



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT EMBU

Civil Appeal 8 of 2007

SAMUEL WAWERU WANGOMBE.....APPELLANT

VERSUS

MOHAMMED ABDI OSMAN.....1ST RESPONDENT

ABDIRAR PARAH NOOR.....2ND RESPONDENT

JUDGMENT

The appellant appeals against the decision of **Resident Magistrate B.A. OJOO at Baricho in Civil Case No. 17 of 2005.** In that case the appellant was claiming damages arising out of a road accident. After hearing evidence the case was dismissed hence this appeal. The two Respondents also filed cross Appeal against the same Judgment.

A perusal of Judgment shows that the Trial Magistrate found there being no evidence to rebut that of plaintiff that the accident was caused by the 2nd Defendant and that the Police Abstract was prima facie evidence of title/ownership of the motor vehicle KAS 164 M. But the Trial Magistrate made a finding that the medical evidence to rebut the injuries was made and produced by an unqualified person Mr. Muriuki who was not even a licensed medical practitioner. She found the report null and void. She relied on a Court of Appeal decision in the **Civil Appeal No. 192 of 1996 between Thurania Karauri and Agnes Ncheche** where the Court of Appeal found that the information in the police abstract form was not sufficient proof of ownership. And that the medical report prepared by Dr. Maina and produced by the plaintiff herself was produced in contravention of Section 35 of Evidence Act Cap 80 Laws of Kenya. The Doctor should have produced it himself. The probative value was nil. The award made for pain and suffering and loss of amenities was erroneous as there was no evidence to support it. That case was also found to have been true barred.

In the present case the trial magistrate dismissed the suit on one ground that the medical report was not admissible evidence. Looking at the Court of Appeal Judgment it is to be noticed that the evidence as to injuries suffered by the plaintiff in that case was not reliable. The plaintiff had another accident 5 years earlier which she said was in the same place but she tried to hide the fact from the court. The doctor's opinion was on injuries which were sustained six years earlier. The Plaintiff had never been his patient prior to 15/11/1994 when he saw her. As the plaintiff had been involved in another accident 5 years earlier it was impossible to determine which injuries were caused by accident pleaded. The court said that the contents of the report was of no probative value.

In the circumstances of this case the 2nd Defendant was charged with a Traffic offence of careless driving contrary to Section 49 (1) Traffic Act in **Baricho Resident Magistrate Civil Case Traffic Case No.904 of 2005** and was convicted on his own plea of guilty. The defendants did not deny this plea. And in any case all the denials in the statement of defence were not supported by evidence as the Defendant offered no evidence. The plaintiff gave evidence of his injuries. He was injured on the right hand and should and was cut by broken glasses. The plaintiff produced as exhibit P. 11. He also produced Exhibit P3. These exhibits P3 form and treatment notes from Kerugoya indicated the injuries suffered by the plaintiff namely bruises on the right upper hand and should or pain, bruises over left had.

It is clear therefore that the report made by Mr. Zachary Githui Muriuki was not necessary. The court ought to have assessed damages on the evidence before it. The authorities placed before the court were on MINOR INJURIES.

Upon considering the circumstances of this case I am convinced that the Hon. Trial Magistrate did misinterpret the Judgment of the Court of Appeal.

I therefore allow this appeal and set aside the Judgment of the Trial Magistrate in the court below dismissing the Appellants suit.

This appeal is allowed Judgment on liability on 100% basis is entered against Defendants jointly and severally. On the issue of quantum the Trial Magistrate did not make any decision. The parties had proposed in their submission supported by authorities what the damages should be awarded. The defendant proposed Shs.40,000/- General Damage. Pled Police Abstract from indicates the payment required that 100/= not 200/= therefore only shs.100/= can be allowed.

On the part of plaintiff it was proposed Shs.150,000/- supported by some old Judgments **HCC No. 1251 of 1992 Beatrice Naliaka Nahanyi vs Michael Kinuthia Kariuki** injuries deep cuts on the right index finger and blunt injury to chest, scars on the chest left forearms and legs all healed award was 80,000/= .

Florence Elvis Wamula vs Kanyinyi Kiguta HCC No. 385 of 1991 at Mombasa. Minor injuries on front part of the head left knee joint more serious that in the above case award was Shs.120,000/=.

Considering these proposals it is my finding that a sum of shs.150,000/- is sufficient award in the circumstances. I shall award 100/= for police abstract as pleaded and proved special damages. The plaintiff is also awarded costs in this suit and in the court below. The upshot is that the appeal is allowed, Judgment entered for Appellant in total sum of shs.150,100/= plus interest at court rates and costs. There is a cross petition filed by the Respondents and dated 19/2/2007. I have examined the grounds set down by the Respondents in support thereof, It is my finding that the Trial Magistrate was correct in finding liability against the Respondent's driver from the facts and evidence before her. I have found liability to be on 100% basis since the negligence alleged against the plaintiff was denied and was therefore not proved.

I therefore do not see merit in the cross appeal the same is dismissed with costs to the Appellant.

Dated this 7th April, 2008.

J. N. KHAMINWA

JUDGE

Mr. Kahiga: I pray for stay.

Court: Order as in other file (8/2007), 30 days from today.

J. N. KHAMINWA

JUDGE

7/4/2008

Khaminwa – Judge

Njue – Clerk

Mr. Kahiga HB for Kinyanjui

Read in open court.

J. N. KHAMINWA

JUDGE