REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 91 of 2002

MIKUMBUNE DAIRY FARMERS CO-OP. SOCIETY LIMITED..... 1ST APPELLANT

M'RUCHIU ROBERT MUTWIRI .....2ND APPELLANT

VERSUS

FREDRICK MUTWIRI ..... RESPONDENT

(An appeal from a judgment of the Hon. Mr. Njeru Ithiga S.R.M. in Meru CMCC No. 347 of 2001 delivered on 23rd July 2002)

JUDGMENT

The respondent who was the plaintiff in the lower court filed a suit in the lower court seeking compensation for personal injury following a road traffic accident. The lower court gave judgment in favour of the respondent for Kshs. 300,000/= being general damages, Kshs. 72,928/= being special damages, and these awards were reduced by 30% respondent's contribution to the negligence. The appellant who was the defendant in the lower court was aggrieved by that decision and filed this appeal. This being the first appellant court, I am obligated to re-evaluate the lower court's evidence and to reach my own conclusion bearing in mind that I did not have the benefit to hear or see the witnesses. The respondent in evidence stated that on 26th December 2000 whilst walking towards Nkubu, on the main Chuka Nkubu road, he was hit by the side mirror of the motor vehicle registration No. KAE 013Z. He said that he was walking on the right side of the road towards Nkubu. He was 3 metres off the tarmac. That vehicle was coming from Nkubu direction and when it reached near him, it suddenly came to where he was and hit him with the side mirror. He was hit on the left shoulder. The vehicle in swerving was attempting to avoid a pot hole. At the time, it was being driven at high speed. On being hit, the vehicle did not stop. It however came back later and took him to Nkubu hospital. He said that the accident occurred 100 metres away from Nkubu hospital. At the time when the accident occurred, the respondent was in the company of his friend Mutai. Mutai was 10 metres away from the respondent when the accident occurred. Respondent said that Mutai followed the subject vehicle and came back with it at the scene later. On being hit, the respondent suffered a compound fracture on the leg. At the time of the hearing of the case, although his leg had healed, he complained of numbness of his toes. He paid the hospital Kshs. 8,000/= and the balance of Kshs. 62,828/= was paid by Riungu in exchange with Riungu leasing his land for 10 years. PWII Mutai said that on the material day, he was in the company of the respondent. On reaching Nkubu town, he saw a vehicle from Meru town. It was a lorry. It came off the road and hit the respondent but missed him. He said the vehicle hit the respondent on his shoulder. Mutai said he had previously seen this vehicle. He described it as a milk van. It failed to stop. He then proceeded to say:-

"I do not know why the vehicle swerved to hit the plaintiff (respondent)"

This contradicted what the respondent had earlier said that the vehicle had swerved to avoid hitting a pot hole. The question that arises is if the respondent saw the vehicle swerving to avoid hitting a pot hole, why would then his companion PWII who was with him not see the same thing? This witness also contradicted the respondent by saying that the respondent was 3 ft away from the tarmac and not 3 metres away as the respondent had said. This witness also contradicted the respondent by saying that after the accident he did not follow the vehicle but rather went to his home. PWIV was the police officer who drew the sketch plan. He attended the accident scene and noted some blood on the ground. He was of the view that there was no sufficient evidence to charge the appellant with the offence of careless driving. PWV was Francis Riungu. He stated that he paid on behalf of the respondent Nkubu hospital Kshs. 62,000/= on 13th March 2001. He however did not produce evidence of that payment. In defence, DWI stated that on the material day, he drove the subject vehicle at 9.30 am along Nkubu Chuka road. He denied that he was involved in any accident. On his way back, he was stopped by a group of people who asked him to take the respondent to hospital because he had hit him. He denied having hit the respondent and stated that the accident scene was 80 metres away from where the traffic police were. He suspected that the respondent and others merely picked his vehicle out of the many on the road that day. DWII was a clerk with M'Ikimbune Dairy Farmers. On that day, he was in the subject vehicle with DWI traveling from Nkubu to Kiigene. He sat in front with the driver. On their way back, people stopped the driver and alleged that he had knocked someone. The driver denied that his side mirror had knocked the respondent. The learned magistrate found that the respondent and PWIII had positively identified the appellant's vehicle. He therefore found that the respondent had proved his case. The appellant filed the following grounds of appeal:-

1. The Learned Senior Principal Magistrate erred in law and in fact in holding that the respondent had proved on a balance of probabilities that it was the 1st appellant's motor vehicle KAE 013Z which hit the plaintiff.

2. The Learned Senior Principal Magistrate erred in law and in fact in holding that a case for negligence had been established by the respondent against appellants.

3. The Learned Senior Principal Magistrate erred in fact in failing to direct himself on the fact of the unreasonable time taken by the respondent at the alleged accident spot which was less than 100 metres from the hospital and police officers manning a road block.

4. In the alternative the Learned Senior Principal Magistrate erred in law in fact in apportioning liability at 70:30 against the appellant while the respondent had not denied the alternative allegation of contributory negligence.

5. Further in the alternative, the Learned Senior Principal Magistrate erred in law and in fact in awarding general damages which were so inordinately high for the alleged injuries that they amounted to a misdirection on the degree of injuries sustained and against the principle of comparable injuries attracting comparable awards in damages.

6. The Learned Senior Principal Magistrate erred in law and in fact in awarding special damages not strictly proved.

7. The Learned Senior Principal Magistrate erred in law and in fact in arriving at a decision wholly against the weight of evidence and submission before the court.

The parties filed submissions in support of their case which submissions, I have had an opportunity to read and consider. In my view, ground number 1 and 2 can be considered together. Those 2 grounds relates to the lower court finding that the appellant vehicle caused the accident and also relate to the finding of negligence on the part of the appellant. I dare say that I disagree with the finding of the learned magistrate on whether the appellant's vehicle caused the accident. The reason for my disagreement with that finding is because the respondent and his witness who were at the scene of the accident

fundamentally contradicted each other. The respondent said he was 3 metres away from the tarmac when the accident occurred. His witness said he was 3 ft away. But perhaps the most telling contradiction was the reason attributed by each one of them why the vehicle swerved. The respondent said it swerved to avoid hitting a pot hole while his witness did not know why it swerved. The other reason why I am unable to support the finding of the learned magistrate is because the respondent and his witness failed to indicate when they noted the registration number of the motor vehicle. PWIII stated that he had previously seen that vehicle on that road. Could that be the reason why he alleged it caused the accident? The respondent said that the vehicle was going at high speed. Suddenly, it swerved and hit him. At what point did he then note the registration number of the vehicle? Because of the failure of the respondent to clearly adduce evidence on when they noted the registration of that vehicle, the defence raised by the appellant has some credence. It is also not clear whether PW2 was amongst the group of people who stopped the appellant's vehicle on its way back. Considering that evidence, one would clearly come to the conclusion that the appellant was possibly stopped by the group of people on mere suspicion. It certainly is not believable that the appellant having caused an accident 80 metres away from where the police were stationed could have returned on the same route within a short time. I therefore make a finding that the respondent failed to prove that the appellant's vehicle hit him on a balance of probability. Accordingly, I find that negligence against the appellant was not proved. Ground 1 and 2 of appeal succeeds. Ground number 3 cannot be a basis of challenging the lower court's decision. It is clear that the respondent was injured. He could not have managed with a compound fracture to his leg take himself to the hospital. Why PWIII his friend did not take action to ensure he was taken to hospital immediately cannot adversely reflect upon the respondent. Ground 3 fails. On ground 4 in my view, the lower court did take into account the respondent's contributory negligence. The court allocated 70% to 30% against the appellant. Therefore I find that ground 4 fails. The injuries that were suffered by the appellant according to the P3 were severe and having considered the authorities cited before the lower court, I cannot fault the award of general damages given to the respondent. Ground 5 therefore also fails. On ground 6, I find that I am in agreement with the appellant. The respondent, when he filed his claim in the lower court, failed to pray in the final prayer of the plaint itemized special damages. Having failed to have done so, the learned magistrate was not entitled to award the respondent Kshs. 72,928/= in special damages. There are numerous authorities which clearly states that special damages have to be specifically prayed for and proved. See **Hahn V. Sigh (1985)** KLR 716 where Court of Appeal held:-

"***Special damages must not only be specifically claimed but also strictly proved.***"

In this case, they were not prayed for. They were also not entirely proved. The respondent only proved payment of Kshs. 8,000/=. The payment that was made on his behalf by PWIV was not proved by means of a receipt. Even if there was proof of payment of Kshs. 8,000/= since it was not specifically prayed for in the plaint the respondent was not entitled to be awarded that amount. The respondent having not prayed for special damages, he did not at the time of filing the plaint pay the filing fees for Kshs. 72,928/=. More outrageously the decree prepared by the lower court after judgment was passed did not receive the payment of further court fees. None were paid. All in all, I am of the view that the appellant appeal does succeed to the extent that the respondent failed to prove that it was the appellant's vehicle that caused the accident. The judgment of this court is as follows:-

1. The judgment of the lower court of 23rd July 2002 is hereby set aside and is substituted with an order dismissing the respondent's suit in Meru CMCC No. 347 of 2001 with costs of that suit being awarded to the appellant.

2. The appellant is also awarded costs of his appeal.

Dated and delivered at Meru this 25th day of September 2009.

MARY KASANGO

JUDGE