REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Appeal 167 of 2005

DAVID LEKARAM MAZANGU…….APPELLANT

VERSUS

JANE MUTHONI MWANGI…….1ST RESPONDENT

SILAS CHEBON……..2ND RESPONDENT

JUDGMENT

The appellant, **David Lekaram Mazangu,** was the 2nd defendant in R.M.C.C. No. 362 of 2003 in the Senior Resident Magistrate's Court at Naivasha. He appeals against the judgment of Hon. Madam Wewa, delivered in favour of the 1st respondent **Jane Muthoni Mwangi,** wherein judgment was entered as against the 1st and 2nd defendants, jointly and severally, for Kshs 100,000/= general damages, 1,400/= special damages, costs and interest. The 1st respondent had sought damages against the two defendants as compensation for injuries sustained in a motor vehicle accident on 28th June 1995 said to have involved motor vehicle registration No. KYM 747, Peugeot 504 *(in which the plaintiff/1st respondent was travelling),* the appellant's motor vehicle registration No. KAC 211K and a third motor vehicle bearing foreign a registration No. plate UAE AJ27969, driven by the 2nd respondent.

Dissatisfied with the lower court's judgment and award the appellant filed this appeal citing six grounds, set out in the Memorandum of Appeal as follows:

1. The learned magistrate erred in fact and in law in finding that the plaintiff had proved her case against the 2nd defendant on a balance of probabilities.

2. The learned magistrate erred in fact and in law in failing to appreciate the inconsistencies in the plaintiff's testimony.

3. The learned magistrate erred in fact and in law in finding that plaintiff had proved that the 2nd defendant was negligent.

4. The learned magistrate erred in fact and in law in failing to appreciate that the police abstract produced by the plaintiff herself blames only the 1st defendant for the accident.

5. The learned magistrate erred in fact and in law in proceeding to write and pronounce a judgment having not had the opportunity to sit and take the evidence in court during the hearing.

6. The learned magistrate erred in law as judgment herein does not comply with the mandatory provisions of Order XX rule 4 and in particular:-

(i) The learned magistrate erred in law in failing to give a concise statement of the case in the judgment.

(ii) The learned magistrate erred in law in failing to state the points of determination and the decisions thereon and the reasons for each decision as is required by law.

Ground 5 appears to have been abandoned at the hearing of the appeal while the rest were consolidated and argued under two heads, firstly, that the judgment of the trial court did not comply with the mandatory provisions of **Order XX rule 4** as captured in ground 6 above and secondly, that the learned trial magistrate erred in finding that the respondent had proved negligence against the appellant, on the balance of probabilities, yet the learned trial magistrate did not state the reasons for believing that the appellant was to blame. The 1st defendant appears not to have participated in the lower court's proceedings.

The appellant does not deny that he was the driver of the motor vehicle registration No. KAC 211K. Neither does he deny that an accident did occur on the date and at the place stated in the 1st respondent's plaint. He avers, however, that the accident was caused or substantially contributed to by the 1st defendant/respondent, as was stated in paragraph 3 of the appellant's defence dated 21st September 1998. He contends that the evidence tendered did not prove his culpability but clearly showed that it was the 1st defendant's motor vehicle which collided with KYM 747. He invited this court to consider that in the abstract report produced by the 1st respondent as *"PExh.1"*, it was stated that the police intended to charge the driver of the 1st defendant's motor vehicle.

Opposing the appeal **Ms Njoroge**, counsel for the 1st respondent, submitted that the judgment of the lower court, although quite brief, did not violate provisions of **Order XX rule 4** since the same stated that the evidence adduced had been considered as were the pleadings and the submissions filed. Counsel submitted that since the lower court's judgment indicates clearly that the points for determination, which were that, an accident did occur in which the 1st respondent sustained injuries, as confirmed by the medical report, then the judgment was not in contravention of the law. She submitted further that the 1st respondent's evidence remained unchallenged, the appellant having neither testified nor called any witness. The 1st respondent testified that at the material time she was a passenger in motor vehicle KYM 747 travelling towards Nakuru. Upon reaching Kinungi and moving uphill, the 1st respondent saw three on-coming motor vehicles, a lorry, KAC 211K and a Nissan UAE AJ27969. KAC 211K overtook the lorry followed by the Nissan which had been driving behind the lorry. The two overtaking vehicles came into the path of KYM 747 and collided with it. According to the 1st respondent's testimony the vehicle in which she was travelling had a head-on collision with both the overtaking vehicles. The driver of KYM

747 died while the 1st respondent lost consciousness. She was unconscious for two weeks and remained at Kijabe Mission Hospital where she had been taken for treatment. After regaining consciousness the 1st respondent was transferred to Nairobi Hospital and was admitted there for six months. She produced in evidence three medical reports to support her injuries and claims to have lost her job due to the injuries sustained in the accident. Under cross-examination the 1st respondent appears to have changed her story as regards which vehicle collided with the one in which she was travelling. Her evidence in cross examination was, inter alia, that:

"***The collision was between the Nissan and our vehicle. It was KAC that started overtaking the lorry. The Nissan urvan was behind it. I would not have known what happened to the KAC in the accident."***

No independent witness was called to explain the collision. The only document produced in an attempt to explain the occurrence was a police abstract report dated 6th September 1995. It would appear that initially, the Police intended to prefer charges against the appellant, whose name was inserted in paragraph 3 of the abstract then crossed out and replaced with one of the Wilson Kiplagat, the deceased driver of UAE AJ27969N. In the absence of any evidence to explain the said cancellation, I accept the submission by the 1st respondent's counsel that the abstract is of no evidential value. From the 1st respondent's statement quoted above it is clear that the involvement in and/or the contribution of the appellant's motor vehicle in the accident was not stated with clarity. The 1st respondent herself having said that she was not in a position to know '*what happened'* to the said motor vehicle in the accident, her testimony exonerates, rather than implicate the appellant. That being the case, this court is unable to see on what basis the learned trial magistrate found as she did, "***that the 2nd defendant (appellant) is to blame too."*** The learned trial magistrate stated that, in arriving at her decision that the plaintiff had proved her case against the defendants, she considered the pleadings, the evidence adduced and submissions. I have examined the said pleadings, the evidence as recorded by the learned trial magistrate, as well as the submissions tendered before her but I find nothing to persuade this court that the 1st respondent did prove her case against the 2nd defendant on the balance of probabilities.

Regarding the non-compliance with **order XX rule 4** I find that, although an attempt was made to set out the points for determination, in the judgment, no statement of the case was set out nor were the reasons for the decision of the learned trial magistrate given. To that extent the judgment does contravene the provisions of **Order XX rule 4** which provides that;

"***judgments in defended suits shall contain a concise statement of the case, points for determination, the decision thereon and the reasons for such decision."***

Given the above, I find that the appeal succeeds and the judgment as against the appellant cannot, therefore, stand. The 1st respondent's claim against the appellant, having not been proved, is hereby dismissed. The quantum, as assessed and awarded by the lower court, having not been challenged by either side, I see no reason to interfere with the same. Accordingly the judgment passed against the appellant is hereby set aside. The appellant shall have the costs of this appeal but each party shall bear its own costs in the court below.

Dated signed and delivered at Nakuru this 13th day of November, 2009

M. G. MUGO

JUDGE