REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 116 of 2008

KENYA POWER AND LIGHTING CO. LTD. …..……. APPELLANT

VERSUS

SAMSON MACHUMA MAKORI ……. RESPONDENT

JUDGMENT

1. On 22/3/1999, the present Respondent, Samson Machuma Makori filed a plaint in the **Kangundo Senior Magistrate's Court in its Civil Suit No. 309/1999.** In it he alleged that on 19/6/1998, he was travelling in an unnamed motor vehicle on an unnamed road when he was involved in an accident and he suffered injuries. The injuries were said to have been;

a. "Soft tissue injuries on right face;

b. soft tissue injury on chin;

c. Injury on the face;

d. Injury left rib cage;

e. Injury on knee."

2. It was also alleged that the accident occurred as a result of the negligence of the Defendant's agents and/or servants. The particulars of negligence were as follows:- that he;

a. "Drove at a speed which was excessive in the circumstances,

b. drove with our due care and attention,

c. failed to keep any proper look out as to have sufficient regard for other traffic/road users on the said road,

d. failed to exercise or maintain any proper or effective control of the said motor vehicle,

e. **failed to stop, slow down and or swerve or in any other way the said vehicle as to avoid the said accident."**

3. The Plaintiff in his Plaint therefore claimed special damages of Kshs.4,500/=, general damages, costs and interest thereon.

4. The Defendant in that suit, (the present Appellant) filed a Statement of Defence dated 20/4/1999 and effectively denied the alleged accident, the particulars of injuries and alleged negligence on its part but in the alternative averred that the accident was caused by the Plaintiff's own negligence and the particulars of alleged negligence were that:- the Plaintiff was negligent in;

a. "Failing to make use of the seat belts provided.

b. Acting in a reckless and grossly negligent manner without due regard to his own safety.

c. Failing to exercise reasonable care under the circumstances.

d. Exposing himself to the risk of injury."

5. When the suit came for hearing on 9/7/1999, the Defendant was not represented and the court took the evidence of the Plaintiff and his witness. I will return to that evidence shortly but on 12/8/1999, judgment was entered for the Plaintiff as follows:-

i. General Damages – Kshs.160,000/=.

ii. Special Damages – Kshs.10,500/=.

iii. Costs and interest.

6. The Grounds of Appeal are as follows:-

1. "The Learned Magistrate erred in law and fact in finding that the Plaintiff/Respondent had proved his case against the appellant inspite of evidence to the contrary.

2. The Learned Magistrate erred in law and fact in relying on hearsay evidence in finding that the Plaintiff/Respondent had proved his case against the appellant.

3. The Learned Magistrate erred in law and fact in his assessment of general damages in that the award was so manifestly excessive as to be a totally erroneous estimate of compensation due to the Plaintiff/Respondent.

4. The Learned Magistrate erred in law and fact in awarding special damages which had not been pleaded and/or proved at all.

5. The Learned Magistrate erred in law and fact in conducting the hearing of the suit in the absence of the Defendant's counsel and/or witnesses and in the circumstances denied the Defendant an opportunity to be heard in the suit in violation of the fundamental principles of natural justice."

7. I have noted the submissions by both Mr Nyaribo for the Appellant and Mr Achoki for the Respondent. I will dispose of the simpler issue of special damages. It is trite that special damages must be specifically pleaded and strictly proved – see **Hahn vs Singh (1985) KLR 716.** In this case, what was pleaded was Kshs.4,500/= in respect of a medical report. In evidence PW1, Samson Machuma Machoki said that he saw a Dr. Okere who examined him and he paid Kshs.4,500/= for his report. That he also paid the doctor Kshs.6,000/= for his court attendance. A report marked as P.Exh.5 was produced. I have

perused the lower court file and the report indeed is on record. A receipt for Kshs.4,500/= dated 29/6/1999 and signed by Dr. C.O. Okere is on record. I cannot therefore fault that evidence and the only proper award in special damages is kshs.4,500/=. The other claim for Kshs.6,000/= has no basis and cannot be allowed. I say this in the interim and subject to my other findings below.

8. The second issue to address is whether the suit was heard without giving the Defendant (now Appellant) a chance to be present and to put forward its case. I have in that regard looked at the record and I see that a hearing notice dated 7/5/1999 was served on M/S Mohamed Madhani & Co. Advocates for the Defendant. At the back of the hearing notice is a stamp bearing the names of that firm of advocates and the signature of one E.O. Ashu's, Advocate, who received the notice at 3.05 p.m. on 7/5/1999. I see no reason to fault that service and the court had a good reason to proceed with the hearing on 9/7/1999 without the presence of the Defendant and for obvious reasons.

9. The third issue to address is whether the Plaintiff had proved his case on a balance of probabilities. The only evidence on record as to the circumstances of the alleged accident was that of the Plaintiff himself. He stated that he was an employee of the Defendant and was stationed at Naivasha and that on 19/6/1998 he was in m/v reg. No. KGF 530 Mitsubishi and on the way back to their camp, the vehicle rolled because the driver was driving at a high speed. He was injured and he produced Exh. 3 signed by a Dr. Muchori who indicated that the injuries suffered were:-

i. Soft tissue injury to the face.

ii. Soft tissue injury to the chin.

iii. Soft tissue injury to the left rib cage.

iv. Soft tissue injury to the right knee.

10. In that document with the letter-heads of Rift Valley Nursing Home and dated 18/1/1997, the accident was said to have occurred on 19/6/1996 and the medical attendance card has the same date.

11. In the Medical Report prepared by Dr. C.O. Okere, the injuries allegedly sustained were as follows:-

i. "**A deep laceration in the right orbital region and face.**

ii. A laceration in the scalp.

iii. A blunt head injury.

iv. A blunt chest injury.

v. A deep laceration in the right ring finger.

vi. A dislocation of the right middle finger.

vii. A deep laceration in the left lower leg.

viii. A blunt injury to the left lower leg."

12. Dr. Okere in that report stated that the accident occurred on 19/6/1996 and the report itself is dated 29/6/1999, the date the Plaintiff was examined by the said doctor. Dr. Okere himself testified in court and gave the same evidence as is contained in the report.

13. In his judgment the learned magistrate, C.D. Nyamweya, SRM used Dr. Okere's medical report as a basis for the evidence as to the injuries suffered.

14. I will dispose of the issue of the dates of the alleged accident. I believe the Plaintiff that the accident indeed occurred on 19/6/1998 and the date 19/8/1998 is a mere typographical error. As to the circumstances in which the accident occurred, the Defendant failed to call evidence to rebut the evidence tendered by the Plaintiff that the driver of m/v KGF 530 was driving at high speed and there is no evidence that the Plaintiff was in any way negligent.

15. As to the injuries allegedly suffered, clearly the injuries in the document prepared by Dr Muchori were the more authentic injuries. The document marked Exh.3 together with the medical attendance card were prepared closer to the accident and surely the injuries could not have multiplied by the time Dr. Okere prepared his report long after the suit had in fact been filed. This explains why the Plaint has similar injuries to those in Dr. Muchori's document. Dr. Okere's report was overly exaggerated. Period.

16. This then takes me to the award in general damages. I have said that the learned magistrate took into account exaggerated injuries and clearly reached an erroneous decision. Mr Nyaribo did not point me to any authority on the subject but I am certain that Kshs.160,000/= was way too high for the injuries suffered in 1999. I will reduce the same to Kshs. 80,000/= as is reasonable for soft tissue injuries aforesaid.

17. Having said all the above things and having analysed the evidence and issues raised on appeal, the Appeal will nonetheless succeed for the following reasons;-

18. Mr Nyaribo has pointed me to Section 11 of the Civil Procedure Rules. It provides as follows:-

"**S.11. Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:**

Provided that-

i. if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and

ii. nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district."

19. I also take note of Section 15 of the Civil Procedure Rules and particularly which provides as follows:-

"**S.15. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-**

a. the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

b. any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally work for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

c. the cause of action, wholly or in part, arises.

Explanation. **(1)–Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.**

Explanation. **(2)-A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.**

Explanation. **(3)-In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely-**

i. the place where the contract was made;

ii. the place where the contract was to be performed or the performance thereof completed;

iii. the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

Illustration.-(**a) A is a tradesman in Nairobi. B carries on business in Mombasa. B by his agent at Nairobi buys goods of A and requests A to deliver them to Mombasa by rail. A may sue B for the price of the goods either in Nairobi, where the cause of action has arisen, or in Mombasa, where B carries on business.**

Illustration.-(**b) A resides at Kisumu, B at Nairobi, and C at Mombasa. A, B, and C being together at Nakuru, B and C make a joint promissory note payable on demand and deliver it to A. A may sue B and C at Nakuru, where the cause of action arose. He may also due them at Nairobi, where B resides, or at Mombasa, where C resides; but in each of these cases, if the non resident defendant objects, the suit cannot proceed without the leave of the court."**

20. In this case, the accident happened in Naivasha. The Plaintiff resided in Naivasha. The Defendant had an office in Naivasha in which the Plaintiff also worked. Why was the suit filed in Kangundo in Eastern Province? Why? Mr Achoki had no coherent answer to that question inspite of the clear provisions of the law as exposed above. The only conclusion that I can reach is that the court in Kangundo did not have jurisdiction and even if I had accepted some of the issues in judgment as I have above, without jurisdiction, there is nothing. As Khamoni J. stated in **R vs Chairman Land Disputes Tribunal ex-parte Kariuki (2005) 2 KLR 1** "**no court can confer jurisdiction upon itself and if a court never had jurisdiction, a party or parties cannot give it that jurisdiction and a party cannot be said to have acquiesced to the jurisdiction which the court before which the appearance claimed to have constituted appearance was made did not have."**

21. That is a correct exposition of the law and therefore all that happened before the court was a nullity. Had it not been, then I would have awarded Kshs.4,500/= in special damages and Kshs. 80,000/= in general damages plus costs and interest. But because it was all nothing, my exposition is for purposes academic and for appeal only.

22. In the event, the suit before the lower court shall be ordered to be dismissed and the Appeal allowed in favour of the Appellant who will have the costs of the dismissed suit and of the appeal.

23. Orders accordingly.

Dated and delivered at Machakos this **18th** day of **November** 200**8**.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Mung’atta h/b for Mr Achoki for Respondent**

N/A for Appellant

ISAAC LENAOLA

JUDGE