REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 28 of 2003

DR. JOHN NANDUKULE OMUKUBA ..…… PLAINTIFF

VERSUS

NIMESH P. SHAH BHIMJI …….. DEFENDANT

JUDGMENT

A claim was filed by the plaintiff against the defendant alleging that due to the defendant's negligence an accident occurred on 10th February 2002 between the plaintiff's motor vehicle and the defendant's vehicle. The plaintiff prayed for general and special damages plus loss of earnings. The defendant has before this court a defence to that claim and a counter claim. When this case came up for hearing on 7th July 2008 the court having given leave to the defendant to serve the plaintiff by advertisement the plaintiff failed to attend court. The court proceeded to hear the defendant's counter claim. The defendant in evidence stated that on 10th February 2002 he was driving to Kisii from Nairobi. In between Naivasha and Limuru at a place called Magina he had an accident. He was driving motor vehicle KAK 993J. As he drove at a corner at that place he suddenly saw the plaintiff's motor vehicle registration number KAN 192P overtaking. He could not avoid the accident and a collision occurred. His vehicle was thrown into a ditch. Fortunately because his car was a left hand drive he did not receive such serious injuries as was the case with the plaintiff. The plaintiff was trapped in the car after the accident. The defendant was conscious after the accident and was able to walk although with pain. The plaintiff was unconscious. The plaintiff was subsequently charged in Traffic Case Nairobi No. 1233 of 2003. The defendant said that just before the collision the plaintiff was traveling down a hill and very fast. The defendant was injured to both his knee caps which were bleeding. His face was also injured and was swollen. He was taken to Aga Khan Hospital to stop the bleeding. After X-rays were taken it revealed a fracture on his face. He produced before court police abstract and the receipt for the same.

He had purchased his motor vehicle on 20th April 2001. He produced a second hand tax return receipt. The motor vehicle after the accident had to be towed to the police station. The damage to the vehicle was assessed by Elegant Assessors and Adjustors. They gave a pre-accident value of that vehicle at Kshs.350,000/-. The assessed the salvage at Kshs.60,000/-. The defendant paid the assessors Kshs.3,800/-. Subsequently he was unable to sell the salvage for the amount assessed and only managed to sell for Kshs.30,000/-. He produced an agreement to that effect. Further he stated that the said motor vehicle he was using it for business. His business is transport business and this necessitated him to see clients in order to collect money. That transport business covered Nairobi, Kisii, Kericho and other parts of up country. They mainly in that business transported food stuff but at times they transported whatever the client wished to have transported. The business was making Kshs.100,000/- on a weekly basis. In order to continue with the business after the accident he had to hire another vehicle at the rate of Kshs.5000/- per day. He hired the vehicle from the date of accident for eight months thereafter. He was confined to the bed for three weeks after the accident in which time the doctor waited for the swelling on his face to go down to enable him undertake surgery. During that time the business did not operate because he was a sole proprietor. After the swelling went down it was noted that he had a chip bone fracture. He was admitted at Aga Khan Hospital for surgery and for dental care which was as a result of that accident. In his final prayer he sought the dismissal of the plaintiff's claim and for judgment to be entered as prayed in the counter claim.

I have considered that uncontroverted evidence of the defendant. Under Order IXB rule 4(1) (3) the court is entitled to dismiss the plaintiff's claim for non-attendance when the same was fixed for hearing. The defendant's learned counsel Mr. Mugambi in his written submissions referred to section 35 of the Limitation of Actions Act. That section provides as follows;

"*For the purposes of this act and any other written law relating to the limitation of actions, anything by way of set-off or counter claim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counter claim is pleaded."*

The accident in this matter occurred on 2nd February 2002. The defendant filed an amended defence with counter claim on 15th March 2005. That was a period beyond three years provided for action based on tort under the limitation of actions Act. I find that I am persuaded by the authority relied upon by the defendant namely; *ERNST & YOUNG (A FIRM) V BUTTE MINING PLC (NO. 2) [1997] ALL ER 471*. The chancery Division of England in 1996 had to consider their section 35 of the Limitation of Actions Act 1980 England which is a replica of our section 35 of the Limitation of Actions Act. The court held as follows;

"*By virtue of section 35 of the 1980 Act, a defendant could use a counter claim as a vehicle immune from existing accrued limitation defences to bring a claim which would be statute-barred if brought in separate proceedings, provided the subject matter of the counter claim was not one which, having regard to the interests of procedural convenience, ought to be tried in a separate action.……"*.

Not only am I persuaded by that decision but the interpretation of section 35 in my view make it very clear that a counter claim may be filed in the claim where it is pleaded and in so doing the opposite party cannot raise a defence of limitation. I am therefore of the view that the defendant's counter claim hereof is not time barred. I have considered the defendant's evidence and I find that the defendant has proved his claim of negligence against the plaintiff. I have considered the cases relied upon by the defendant in his claim for general damages i.e. *HCCC NYERI NO. 18 OF 2003 – Samuel Kinyanjui Thuo v Francis Kuria Gathuka.* In that case the court awarded Kshs.250,000/- for general damages for injury to the teeth and residual scars on the face. In the case at *Eldoret HCCA No. 74 of 2004 Pan paper Mills (EA) Ltd & another v Asha Hassan.* In that case the court upheld the finding of the lower court where an award was made of Kshs.300,000/- for general damages where a party was injured to the legs and suffered what the learned magistrate described as grievous harm. I am in agreement with the submissions of the defendant's counsel for an award of General damages to be made to the defendant for Kshs.350,000/-. The defendant also did prove by receipts his claim for special damages. In respect for his claim for damages for loss of motor vehicle the defendant in evidence stated that the pre-accident value of his motor vehicle was Kshs.350,000/-. Although in evidence he said that he sold the salvage for Kshs.30,000/- there was no amendment made to his counter claim where he indicated the salvage value to be Kshs.60,000/-. In this judgment therefore I shall deduct Kshs.60,000/- for the pre-accident value. The defendant did not produce any receipts to prove loss of user of the motor vehicle. That claim is essentially a claim in special damages. It therefore needed to be strictly proved. The court of appeal in the case of *JIVANJI V SANYO ELECTRICAL COMPANY LTD [2003] KLR 425*. In respect of the claim for special damages stated as follows;

"*This court in CA 192/92 Coast Bus Service Ltd v Sisco E Murunga Ndanyi & 2 others (UR) had this to say:-*

"*It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Ltd and another v Samson Kipruto Chebon, Civil Appeal No 22 of 1991 (unreported). In the latest case, Cockar, JA who dealt with the issue of special damages said in his judgment:-*

"*It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni, J quoted in support the following passage from Bowen, LJ's judgment on pages 532, 533 in Ratcliffe v Evans (1892) 2 QB 524, an English leading case of pleading and proof of damages;*

The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularly must be insisted on, both in pleading and proof of damages, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

The defendant did not produce receipts to prove he hired an alternative motor vehicle after the accident. The claim for loss of user therefore fails. The defendant stated that his business was earning Kshs.100,000/- per week. He claimed a total of Kshs.300,000/- for the three weeks that he was hospitalized. He did not however prove to the court that his company was indeed making that profit. On a claim such as that one of loss of earnings the defendant ought to have placed before court books of account of his company to prove that indeed it was making that profit. That was the finding in the case of Bank of Baroda (Kenya) Limited v Timwood Products Ltd Nai CA 132 of 2001 (unreported). The court of appeal in that case had this to say,

"*It may be that Kenya's economy is topsy-turvey and it may be that management accounts kept by companies such Timwood may not be very useful, but if such accounts are kept and one is claiming damages for loss of profits, such accounts ought to be produced to assist the court in coming to a conclusion on the issue of whether there has in fact been a loss, and if so, the magnitude of the loss. We think the learned Judge was not right in simply dismissing the failure to produce evidence proving loss of profit on the basis that in a topsy-turvey economy such evidence would not be useful."*

The judgment of this court is as follows:-

1. The plaintiff's claim against the defendant is hereby dismissed for non-attendance with costs to the defendant.

2. The defendant is awarded Kshs.350,000/- for general damages, Kshs.153,582/- for special damages and costs of the counter claim.

Dated and delivered at Nyeri this 16th day of October 2008.

MARY KASANGO

JUDGE