



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 249 OF 2009

FRACIAH NJERI GRACE.....APPELLANT

VERSUS

ISAIAH NGARARIKA MUINDI.....1ST RESPONDENT

ANTHONY MAINA MUNYUA.....2ND RESPONDENT

(Being an appeal from the Judgment and decree of Hon. Nicholas Njagi, in Naivasha Chief Magistrate's Civil Case No. 926 of 2006)

JUDGMENT

In a Plaintiff dated 29th November 2006 and filed on 21st December 2006, the Plaintiff (*now Appellant*) sued the Defendants\ upon a claim of negligence on the part of the 2nd Defendant (*2nd Respondent*) who was the driver of the 1st Defendant\ (*1st Respondent*) motor vehicle registration number KAU 298K.

The Appellant claimed that on or about 8th September 2006, she was a lawful and fare paying passenger in the 1st Respondent\ motor vehicle registration number KAU 298K along the Nairobi-Naivasha road when upon reaching an area known as KINALE, the 2nd Defendant drove, managed and/or controlled the said motor vehicle so negligently and/or dangerously that he caused and/or permitted the said motor vehicle to collide with an on-coming vehicle registration number KYY 930, Isuzu lorry while trying to overtake thereby permitting and/or causing the plaintiff to suffer severe injuries -

- (a) itchiness of the scars on the right arm,*
- (b) pain on the knee joints,*
- (c) bruises on the right side of the face.*

And by reason thereof she suffered loss and damage. She gave particulars of special damages -

- (a) Police Abstract Kshs 100.00/=*
- (b) Medical Report Kshs 2,000.00/=*

2,100.00/=

And ultimately prayed for the following orders -

(a) *general damages for pain and suffering,*

(b) *special damages as stated above,*

(c) *costs and interest,*

(d) *any other relief which the court may deem fit to grant.*

In their Defence dated 27th April 2007 but filed on 30th April 2007, the Respondents denied ownership of motor vehicle registration number KAU 298K and also denied that the second defendant was the driver thereof, and put the appellant to strict proof thereof.

In addition to the denial of ownership of the said motor vehicle, the Respondents also contended that the accident was caused by the negligence of not only the driver of the other vehicle (KYY 930) but also that the Appellant was also negligent in failing to take sufficient regard for her own safety while aboard the motor vehicle.

On account of allegations against the driver of the other motor vehicle KYY 930, the Respondents took out a Third Party Notice dated 7th January 2008 claiming indemnity from the Third Party in the event of any judgment being passed against them.

There is no record of either service, or response from the Third Party so that the matter went to trial without the presence or appearance of the Third Party.

When the case came up for hearing on 15th September, 2009 the Appellant testified and closed her case. Mr. Ngila, counsel for the Defendants was granted an adjournment to call the defence witness(es) and the matter was fixed for hearing on 13th October, 2009.

On 13th October, 2009 Mr. Ohiga counsel holding brief for Mr. Ngilu - for the Defendants, informed the learned trial magistrate that the defence was not calling any witness and closed the defence case, and called for a date for submissions which were duly filed by counsel for both parties.

In its judgment delivered on 17th November 2009, the learned trial magistrate found that the plaintiff (*appellant*) had not proved its case on the balance of probability. The principal reasons were that the plaintiff had not established that she was injured at all, and **secondly**, that this finding was irrespective of whether the respondents had called witnesses or not.

However by some strange twist of logic the learned Principal Magistrate held that had the Appellant proved her case, he would have awarded her Sh 70,000/= as compensation general damages, and that this sum would have been adequate compensation to the Appellant. As I have observed, this was twisted logic, having found that the Appellant had not established any case on the balance of probability, the basis of any award of damages would have purely hypothetical - which hypothesis had again no basis at all.

Aggrieved with this judgment and orders dismissing her suit, the Appellant came to this court under a Memorandum of Appeal dated 23rd November 2009, and filed on 24th November 2009. The grounds of appeal were -

(1) *The learned magistrate erred in fact and in law in disregarding the plaintiffs\' uncontroverted evidence and submissions thereof and subsequently dismissing the appellant\'s/plaintiffs\' suit,*

(2) *The learned magistrate erred in law and in fact in disregarding the fact that the standard of proof in civil cases is on a balance of probability and thereby imposing upon the appellant/plaintiff*

unnecessary and impossible burden.

(3) The learned magistrate misdirected himself in disregarding the appellant's/plaintiffs' testimony, which was unchallenged.

(4) The learned magistrate erred in law and in fact in finding that the plaintiff had not proved that the 1st defendant/respondent was the owner of the subject motor vehicle when the plaintiff adduced ample, credible and unchallenged evidence on that account.

(5) The learned magistrate erred in law in misapprehending the decision of the appellate court on proof of ownership of motor vehicles under the Kenyan law.

(6) The learned magistrate erred in law and in fact by dismissing the appellant's case entirely yet the grounds on which the dismissal proceeded only related to the 1st defendant/respondent.

(7) The learned magistrate erred in fact and in law in disregarding overwhelming evidence of the 2nd defendant's/respondent's negligence.

(8) The learned magistrate misdirected himself in failing to factor in the relevant factors in his assessment of damages.

And on those grounds the Appellant prayed that -

(a) The appeal be allowed and the decree against the appellant be set aside and enter judgment in favour of the appellant as prayed in the plaint.

(b) Alternatively, the decree against the appellant be revised and/or reviewed in his favour and find the respondents fully liable.

(c) The costs of this appeal and of the lower court be granted to the appellant.

(d) Any other relief that the court may deem just to grant.

Following directions made on 18th May 2011, the parties filed written submissions, commencing with those of the Appellant's counsel dated and filed on 30th May 2011 and the Respondent's counsel dated 13th July 2011 and filed on the same day. There was a reply to the Respondents' submissions dated 10th August 2011 and filed on 12th August 2011, and the Supplementary Record of Appeal filed by the Appellant's counsel on 18th January 2012 with leave of court granted on 20th February 2012.

I have perused and considered both the written and oral submissions by Mr. Kisilah learned counsel for the Appellant and Mr. Okwiri learned counsel for the Respondents. The first borne of contention is whether the Appellant proved negligence on the part of the Respondents. The second point of disagreement was the Appellant suffered injuries at all, and if, so whether these injuries were proved merely by a past treatment report by a consultant Doctor who did not attend to the Appellant, and therefore without the production of treatment notes or card.

I will begin with the submissions of the Mr. Okwiri counsel for the Respondents who was the proponent of the view that no negligence was proved against the respondent unless proof was also shown that the 1st Respondent was the registered owner of the motor vehicle. Counsel relied upon the Court of Appeal decision in **THURANIRA KARAUARI VS. AGNES NCHECHE** (Civil Appeal No. 192 of 1996) in which the learned Judges of Appeal held *inter alia* -

"The plaintiff did not prove that the vehicle which was involved in the accident was owned by the Defendant. As the Defendant 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 lorry. Mr. Kimathi for the plaintiff, submitted that the information in the Police Abstract (Report) that the lorry belonged to the Defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."

That line of argument was repeated and followed in the cases of **A. JIWA SHAMJI LTD VS. MARSELA KIPKEMOI** (suing as personal representative of **DAVID KIPRONO KIMOING (Deceased)**) [2009] eKLR and **JOHN KIRIA & 6 OTHERS VS. CHARLES KAUNDA MUSYOKA & ANOTHER** [2010] eKLR).

In both of these cases, the basis of the plaintiff's cases were a Police Abstract Report which showed the respective Defendants as owners of the motor vehicles involved in the accidents. The plaintiff's however failed to produce in the course of their evidence, a Certificate of Search from the Registrar of Motor Vehicles as to who is the true owner of the motor vehicle in question.

Whereas it is indeed the law under Section 8 of the Traffic Act, (*Cap. 403, Laws of Kenya*) that the person in whose name a vehicle is registered is deemed to be owner of the vehicle, but this is not conclusive, because the contrary could be proved. Such is the case where a new owner has failed to submit the transfer for registration in his name, within the periods prescribed under Section 9 of the Traffic Act.

In light of the clear provisions of Section 8 of the Traffic Act, I hold the view that the decision in **THURANIRA KARAUARI VS. AGNES NCHECHE** and subsequent decisions of this court following that decision were made *per incuriam*. Apart from the provisions of Section 8 & 9 of the Traffic Act, these are my other reasons for holding that view.

Firstly and I think it is plain common sense even, that liability on negligence cannot be based upon ownership or title. If this were so, would an injured person sue the owner of a hijacked vehicle which runs over pedestrians or collides with another vehicle purely on the basis of ownership? The answer is obviously be in the negative. For the tort of negligence to attach it must be shown either that the owner of the vehicle was negligent in the manner he was driving the vehicle, or that some his agent was driving the vehicle hence the principle of vicarious liability.

Secondly the law of evidence concerning ownership is clear. Section 116 of the Act, (*Cap. 80, Laws of Kenya*) provides -

"When the question is whether any person is an owner of anything of which he is shown to be in possession, the burden of proving he is not the owner is on the person who affirms that he is not the owner."

Unlike in criminal cases where the burden of proof is always upon the prosecution - Section 116 is a departure or an exception to Section 107 of the Evidence - that he who alleges a fact must prove it. Where therefore a person in the position of the Respondents (*and the 1st Respondent in particular*) denies that he is or was the owner of motor vehicle KAU 298K as the Respondent did in paragraph 2 of the Defence the burden shifted to them. It is therefore not open to them, whether jointly or severally, to maintain that the Police Abstract which showed the 1st Defendant as the owner of the motor vehicle KAU 298K, is not conclusive evidence of the 1st Defendant's ownership of the said vehicle. If it were otherwise the universal acceptance of the Police Abstract as to the correctness of information therein would come into question and disrepute.

The Police Abstract Form is not one of the forms prescribed under the Traffic Rules made under S.119 of the Traffic Act. Its basis is however found in Section 5 of the Act -

"S. 5(1) The Registrar shall keep records of all motor vehicles and trailers registered in Kenya, and shall cause every licensing officer to keep records of all vehicles registered by him,

(2) Vehicle records maintained by the Registrar or a licensing officer shall be

open for inspection by any Police Officer, any collector of customs and the Chairman of the Licensing Board, who shall be entitled to copy any record in such records free of charge,

(3) Any person who satisfied the Registrar that he has reasonable cause therefore shall be entitled on payment of the prescribed fee to a copy any entry in such vehicle record.

It is thus clear to me that the entries as to ownership of a motor vehicle contained in a Police Abstract can only be from the Records of the Registrar of Motor Vehicles or a Licensing Officer under the Act.

In addition, under Section 86(1) of the Evidence Act, the court shall presume the genuineness of every document purporting to be -

(a)

(b)

(c) a document directed by law to be kept by any person if such document is kept substantially in the form required by law and is produced from proper custody.

(2) Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such origin probable.

Two conclusions may be drawn from the above provisions of the Traffic Act, and the Evidence. It is clear to me, **firstly** that entries as to ownership of a motor vehicle contained in a Police Abstract can only be from records of the Registrar of Motor Vehicles or his Licensing Officer under the Act. **Secondly** the courts are enjoined to be preserve as genuine any document directed to be kept by any person if such document is kept substantially in the form required by law and is produced from proper custody. **Thirdly** entries in an abstract can only be from the Register of motor vehicle owners which register can only be under the proper custody of the Registrar or Licensing Officer and of which, not a Police or Customs Officer has free access, but also ordinary citizens have access subject to payment of a fee.

To urge otherwise as it was done in this case and in others is absolutely illogical.

The Respondents did not help their case. Having denied ownership of their vehicle or even the driving then by the 2nd Respondent, they failed to discharge the burden thrust on them by their own averment that they were not the owners of the vehicle. I entirely agree and endorse the holding in **EDWARD MURIGA (through Stanley Murigu) vs. NATHANIEL DSCHULTER (Civil Appeal No. 23 of 1997)**, that -

"where a Defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the Defence is not evidence."

The other way putting this is that an averment is a pleading is not evidence.

I therefore find and hold that there was no basis for the learned trial holding that the Appellant had failed to prove ownership of the offending vehicle. Ownership of a motor vehicle is not a sine qua non in a claim for negligence arising out of an accident. The next question then is, did the Appellant prove her claim in negligence against the Respondents? I think she did, on the balance of probability.

NEGLIGENCE

A person who drives a vehicle on a highway has a duty to take reasonable and proper precautions in the use of the vehicle, and failure to observe such precautions will give a cause of action to any person

who suffers damage as a result.

In the old case of **HEAVEN VS. PENDER (1883), II Q.B.D., BRETT M.R.** said at p. 507 -

"Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his own part, has suffered injury."

A person, therefore, who drives a vehicle on a highway must always exercise not only care but also skill. He must observe the ordinary rules of the road unless a deviation from such rules is necessary to avoid an accident. He must not drive at an excessive speed in the circumstances. He must keep a proper look-out for pedestrians on other road users. He must, where expedient, give warnings of his approach, as at cross-roads. Even if another user of the road is negligent, he must exercise due skill in trying to avoid the consequences of that negligence.

Failure on the part of the driver in any such matter would be a breach of duty on his part and he would be liable for the damage caused by his negligence. What would amount to a breach of duty will always depend upon the circumstances of the case and there is no rule limiting the degree of care that is necessary to exercise.

For instance an open highway such the Nairobi-Thika Super Highway, or other dual carriage highway, a motor vehicle may proceed considerably faster than through the traffic city of Nairobi at any time of day, and the degree of vigilance may also be less. A speed of say 80 KPH may be perfectly safe on a main highway that a speed of 50 KPH may amount to gross negligence on a crowded thorough fare.

In an action claiming damages for injuries suffered as a result of negligence, the burden is on the plaintiff who avers negligence to prove by his own evidence a definite breach of duty by the Defendant.

In this case, it was the Appellant's evidence that she was travelling from Nakuru heading to Nairobi. She using a matatu (*a mini-bus*) which she boarded at the Nakuru Bus Stage. She boarded motor vehicle KAV 298K. The journey started at 11.00 a.m. She did not reach Nairobi. The vehicle was involved in a road traffic accident at a place known as KINALE. It was misty. There was a jam of other motor vehicles. The driver of our motor vehicle overtook without checking if it was safe to overtake on a long jam. Our matatu was hit by a lorry. This was on the Defendant's side of the road.

A careful and prudent driver will abide his time when faced with a long jam of other vehicles and bad weather such as a mist or fog. Notwithstanding the long line of other vehicles sneaking their way towards Nairobi. The 2nd Respondent became driver intrepid and elected to overtake the long line motor vehicles (*on the Defendant's side - meaning most probably on the right of the rear side*) met and got hit by the on-coming lorry from the opposite direction. If a plaintiff was looking for one act of negligence, overtaking a long line of motor vehicles on a misty road - where visibility would thus be poor, was foot-hurdy, but hardly surprising from our common matatu drivers. It is therefore not surprising that the 2nd Defendant was charged in Limuru Court most probably for careless driving as the Appellant did not think it fit to obtain a record of proceedings of that court. It would have been helpful, but not essential to the Appellant's civil case.

It is thus clear to me that the accident occurred due to the pure negligence of the 2nd Defendant while driving the motor vehicle of the 1st Defendant. There was certainly a breach of the duty of care owed by the 2nd Respondent to his passengers in motor vehicle KAU 298K, to drive with due care and attention and not overtake needless at a road jammed with other motor vehicles with minimal visibility.

INJURIES AND DAMAGES

The Appellant testified that as a result of the accident, she suffered injuries on the right hand, right leg and on the right side of the head. She was treated and discharged. She was charged and paid Sh 980/=

for treatment.

Mr. Okwiri learned counsel for the Respondents argued that there was no evidence of the Appellant's treatment at Kijabe A.I.C. Mission Hospital, and that in absence of treatment notes from Kijabe Hospital. There was no basis upon which Dr. Kiamba a Medical Practitioner could either have completed P3 (*Kenya Police Medical Examination Report*) or still less have issued his Report dated 26th October 2006.

The basis of this argument are decisions of this court such as **EASTERN PRODUCE (K) LTD VS. JAMES KIPKETER NGETICH [2005] eKLR** and similar decisions often cited by counsel to aid Defendants avoid liabilities on pure technicalities.

As already stated above the law is clear, he who alleges must prove. The proof is however on the balance of probability. The burden of proof in a suit or proceedings lies on the person who would failing no evidence at all were given on either side.

The Respondents offered no evidence. The appellant did. The appellant was a passenger in the Respondent's motor vehicle. The motor vehicle was involved in an accident. The Appellant attended AIC Kijabe Mission Hospital. She was attended to medical personnel of that hospital. At the end of the attendance she was issued with an outpatient receipt indicating the form of treatment and drugs she was given and the charges therefor. The treatment notes belong to the hospital. The Appellant was given a future attendance card number 441673. The Respondent never offered any evidence to contest either the outpatient receipt or the attendance card as that A.I.C. Kijabe Mission is an invention of the Appellant.

I think it is an observation or logic to hold that because the original treatment notes were not produced. Appellant did not travel in the Respondent's vehicle, the accident did not occur, the Appellant was not injured, the Appellant did not attend any hospital, the Police Abstract Report of the accident was a figment of the futile imagination of the Traffic Police, the alleged prosecution of the 2nd Respondent for careless driving did not occur, and I suppose ultimately ad absurdum, motor vehicle KAU 288K did not exist! And ultimately the report by Dr. Kiamba is also a fabrication. Whatever the origin of the doctrine of adducing evidence of original treatment may have been, a case of this land must be decided upon the totality of the evidence before the court, and not merely on the absence of original treatment notes. In this case, I hold that the Appellant had proved her case on the balance of probability, that she suffered injury as a result of the negligence of the 2nd Respondent, and employer of the 1st Respondent, and the Appellant suffered injury and claimed damages.

The quantum or extent of damages depends upon the nature of injury the Appellant suffered. The Appellant was treated and discharged the same day from A.I.C. Kijabe Mission Hospital. Dr. Kiamba who examined the Appellant about 7 weeks after the accident described her injuries as "grievous harm" and awarded her six weeks temporary disability. He gave her a clean bill of health except for residual pain in the right arm and both knees, and itchiness of the scars.

The Appellant's counsel had referred to earlier cases, such as **ATTORNEY GENERAL VS. WAYEIRA [1983] KLR** where the court assessed damages of Ksh 125,000/= for heard injury, lacerations, and injury to a right knee, and residual In **APRON CAR LIMITED VS. BIMOMO & 2 OTHERS [2004] 2 KLR** the court awarded Ksh 150,000/= for injuries similar to those suffered by the Appellant.

In **CECILIA W. MWANGI & ANOTHER VS. RUTH W. MWANGI** (*Civil Appeal No. 251 of 1996*) the Court of Appeal said - "*It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases*"

Taking the awards in those cases and the of inflation, I would award the Appellant the sum of Ksh 202,100/= comprising -

(i) General damages Sh 200,000/=

(ii) Special damages ----- 2,100/=

--- 202,100/=

The Appellant will also have the costs in this and the lower court.

The appeal succeeds, I set aside the judgment of the lower court, and substitute therefor with the orders above.

It is so ordered.

Dated, signed and delivered at Nakuru this 20TH day of JULY 2012

M. J. ANYARA EMUKULE
JUDGE