IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 17 OF 2007

DYAL SINGH VIRDEE……...APPELLANT

VERSUS

DAVID MWANGI KABIRU..……....1ST RESPONDENT

SIMON KABIRU (Suing as the legal representative

of the estate of Stanley Kabiru Githae (Deceased)…..……...2ND RESPONDENT

JUDGMENT

David Mwangi Kabiru, the plaintiff/respondent (hereinafter referred to as respondent) filed a suit in the Nakuru Chief Magistrate's Court Civil Case No. 1136 of 2004, against Dyal Singh Virdee the appellant. He filed the suit in his capacity as legal representative of the estate of the deceased, Stanley Kabiru Githae. The deceased was said to have been cycling along Solai-Nakuru Road on 8/9/2001 when the appellant negligently drove motor vehicle KYY 128 Nissan Sahara Pick-up, which he allowed to knock down the deceased who sustained serious injuries as a result of which he met his death. According to the plaint dated 18/5/2004, the respondent averred that the appellant was the registered owner of the subject motor vehicle and drove it so negligently and listed the particulars of negligence at paragraph 4 of the plaint. As a result the respondent claimed general damages under the Law Reform act and the Fatal Accidents Act, and special damages on behalf of the deceased's estate.

The appellant filed a defence on 27/1/2005 and it is dated 26/1/05 in which he denied owning the subject motor vehicle or the occurrence of the accident, the alleged negligence and that if an accident ever occurred, it was solely caused by the negligence of the deceased; the injuries sustained and listed particulars of negligence attributed to the deceased.

At the trial before Mutembei, Senior Principal Magistrate, the plaintiff testified that the deceased was his father. He received a report that the father had been hit by motor vehicle KYY 128 belonging to Dyal Singh Virdee. He obtained the police abstract from Bahati Police Station (Ex.1). He later obtained letters of administration together with his brother David Mwangi Kabiru (Ex.3) and testified in an inquest No.2/2003. At the time of his death, the deceased was 55 years and carrying out farming activities.

PW2, Francis Mungai Ndegwa, told the court that he had gone to Maili Kumi on 8/9/2003 about 2.00 p.m. He met the deceased and they started going home together. Each had a bicycle and the deceased rode ahead of him on the left side of the road facing Nakuru direction. A vehicle approached from the opposite direction, came into their lane when trying to negotiate a corner and hit the deceased. He is the one who took the deceased to Nakuru Provincial Hospital where he died at 4.30 p.m. that same day. PW2

blamed the accident on the vehicle and denied that the deceased was riding in the middle of the road. He was not called to testify in the inquest though he recorded a statement with police.

The defence called PC David Thuranira (DW1) as a witness. He was not the Investigation Officer in the matter. The Investigation Officer, one Senior Sergeant Katuku was on transfer to Headquarters Nairobi. DW1 produced the police file and according to the summary in the file, the motor vehicle was heading to Nakuru while the cyclist was heading the opposite direction and that the cyclist was riding in the lane of the oncoming vehicle; that the driver swerved to avoid hitting the cyclist but the cyclist swerved to the same lane and they collided. The report of the Investigation Officer was that the cyclist was to blame for the accident and recommended that an inquest be conducted.

After hearing the evidence of the witnesses, the court found the appellant wholly to blame for the accident and entered judgment in favour of the respondent as follows:-

Pain and suffering - Kshs.15,000.00

Loss of dependency - Kshs.400,000.00

Expectation of life - Kshs.115,000.00

The appellant is aggrieved by the said judgment both on liability and quantum and preferred this appeal citing the following grounds:-

1. **That the magistrate failed to give a concise statement of the case, points of determination and the reason for the decision;**
2. **That the plaintiff did not discharge the burden of proof placed on him;**
3. **The plaintiff failed to prove that the defendant is the owner of the vehicle;**
4. **The trial magistrate erred by rejecting the evidence contained in the police file;**
5. **That the trial magistrate disregarded the issue of contributory negligence;**
6. **The court erred by assessing the respondent's income at Kshs.5,000/- per month.**

The appellant therefore urged the court to allow the appeal and set aside the judgment, or alternatively, the court to find that there was contributory negligence and the damages awarded be reviewed and revised and costs be awarded to the appellant.

Mr. Mahida who urged the appeal on behalf of the appellant submitted that the appellant denied ownership of the vehicle and the respondent did not adduce any evidence to prove ownership. He relied on the Court of Appeal decision in **Thuranira Karauri v Agnes Ncheche CA 192/96** and **Charles Mageto HCA 188/02**, where the courts held that ownership of a vehicle could only be proved by production of a certificate of search signed by the Registrar of Motor Vehicles. Counsel also submitted that PW1 did not adduce any evidence in support of his allegations of negligence. He said that PW2's evidence in court contradicted the statement he had written with the police as to how the accident occurred. Counsel further submitted that the judgment was brief and does not comply with requirements of the law. Counsel also urged that the magistrate should have considered the issue of contributory negligence by the deceased.

Lastly, it was the appellants submission that the award was excessive because there was no proof that the deceased earned Kshs.5,000/- per month and that since he was 55 years at the time of death, the multiplier of 10 years was incorrect.

Mr. Karanja, counsel for the respondent submitted that the appellant's documents at page 86 of the record of appeal and the police abstract do confirm that the appellant is the owner of the said motor vehicle. He also submitted that DW1 was not an eye witness nor was he the Investigation Officer but just picked the police file to produce it in court and his evidence was all hearsay. It was also urged that the opinion of the police officer is not binding on the court. Counsel also urged that when PW2 was cross examined, there was no reference to his statement made to police and it cannot be challenged by way of

submissions. He also observed that the fact that the police file was produced in evidence is not admissibility of its probative value but that has to be determined by the court. He noted that the sketch plan was not produced in court which raises a presumption that it may have been adverse to their case. He urged court to maintain the multiplier of 10 years because farmers do not retire at age 55 years.

I have carefully perused the judgment of the trial court. The trial magistrate basically summarised the case of both the appellant and respondent in two paragraphs and made a determination. I do agree with the appellant that the magistrate did not comply with the provisions of **Order 21 Rule 4** of the **Civil Procedure Rules** which requires that judgments in defended suits contain a concise statement of the case, the points for determination, the decision and the reasons for the decision. It is clear that the trial magistrate failed to give the reasons for arriving at the decision. The fact that he declared the evidence of PC Thuranira to be hearsay did not mean that the respondent had proved his case on a balance of probability. The court should have considered all allegations of negligence contained in the plaint to determine whether the evidence adduced by the respondent established all the allegations made on a balance of probabilities.

At paragraph 3 of the defence, the defendant denied that he was the registered owner of the vehicle. I have carefully considered the evidence of PW1 and PW2 and there was totally no evidence to support the allegation that the said vehicle was owned by the defendant. The only evidence connecting the appellant to the vehicle is the police abstract which names the defendant as the owner of the vehicle. Mr. Karanja, counsel for the respondent urged that ownership was proved by the abstract and the appellant's own documents exhibited at page 86 of the record of appeal which has the name of the appellant, address and a person named as buyer i.e. Jackson Maingi Kithuku. It is not clear what the document is. In the case of **Thuranira Karauri v Agnes Ncheche CA 192/96,** the Court of Appeal held that since the defendant had denied ownership, it was incumbent on the plaintiff to place before the judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the vehicle. The court rejected the submission that the police abstract was sufficient proof of ownership. J Musinga cited with approval the above case and went on to say as follows:-

> **"A police abstract report cannot be accepted as a document which proves ownership of a motor vehicle. The memorandum contained on the reverse side of the abstract originates from the police clearly indicate that such abstracts give only the salient facts of the occurrence of an accident without purporting to be an actual copy of a police report and the memorandum further states that the police cannot accept responsibility for the accuracy of the same. A certificate of an official search from the Registrar of Motor Vehicles is therefore appropriate in proving ownership of a motor vehicle."**

I totally agree with the finding of J Musinga and the Court of Appeal.

The respondent alleged that the driver of the motor vehicle KYY 128 drove it negligently that it caused the accident. PW1 did not witness the accident. PW2 told the court that he was riding behind the deceased and witnessed the accident whereby the driver of the vehicle left its side and came into their lane. It is PW2 who took the deceased to hospital. The driver of the vehicle and the passenger in the vehicle were not called as witnesses. Not even the Investigation Officer who visited the scene was called as a witness. DW1 who was not connected with the case purported to testify and blame the deceased for the accident. PW2's evidence was hearsay. PW2 had recorded a statement and was never cross examined on the said statement. The said statement having not been challenged on cross examination, it could not just be attacked in the defence. Besides, the statement was never shown to PW2 to confirm whether or not it was his statement which he signed. The evidence of PW2 was not challenged whereas the evidence of DW2 was not of any probative value. No reason was given as to why the driver, the passenger, or the Investigation Officer did not come to testify. There was evidence that a sketch plan of the scene was taken but it could not be found on the police file. DW1's evidence was all hearsay and cannot be relied upon. The court will believe PW2's evidence that it was the driver of the vehicle who left his lane and came into their lane.

In the alternative, the appellant pleaded contributory negligence against the deceased whom he alleged

failed to keep a proper look out or came into the path of the vehicle. The driver or Investigation Officer having failed to testify, I find that the appellant did not adduce any evidence in support of the defence. However, PW2 did not tell the court what the deceased did to try and avert the accident. The deceased owed a duty of care to himself too. I would therefore have attributed some negligence on the deceased, that is, 10% as against the appellant. However, the plaintiff having not established who the owner of the vehicle is, I would find that this case is not proved as against the appellant on a balance of probability and the same must be dismissed.

For purposes of assessment of costs, I will go ahead and assess the damages I would have awarded in the event the respondent had proved their case against the appellant. The deceased was said to be a farmer, earning a total of about 10,000/- but the court adopted a sum of Kshs.5,000/- as total earnings and that deceased may have lived for 10 years. The appellant suggested the court adopt the monthly earnings to be Kshs.3,000/-; that the deceased may have lived for another 6 years. The deceased was a farmer and farmers do not necessarily retire at 55 years. He may have continued active farming for over 10 years. I would have adopted 10 years and having demonstrated that he earned some money from farming, a sum of Kshs.5,000/- per month was a fair estimation. I estimate a ratio of dependency at 2/3. In the end, I would have calculated the damages as follows:-

1. Pain and suffering = Kshs. 15,000.00

2. Loss of dependency – 5000x 12x10x2/3 = Kshs.400,000.00

3. Loss of expectation of life = Kshs.100,000.00

Total = Kshs.515,000.00

In the end the respondent would have been entitled to Kshs.515,000/- in terms of damages less contribution of 10% bringing the sum to Kshs.463,500/-. The costs will be assessed on that basis.

In the end, the appeal is hereby allowed, the appellant will have costs of the appeal and the lower court.

DATED and DELIVERED this 27th day of September, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Omwenyo holding brief for Mr. Nyambane for the appellant

Ms Wanjiru holding brief for Mr. Karanja for the respondent

Kennedy – Court Clerk