



STANLEY KIMERE..... APPELLANT

VERSUS

EVERIGGING AFRICA CONTRACTORS LIMITED.....RESPONDENT

### J U D G M E N T

On 25/2/00 the Appellant moved to this court on appeal, challenging the Judgment of Principal magistrate, in Civil Case No. 3308 of 1998, on the following grounds:

1. The Learned Magistrate erred in law and in fact in failing to hold that the Respondent was to blame for the accident, the state having preferred to institute Traffic proceedings against the Respondent's driver **and not the appellant.**
2. **The Lower Court erred in law and fact in dismissing the appellant's suit on the basis that the Respondent's driver had been acquitted in Traffic Case No. 2874 of 1996 which proceedings were not produced in court to assist the court in determining why the Respondent's driver was acquitted.**
3. **The Lower court erred in fact and in law in failing to take into account the fact that the Respondent's driver had been put to his defence in the Traffic case, which fact, had it been taken into account, the court would have found that it was more probable than not, that the Respondent's driver was to blame for the accident.**
4. **The Lower Court erred in law and in fact by failing to apply the principle that where it is not possible to establish exactly how an accident occurred, the court should apportion liability equally among the drivers, and that consequently the Respondent was liable to pay at least 50% of the proven loss and damage to the Appellant;**
5. **The Lower Court erred in law and fact in relying on the fact that no appeal had been lodged by the Appellant in the Traffic case to dismiss the appellant's suit while the appellant was not a prosecuting party in the Traffic proceedings and could not therefore appeal against the decision of the court in the Traffic proceedings.**
6. **Learned Magistrate erred in fact and in law in failing to take into account that the burden of proof in a criminal case is higher than that in a civil case and the acquittal of the Respondent's driver in the Traffic case did not exonerate him from blame in subsequent civil proceedings.**

Wherefore the appellant prays that the appeal be allowed and the judgment of the lower court set aside; Judgment be entered for the appellant as prayed in the Amended Plaintiff; and the costs of this appeal and those in the lower court be awarded to the appellant.

The **FACTS** in the case are briefly as follows:

The Plaintiff stated that on 1/6/96 he drove a 1200 Datsun Pick up Registration no. KAD 697W. When he got to Karai on the Nairobi-Naivasha Road he was downhill. There was a trailer ahead of his vehicle. Coming on from the opposite direction were two vehicles – matatus – which were on the climbing lane.

There was also a lorry Reg. No. KAB 983W which was behind his vehicle which came at a high speed, overtook his vehicle and the trailer which in the process the two oncoming Matatus were overtaking each other. A head on collision was imminent and the lorry swerved to the left and banged his pickup at the back.

He produced – Police Abstract and reported the accident to his insurers and took the vehicle for repairs. He spent K.Shs.64,000/- for loss of user and he had a motor vehicle which was being repaired. He produced the Report as exhibit.

The Defendant, in defence, stated that he was driving vehicle KAB 983W on 1/6/96. He stated that the Plaintiff vehicle and a matatu were overtaking each other and he rammed behind the Plaintiff's motor vehicle when it retreated. He stated that he was charged with a traffic offence but was acquitted in Traffic Case No. 2874/96.

Defendant's witness testified that he was in vehicle KAB 983W and saw exactly what happened, and that Plaintiff's vehicle was behind them, overtook and came downhill only to find a matatu oncoming with another and retreated and an accident occurred. Plaintiff also called evidence – witness who stated that Defendant's vehicles were overtaking, thus corroborating Plaintiff's evidence. The criminal case proceedings were not produced in court by either side.

In the cause of his judgment, the lower court held that the Plaintiff has not produced the proceedings in the traffic case, nor had he preferred any appeal – in the exparte criminal proceedings. Further, the lower court held that it was the evidence of the Plaintiff against that of the Defendant but went further and held that the acquittal of the Defendant, in the criminal trial swayed the case in the Defendant's favour.

On the above basis the suit was dismissed with costs to the Defendant.

Having perused the pleadings including the submissions by counsel for the two parties, I have reached the following findings and conclusions.

The Learned Magistrate concluded that both parties contributed to the accident on equal measure, and each blamed the other for what happened. Rather than deal with apportionment of liability on those findings, the Learned Magistrate erred in going out of his way to find reasons/justification for tilting the balance of what the evidence before him showed. This he did by considering the acquittal of the Respondent's driver in an earlier Traffic Case, which arose from those same facts.

I have no doubt that the Lower Court had no basis in arriving at that conclusion, and this on the following reasons.

First, the proceedings in which the Respondent's driver had been acquitted were not produced in court. Hence that evidence, if any, was extraneous to the case before the court. But even if the traffic criminal proceedings had been put in as evidence, the standard of proof in criminal cases is totally different from that applicable in a Civil case, such as was before the lower court.

In the end, I find and hold that the Learned Magistrate, should have stopped at the finding that both parties were to blame for the accident. Thereafter he should have proceeded to apportion liability between the parties in accordance with the ratios to which he found the parties responsible for. In this case, despite the opportunity of assessing the demeanour of the witnesses, the Learned Magistrate was of the view that it was not possible for him to do so. Under those circumstances, the liability should have been apportioned on a 50% basis on each side.

Secondly, the idea that the Appellant failed to appeal against the decision in the Traffic case is absurd. Only a party to a case has the capacity to appeal against a Judgment/Ruling therein. Here the appellant was not a party to the Traffic case. He could not appeal.

On the above reasons, I find and hold that the lower court erred in law in heaping all the blame on the

appellant when the evidence and conclusions of the Learned Magistrate were to the contrary.

For all the above reasons, this appeal succeeds and I order as under:

- 1. The appeal is allowed and the judgment of the lower court is hereby set aside.**
- 2. Judgment is accordingly entered for the appellant, as prayed in the Amended Plaintiff, on the basis of 50% liability for each party.**
- 3. The Respondent to bear the costs of both this appeal and the costs at the subordinate court, with interest at court rates from the date of filing of the suit till payment in full.**
- 4. Since there were no general damages claimed or personal injuries claimed. I award only the special damages claimed and proved.**

DATED and delivered in Nairobi, this 29<sup>th</sup> Day of May, 2007.

**O.K. MUTUNGI**

**JUDGE**