



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 143 of 2008

V.O.W (Minor) suing through Uncle and Next Friend
E.O.W.....APPELLANT
VERSUS
PRIVATE SAFARI (E.A.) LTD.....RESPONDENT

(Being an appeal against the judgment and decree of Hon. Ms. W. Mokaya, SRM delivered on the 28th day of February, 2008 in Nairobi Milimani CMCC No.6935 of 2006)

J U D G M E N T

1. This appeal arises from a suit which was brought by a minor V.O.W suing through his next friend E.O.W (hereinafter referred to as the appellant). The minor had sued Private Safaris East African Ltd (hereinafter referred to as the respondent). The minor's claim was for general and special damages arising from injuries suffered by the minor in an accident involving the respondent's motor vehicle registration No.KAM 515T (hereinafter referred to as the subject vehicle). It was claimed that the accident was caused by the negligence of Paul Mwangi Waithaka, an employee, servant or agent of the respondent in the management and control of the subject vehicle.

2. The respondent filed a defence to the appellant's claim in which it admitted the accident but denied that it was caused by the negligence of its driver. The respondent claimed that the accident was as a direct result of the negligence of the minor's uncle and next friend.

3. During the hearing of the suit 3 witnesses testified in proof of the appellant's case. These were PC Charles Karumba an officer attached to Kilimani Police Station, the minor's next friend, and the minor. Briefly their evidence was as follows: On the material day, the minor who was 17 years old at the time of testifying was riding a bicycle along Ngong road on his way to school. When he reached around Dagoreti Corner he was hit by the said vehicle. The minor explained that the said vehicle moved from the right side of the road and hit him on the left side where he was riding. As a result of the accident the minor suffered injuries which included fracture on the right elbow and right leg. He was taken to Kenyatta National Hospital where he was treated. PC Charles Karumba produced an abstract report of the accident which showed that the pedal cyclist was blamed for the accident. He admitted that he was not the one who was investigating the case.

4. Paul Mwangi Waithaka testified in support of the defence. He explained that on the material day he was driving the subject vehicle. While at Dagoreti Corner roundabout he suddenly saw something ahead. He then saw

someone riding a bicycle and the cyclist came and hit the right side of the subject vehicle. The witness maintained that he was not speeding and that it was the cyclist who hit the subject vehicle and damaged it on the front right side headlamp.

5. Written submissions were filed on behalf of both parties each urging the court to find in favour of his client. In her judgment, the trial magistrate noted that the only relevant evidence regarding how the accident occurred was the evidence of the minor and that of the only witness called by the defence. The trial magistrate noted that the evidence of the police officer, who produced the police abstract, did not corroborate the appellant's evidence but gave credibility to the defence. The trial magistrate noted that the collision on itself was not evidence of liability. She concluded that the appellant had failed to prove their case on a balance of probability. Consequently, the trial magistrate assessed general damages at Kshs.350,000/= but dismissed the appellant's suit.

6. Being aggrieved by that judgment, the appellant has lodged this appeal raising 7 grounds as follows:

- (i) That the learned magistrate erred in law in dismissing the suit in view of the evidence adduced before the court.
- (ii) That the learned magistrate erred in law and fact in dismissing the suit when the appellant had proved on a balance of probability that the respondent was liable as alleged in the plaint.
- (iii) That the learned magistrate misapprehended the evidence before the court and as such arrived at a wrong finding on the issue of liability of the respondent to the appellant.
- (iv) That the learned magistrate misdirected herself in law and fact when she considered the evidence of the respondent on who was to blame for the accident when the respondent did not plead any negligence on the part of the appellant nor make any allegation of blame against the appealing for the accident in its defence.
- (v) That the learned magistrate erred in law and fact in determining issues not joined by the parties in the pleadings.
- (vi) That the learned magistrate erred in law and in fact in reaching findings not supported by and contrary to the evidence before the court.
- (vii) That the learned magistrate erred in law and in fact in failing to appreciate and take into account documentary evidence produced by PW2 in reaching her findings.
- (viii) That the learned magistrate erred in law and fact in failing to consider the evidence before the court in its totality.

7. In support of the appeal, Mr. Oluoch who appeared for the appellant abandoned ground No.(i). Mr. Oluoch submitted that under Order VI Rule 3 and Rule 8 of the Civil Procedure Rules, pleadings must contain all necessary particulars. He noted that a party was bound by his or her pleadings. Thus, evidence must be lead to prove the claim as pleaded. Mr. Oluoch submitted that in the defence no particulars of negligence were alleged against the minor, although it was alleged that the next friend was negligent. It was contended that the next friend was not a party to the suit, nor was any evidence led to prove the particulars of negligence alleged against the next friend. It was noted that the issue of negligence against the appellant was introduced in the submissions and ought to have been ignored. The following cases were relied upon:

- ***Nairobi City Council vs Thabiti Enterprises Ltd Civil Appeal No.264 of 1996.***
- ***Nganga & another vs Owiti & another [2008] 1KLR EP 749.***
- ***Mukasa vs Singh [1969] EA 442.***

8. It was further argued that contrary to the trial magistrate's finding, the appellant proved his case as the evidence of the appellant's witnesses established the particulars of negligence which were pleaded. In that regard the case of ***Peter Ndungu vs Telkom (K) Ltd HCCC No.7397 (Machakos)*** was relied upon. It was submitted that the trial court failed to consider the evidence as a whole. The court was urged to allow the appeal and further allow the special

damages of Kshs.16,700/= which was proved.

9. Mrs. Ochieng who appeared for the respondent opposed the appeal. She submitted that the trial magistrate had the opportunity of examining the demeanour of all the witnesses who appeared before her. She noted that the trial court did not consider the negligence of the minor as an issue. She maintained that the trial magistrate dismissed the appellant's suit, as the claim against the respondent was not proved. Mrs. Ochieng maintained that evidence was led to show that the next friend was negligent. She argued that it was upon the appellant to establish negligence, and this not having been done, the court was right in dismissing his suit.

10. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial court, I have also given due consideration to the submissions made before me. I find that in the plaint, particulars of negligence were alleged against the driver of the respondent as follows:

- (i) Driving the said motor vehicle at excessive speed in the circumstances.
- (ii) Failing to have due regard to other road users particularly the plaintiff thereby causing the accident.
- (iii) Failing to see the plaintiff in time to avoid the accident.
- (iv) Failing to swerve, manage and or control the said motor vehicle or otherwise warn the plaintiff so as to avoid the accident.
- (v) Failing to keep the motor vehicle within his lawful side while driving on the road.
- (vi) Hitting the plaintiff on the right side of the road which was the plaintiff's lawful side.

11. In his evidence, the minor plaintiff never testified that the respondent's vehicle was being driven at an excessive speed. He claimed that he was riding on the left side when he saw the vehicle coming with lights on. He claimed that the vehicle moved from the right side and hit him on the left side. From the evidence of the minor, it was not clear whether he was travelling the same direction as the respondent's vehicle or whether there was anything that the respondent's driver could have done to avoid the accident.

12. Section 107 of the Evidence Act states as follows:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

13. In this case, the appellant asserted that the accident was caused by the negligence of the respondent's driver. It was therefore for the appellant to establish facts upon which such negligence could be established. Although the collision was not in dispute, the evidence before the trial magistrate was not conclusive on the cause of the accident. The trial magistrate was faced with two versions, that of the appellant and that of the respondent. The trial magistrate who had the advantage of seeing the demeanour of the witnesses rejected the appellant's evidence.

14. I have no reason to fault the trial magistrate in that regard. I find that there was no evidence upon which a finding of negligence against the appellant's driver could be arrived at. It was not for the respondent to prove that he was not negligent but for the appellant to discharge that burden. Indeed, an accident can be caused by many factors. For the above reasons, I find no merit in this appeal and do therefore dismiss it. I make no order as to costs.

Dated and delivered this 25th day of May, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Oluoch for the appellant

Advocate for the respondent absent

Eric - Court clerk