



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 80 OF 2006

JUSTO MAKADIANI SUNGUTI APPELLANT

VERSUS

UNITED MILLERS LIMITED 1ST RESPONDENT

REUBEN KIPNGETICH 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Honourable M. K. NYAKUNDI (Senior Resident Magistrate) in ELDORET CMCC. No. 63 of 2003 delivered on 25th May 2003)

JUDGMENT

In a Plaintiff filed in Court on 8th August 2001 and dated 25th May 2001, the plaintiff, **JUSTO MAKADIANI SUNGUTI**, (herein, the appellant) sued the defendants, **UNITED MILLERS** (herein, the first respondent) and **REUBEN KIPNGETICH** (herein, the second respondent) for damages arising from a road accident which occurred on the 24th April 2001 along Kapsabet-Nandi Hills road involving the plaintiff and a motor vehicle Reg. No. **KAM 365 J** Mitsubishi Canter said to belong to the first respondent and driven at the time by the second respondent.

It was the appellant's contention that he was on the material date lawfully, diligently and carefully riding his bicycle when the second respondent within the scope of his employment drove the said motor vehicle in a negligent, reckless and careless manner such that it veered off the road and hit the appellant from the rear.

Consequently, the appellant suffered severe personal injuries and in the process suffered loss and damages. The appellant therefore prayed for general and special damages plus costs of the suit and interest against the respondents jointly and severally.

In a statement of defence filed and dated 29th August 2001, the respondents denied the allegations made against themselves by the appellant and in particular the allegation that the first respondent was the registered owner of the material motor vehicle and the allegation that the said motor vehicle was driven in a negligent, reckless and careless manner such that it veered off the road and hit the appellant. The respondents contended that, if any accident occurred then the same was solely or substantially contributed to by the appellant. The respondents therefore prayed for the dismissal of the appellant's case with costs.

During the trial, the appellant (PW 1) testified that he was riding his bicycle from Nandi to Kapsabet when he was hit from behind by the material vehicle which he had not seen approaching. He lost consciousness and regained it while at Kapsabet Hospital where he had been admitted and discharged on

14th May 2001. He suffered injuries on the head, shoulder, hands, legs and a fracture of the pelvis. He reported the accident to the police and was issued with a P3 form. He was also issued with a police abstract. Later, he was examined by Dr. Aluda who prepared a medical report for a fee of Ksh. 1,500/-.

The appellant blamed the driver of the vehicle for the accident and contended that he was on his proper side of the road riding in a proper manner without being intoxicated. **P.C PETER GATITU (PW 2)** of Nandi traffic police produced the police abstract and stated that the material vehicle belonged to the first respondent.

None of the respondents testified in Court to either support their defence or controvert the appellant's testimony.

In the Judgment that followed the trial, the learned trial Magistrate dismissed the appellant's case on the basic ground that the ownership of the subject motor vehicle was not established. In so doing, the learned trial Magistrate rendered himself as follows:-

“On evidence by the plaintiff on cross examination, Court confirmed that there was no search from the Registrar of motor vehicles to confirm the owner of the motor vehicle. I have perused the pleadings on record. The defence in paragraph three (3) and four (4). It is very clear that the issue of ownership was crucial for the plaintiff to prove their case. The search from the Registrar of Motor Vehicles which was not done could have supported the plaintiff's case. At this time, having no official search from the Registrar of motor vehicles and the plaintiff having not proved his case on a balance of probability. I dismiss the plaintiff's case against the Defendant. The police abstract is not full proof of ownership.”

On quantum, the learned trial Magistrate said that if the plaintiff had proved his case, a sum of Ksh. 450,000/- would have been awarded as general damages. However, special damages would not have been awarded as the receipt produced offended the mandatory provisions of the Stamp Duty Act.

On liability, the learned trial Magistrate apportioned blame at a ratio of 50:50.

Being aggrieved by the decision of the learned trial Magistrate, the appellant preferred this appeal on the basis of the grounds contained in the Memorandum of Appeal dated 16th June 2006. Learned Counsel, **MR. ESIKURI**, argued the appeal on behalf of the appellant and indicated that the same is essentially on liability. The thrust of his arguments was that the learned trial Magistrate erred in law in dismissing the appellant's case on the basis of wrong and inapplicable principles of law.

In particular, learned Counsel argued that there was sufficient evidence to prove that vehicle belonged to the first respondent. A police abstract was produced to establish the fact. This was not challenged and there was no evidence reverting the appellant's evidence on the abstract.

Learned Counsel relied on his list of authorities dated 22nd November 2011 and contended that Ownership of the vehicle was proved by the production of a police abstract which was not challenged.

On liability, learned Counsel submitted that since the appellant was hit from the rear by the vehicle, he ought not have been found liable at any rate. Therefore, the apportionment of liability at 50:50 was not justified.

For all the foregoing reasons, the appellant urged this Court to allow the appeal.

On their part, the respondents opposed the appeal through their learned Counsel, **MR. MARITIM**, who argued that the appellant failed to prove that the first respondent was the owner of the vehicle. There was no conclusive evidence of ownership. As such, the finding of the learned trial Magistrate in that regard was proper. On liability, learned Counsel argued that the appellant's explanation on how the accident occurred did not throw any liability on the part of the respondents and since no charge was preferred against the second respondent, the apportionment of liability by the learned trial Magistrate at 50:50 was

proper.

Learned Counsel submitted that PW 2 testified that the appellant was charged with a traffic offence which was later withdrawn.

For all those reasons, the respondents prayed for the dismissal of this appeal with costs.

Having heard both sides, the obligation of this Court is to re-visit the evidence and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

In that regard, the evidence adduced at the trial has been re-visited hereinabove. This was the evidence in support of the appellant's case. The respondent's filed a joint statement of defence but did not lead any evidence in support thereof. Consequently, the appellant's evidence against the respondents remained largely uncontroverted. That being the position, it would follow and this Court finds as much, that the occurrence of the accident and the manner in which it occurred was undisputed. Therefore, there was no rationale for the learned trial Magistrate to have apportioned liability at the ratio of 50:50. Clearly, there was no contributory negligence proved against the appellant by the respondents. Therefore, the respondent ought to have been held 100% responsible for the accident.

Such liability would have been held against the two respondents only if ownership of the motor vehicle by the first respondent was proved.

The only evidence of ownership availed by the appellant was a police abstract showing that the vehicle belonged to United Millers of P.O. Box 620, Kisumu (i.e. the first respondent). The issue that arose was whether the police abstract was conclusive evidence of ownership of the vehicle by the first respondent.

The learned trial Magistrate found that the police abstract was not full proof of ownership.

In this Court's opinion, a police abstract is indeed not conclusive evidence of ownership of a motor vehicle. A certificate from the Registrar of Motor Vehicle would be conclusive evidence of such ownership. In this case, the certificate was not availed by the appellant who had to contend with the police abstract to prove ownership of the vehicle by the first respondent.

The said abstract was produced in Court without any objection from the respondents by P.C Peter Gatitu (PW 2). Indeed, the respondents did not offer any challenge to the police abstract and the contents thereof, which contents revealed that the vehicle was owned by the first respondent and was at the material time being driven by its driver, the second respondent.

Although the police abstract could not conclusively prove that the vehicle was at the material time owned by the first respondent, it nonetheless in the absence of the certificate from the Registrar of Motor vehicles, provided "*prima-facie*" evidence of ownership of the vehicle by the first respondent and more so, considering that the abstract was not challenged at all at the trial. (See, **WELLINGTON NGANGA MUTHIONA VS. AKAMBA PUBLIC ROAD SERVICES LIMITED AND ANOTHER CIVIL APPEAL NO. 260 OF 2004 AT KISUMU (C/A) and LAKE FLOWERS VS. CILA FRANCKLYN ONYANGO NGONGA & ANOTHER [2008] e KLR**). In the circumstances, this Court does not agree with the learned trial Magistrate that ownership of the vehicle was not established by the appellant. Indeed, such ownership was established on a balance of probabilities by the production of the police abstract. The dismissal of the appellant's case by the learned trial Magistrate on account of the ownership of the vehicle was based on wrong principles of law and hence erroneous.

For all the foregoing reasons, this Court would find both respondents fully liable for the consequences of their negligent acts which occasioned injury and loss to the appellant. The appellant was thus lawfully entitled to damages from the respondents.

With regard to quantum of damages, the medical reports by Dr. Aluda dated 14th May 2001 and Dr. Gaya dated 6th September 2002 showed that the appellant suffered serious injuries which included fracture of

the pelvis leading to a ten (10%) per cent permanent disability. The learned trial Magistrate assessed general damages for pain, suffering and loss of amenities at Ksh. 450,000/-.

However, the learned trial Magistrate overruled claimed special damages in the sum of Ksh. 1,500/- for reason that the payment receipt by Dr. Aluda offended the Stamp Duty Act. Nonetheless, the receipt proved that an expense had been incurred by the appellant.

The appellant had suggested a sum of Ksh. 500,000/- for general damages while the respondents had suggested a sum of Ksh. 150,000/-.

Considering the injuries suffered by the appellant and the trends of inflation at the time, a sum of Ksh. 450,000/- proposed by the learned trial Magistrate was reasonable and adequate compensation for pain, suffering and loss of amenities. The appellant was also entitled to special damages in the sum of Ksh. 1,500/-.

In the end result, this appeal is allowed to the extent that the Judgment of the learned trial Magistrate dismissing the appellant's suit is hereby set aside and substituted with Judgment being entered for the appellant against the respondents jointly and severally for the total sum of Ksh. 451,500/- together with costs and interest. The appellant will also be entitled to the costs of this appeal.

Ordered accordingly.

J.R. KARANJA
JUDGE

[Delivered and signed this 6th day of December, 2011]

[In the presence of M/s. Kimathi for the Appellant and M/s. Kosgey for the respondent]