REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 69 of 2006

ABDUL KADIR EZMI……………………………....………………………APPELLANT

VERSUS

LYDIA KAMBURA MWONGERA…………………………………………RESPONDENT

(Appeal from the judgment of the Hon. D. Moroka, Resident Magistrate in Maua

P.M.C.C. No. 26 OF 2006)

: Negligence – Proof

Evidence to be of probative value -

Particulars of negligence – not enough.

: Judgment – be reasoned –

Order rule 4 of Civil Procedure Rules.

JUDGEMENT

The Appellant has appeal to this Court on five grounds against the above captioned judgment of the trial court. The grounds are –

(1) the learned trial magistrate erred in law and fact in holding in favour of plaintiff yet negligence was not proved,

(2) the learned magistrate erred in law and fact in arriving at a decision without assigning reasons thereto.

(3) The learned trial magistrate's award on quantum was excessive and inordinately high

(4) the learned trial magistrate erred in law and fact in disregarding the authorities on quantum relied upon by the Appellant,

(5) the learned trial magistrate's judgment is wrong in law.

After Mr. Carl Peters Mbaabu had argued his appeal on all the five grounds, Mr. Kiambi learned Counsel for the Respondent raised a point by way of a preliminary issue as to whether the appeal was competent as drawn as it lacked any prayer if the Court were to find that the appeal was meritorious. I shall dispose of this point first.

Order XLI Rule I (1) & (2) of the Civil Procedure Rules provides that –

(1) Every appeal to the high Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

Rule 13 (1) of Order XLI of the Civil Procedure Rules allows an appellant to amend his memorandum of appeal without leave at any time before the Court gives directions under rule 8 B of the same order.

I will also make reference to Order VI rule 12 of the Civil Procedure Rules which provides that no technical objection may be raised to any pleading on the ground of any want of form.

I will further make reference to order VII rule 6 of the Civil Procedure rules which state that ever plaint shall state specifically the relief which the Plaintiff claims, either simply or in the alternative and it shall not be necessary to ask for costs which may always be given as the court thinks just.

It was learned Counsel for the Appellant, Carl Peters Mbaabu's argument that there was no provision in Order XLI – on appeals which requires an appeal to contain a prayer at the end of the numbered consecutive grounds. I do not with respect to learned counsel agree with this submission.

Order XLI rule 1 clearly states that every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. Under Section 2 of the Civil Procedure Act (Cap 21, Laws of Kenya), the mother of Order XLI pursuant to Section 81 thereof (Rule making provision), a pleading is defined as including –

"a Petition or Summons and the statements in writing of the claim or demand of any Plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counter-claim of a defendant ...."

For example, a plaint is a typical pleading by which the majority of claims are commenced. Order VII rule 6 aforesaid requires that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative. The only item of claim which may be left out is costs and interest as these are the discretion of the Court even though costs generally follow the event.

Carl Peters Mbaabu argued in his usual bombast style that is clear from the grounds of appeal that if his appeal succeeds, there is only one conclusion, the judgment of the lower court will be set aside. The difficulty with that argument is that it flies into the face of the defective appeal. It is not merely a question of form. The law is about both substance and form or procedure. The substance here is that the appeal is incurably defective not merely for want of form – because it is has form, but because it has no claim or relief sought. The law is that parties are bound by their pleadings unless first amended. There was no amendment of the memorandum of appeal in this matter. It is not for the Court to fill gaps in any party's pleadings. I would for that reason alone dismiss the Appeal.

However taking the view held by Mr. Carl Peters Mbabu that the appeal was regular and not in any way defective, and the Court were to ignore the defect in the absence of any prayer for relief at the end of the memorandum of appeal, will the appeal succeed? Let us therefore examine each of the grounds of

appeal.

Ground 1

That the learned magistrate erred in law and fact in holding in favour of the plaintiff yet negligence was not proved.

In arguing this ground Counsel relied on the decision my brother, J. W. Mwera in the case of PETER KINYANJUI MBURU VS. GEOFFREY KINYUA MUCHOYA & TWO OTHERS (Nairobi HCCC NO.1400 OF 1992) in which the learned judge opined quite correctly that -

"the reason why a party is called to prove his case formally or in order to prove the damages claimed is to establish the basis of the claim, that the evidence should support the claim of negligence, that the Court then finds liability to be shouldered by the Defendant and damages are properly supported and awarded.

The Court of Appeal came to a similar conclusion that a Plaintiff must prove his case pleaded in the Plaint. Court of Appeal at Nairobi Civil Appeal No. 252 of 1998 between MARI AYO WANYAMA & 2 OTHERS VS NAIROBI CITY COUNCIL.

Each case must however be decided on the basis of its own peculiar facts, as indeed those were decided. The case here is that the Respondent was a passenger in the Appellant's vehicle. The vehicle was being driven fast at between 120-140 KPH. When it hit a pot hole or was avoiding some pot hole (s) it veered off the road and rolled. The particulars of negligence, and the Plaint is perhaps not a model of pleadings as so often in these cases – when pleadings are cut and pasted without taking into account the particular circumstances of the accident. In this case the Plaintiff relied upon the doctrine of *res ipsa loguitur* (the thing speaks for itself).

The doctrine of res ipsa loquitur provides that in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. As Blacks' Law Dictionary 8th Edn. At p.1336 says –

"the phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact, for a defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury (or court), in light of common sense and experience, inferring that the accident was probably the result of the defendant's negligence, in the absence of an explanation or other evidence which the jury/or court believes"

Negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation, and includes any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except conduct that is intentionally, or want only disregardful of others' rights. The term denotes culpable carelessness.

In this case the Plaintiff testified how she boarded motor vehicle KAT 663A at Easleigh Estate Nairobi, and at a place called Kangeru along the Meru-Nairobi road, the defendant was over speeding and driving at 120-140 Kph, hit a pot hole and the vehicle rolled severally. It does not take the science of relativity to observe that if one is driving at that speed, and suddenly comes upon a pot hole, the likely chances are that the vehicle will hit the pot hole with a big thud – and if the driver was not anticipating such a hole on the road, he will be taken by surprise, and that the chances of bumping and rolling off the road are very real and high. That is most probably what happened in this case, and is clearly implied in the doctrine of res *ipsa loquetur*, and indeed the Respondent's evidence in chief. The evidence of PW3, No.67727 P.C. Peter Njeru confirmed the occurrence of the accident on the material date, and that the Plaintiff was a passenger in the said motor vehicle.

The Appellant cannot therefore contend either that the accident did not occur or that negligence was

not proved. The evidence of the Respondent is clear testimony of the occurrence of the accident, and the doctrine of *res ipsa loquitur* raises a prima facie case, which the Appellant did not rebut that the accident occurred because of his reckless speed whether or not he knew the condition of the road. Ground 1 of the Appeal therefore fails and I so hold.

Ground 2 – That learned trial magistrate erred in law and fact in arriving at a decision without assigning reasons thereto.

Mr. Carl Peters Mbaabu learned Counsel for the Appellant urged that the learned trial Magistrate failed to comply with the requirements of Order XX rule 4 of the Civil Procedure Rules which sets out what a judgment in a defended suit should contain, and these are-

(a) a concise statement of the case;

(b) the points for determination

(c) the decision thereon,

(d) the reasons for such decision.

Counsel relied on the decision of Hon. Mr. Justice Musinga in the case of OCHIENG VS AMALGAMATED SAW MILLS LTD [2005] (KIR 151, where the learned judge held *inter alia* that

a judicial officer is under a duty to state the reasons which made him arrive at a particular decision. Any judgment that does not contain the essential ingredients of a judgment as required under Order XX Rule 4 of the Civil Procedure Rules is not a judgment and an appellate court would most likely set it aside."

In STANDARD CHARTERED BANK LTD VS INTERCOM SERVICELTD & 4 OTHERS (2004) 2KLR 183, the Court of Appeal held *inter alia* that it was the duty of the High Court under Civil Procedure Rules Order XX rule 4……..

"to carefully analyze the contradictions and inconsistencies in the evidence of witnesses……"

There is no gainsaying either the provisions of Order XX rule 4 or indeed the holding in the above-cited cases. There is no school for model judgment writing. The precise requirements of Order XX rule 4, will not be discernible in that order. They will however be discernible from the judgment as a whole.

The judgment of the learned trial magistrate clearly identifies the issue –

"the Plaintiff/Respondent sued the Defendant/Applicant) for damages arising out of injuries suffered by the Respondent as a result of a road traffic accident caused by the Appellant's careless and negligent driving of his motor vehicle."

That is the precise statement of the claim and basis thereof. That too was the point of determination whether or not the Appellant was negligent and cause of the accident where the Respondent suffered the injuries in issue.

Counsel for both the appellant and the Respondent filed written submissions through their Counsel. The Appellant's Counsel's submissions generally referred to cases where the claimants suffered relatively minor injuries and therefore received relatively low awards of damages. The Respondent's Counsel on the other hand cited cases with comparable injuries and comparable awards of damages.

These submissions and cases were listed by the trial magistrate in his judgment, and he clearly stated –

"After listening to both parties and having considered the evidence adduced at the trial and also having looked at the submissions and authorities annexed thereto, the Court finds on balance of probability the

plaintiff has proved his case against the defendant and I therefore enter judgment for the Plaintiff."

There is therefore both the premise, the syllogism, and the determination or conclusion. Learned Counsel for the Appellant glossed over the fact that the Appellant declined to give evidence at the trial and the Court had to proceed ex parte on the last day of the trial. The trial Court did with the evidence before him, the pleadings and submissions of Counsel arrive at a fair conclusion, and determination of the matter. Ground 2 of the Appeal must therefore fail, and I so hold.

Ground 3 – The learned Magistrate's award on quantum was excessive and inordinately high

Ground 4 – The learned trial magistrate erred in law and fact disregarding the authorities on quantum relied upon by the Appellant.

Ground 5 – the learned trial magistrate's judgment is wrong in law .

Having held as I have done on ground 2, that the learned trial magistrate complied with the provisions of Order XX rule 4 of the Civil Procedure Rules, that he did in fact consider the evidence before him, the submissions by the Applicant's Counsel as well as those of the Respondent's Counsel, I am unable to accede to the Appellant's contention in Ground 3, that the award of damages was excessive and inrodinately high. It was not, and neither can I for the same reasons accede to ground 4, that the Appellants authorities were disregarded by the trial court, and neither can I say that the trial Court's judgment was wrong in law.

The principles upon which an appellate court will interfere with a trial court's assessment of damages were reiterated by the Court of Appeal in the case of GICHUKI VS TM-AM AND CONSTRUCITON GROUP (Africa) [2003], E.A. 83. Those Principles are that the trial Court must have applied a wrong principle, for instance, taking into account an irrelevant factor or failing to take into account a relevant factor, misapplying or not understanding the correct law or not correctly appreciating the evidence adduced, or short of these the damages awarded by the court are so inordinately high or low that some error of principle must be evident.

None of those principles were violated or are present in this matter. As a result therefore, the Appellant's appeal dated and filed on 26.07.2006 is dismissed with costs to the Respondents.

Those are the orders of this court.

Dated, delivered and signed at Meru this 8th day of May 2009.

M. J. ANYARA EMUKULE

(JUDGE)