



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Civil Appeal 17 of 2007

CAROLYNE INDASI MWONYONYO APPELLANT

V E R S U S

KENYA BUS SERVICE LTD. RESPONDENT

J U D G M E N T

The appellant was the plaintiff in Kakamega CMCC no.453 of 2004. Judgment was delivered on 16th January 2007 and her suit was dismissed. That led to the filing of this appeal. The grounds of appeal are that:-

- 1.The appellant's evidence was overwhelming and proved the case to the required standard.*
- 2.A consent on liability had been recorded yet the suit was dismissed.*
- 3.There was enough evidence to prove that the appellant suffered injuries but the trial court held that there was no proof of injury.*
- 4.The trial court failed to identify and determine the correct issues.*
- 5.The trial court erred in failing to assess the quantum of damages payable to the appellant.*

Counsel for the appellant submitted that the trial court relied on the authority of the case of **EASTERN PRODUCE (K) LTD VS JAMES KIPKETER NG'ETICH – ELDORET HCCC NO. 85 of 2002** but that authority was distinguishable from the appellant's case as in the appellant's case liability had already been recorded while in the authority relied upon the occurrence of the accident and liability was denied. It is the appellant's further submissions that the case was to be proved on a balance of probability. Evidence on the injuries and treatment was tendered. Counsel relied on the case of **STEPHEN KAGOOIVO VS JOSEPH WAITHAKA KABAI & 3 OTHERS NAIROBI HCCC NO.4089 of 1988** and **MOMBASA HCCC NO.349 of 1989, MONICA NTHENGA NZUKI vs MARSH JERRY TRANSPORTERS LTD.**

The respondents opposed the appeal. They do agree that liability had been recorded at the ratio of 90%:10% in favour of the appellant. The respondents maintain that the appellant failed to prove her case on a balance of probabilities as required in civil cases. No treatment notes were produced or discharge summary from Kakamega Highway Hospital to prove that indeed she sustained injuries. Whereas the accident occurred on the 12th of January 2002, the receipts she produced were issued on 20th June

2002. The suit was filed on 8th September 2004 while the medical report was done on 20th November 2004. The Doctor who prepared the medical report stated that he relied on treatment notes from Kapsabet Hospital but the appellant did not testify that she visited that hospital and no treatment notes from the Hospital were produced hence rendering the Doctor's evidence as hearsay.

The record of the trial court shows that by a letter dated 30th August 2005, liability was agreed at 90%:10% in favour of the plaintiff. The matter proceeded for hearing and two witnesses testified. The appellant's evidence is that on the 12th day of January 2002 she was travelling from Nairobi to Kakamega in a Kenya Bus Service bus. The bus driver passed Makutano junction and on realizing that he had passed the junction, he reversed and took the Kapsabet route. The vehicle moved in a zigzag manner and overturned. The appellant found herself at Kakamega Highway Hospital. According to her testimony, she was injured on the head, chest, neck and right knee that was put on a plaster.

The appellant further testified that she was admitted at Kakamega Highway Hospital for one month and paid KShs.90,000/= having incurred a bill of KShs.130,000/=. She produced some receipts for the medical treatment. The appellant also testified that she was later treated at Emasai Hospital and was later examined by Dr. Andai (PW2). The appellant was also treated at Mukumu Hospital as a follow up and that she had a dislocation of her right knee as a result of the accident.

PW2 was DR. CHARLES MASINDE ANDAI. His evidence was that he examined the appellant on 20th November 2004. According to PW2, the appellant was treated at Kapsabet Hospital and PW2 prepared a medical report that was produced as plaintiff exhibit 4. According to PW2, the injuries sustained by the appellant were of the nature of soft tissues and a dislocation of the knee joint.

The defence did not call evidence. By a further consent, the receipts that had been marked as MFI(a) (b) (c) (d) and (e) were produced as exhibits.

The trial magistrate dismissed the appellant's suit. The trial court noted that liability had been conceded and there was therefore no doubt that the accident occurred. The trial magistrate held that the particulars of injuries in the medical report were at variance with the ones in the plaint and that the appellant's evidence and that of the Doctor (PW2) was shaken during cross-examination. No treatment notes from Kapsabet Hospital were produced and that PW2 conceded during cross examination that the injuries were minor. No medical report from Kakamega Highway Hospital which had been marked was produced and that report could have presented a clear picture on the injuries suffered by the appellant.

The main issue for determination in this appeal is whether the appellant sustained any injuries as a result of the accident that occurred on 12th January 2002. Since parties recorded a consent on liability, it is agreed that the appellant was involved in the road traffic accident. Apart from the consent, the plaintiff's testimony before the trial court does establish that indeed she was travelling in the accident vehicle.

The only issue for determination by the trial court was on the quantum payable to the appellant and the trial court correctly held that liability was not an issue. Did the appellant prove her case as required by the law. The reason as to why the trial court dismissed the suit was that no medical treatment notes or discharge summary from Kakamega Highway Hospital where she was admitted were produced. Further, the court noted that the suit was filed before the Doctor (PW2) prepared his medical report. Several relevant documents that were marked for identification were not produced. The trial magistrate further noted that the appellant was treated at Kakamega Highway Hospital yet PW2 stated that he relied on treatment notes from Kapsabet District Hospital to compile the medical report.

The best way to evaluate this appeal is to first analyze the appellant's case before the trial court relating to the injuries suffered. The appellant's evidence is that the bus she was travelling in overturned and she found herself at Kakamega Highway Hospital. She sustained injuries on the head, chest, neck and mouth, bruises on the face and her left fingers were swollen. She was also injured on the right knee and it was put on plaster and the knee was also operated. According to the record of the trial court the appellant

was admitted for one month although the date of discharge as per the record is given as June 2002 having been admitted on 12th January 2002. The appellant produced receipts for payment of medical treatment. Some of the medical documents were not produced and these include the in-patient bill payment receipt (PMI 2), a letter from Emanzal Hospital demanding payment of KShs.211,860/= as medical bill (MFI 3) and a medical report from Kakamega Highway Hospital (MFI -6).

The next relevant evidence on the injuries is that of PW2, Dr. Charles Masinde Andai. In his testimony he stated that he examined the appellant. According to PW2, the appellant sustained blunt injury to the neck and upper hip, a cut on the face and bruises on the right hand. She had blunt injuries to the chest and neck and dislocation on the knee. According to PW2, the appellant was treated at Kapsabet Hospital and relied on the treatment notes from that hospital. The entire Doctors evidence during cross-examination is as follows:-

“I examined the plaintiff after about 2 years. I did not treat the patient. I relied on treatment notes form Kapsabet Hospital. I also relied on personal history. I do not have the treatment notes with me. I agree with you that the injuries were of a soft tissue nature. There was a dislocation of the knee joint. It is true I opined that there was a likelihood of developing postathritis. All the injuries had healed leaving scars.”

The Doctor went on to prepare a medical report which was produced as plaintiff’s Exhibit 4. The Doctors medical report states in part as follows:-

“RE; MEDICAL REPORT ON CAROLYNE INDASI MWONYONYO

I medically examined the above named on 20/11/2004. History was narrated by herself. More information was obtained from her discharge summary from Kakamega Highway Nursing Home”.

The report further states as follows: _

“TREATMENT

She was treated at Kapsabet District Hospital and thereafter at Highway Nursing Home where she was admitted for one month. Treatment included cleaning and stitching of the wounds, reduction of the dislocated knee in theatre under local anesthesia, application of plaster of Paris to the right lower limb, antibiotics, analgesics and physiotherapy.”

Given the evidence on record, I am satisfied that indeed the appellant was in the accident vehicle and she did sustain the injuries indicated in the medical report. The appellant produced four receipts from Kakamega Highway Nursing Home being payment for treatment and physiotherapy. The trial court found that the receipts were issued sometime after the appellant had been discharged and wondered why the receipts were not pleaded in the plaint. These receipts as per the evidence of the appellant during cross examination were for follow up treatment. I do note that the trial court was suspicious of the documents produced by the appellant and the language of part of the judgment is clothed with questions and doubts. From the appellant’s case, the accident occurred somewhere at Kapkangeni area along Kapsabet – Chavakali road as per paragraph 3 of the plaint. When the appellant testified she did not mention that she had been treated at Kapsabet General Hospital before being treated at Kakamega Highway Nursing Home. The fact that the appellant did not mention having been treated at Kapsabet General Hospital did not render the Doctor’s medical report hearsay as alluded by the respondents. Further, it was the trial court that was taking the evidence and the trial magistrate could have verified on the date of discharge from Kakamega Highway Hospital from the appellant as well as from the Discharge Summary that was marked for identification. The trial court became suspicious of the appellant’s injuries for no reason. It is clear from the record that it was the mistake of the appellant’s Advocate who failed to produce some of the relevant documents. However, the oral evidence of the appellant as to the injuries she sustained was also part of the evidence and there was no need for the appellant to have produced the treatment notes. The Doctor who examined the appellant in his report stated that he relied on treatment notes from Kapsabet General Hospital **and the Discharge Summary from Kakamega Highway Nursing Home**. The Doctor also saw the appellant and in his report it is indicated that the appellant walked with

slight limp.

The Black's Law Dictionary defines the term Evidence as:-

“Any species of proof, or productive matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete object etc for the purpose of inducing belief in the minds of the court or jury as to their contention.”

It is clear from the above definition that evidence can be by way of oral, documents or objects. I do find that the trial court erroneously dismissed the appellant's suit for no apparent reasons. The trial's court's suspicions on the injuries sustained by the appellant blinded its objectivity and corrupted its mind. The evidence adduced did prove the appellant's case on a balance of probability and the evidence was sufficient to have found in favour of the appellant. The oral evidence was sufficient to find in favour of the appellant. There is no written rule that injuries suffered by a victim of a road traffic accident must be proved by documentary evidence in form of treatment notes and medical report only or that a plaint cannot be filed until a plaintiff who is a victim of a road accident has had a medical report prepared by a doctor.

The appellant suffered soft tissue injuries and dislocation of the right knee. The appellant's advocate urged the trial court to award the appellant KShs.500,000/= in his submissions before the trial court. Similarly, in his written submissions before this court the appellant's counsel is seeking damages of KShs.500,000/=. I have read the authorities relied upon by the appellant's counsel both before the trial court and this court. Before the trial court the respondents sought an award of KShs.20,000/=.

Given the nature of the appellant's injuries which include both soft tissue injuries and dislocation of the right knee, I do award the appellant a sum of KShs.350,000/= as general damages. As for special damages, the appellant stated that she spent over KShs.100,000/= and was still indebted. The five receipts produced by consent totals KShs.13,600. I do award the appellant KShs.13,600/= as special damages.

In the end I do hold that the appeal has merit and the same is allowed. The trial court's judgment is set aside and replaced with judgment in favour of the appellant for KShs.350,000/= as general damages and KShs.13,600/= as special damages. The above sums shall be subject to the consent on liability at the ratio of 90:10 in favour of the appellant. The appellant shall have the costs of both the lower court and of this appeal.

Delivered, dated and signed at Kakamega this 24th day of May 2012

SAID J. CHITEMBWE

J U D G E