



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 863 OF 2006

RUTH NJERI NDEGWA.APPELLANT

VERSUS

WONDER FOODS LIMITED. RESPONDENT

(Being an appeal from the judgment and leave from the Chief Magistrate's Court at Nairobi dated 13th November, 2006 in CMCC no. 2182 of 2004)

J U D G M E N T

The Appellant herein who was the Plaintiff in the lower court, filed a plaint dated the 4th day of March 2004 against the Respondent (defendant in the lower court).

In the plaint, the Appellant claims that on or about the 23rd day of April, 2003 she was travelling as an employee in the Respondent's motor vehicle registration number KAM 297L along Waiyaki Way road within Nairobi when the said motor vehicle was negligently driven and/or controlled by the Defendant's agent that it lost control and overturned thereby causing serious bodily injuries to the Appellant.

The particulars of the negligence are set out in Paragraph 4 of the Plaint. In addition to the particulars of negligence, the Appellant has relied on the doctrine of Res Ipsa Loquitor and the provisions of the Traffic Act and the Traffic Rules.

It is further pleaded that as a result of the accident, the Appellant suffered loss and damage the particulars whereof are set out in paragraph 5 of the plaint.

The Respondent filed a defence dated 9th September, 2004 denying ownership of motor vehicle registration Number KAM 297L and puts the Appellant to strict proof. In the alternative, the Respondent denies that the Appellant was travelling as an employee in the aforesaid motor vehicle at the material time. The occurrence of the accident is also denied and the manner in which the accident is said to have occurred.

The Respondent also denied the particulars of negligence attributed to its driver, agent, servant and/or employee and/or carelessness and put the Appellant to strict proof. It further avers that the doctrine of Res Ipsa Loquitor is not applicable in the case. The particulars of the Appellant's injuries and special damages set out in paragraph 5 of the Plaint are all denied.

In his evidence, the Appellant told the court that on the 23rd April, 2003, she was leaving Kangemi in the Respondent's Company Vehicle registration Number KAM 297L when on reaching Nairobi School (Waiyaki Way) it veered off the road and it was involved in an accident.

It was her further evidence that before the accident, the motor vehicle was fairly speeding and the accident was self involving. The vehicle landed off the road and fell on its side. He sustained injuries following the accident and good Samaritans took him to M.P Shah Hospital where she was treated and referred to Aga Khan Hospital. She produced the medical treatment note from M.P Shah Hospital, a medical Report by Dr. Bondo, L.D 104 form, a P3 form and a Police Abstract as exhibits in support of her case. She also produced a second medical report by doctor Ruga and another medical report by Doctor Modi.

The Respondent did not call any witnesses but its Advocate cross-examined the Appellant who stated that the motor vehicle was travelling at a moderate speed, it was drizzling and therefore, slippery. She further told the court that she was seated in the driver's cabin and she did not see any other motor vehicle in front of their vehicle.

The Appellant was the only witness while the Respondent closed their case without calling any evidence and thereafter parties put in written submissions. In his judgment delivered on the 13th day of November, 2006, the learned magistrate dismissed the Appellant's case and hence the Appeal herein.

The Appellant in her Memorandum of Appeal raised the following grounds: -

- i. The learned magistrate erred in law and in fact in failing to take into consideration the oral evidence by the Appellant in court.
- ii. The learned magistrate erred in law and in fact in considering issues in the Respondents defence and submissions and which were not supported by evidence.
- iii. That the learned magistrate erred in law and in fact in failing to find that the Plaintiff's evidence was uncontroverted by evidence.

When the matter came up for directions before Justice Mabeya on the 6th February, 2015, the learned counsel for the Appellant informed the court that the record was incomplete as there is evidence left out and he sought leave to file a supplementary record which leave was granted. The supplementary record was filed on the 18th March, 2015 and the same contains the following documents.

1. Letter of offer from Wonder Foods Limited dated the 29th day of May, 1996.
2. Pay slips from the year 2003-2004.
3. Pay advice for the year 1999 from Wonder Foods.
4. Provisional Member statement of Account from National Social Security fund.

The Appeal proceeded by way of written submissions which the learned counsels for the parties highlighted on the 28th day of January, 2016.

In his submissions, counsel for the Appellant submitted that the learned magistrate did not understand the nature of the claim before him in that he took it purely as an accident and failed to consider the pleadings. He stated that the Appellant has relied on L. D. 104 form which clearly shows the employer as the Respondent and that being the case, there was no requirement for the Appellant to prove who was driving the accident motor vehicle.

He further submitted that the learned magistrate erred in shifting the burden based on the pleadings in that the Respondent having denied ownership of the aforesaid motor vehicle it ought to have called evidence to support the pleadings which was never done. That L. D. 104 form confirms that the Appellant was the Respondent's employee and the evidence of road traffic accident was merely to confirm the accident. There was no need to tender evidence on ownership and once the Appellant produced L. D. 104, she

discharged that duty. He urged the court to find that by failing to appreciate the evidential value of L. D. 104, the trial magistrate erred and in so doing, he misdirected himself.

He averred that the police abstract confirmed that an accident occurred involving a vehicle wherein the respondent was travelling as a passenger and in this case, it was not used as evidence of ownership but only confirms occurrence of an accident.

On quantum of damages, on what the learned magistrate would have awarded, he submitted that the sum of Ksh.200,000/- was too low as the Appellant's injuries were severe and the award is not in tandem with the injuries. He urged the court to review the same and award a fair compensation.

On the issue of the supplementary record of appeal, he contended that the Appellant sought leave to file the same and on that date, he clearly stated that the documents were left out in the lower court and the Respondent conceded and since he sought the leave, the documents can be relied on and the supplementary record is properly before the court.

According to him, the documents in the supplementary record only confirms the fact that the Appellant was an employee of the Respondent and have nothing to do with proving liability. He distinguishes the authority relied on by the Respondent being Civil Case No. 307 of 2008 in that in the said case, the Judge dismissed the case because the Appellant failed to produce documents that were marked for identification while in this case, the documents were produced with the leave of the court.

On his part, the learned counsel for the Respondent submitted that the learned magistrate was right in dismissing the Appellant's case because she failed to establish any link between motor vehicle KAM 297L and its driver with the Defendants company. He further submitted that there was no evidence of ownership tendered by the Appellant and the court had to determine the issue. That the police Abstract produced by the Appellant was important to confirm the accident and in it, the motor vehicle belongs to one Maweu Munuve.

With regard to the supplementary record, he submitted that no leave was granted to introduce new documents and that those documents were not produced in the lower court and therefore the same should not be admitted in evidence.

I have carefully considered the submissions by the learned counsels and also the record of the lower court with regard to the proceedings and the documents that were produced in evidence as exhibits.

First, I would like to deal with the issue of additional documents filed by way of a supplementary record of appeal filed on the 18th March, 2015. It is noted from the record that the Appellant sought leave of the court to file a supplementary record of appeal on the 6th February, 2015. On the material day Mr. Macharia Advocate for the Appellant informed the court that the record of appeal that he has filed is incomplete as there is evidence left out and for that reason he needed to file a supplementary record. Mr. Asiyo Advocate for the Respondent is on record as having said ***"That is the case."***

What is clear to me from the record of that day is that the court was not told whether the documents to be filed were new and additional documents or whether they were documents that were part of the record in the lower court and that the Counsel for the Appellant had forgotten to file them in the Record of Appeal. But since there was no objection from the counsel for the Respondent, I take it to mean that he had been explained to, the documents that the Appellant wanted to put in and therefore, I will not interfere with that agreement though Mr. Itonga for the Respondent seemed to suggest by his submissions that no leave was sought to introduce new documents. Since there was an advocate who was appearing on his behalf on that day, he cannot be heard to suggest that leave was not sought yet his representative is on record as having told the court that:-

"That was the case."

The main contention by the Counsel for the Appellant is that the learned Magistrate did not understand

the nature of the claim before him in that he took it purely as an accident matter and failed to consider that the Appellant was travelling in the motor vehicle as an employee of the Respondent. In fact that is the basis of the whole Appeal.

Looking at the documents that were adduced in the lower court and more particularly the L.D. 104 and the letter of appointment, I have no doubt in my mind that the Appellant was an employee of the Respondent.

On the material day she states that she was travelling in motor vehicle registration number KAM 297L, in his capacity as an employee of the Respondent when the aforesaid motor vehicle was negligently driven and/or controlled by the Respondent's agent/driver that it got involved in an accident wherein the Appellant was injured. In the Complaint that she filed before the court, paragraph 3, it is pleaded that the Respondent was the registered owner of the said motor vehicle. In the police Abstract that she produced as an exhibit, the owner of the motor vehicle aforesaid is indicated as Dickson Maweu Munuve and no official record by way of a search was produced or in any other form to connect the Respondent to the ownership and/or control of the said motor vehicle.

Though Counsel for the Appellant argues that the police Abstract was produced merely to confirm that there was an accident on the material date involving the Appellant who was travelling as a passenger in motor vehicle KAM 297L, the court is prepared to accept that argument but in my view, the Appellant ought to have gone further and brought out the connection between the vehicle and the Respondent. It was not enough for her to merely state that the vehicle was owned by the Respondent at the material time.

Either way, whether the cause of action is based on negligence or on the relationship of an employer/employee as between the Appellant and the Respondent, the Appellant needed to bring out a connection between the aforesaid motor vehicle and the Respondent for any liability to attach to the Respondent.

It is trite law that whoever alleges must prove. The Appellant filed the case against the Respondent and she was under duty to prove her case on a balance of probability. The fact that the Respondent did not call any evidence, did not make the burden lesser on her part. It is my considered view that she failed to discharge that burden.

In the upshot, I have no option but to dismiss the appeal with costs to the Respondent. I find no reason to interfere with the judgment of the learned magistrate on liability and had the Appeal succeeded the award of general damages in the sum of Kshs.200,000/- would have been adequate compensation.

It is so ordered.

Dated, signed and delivered at Nairobi this 31st day of March, 2016.

.....

L NJUGUNA

JUDGE

In the presence of:-

..... ***for the Appellant***

.....***for the Respondent.***