BERNARD WAMBOKA LUKORITO..……..…….. APPELLANT

VERSUS

ROBERT KINUTHIA MURUA…..…….. RESPONDENT

(Being an appeal against the judgment of Honourable Mrs. M.A. Odero dated 27th June, 2007 at Milimani Commercial Courts, Nairobi in Civil Suit No. 10036 of 2005)

J U D G M E N T

1. This judgment arises from a suit which was filed in the Chief Magistrate's Court at Nairobi, by Bernard Wamboka Lukorito, hereinafter referred to as the appellant. He had sued Robert Kinuthia Murua, hereinafter referred to as he respondent, seeking general and special damages. The appellant's claim arose from an accident involving motor vehicle KAN 584D in which the appellant suffered personal injuries. The appellant claimed that the respondent was the registered owner and driver of motor vehicle KAN 584D. The appellant further claimed that the accident was caused by the negligence of the respondent.

2. The respondent filed a defence in which he denied that an accident involving motor vehicle registration number KAN 584D occurred, or that if such accident occurred, the same was caused by his negligence. The respondent further stated without prejudice, that the accident was wholly caused or substantially contributed to, by the appellant. The respondent denied that the appellant suffered any injury, and further maintained that the appellant's plaint was incurably defective.

3. During the hearing in the lower Court, the appellant called three witnesses. These were: Dr. Kiama Wangai, Sgt. Vincent Sululu, and the appellant. Their evidence was briefly as follows: On the 12th July, 2005 at about 6pm the appellant was with his cousin, Fred Manyonge. They were standing at the side of the road chatting, when a matatu came from the City Center direction. The matatu swerved off the road onto the pavement, where the appellant was standing. It hit both the appellant and his cousin.

4. The appellant who lost consciousness was admitted at Kenyatta National Hospital for four days. Upon being discharged from Kenyatta National Hospital, the appellant was re-admitted at Nazareth Hospital for a further two weeks. He later reported the accident at Karuri Police Station and was issued with a P3 form. The appellant explained that the matatu which hit him was registration number KAN 584D. He blamed the driver of the matatu for causing the accident. His cousin, Manyonge died as a result of the accident.

5. Under cross-examination the appellant conceded that there was also a bus which was involved in the

accident, but denied that he was hit by the bus. The appellant maintained that he was informed that he was hit by the matatu. Sgt. Vincent Sululu an officer attached to Karuri Police Station, produced an abstract report of the accident. Sgt. Sululu explained that the driver of the matatu registration No. KAN 584D was arraigned and charged at Kiambu Court for the accident. He stated that there was also a bus, KAL 870B which was also involved in the accident.

6. Dr. Kiama Wangai who examined the appellant testified that the appellant suffered blunt injury to his chest, deep cut wounds on the head, fracture of right clavicle, two fractures of pelvis, blunt injury to head with loss of consciousness. As a result of the injuries, the appellant's right leg is shorter by 3 centimetres, and the appellant walks with a limp. The appellant is also at risk of developing osteoarthritis. Dr. Wangai assessed the appellant's permanent functional disability at 15%.

7. At the close of the appellant's case, hearing was adjourned to 18th April, 2007. On that day, there was no appearance for the respondent and the trial Magistrate reserved the matter for submissions. Accordingly, both parties filed written submissions.

8. For the appellant, it was submitted that the respondent was negligent in veering off the road and knocking the appellant. The appellant pleaded *res ipsa loquitor*. The Court was urged to note that the respondent, who had a duty to explain why the vehicle veered off the road, opted to call no evidence. Relying on the case of ***Msuri Muhhiddin vs. Nazzor bin Seif El Kassaby & Another [1960] E.A. 201,*** the Court was urged to find the respondent fully liable. With regard to quantum, the Court was urged to award general damages of between 650,000/= and 700,000/=.

9. For the respondent it was submitted that the burden of proof of any particular fact, lies on the party who wishes the Court to believe in its existence, unless it is proved by law that the proof of that fact shall lie on any particular person. It was submitted that the appellant had no personal knowledge of the motor vehicle which hit him, but relied on information from people who were not called to testify. It was contended that there were two vehicles involved in the accident, and the appellant therefore ought to have called at least one eye witness, to prove that it was motor vehicle registration number KAN 584D which hit him.

10. It was further submitted that the appellant did not prove that the respondent owned motor vehicle KAN 584D, at the time of the accident, as no certificate of search from the registrar of motor vehicles was produced. The Court was urged to find that the appellant's case could not stand as the ownership of the motor vehicle was the only link to liability on the part of the respondent.

11. Without prejudice, it was submitted that the appellant should be held substantially to blame for the accident as he was not vigilant. It was contended that the report prepared by Dr. Wangai was rather exaggerated. On the issue of quantum it was submitted that an award of Kshs.50,000/= would be sufficient compensation.

12.In her judgment the trial Magistrate dismissed the appellant's suit, holding that the appellant did not see the registration number of the vehicle which hit him, nor did he call any witness to testify regarding that vehicle. The trial Magistrate further found that the appellant had not called evidence to establish ownership of the motor vehicle.

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

(i) That the learned Ag. Chief Magistrate erred in law and in fact in dismissing the plaintiff/appellant's suit in its entirely and against the weight of evidence adduced at the trial.

(ii) That the learned Ag. Chief Magistrate erred in law and in fact by totally disregarding the plaintiff/appellant's evidence and which evidence was uncontroverted.

(iii) That the learned Ag. Chief Magistrate erred in law and in fact in failing to appreciate the degree of proof required in civil cases.

(iv) That the learned Ag. Chief Magistrate erred in law and in fact in failing to appreciate the legal principle in civil matters (that is to say) that which is admitted by the pleadings need not be proved.

(v) That the learned Ag. Chief Magistrate erred in law and in fact in totally ignoring the evidence of PW3, one Sergeant Vincent Sululu, Police Force No.54782.

(vi) That the learned Ag. Chief Magistrate erred in law and in fact in failing to assess the quantum of general damages awardable to the plaintiff/appellant and the special damages which were pleaded and proved at the trial.

14. At the hearing of the appeal, although duly served, there was no appearance on behalf of the respondent. Hearing of the appeal therefore proceeded *ex parte.* In support of the appeal, Mr. Mwangi who appeared for the appellant submitted that the issue of ownership of the motor vehicle was not in dispute as the respondent had admitted paragraph 2 of the plaint. There was no requirement for the appellant to prove ownership of the motor vehicle. It was further submitted that the trial Magistrate erred in failing to assess the quantum of damages. The Court was therefore urged to refer the suit back to the lower Court to be heard by another Magistrate.

15. I have carefully reconsidered and evaluated all the evidence which was adduced before the lower Court, as I am expected to do in this first appeal. I have also given due consideration to the submissions which were made before me. Paragraph 2 of the appellant's plaint which was filed on 9th September, 2005 stated as follows:

"*The defendant is a male adult of sound mind residing and working for gain in Nairobi and was at all material times the driver and registered owner of motor vehicle registration number KAN 584D. His address for service for the purposes of this suit is P.O. Box 52861, Nairobi. (Service of summons to be effected through the plaintiff's advocates offices*)."

16. The respondent's reply to that averment is contained in paragraph 1 of the defence filed on 30th September, 2005 which stated as follows:

"*The defendant admits the descriptive contents of paragraph 2 of the plaint save that his address shall be c/o A.N. Ngunjiri & Company Advocates, Portal Place, 3rd floor, Banda/Muindi Mbingu Street P.O. Box 61747 Nairobi (Our Ref: ANN/BS/601/2002).*"

17. Paragraph 2, 3, 4, 5, 6 and 10 of the defence, all of which contain denials regarding facts pleaded in the plaint, did not make any reference to the issue of ownership of motor vehicle KAN 584D. Thus there was no specific denial of the appellant's pleading that the respondent was at the material time, the driver and registered owner of motor vehicle registration number KAN 584D. These facts taken together with paragraph 2 of the plaint, and the admission contained in paragraph 1 of the defence leads to a conclusion that there was no issue for determination before the trial Court, regarding the ownership of motor vehicle KAN 584D. Thus, the appellant did not need to call any evidence in that regard. The trial Magistrate erred in rejecting the appellant's claim for that reason.

18. Be that as it may, the appellant had a duty to prove, firstly that he was injured as a result of being knocked down by motor vehicle KAN 584D. Secondly, that the motor vehicle was being driven by the respondent. And thirdly, that the accident was caused by the negligence of the respondent. The appellant was the only witness who testified as to how the accident occurred.

19. The appellant's evidence regarding the particulars of the motor vehicle which knocked him and the identity of the person who was driving the motor vehicle, was not sufficient to establish the particulars of the motor vehicle or the identity of the person who was driving the vehicle. This is because the appellant admitted under cross-examination that there were two motor vehicles involved in the accident, and that he was told that it was the matatu which hit him.

20. Thus, the appellant did not have personal knowledge of the motor vehicle which hit him. Since the persons who gave him the information were not called to testify, the information relied upon by the appellant was hearsay and therefore inadmissible to establish the facts.

21. A police abstract report of the accident was produced in evidence. That abstract report showed that there was an accident involving two vehicles, motor vehicle KAN 584D and motor vehicle KAL 870B. The abstract report is therefore not sufficient to establish that it was motor vehicle KAN 584D and not motor vehicle KAL 870B which knocked the appellant. Moreover, neither the officer who investigated the accident, nor the officer who visited the scene was called to testify. The information on the police abstract report therefore remained unverified.

22. The upshot of the above is that there was no evidence upon which the liability of the respondent could be established. And the trial Magistrate was right in coming to the conclusion that the respondent was not liable. Notwithstanding her finding on liability, the trial Magistrate was under a responsibility to assess the quantum of damages. The failure to do so was an error on her part.

23. Dr. Wangai testified that the appellant suffered blunt injuries on chest, deep cut wounds on the head, fracture of right clavicle, two fractures of the pelvis, and blunt injuries to head with loss of consciousness. The appellant had to be admitted in hospital for more than two weeks. His injuries have resulted in shortening of his left leg which has exposed him to risk of developing osteoarthritis. The injuries have also resulted in a permanent functional disability of 15%. It is obvious that the injuries were serious and the award of Kshs.50,000/= which was proposed by defence counsel could hardly do any justice. An award of Kshs.550,000/= would have been more appropriate.

Nevertheless, the appellant having failed on the issue of liability his appeal is dismissed. I make no orders as to costs.

Dated and delivered this 23rd day of October, 2009.

H. M. OKWENGU

JUDGE

In the presence of: -

Kuyo holding brief for Mwangi for the appellant/applicant

Advocate for the respondent, absent

Eric, court clerk