidence in chief the respondent produced the P3 form and the police abstract that were marked for identification as MFI 1. The Respondent alluded that he would call a police officer to produce the two documents but closed his case without the two documents being produced and admitted as evidence.

Upon parties filing written submissions, the respondent in his supplementary written submissions dated 10th September 2007 annexed the two documents and urged the trial Magistrate to peruse and consider them in his judgment.

4. The appellants submissions were dated 28th August 2007 and were prepared before the respondents submissions going by the dates noted on the said submissions.

I have perused the judgment. The trial Magistrate stated that he considered all the submissions. He however did not state the fate of the two documents that were not produced and marked as exhibits while considering the issue of whether or not an accident did occur and if so, whether the respondent was injured, save considering the medical report prepared by Dr. Kuria. Indeed it was his statement that the medical report confirmed that the respondent had been injured.

Upon that basis, the trial Magistrate made findings that the respondent had proved liability against the appellants and assessed damages as aforestated.

5. In their application dated 18th October 2007 made soon after the judgment, the appellants sought that the judgment delivered on the 19th September 2007 be reviewed upon grounds that new and important matter that was not within their knowledge at the time of the judgment and decree were passed. This was pursuant to provisions of **Order 45 of Civil Procedure Rules (2010). Rule 1(b)** thereof provides that a party may apply for review of a decree from which no appeal has been filed upon grounds of discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, among others.

6. The appellants relying on the above conditions submit that the supplementary affidavit to which the P3 and police abstract were annexed came after they had filed their submissions and as they were not produced as exhibits during the hearing, they were not given an opportunity to object to or cross examine on the said documents that is contrary to the law of evidence.

7. I have stated above that the occurrence of the accident and injury were denied by the appellants. A P3 form is one of the basic documents that a party ought to provide to the court to confirm that indeed an injury was sustained and treatment given soon after the accident. A medical report on its own in my view, is not capable of proving that basic fact as it comes much later. In this case the accident is said to have occurred on the 3rd January 2000 while the medical report was prepared on the 13th January 2000. No police officer from the police station where the alleged accident attended court to produce the police file which would have confirmed to court whether or not an accident did occur involving the accident vehicle and the Respondent.

8. A nexus must be proved, because not every injury must be caused through a traffic Road accident, as well as any negligence attributable to either of the parties. See **Satpack Industries -vs- James Mbithi Munyao C.A. No. 152 of 2002.**

Without the two vital documents and for which failure to produce as exhibits, and which were annexed to the respondents submissions is but an ambush, and unprocedural. A court cannot rely on documents that were not produced as exhibits and introduced in submissions only. That is not only an error on the face of the record but also new evidence produced from the back door after closure of the case.

9. In **Muyodi -vs- Industrial & Commercial Dev. Corporation & Another** (**2006**) **IEA 243** that court held that:

> ***"For an application for Review Under Order 45 of Civil Procedure Rules to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which for due diligence was not within his knowledge--- or error apparent on the face of the record, and application was to be made without unreasonable delay."***

See also **Jacinta Wairumu Njoroge -vs- Julia Wanjiru & 4 Others (2015) e KLR.**

10. The appellant's discovery after judgment that the P3 and the police abstract were annexed to the supplementary submissions and duly considered by the trial magistrate when not produced as evidence in my considered view is a good ground to qualify for an application for review of the judgment. It is my findings that had the trial Magistrate not considered the P3 and Police Abstract, he would not have come to his findings that the accident occurred and that the respondent was injured, and therefore the respondent had not proved negligence against the appellants. See **Jacinta Wairimu Njoroge** case above.

11. In her ruling delivered on the 7th December 2007, the trial magistrate found no merit in the Review application on the grounds that the affidavit in support was sworn by a stranger to the case, the manager of the Insurance company that had insured the accident vehicle who was not a party to the case. On this ground alone, he dismissed the application for Review of the judgment.

12. It has been submitted that the trial Magistrate misdirected himself on the principles of subrogation, under **Cap 405 Insurance** (Motor vehicles third party Risks).

Under the provisions of Section 10 of the said Act, the insured the 1st appellant may defend the suit on behalf of the Insurance company under its subrogation rights.

In **Juma Ali Mbwana & Another -vs- Umi Omar Musa (2014) e KLR J. Kasango** render that:

> ***"an insurance company which has a statutory duty to satisfying a judgment is entitled to apply to court to set aside the judgment in appropriate case."***

13. This position has been adopted in numerous decisions. Under the subrogation principles, the Insurance company cannot file a suit in its name, but it gives that power and authority to its insured to claim or defend a suit, and only after an order or judgment has been passed does the insurance company comply with **Section 10 of Cap 405.**

This was the holding in **C.A No. 78 of 2013 Lessie John Wilkins -vs- Buzeki Enterprises Ltd (2015) e KLR.** I have no reason to depart from the principles and holding.

I therefore find that the trial Magistrate misdirected himself in law by terming the Insurance Company manager who swore the affidavit in support of the application for Review Orders a stranger. He ought to have considered the affidavit in support of the application, and had he done so, he would have come to different findings.

14. The Respondent did not file written submissions or tender oral submissions on the appeal despite being given sufficient time to file such submissions. The appeal therefore stands unopposed and for the reasons stated, it is allowed.

To that extent the trial Magistrate's ruling delivered on the 7th December 2007 is set aside and substituted with an order that the Application dated 18th October 2007 is allowed. Consequently, the Judgment delivered on the 19th September 2007 is set aside and substituted with an order that the Respondent's case being **Naivasha SPMCC Suit No. 90 of 2001** is dismissed with costs to the Appellants.

15. Each party shall bear its costs on this appeal.

Dated, signed and Delivered this 20th Day of April 2017

J.N. MULWA

JUDGE