REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL APPEAL 246 OF 2006

PANKAJ D. SHAH…..…….....……...APPELLANT

VERSUS

CHARLES MAINA KAHARUKA t/a CHAMA ENTERPRISES...RESPONDENT

(An appeal from a decree of the Senior Resident Magistrate's Court at Nairobi (Ms. P. Wekesa) dated 17th December, 2004 in Civil Case

No. 1966 of 2004)

J U D G M E N T

1. This is an appeal arising from a suit which was originally filed in the High Court but later transferred to the Chief Magistrate's Court. The suit was brought by Pankaj D. Shah, hereinafter referred to as the appellant. He had sued Charles Maina Kaharuka t/a Chama Enterprises, hereinafter referred to as the respondent. The claim arose from an accident involving the appellant's motor vehicle registration No. KZR 045 and the respondent's motor vehicle registration No. KRU 510 which accident the appellant maintained was caused by the negligence of the respondent or his driver. The appellant sought to recover Kshs.683,845/= being special loss suffered by him as a result of the accident.

2. The defendant filed a defence in which he denied the appellant' allegations of negligence and contended that the accident was caused by the negligence of the driver of the appellant's motor vehicle. He therefore urged the Court to dismiss the appellant's suit.

3. Hearing of the suit proceeded before the Senior Resident Magistrate. The appellant called three witnesses who were Lalit D. Shah, a brother to the appellant who was driving the appellant's motor vehicle at the material time; and Dominic Wambua. Lalit Shah testified that on the material day he was driving along Thika when all over a sudden a lorry on the opposite side of the Thika dual carriage way, lost control, went into the trench separating the carriage way, came out of the trench on to the path of the appellant's vehicle, and hit the appellant's car on the right hand side, before landing in the river. Lalit Shah maintained that the driver of the lorry was overspeeding and his brakes also appeared to have failed.

4. The appellant's motor vehicle was damaged on the right hand side. The accident was reported to Kenindia Insurance Company who were the insurers of the appellant's motor vehicle. The vehicle was

towed to St. Austins Garage. It was later examined by a motor vehicle assessor, one J.S. Ghataore, of Accident and General Investigations, who declared the appellant's motor vehicle a right off. The cost of repair was estimated at about Kshs.550,000/= against the pre-accident value of Kshs.700,000/=.

5. The appellant claimed Kshs.683,000/= being the pre-accident value of the vehicle less the salvage value plus the assessor's fee, investigator's fee, excess and police abstract. The accident was reported to the police and a police abstract report of the accident was produced in evidence. Also produced was the assessor's report which was produced by Dominic Wambua, assistant manager with Kenindia Insurance Company as the assessor was said to have left the country by the time the report was produced.

6. The defendant called three witnesses. These were; Simon Wahome Mwangi (Mwangi) who was driving the respondent's motor vehicle on the material day, Fidelis Mundia Kinuthia (Kinuthia) a motor vehicle assessor, and the respondent.

7. Mwangi explained that the front tyre of the lorry got a puncture, the steering wheel of the motor vehicle became bad and he could not control it. He hooted and put on the vehicle's headlights. The vehicle went on the other side of the dual carriage way. Mwangi kept on warning other motorists of the danger, but saw the appellant's motor vehicle which did not do anything to avoid the respondent's vehicle. The respondent's lorry hit the appellant's vehicle. Mwangi maintained that the appellant's vehicle which was only slightly damaged, was driven off after the accident. Mwangi explained that the lorry was moving at a very slow speed. He claimed that the lorry was only carrying 7 tonnes of tiles as against its full capacity of 12 tonnes. Mwangi maintained that the accident was inevitable.

8. The respondent testified that the tyres of his motor vehicle were as good as new as the motor vehicle had not run for over a month. He maintained that he used to service his motor vehicle regularly and could not understand what caused the puncture. He maintained that the accident was caused by the tyre burst.

9. Kinuthia who has been a motor vehicle inspector for over 15 years, explained that on the respondent's instructions, he perused the Court file and read a motor vehicle assessment report, in respect of motor vehicle KZR 045 which was produced as exhibit. He formed the opinion that motor vehicle KZR 045 could have been put back on the road. He estimated a total of Kshs.388,663.60 for repairing the vehicle.

10. Written submissions were filed on behalf of each party. For the appellant, it was submitted that the respondent did not deny the particulars of negligence cited by the appellant. It was maintained that the defence of a tyre burst and inevitable accident, were not specifically pleaded in the plaint and was therefore, a departure from the pleadings. The Court was urged to reject the motor vehicle inspection report produced by the respondent as the inspection was done long before the accident. It was maintained that an inspection carried after the accident would have been more relevant.

11. It was further contended that the respondent did not produce any evidence of the alleged purchase of new tyres. The Court was urged to find that the accident was caused by the negligence of the respondent's driver, and therefore the respondent was vicariously liable. The Court was urged to find that sufficient evidence had been produced to prove the appellant's claim on a balance of probability.

12. For the respondent it was submitted that the appellant was not a proper party to the suit as the insurance company paid the claim to a person other than the appellant. It was contended that the claim being made under the subrogation rights of the insurance company, it must fail, as there was no proof that payment was made to the person in whose name the insurance company was seeking to recover. It was further submitted that the appellant's motor vehicle was not a write off and could be put back on the road at an estimated cost of Kshs.318,000/=. It was contended that the appellant's claim was greatly exaggerated.

13. It was argued that the respondent's motor vehicle had been serviced barely one month prior to the accident and was therefore in good mechanical condition. Finally, it was submitted that the respondent's driver had been diligent, he did his best by hooting and putting on lights to alert other road users, and that it is the appellant's driver who did not heed the warning. Reliance was placed on ***Civil***

Appeal No.1 of 1979, Kago vs. Njenga, in support of the respondent's contention that the accident was caused by circumstances beyond their control.

14. In her judgment the trial Magistrate found that the appellant had not proved the particulars of negligence alleged against the respondent's driver. The trial Magistrate held that the respondent's motor vehicle moved in the way it did as a result of a puncture in respect of which the respondent's driver had no control of. She therefore dismissed the appellant's claim.

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

(i) That having correctly found that there was no dispute as to the occurrence of the accident and that the respondent's motor vehicle hit the appellant's motor vehicle causing damage; the learned trial Magistrate erred in holding that the appellant had not proved his case on a balance of probabilities and proceeded to dismiss the appellant's case.

(ii) That the learned trial Magistrate erred in law and in fact in holding that the accident was caused by a puncture to the respondent's motor vehicle when the same was not pleaded in his defence.

(iii) That the learned trial Magistrate erred in law and in fact in holding that the appellant failed to prove his case on a balance of probabilities even after it was clearly pleaded in the plaint that the appellant would rely on the doctrine of *res ipsa loquitor*.

(iv) That the learned trial Magistrate erred in law and in fact in holding that the circumstances of the accident were beyond the control of the respondent's driver when the same was not pleaded in the defence thus denying the appellant an opportunity to be on guard as to what to expect at the trial.

(v) That the learned trial Magistrate erred in law in taking into consideration extraneous factors to hold that the respondent's driver was not negligent.

(vi) That the learned trial Magistrate erred in law in failing to make a finding based on the appellant's evidence that the respondent's driver was negligent and that the respondent was liable to compensate the appellant as prayed in the plaint.

(vii) That the learned trial Magistrate erred in law and in fact in dismissing the appellant's suit with costs to the respondent.

16. In support of the appeal, Mr. Kiura pointed out that in his evidence before the trial Magistrate, Mwangi blamed the accident on a tyre burst and also alleged that the steering wheel locked. He noted that although the respondent claimed that the motor vehicle was inspected, the inspection report was not produced and therefore the Court was denied information which could have explained the locking of the steering. It was maintained that the tyre burst did not excuse the respondent from liability, as it did not necessarily follow that the puncture would lead to an accident. The Court was urged to find that the appellant was a victim, and that the trial Magistrate was therefore wrong to dismiss the suit.

17. Mr. Maina who appeared for the respondent supported the finding of the trial Magistrate. He maintained that the accident was caused by a tyre burst and drew the Court's attention to the receipt which was produced to show that the motor vehicle had been serviced just prior to the accident. Mr. Maina further pointed out from page 32 of the record of appeal that the inspection report was produced in evidence. He submitted that the trial Magistrate was right in applying the doctrine of inevitable accident.

18. With regard to the fact that the defence of inevitable accident was not pleaded, Mr. Maina relied on ***Odd Jobs vs. Mubia [1970] EA 476*** in which it was held that the Court may base its decision on an unpleaded issue if it appears to the Court that the issue had been left to the Court for a decision. It was contended that evidence regarding the inevitable accident was admitted and the appellant given the opportunity to cross-examine the respondent's witnesses on that issue. The Court was further urged to

note that the respondent's motor vehicle was going downhill and was carrying materials weighing 7 tonnes. The possibility of it veering off the road was there.

19. I have carefully reconsidered and evaluated the evidence as I am expected to do in this first appeal. I have also taken note of the submissions which were made before the lower Court and before this Court. There was no dispute that an accident occurred involving the appellant's vehicle and the respondent's vehicle. It was further not disputed that the respondent's motor vehicle lost control and moved onto the path of the appellant's vehicle which was traveling from the opposite direction. Thus, it was common ground that the collision took place when the respondent's vehicle was on the wrong side of the road. The main issue was whether the accident was caused by the negligence of the respondent's driver or the appellant's driver.

20. From the statement of defence which was filed by the respondent, the respondent maintained that the accident was caused by the careless and negligent driving of the appellant's motor vehicle. In his evidence in Court, the respondent's driver explained that the accident was caused by a tyre burst following a puncture and the locking of the steering wheel making it difficult for the respondent's driver to control the motor vehicle. He maintained that the accident was inevitable.

21. Firstly, the fact of the tyre burst/puncture and locking of the steering wheel are factors which ought to have been pleaded. I concur with the respondent that the allegation that the accident was inevitable was an afterthought. Secondly, under normal circumstances, a tyre burst would not cause a motor vehicle to lose control if the driver is driving at a reasonable speed and is driving carefully. In this case although the respondent's driver maintained that he was driving at a reasonable speed, given that he was driving downhill carrying a heavy load, he must have been driving at a speed which was too fast making it difficult for him to control the vehicle when the tyre burst.

22. Moreover, although it was claimed that the steering wheel of the vehicle became "hard" or locked, there was no expert evidence produced to confirm that or to explain what could have caused the steering wheel to lock. It is true that an inspection report was produced as defence exhibit 3. That report, however, was for an inspection carried out on 12th January, 1999. It was of no relevance in determining the state of the respondent's vehicle as at 10th December, 1999 when the accident occurred.

23. Further, while the respondent's driver blamed the appellant's driver maintaining that he did not heed his warning, or make any effort to avoid the respondent's vehicle, the appellant's driver cannot be blamed as he was on his side of the road and could do little to avoid the accident. Moreover, there was no evidence in support of the respondent's allegation that the appellant's driver was negligent.

24. For the above reasons, I find that the findings of the trial Magistrate that the accident was inevitable, was inconsistent with the evidence which was adduced before her. I find that there was sufficient evidence to establish that the accident was caused by the negligence of the respondent's driver in driving at an excessive speed and in failing to control the respondent's motor vehicle, causing it to go onto the path of the appellant's vehicle. The respondent must therefore be held vicariously liable to the appellant.

25. It is clear that the appellant's claim was a special damages claim which had to be specifically proved. The claim being one brought under rights of subrogation, the appellant had to establish that the loss was incurred by the insured and that the insurance company paid for the loss. It is evident from the exhibits produced before the trial Magistrate, marked plaintiff's exhibit 12, that the appellant's motor vehicle was insured by Kenindia Insurance Company Limited and that the insured was the appellant.

26. The assessment report which was prepared by J.S. Gataore gave the estimated cost of repairs at Kshs.550,000/= against the pre-accident value of Kshs.700,000/=. The respondent attempted to show that the estimated cost of repairs was exaggerated. This was done through a report prepared by Kinuthia. Nevertheless, Kinuthia's report cannot be relied upon. It is a report which was prepared about 4 years after the accident relying only on photographs. I find that report completely unreliable as it was tailored to essentially suit the respondent's defence. I find that there was sufficient evidence to establish the pre-

accident value of the appellant's motor vehicle, the salvage value and the estimated cost of repairs. The writing off of the appellant's motor vehicle was therefore justified.

27. Again it is evident from the documents produced that the claim was lodged by Lalit D. Shah who also signed the rights of subrogation. There is however an appropriate power of attorney donated by the appellant to Lalit D. Shah. Payment of the money was effected through an account which was in the name of Ms. Didy's. Again that was done at the request of the appellant who explained that he did not have an account in his name. In the light of the above, I am satisfied that there was ample evidence to justify the claim in the appellant's name under the rights of subrogation. The claim for the special damages was also established.

28. Thus, I find that the judgment of the lower Court cannot stand. I set aside the judgment of the lower Court, dismissing the appellant's suit, and substitute it with a judgment in favour of the appellant as against the respondent in the sum of Kshs.683,845/=. I award the appellant interest from the date of filing the suit in the lower Court, costs of the suit in the lower Court, as well as costs of the appeal.

Those shall be the orders of this Court.

Dated and delivered this 15th day of October, 2009.

H. M. OKWENGU

JUDGE

In the presence of: -

Wananda holding brief for Kiura for the appellant

Advocate for the respondent, absent

Eric, court clerk