



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA

#### AT NAIROBI (NAIROBI LAW COURTS) Civil Appeal 282 of 2000

HENRY NDUATI CHEGE..... APPELLANT

VERSUS

PETER WANJOHI MWANGI..... RESPONDENT

(An appeal from judgment of the Principal Magistrate, H. Owino (Miss) delivered on 12<sup>th</sup> May, 2005 at Milimani Commercial Courts in PMCC No. 135 of 1999)

#### J U D G M E N T

1. This appeal arises from a suit which was filed on the 10<sup>th</sup> February, 1999, in the Chief Magistrate's Court at Nairobi, by Henry Nduati, hereinafter referred to as the appellant. He had sued Peter Wanjohi Mwangi, hereinafter referred to as the respondent. The appellant's claim was for general and special damages for personal injuries suffered by him as a result of a road traffic accident, involving motor vehicle registration No. KAH 767Z, (hereinafter referred to as the vehicle) which the appellant contended belonged to the respondent. The appellant claimed that the accident was caused by the negligence of the respondent, his servant and/or agents.
2. The respondent filed a defence on the 8<sup>th</sup> June, 1999 in which he admitted ownership of the vehicle but denied the allegations of negligence. The respondent further denied that the vehicle was involved in an accident or that the appellant suffered any injuries.
3. Hearing of the suit commenced on 14<sup>th</sup> February, 2000 during which the appellant testified. During the course of the appellant's evidence, it transpired that there was a discrepancy regarding the date of the accident which was indicated in the plaint as 22<sup>nd</sup> April, 1998 and 2<sup>nd</sup> May, 1998 in the P3 form. Counsel for the respondent therefore objected to the production of the P3 form.
4. On the 15<sup>th</sup> March, 2000 the appellant was granted leave to amend his plaint, and the draft amended plaint deemed as properly filed and served. The respondent was granted 14 days in which to file an amended defence. On 4<sup>th</sup> April, 2000 the respondent filed an amended statement of defence in which he denied ownership of motor vehicle KAH 767Z and further denied that the appellant was a passenger in the vehicle or that he sustained any injuries as a result of an accident involving the said vehicle. The respondent further maintained that the appellant's suit was incompetent.
5. Hearing resumed on 18<sup>th</sup> April, 2000 during which the appellant called Dr. Peter Kariuki who testified. The appellant's counsel then raised an issue with regard to the amended defence filed on 4<sup>th</sup> April, 2000 urging the Court that the same ought to be struck off as it was filed after the 15 days period that the appellant was given. The Court overruled that objection and adjourned the hearing at the request of the appellant's counsel to enable him call further evidence.
6. Hearing resumed on 25<sup>th</sup> April, 2000 but the appellant's counsel applied for further adjournment which was rejected by the Court, whereupon counsel for the appellant closed his case. The respondent did not call any evidence but written submissions were filed by both parties.
7. For the appellant it was submitted that the respondent could not legally rely on the amended defence, as the same was filed out of time. It was submitted that the respondent misled the appellant into thinking that the only matter in issue was the quantum of damages. It was contended that the attempt to change this position by changing these pleadings was malicious. It was submitted that the respondent not having called any evidence the Court should assess the appellant's evidence and find the respondent 100%

liable. Relying on *Dominic Kitau Mbugua & Another vs. Livingstone Gitusu*, the Court was urged to find the respondent liable. On the issue of quantum, the Court was urged to award the appellant damages of Kshs.120,000/=.

8. For the respondent it was submitted that the appellant's suit was incompetent as vicarious liability was never pleaded in the plaint nor was the driver of motor vehicle registration No. KAH 767Z enjoined in the suit. It was further submitted that the appellant had failed to establish ownership of motor vehicle KAH 767Z. It was further maintained that the appellant had failed to discharge the burden of proof with regard to negligence on the part of respondent. On quantum it was submitted that the injuries alleged by the appellant could only attract a sum of Kshs.50,000/= as general damages.
9. In her judgment the trial Magistrate ignored the issue of the amended defence maintaining that same ought to have been made before the hearing started. She maintained that the appeal had to be determined on merit. She found that the appellant had failed to call evidence to establish ownership of the motor vehicle. On that ground the suit was dismissed.
10. Being aggrieved by that judgment, the appellant has lodged this appeal raising 6 grounds as follows:
  - (i) The learned Magistrate erred and misdirected herself in finding that the ownership of motor vehicle registration number KAH 767Z had not been proved despite the same having been admitted by the defendant in his defence dated 8<sup>th</sup> June, 1999.
  - (ii) The learned Magistrate erred and misdirected herself in considering the amended defence despite its having been filed out of time in disregard of the consent order dated 15/3/2000 and the plaintiff's preliminary objection made on 18/4/2000.
  - (iii) The learned Magistrate erred and misdirected herself in considering the amended defence dated 20<sup>th</sup> March, 2000 but filed on 4<sup>th</sup> April, 2000 which was 6 days outside the time stipulated by the consent order without reviewing the said consent order and in the absence of an application for extension of time by the defendant.
  - (iv) The learned Magistrate erred and misdirected herself in finding that ownership of motor vehicle registration number KAH 767Z had not been proved despite the plaintiff's testimony which was uncontroverted in disregard of s.116 of the Evidence Act (Cap.80 Laws of Kenya) and Rule 39 of the Traffic Rules made under the Traffic Act (Cap.403, Laws of Kenya).
  - (v) The learned Magistrate erred in failing to assess the damages recoverable as by law required.
  - (vi) The learned Magistrate erred in awarding costs of the suit to the defendant.
11. At the hearing of the appeal there was no appearance for the respondent despite a hearing notice having been duly served. Hearing of the appeal therefore proceeded *ex parte*.
12. Mr. Nyaga who appeared for the appellant submitted that the respondent had admitted the ownership of the vehicle in paragraph 2 of the defence, and that by the time the amended defence was filed, the appellant had closed his case and could not therefore address the pleadings. Mr. Nyaga further maintained that the trial Magistrate was wrong in admitting the amended defence which was filed 6 days out of time. Mr. Nyaga further submitted that the trial Magistrate erred in failing to assess the quantum of damages. He therefore urged the Court to allow the appeal.
13. I have carefully reconsidered and evaluated all the evidence which was adduced in the lower Court. Firstly I do note that the issue of the amended defence being filed out of time was raised by the appellant's advocate before the hearing of the suit was concluded. The trial Magistrate overruled the objection to the amended defence. The appellant did not appeal against that order or ruling. Further, under Order XLIX Rule 5 of the Civil Procedure Rules, the Court has powers to enlarge time for the doing of any act or taking any proceedings under the rules. The trial Magistrate in her wisdom decided to exercise that discretion in the respondent's favour and I have no reason to fault the Magistrate in that regard. Moreover the amended defence was filed in response to the amended plaint which had been filed by the appellant. The amended plaint was filed on 15<sup>th</sup> March, 2000 after the hearing of the appellant's suit had commenced. The amended defence was filed on 4<sup>th</sup> April, 2000 just slightly over 2 weeks from the time the amended plaint was filed. At that time the appellant had not closed his case. In fact, on the 18<sup>th</sup> April, 2000 hearing of the appellant's case continued. It is not therefore correct that the statement of defence was amended after the appellant had closed his case. Although the appellant had already testified, his case was not closed and he could easily have been recalled to adduce evidence on the issue of ownership of the motor vehicle. The Court did adjourn the matter in an effort to accommodate the appellant to call his witnesses but the appellant failed to do so. The appellant cannot therefore blame the Court. It is evident that the appellant failed to call any evidence to establish the ownership of the vehicle. In the circumstances, his claim against the respondent could not stand. As regards the issue of quantum the trial Magistrate ought to have assessed the quantum of damages

notwithstanding her finding on the issue of liability.

14. It is apparent from the plaint and the evidence of Dr. Peter Kariuki that the appellant suffered essentially soft tissue injuries and head concussions for which he was treated and discharged. In the circumstances a sum of Kshs.60,000/= would have been appropriate for general damages. The appellant having failed on the issue of liability I dismiss his appeal. The respondent having failed to attend Court for the hearing of the appeal, I make no order as to costs.

**Dated and delivered this 3<sup>rd</sup> day of December, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ms. Kiptoo holding brief for Nyagah for the appellant

Advocate for the respondent, absent

Eric, court clerk