REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 28 of 1998

GLADYS KARAMBU RIUNGU…….APPELLANT

V E R S U S

JEREMIAH MUTHOMI…….RESPONDENT

(AN APPEAL FROM THE JUDGEMENT OF CHIEF MAGISTRATES COURT AT MERU BY

P.M. MUTANI SRM MERU DATED 29TH APRIL 1998, IN MERU CMCC NO.26 OF 1996)

J U D G M E N T

1. The Appeal herein arises from the decision of P.M. Mutani Senior Resident Magistrate in Meru CMCC No. 26/1996 dated 29.4.1998. The learned magistrate had found that the suit, arising from an alleged road traffic accident involving the Appellant and M/V Reg. No. KAB 003N, had not been proved on a balance of probabilities and dismissed it with no order as to costs.

The grounds of appeal are;-

"**1. The Learned Senior Resident Magistrate erred in law and fact by disregarding the appellant's evidence in his judgment.**

2. The Learned Senior Resident Magistrate erred in fact and law by dismissing the appellant's case without properly evaluating the evidence on record.

3. The Judgment of the learned senior resident magistrate does not conform to the provisions of Order XX Rule 4 of the Civil Procedure Rules".

2. The suit before the learned magistrate was filed by the Appellant on 21.1.1994 and in it she claimed general and special damages arising from an accident on 18.10.1993 involving motor vehicle registration number KAB 003 N which allegedly knocked down the Appellant who was a pedestrian along the Meru-Githongo Road. It is important to note that at paragraph 5 of the Plaint, the Appellant averred that the 2nd defendant in the suit, Cyrus Muriuki M'Itunga was an agent or servant of the present Respondent and that it was he who managed the said motor vehicle negligently, hence the accident. The Respondent in the Appeal was sued in that capacity and the principle of vicarious liability was invoked. It is apparent that no appeal was preferred against the 2nd Defendant and in any event the learned magistrate upon hearing the evidence presented before him determined that the Appellant had not been hit by the subject motor vehicle; that the alleged negligence had not been proved and dismissed the suit with no order as to costs.

That decision triggered this Appeal.

3. As the first appellate court, there is a duty imposed to evaluate the evidence and determine whether the case had been proved on a balance of probabilities and consequently whether the decision being challenged was proper or not.

4. The evidence leading to the very short and scanty judgment of the learned Magistrate was as follows:-

P.W.1, the Appellant, Gladys Karambu Riungu said that on 18.10.1993 she was walking home from Meru Town in the evening with other women when suddenly, a matatu registration number KAB 003N having passed them reversed down hill and hurtled towards them. She asked her colleagues to move out of its way but the vehicle came towards her and "**lay on** *[her*] **in a ditch**". That she could not get out of its way as there was a high embankment next to the road and as a result, she was injured on the right hand and right leg. She produced documents showing the injuries and treatment that she received at Meru District Hospital. She also produced a medical report by one Dr. Muriithi showing the extent of the injuries and the receipts for both the treatment and the medical report.

5. In cross-examination and of relevance, the Appellant said that "**the vehicle reversed for a distance like from the court to the D.C.'s office (800 metres)?"**

6. P.W.2, Jane Mbuya stated that on the material date, the matatu passed them and then reversed and they could clearly see it doing so from a distance and as they all scampered to avoid being hit, it fell on the side where the Appellant was and it "**lay on her.**" That passengers came out and pushed the vehicle off the Appellant. It was her evidence that while other pedestrians ran off to the right side of the road, the Appellant was the only one who ran off to the left side and eventually that is where the reversing vehicle landed.

7. In cross-examination she stated as follows:-

"**The vehicle found Gladys at the hedge and fell on her. I saw the vehicle going the direction where Gladys had fled. The vehicle lay on Gladys. I remember testifying in the traffic case. It is correct I removed her luggage off her back. Gladys was in a standing position. The vehicle was against her and she was against the road bank. The vehicle was pushed off her by men"**

8. For the Respondent, D.W.1, Cyrus Muriuki M'Itonga, the 2nd Defendant and driver of the subject motor vehicle stated that on the material date, he was driving towards Githongo and at Majengo area, the brakes of the vehicle failed and the vehicle "**skidded into a ditch**". The vehicle was pushed out and then the same was restarted he drove it off with no complaints about any injury to anyone including the Appellant who the witness denied seeing on the material day. Nonetheless, D.W.1 was arrested four (4) days later and charged with careless driving, a charge still pending by the time of the trial.

9. D.W.2, Cyrus Muriuki was the turn-boy of the matatu driven by D.W.1 and he stated that the engine stopped in a muddy section of the road on the material evening and the vehicle moved backwards into a ditch on the left side of the road. Passengers and D.W.2 pushed it out and it started and went its way with no injuries to anyone including to the Appellant who D.W.2 did not see at the scene.

10. I should backtrack here and state that in a statement of Defence dated 16.10.1995, the 2 Defendants denied the alleged accident involving the Appellant and denied the injuries sustained by her.

11. I have noted the elaborate submissions by counsel and in my view, the beginning of this matter is the allegations of negligence on the part of the 2nd Defendant in the suit and at paragraph 5 of the Plaint, they are listed as:-

"**PARTICULARS OF NEGLIGENCE**

(a) Driving at an excessive speed in the circumstances

(b) Driving a defective motor vehicle.

(c) Failing to have due regard to the safety of other road users and in particular the plaintiff.

(d) Allowing the said motor vehicle to fall into a ditch.

(e) Failing to stop, to slow down, to swerve, to brake or in any other manner to control the said motor vehicle to avoid the accident."

12. It is trite law that a party which sues and claims negligence on the part of another must prove that fact strictly. In this case, one of the allegations of negligence was that the motor vehicle was defective. It was admitted by D.W.1 that;

"**I do recall on arrival at Majengo the engine of the car stopped as I turned to go uphill. The brake failed as the booster was not working. I tried to reverse……the vehicle skidded into a ditch."**

13. No explanation whatsoever was given by Respondents why the booster was not working so as to affect the braking system and which clearly rendered the vehicle defective. In **Winfied and Jolowicz on Tort, 16th Edition, 2002,** it is stated as follows at page 205;-

"**If A borrows a car from B and A runs into C, that suggests negligence on A's part; but if it is shown that the cause was the sudden failure of the brakes that would exonerate A, but not necessarily B, for it is rare for the brakes on a well maintained care to fail without warning. If of cause B produces evidence that the car was properly maintained, C's claim fails."**

Similarly it is stated that::

"**If a car strikes a pedestrian on the pavement that suggests negligence on the driver's part."**

14. The point is that the defect in the motor vehicle was admitted and the circumstances of the same are agreed between the parties save that the injuries sustained by the Appellant are denied. I should dispose of the latter issue before returning to the question of negligence. My view on that regard is this;- although it is denied that the Appellant was injured during the incident, I cannot believe that it is mere coincidence that at the precise time and place and in the very same circumstances as stated by the Appellant, admitted by D.W.1 and D.W.2, the accident in issue occurred and the Appellant was injured. I note that P. Exh.2 the (Police Abstract) confirms that the incident occurred and the medical report (P.Exh.3) and treatment notes indicate clearly that the injuries were sustained. I will dismiss the defence in that regard and I believe the evidence of the Appellant as credible.

15. On negligence, I have said that the defect of the motor-vehicle was admitted and no evidence was tendered to show that the motor-vehicle was otherwise in road-worthy form. The driver was arrested and charged with the offence of careless driving and one of the witnesses was the Appellant and this fact came out in her cross-examination. Had the motor-vehicle been in a road worthy condition, it would have climbed the hill without rolling backwards and pinning the Appellant who was a lawful pedestrian. Negligence was proved on a balance of probability for that reason and the decision of the learned magistrate to the contrary was therefore made in error.

16. The second issue to address is the medical evidence regarding the Appellant. It has been contended that there was no such evidence before court and that without it the injuries could not be ascertained. My view is that the argument is pedestrian because whereas it is true that the treatment notes and medical report were produced by the Appellant in evidence and not any medical practitioner, the said documents were in fact produced with the consent of the Respondent who was ably represented by Mr. Mburugu, advocate who is still representing him on appeal and in such a situation I cannot see how at this stage that evidence can be faulted. The end result is that the medical evidence of injuries sustained by the Appellant were not challenged and it is my finding that she proved that she suffered the following injuries;

(a) Fracture of the right radius and ulna

(b) Bruising of the right leg.

17. Having held as I have, all other issues raised in submissions by advocates become peripheral and having jurisdiction to do so, the only issue left for this court to determine is quantum of damages and whether there should be contribution on the Appellant's part.

18.I have been urged on behalf of the Respondent to find that there was contributory negligence on the part of the Appellant because she did not run away from the reversing motor vehicle, as did other women who were with her. A person is guilty of "**contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might hurt himself and in his reckonings he must take into account the possibility of others being careless**" **per Denning J. in Jones vs Livox Quarries Ltd [1952] 2 Q.B. 608 at 615**. This holding is true in this case because, the Appellant in her evidence was the one who warned her fellow pedestrians that the vehicle was hurtling backwards but whereas all others heeded that warning, she did not do so and instead went the wrong direction akin to a goalkeeper well aware that the goal posts were there and hurting himself as he dives towards one such goal post. I therefore agree that the Appellant, having seen the vehicle from a distance, should have done more than pin herself to the embankment unlike the others who escaped with prudence.

19. As to what contribution the Appellant is entitled to, I do not agree with Mr. Mburugu for the Respondent that she should share the full blame. My view is that her friends escaped unhurt because they made the right decisions in an unfortunate situation but the Appellant did not and should shoulder 50% of the negligence as in the circumstances of this case she acted unreasonably and not like her prudent friends in getting out of the way of the reversing motor vehicle.

20. Although no submissions were made as to quantum, before me I am of the view that this court should award what is fair and reasonable noting the injuries suffered. Based on the decisions in **Nguza vs Kiatune and Another Nairobi HCCC 138/87 (UR) and Peter Kitungu vs Otieno Inda NRB HCCC 273/89 (UR**) submitted by counsel for the Appellant before the trial court, the Appellant wanted damages amounting to Ksh.240,000/- while counsel for the Respondent proposed an award of Ksh.80,000/- as general damages and he relied on the authorities of **Zakaria vs Ochira and Another NRB HCCC 2655/90 (UR)** and **Benedict Kisingwa vs Pollman's Tours C.A. 81/90.** My reading of the injuries and the authorities would lead me to conclude that based on inflation and the increased cost of living since the above decisions, a sum of Ksh.400,000/- would be reasonable as general damages and taking into account the element of 50% contributory negligence, the Appellant should be awarded Ksh.200,000/-

21. As to special damages I note that only the sum of Ksh.770 being Ksh.670/- for medicals and Ksh.100/- for Police Abstract were proved and I shall award that sum only.

22. In the end, the appeal is allowed, the order dismissing the suit is set aside and instead judgment is entered for the Appellant in the sum of Ksh.200,770/= as above being general and special damages plus costs in the trial court and on Appeal.

23. Orders accordingly.

Dated signed and delivered this 24th day of July 2007

ISAAC LENAOLA

JUDGE

In presence

Mr. Lompo Advocate for the Appellant.

Mr. Anampiu holding brief for Mr. Kirema Advocate for the Respondent.

ISAAC LENAOLA

JUDGE