



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 50 of 2003

CATHOLIC DIOCESE OF MERU ::::::::::::::::::::::::::::::::::: APPELLANT

AND

OBADIAH MWANGI KARIUKI ::::::::::::::::::::::::::::::::::: RESPONDENT

(Being an appeal from the Judgment and Decree of the learned Senior Principal Magistrate Njeru Ithiga dated and delivered on the 6.5.2003)

1. The appellant herein was the defendant in Meru Chief Magistrate's Court Civil Case No 193 of 2002 in which it had been sued for recovery of damages for alleged negligence in a road traffic accident that occurred on 12.10.2000 along the Meru Cathedral Road. The respondent herein who was the plaintiff in the lower court, alleged that the appellant's driver negligently drove motor vehicle Registration Number KAM 247V and as a result thereof the respondent who was by then walking along the road was knocked down and sustained the following injuries:-

- Fracture of the left clavicle
- Linear fracture of the right scapular
- Cuts and bruises over his scalp and lower joint
- Chest injuries and multiple injuries

2. The respondent alleged that as a result of the injuries sustained he suffered loss and damage and prayed for both special and general damages. He also prayed for costs and interest.

3. In its statement of defence dated, 26/2/2002 the appellant denied all allegations of negligence made against it. It also denied allegations of the injuries sustained by the respondent and in the alternative pleaded contributory negligence against the respondent as follows:-

- a) Touting at the middle of the road without regard of his own safety.
- b) Being absentminded on a busy road.
- c) Walking carelessly
- d) Failing to make it possible for the 2nd defendant to avoid hitting him\
- e) Walking in a zigzag manner on the road

- f) Playing on the road
- g) Failing to heed the presence of vehicular traffic and in particular motor vehicle KAM 247V on the said road
- h) Being idle and disorderly

4. The respondent, as plaintiff, gave evidence and also called one witness Dr John Macharia. The Respondent's case was that on the 12.10.2001 at about 5.30 p.m, he was walking along the Meru – Cathedral road when the appellant's vehicle hit him from behind. He stated further that the driver of the appellant's vehicle lost control as the driver negotiated a bend in the road. The respondent further testified that as a result of the accident, he suffered the injuries I have already set out herein above and that the injuries necessitated the respondent's hospitalization for about five (5) days.

5. The respondent testified further that after being discharged from hospital, he reported the accident to the police and was later seen by Dr John Macharia who prepared a Medico – legal report that was produced in court as Plaintiff exhibit 3. Other exhibits produced by the respondent in support of his case against the appellant were treated cards from Nkubu Mission Hospital, together with payment receipts for the hospital charges and for the Police abstract.

6. In his further testimony, the respondent stated that as a result of the accident, he was unable to perform the same kind of work he used to do as a technician with Telkom Kenya. He also testified that the injuries had left ugly healed scars all over his body and that he also suffered chest pains.

7. PW2 was Dr John Macharia. He stated that he examined the respondent after the respondent was allegedly involved in a road traffic accident on 12/10/2001. According to PW2, the respondent complained of pains in the chest, left shoulder and the back. He also testified that the respondent had sustained fractures of the left and right clavicles, painful chest and cuts bruises on the lower legs. The respondents also had scars on the left lower limbs and scalp, but that the injuries were not of a serious kind. The respondent paid Kshs 2000/= for the examination.

8. The appellant called Sister Joyce Rita Karambu who was the driver of the appellant's motor vehicle at the time of the accident. She testified that as she approached the scene of the accident, she noticed the respondent coming towards her. In an attempt to avoid hitting him she lost control of the motor vehicle and the vehicle landed on its side. She blamed the respondent for the accident. She denied driving the motor vehicle at high speed as alleged by the respondent and added that she did her best to avoid hitting the respondent. Sister Rita was charged with driving an unlicensed motor vehicle.

9. In her further evidence, Sister Rita told the court that by the time of the accident she had had her driving license for only ten (10) days and that the respondent was walking right in the middle of the road, but that she did not see the respondent playing on the road nor could she say that the respondent was idle and disorderly at the time of the accident. It further came out from her testimony that the day of the accident was the very fast time that she was driving on a public road. She also stated that when she approached the corner, she hooted as a safety precaution.

10. In his judgment delivered on 6/5/2002, the learned trial Magistrate entered judgment for the respondent as against the appellant, apportioning liability at 90% against the appellant. He found that the appellant driver was unable to control the control the motor vehicle because she was not licensed to drive it. I hasten to state here that the appellant's driver though licensed to drive did not have any experience as that day was the first day the said driver was out alone driving on a public road.

11. As for damages, the learned trial Magistrate awarded Kshs 300.000/= in general damages subject to the 10% contributory negligence with a final judgment of Kshs 273,600/= plus costs and interest.

12. The appellant, being dissatisfied with the said judgment, appealed. There are six (6) grounds of appeal as per the Memorandum of Appeal dated 29/5/2003, namely:-

- (i) That the learned trial magistrate erred in law and in fact in failing to find that ownership of motor vehicle registration No KAM 247V had not been proved the said ownership having denied by the defendant.
- (ii) That the learned Senior Principal Magistrate erred in law and in fact in failing to find that the respondent had failed to prove negligence by failure to enjoin the driver of the accident motor vehicle if any.
- (iii) That the learned Senior Principal Magistrate erred in law and in fact in failing to find that the respondent was 100% to blame for the suit (sic) accident.
- (iv) That the learned Senior Principal Magistrate erred in law and in fact in awarding excess general damages in consideration of the injuries sustained and all the circumstances of the case.
- (v) That the Senior Principal Magistrate erred in law and in fact in disregarding the evidence of the defendant and in relying on extraneous matters in his judgment.
- (vi) That the whole judgment is against the weight of evidence.

13. During the hearing of the appeal, the appellant's counsel relied on two authorities in an effort to show that the ownership of the motor vehicle was not proved. Ground 2 of the Memorandum of Appeal was abandoned, while grounds 3,5 and 6 were argued together, the gist of which was that the learned trial Magistrate ought to have found the respondent 100% liable in negligence for the accident. On ground four the appellant's counsel urged this honourable court to find that the injuries sustained by the respondent were not of such a serious nature as to warrant the high award of general damages made by the trial court. The cases cited to me are:- (a) **Court of Appeal Civil Appeal No 192 of 1996** between **Thuranira Karauri and Agnes Mcheche**; (b) **Court of Appeal Civil Appeal No 138 of 2002 – Morris Mugambi & Another vs Isaiah Gituru.**

14. Mr Charles Kariuki, counsel for the respondent contended that the issue of ownership of the subject motor vehicle was proved on a balance of probabilities and that the appellant did not rebut that evidence. Further, that the evidence of the police abstract which was tendered in evidence by consent of both parties proved beyond doubt that the subject motor vehicle belonged to the appellant. The respondent cited a persuasive authority in support of his case on the issue of proof of ownership of motor vehicle to wit **Njeri HCCA No 34 of 2002** between **Samuel Mukunya Kamunge and John Mwangi Kamuru**(Unreported).

15. My duty as the first appellate court is to re-consider and re-evaluate the evidence on record with a view to reaching my own conclusions in the matter. I shall first of all deal with the issue of whether or not the respondent proved that the motor vehicle that knocked him down belonged to the appellant.

16. From the evidence on record, it is clear to me that the respondent proved on a balance of probabilities that the motor vehicle KAM 247V belonged to the appellant. There is the evidence of the police abstract which was tendered by consent of parties and that evidence shows clearly that the owner of the motor vehicle Registration No KAM 247V is the appellant. I shall shortly show why it was not necessary that the respondent produce other documentary evidence to prove that point.

17. In this case, the appellant called the driver of the motor vehicle as a witness, and this part of what Sister Joyce Rita Karambu told the court:-

“ I work in the Diocese of Meru in the Bishops Office. On 12/10.2001 I was driving motor vehicle KAM 247V from the office”.

18. In my considered view, that evidence confirms that the vehicle belonged to the Bishop's office of the Diocese of Meru. I do not see any reason for reading any other inference in the matter. The appellant's witness did not rebut the respondent's evidence that the information in the police abstract as to ownership

of the motor vehicle was not correct. Prima facie, therefore, I find that the evidence before the court was that the motor vehicle which was being driven by DW1 and which motor vehicle cause the accident belonged to the appellant. There was no contrary evidence by the appellant that ownership of the subject motor vehicle had changed hands.

19. As regards the award made by the learned trial Magistrate, I find that there is no sufficient ground to warrant on interference with the finding by the learned trial Magistrate. The guiding principle for this court to interfere with an award of the lower court is that:-

“...it must be shown that a relevant factor was not taken into consideration or an irrelevant factor was taken into account, or that the trial court did not appreciate the importance of some material evidence or that the award is so inordinately low or high that some such like mistake must be assumed.”

(see **Morris Mugambi & Another vs Isaiah Gituru** – Supra).

20. In the present case, I have not noted that the learned trial Magistrate was guilty of any of the foregoing, on either limb of the award made. I also do find that the apportionment of liability cannot be faulted. Although the appellant alleged in its pleadings that the respondent was walking and infact playing on the road as at the time of the collision, DW1 controverted these averments when she was put under cross-examination. I therefore do find as the learned trial Magistrate found, that DW1 did not have proper control of the motor vehicle she was driving at the material time, and it was a result of that lack of control that she lost control of the vehicle at the bend and ended up knocking the respondent. The accident resulted in injuries testified to by both the plaintiff himself and his witness, PW2, Dr John Macharia.

21. In the result, I find that the appellant’s appeal lacks merit. The same is dismissed in its entirety with costs to the respondent.

22. Orders Accordingly.

Dated at Meru this 8th Day of February 2007.

R.N. SITATI

JUDGE