REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 4B of 2009

ROBERT GHONZI KIMANI ….....APPELLANT

VERSUS

DAVID BWIRE KHISA ….....1ST RESPONDENT

CMC MOTORS LIMITED.....2ND RESPONDENT

JUDGMENT

The appellant herein has filed four (4) grounds of appeal which can be summarized as follows:-

1) The trial Magistrate erred in law and in fact in holding that the appellant had failed to prove ownership of the motor vehicle.

2) The trial Magistrate erred in relying on wrong principles of law in reaching the decision.

The brief summary of the case is as follows:- **PW1 Robert Gonzi Kimani** was riding motor cycle registration number **KAW 211F** in the morning of 19th January 2007 along Mosque and Paramount road junction. At the very junction he was knocked by motor vehicle registration number KAR 250 S Land Rover Discovery.

As a consequence of the said accident he sustained serious injuries namely:-

1. **Dislocation of right hand shoulder**
2. **Chest Injuries**
3. **Injuries to right hip**
4. **Bruises on head**
5. **Bruises right knee.**

He was unconscious and was rushed to Aga Khan Hospital and later Jalaram Hospital. He testified that he was charged in a traffic case but was acquitted.

He largely blamed the driver of the motor vehicle whom he claim was driving at a high speed.

Both the police abstract and the medical report were produced by consent. **DW1 David Wabwire Khisa** was the driver of the motor vehicle that allegedly hit the appellant.

He told the court that although the accident occurred it was the appellant who was on the wrong as he failed to stop at the junction and was riding at a high speed.

The fundamental issue to determine here is the ownership of the motor vehicle and the question of liability. I have no doubt in my mind that an accident indeed occurred on the material day.

But why did the trial magistrate decide that the motor vehicle did not belong to the respondent? According to him the respondent did deny and he relied heavily on the case of T**huranira Karauri =vs= Agnes Ngeche C. A. No. 192 of 1996 (Nyeri).**

I have perused the pleadings herein. The respondents have denied in their defence paragraph 3 that they are the owner of the suit motor vehicle.

However in his evidence DW1 said:-

"I live in Kisumu town and work with CMC Motors Kisumu as a driver".

On that day I was given a vehicle No. KAR 250 S a Land Rover Discovery by my boss the branch manager who instructed me to go to his house".

On cross examination he said:- **"The vehicle belongs to CMC Motors"**.

Clearly therefore the admission by the respondent in the absence of any contrary prove indicates that its the owner of the motor vehicle.

The Thuranira case can be clearly distinguished. In that case the registration of the vehicle was in question. The police abstract which in the absence of the certificate of registration from the Registrar of Motor vehicle is a prima facie proof of ownership was produced by consent does not dispute the fact of ownership.

The pleadings have been held not to be evidence but mere averment.

The late Justice Madan said in the case of **CMC Aviation Limited =vs= Cruisair Limited (No. 1) 1978 KLR 103 and 104** that:-

"**The pleadings contain the averments of the parties concerned until they are proved or disapproved or there is admission of them or any of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.**

The pleading in this suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents".

On this score therefore the learned trial magistrate erred and I do find that the motor vehicle in question indeed on their own admission belonged to the respondent and the 1st respondent was lawfully driving the said vehicle.

On the issue of liability I have perused the entire evidence by the appellant as well as the 1st respondent. I note that both lay blame on each other. Despite this the appellant though acquitted was charged in a traffic court.

In the absence of an independent witness it is in my estimation quite difficult to ascertain who actually caused the accident. This was a junction and both drivers ought to have been careful. If indeed the respondent was driving slowly he would have certainly seen the appellant and tried to avoid the accident.

Equally the appellant must have been reckless. I do not believe that he was very carefully when riding on an intersection like in this case. Moreover, he was carrying a child and thus ought to have been

more careful.

My finding is that both driver must share the blame. I do find that on liability the appellant as well as the 1st respondent must carry the responsibility on a 50:50 basis.

I shall therefore allow the appeal on this ground also and set aside the trials courts finding.

On quantum, I have carefully seen the authorities relied on by the trial court as well as the parties submission herein. I would go by the finding by the trial court. The injuries suffered by the appellant were largely serious and the general damages of Kshs. 400,000 was fair and equitable.

In the premise I shall allow the appeal by setting aside the judgment of the lower court. I shall sustain the general and special damages awarded by the trial court of Kshs. 415,000.

Since liability as found above is equal I shall a portion damages equally that is the appellant shall be paid the sum of Kshs. 207,000 as well as half costs in this appeal and in the lower court .

Orders accordingly.

Dated, signed and delivered at Kisumu this 25th day of March 2013

H. K. CHEMITEI
JUDGE

In the presence of:

…..... Advocate for the Petitioners

….....Advocate for the Respondent

HCK/aao