REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appeal 120 of 2001

ALFAYO PETER KOKA

.....APPELLANT

-VERSUS-

JANET MINAGE CHIVANGI

.....RESPONDENT

JUDGMENT

Coram J. W. Mwera, Judge,

Musiega for Appellant,

Raymond CC.

A judgment was delivered by a Principal Magistrate, in CMCC 611/1998, at Kisumu. It was dated 24.11.99. The record shows that the earlier date to deliver this judgment was 15.4.1999. These dates seemed to be the basis in one of the grounds in this appeal and so that shall be reverted to below. The case before the lower court arose from a road accident which took place on MBALE - MBIHI ROAD on 4.6.94. A cyclist named Fredrick Mwanga died as a result and his mother and legal representative, the present respondent, sued to recover damages for and on behalf of Fredrick's estate. The suit was filed by M/s Kuke & Co. Advocates, Kisumu. The appellant was represented by M/s D. M. Amayamu & Co. Advocates Eldoret, and both pleadings are on record.

The respondent and one Hesbon Kisuza, PW2 testified. The appellant did likewise with one Geoffrey Kagari (DW2) as his witness. Judgment was given in favour of the respondent - Kshs 60,000/= general damages and Kshs 8,100/= special damages.

Mr. Musiega argued the 7-point appeal, all on his own since the firm of Kuke & Co. Advocates was shown to have been served with due hearing notice, but did not appear to oppose the appeal. After abandoning grounds 1 and 5, Mr. Musiega proceeded to argue the rest of the grounds apparently globally. That the learned trial magistrate contravened Order 20 rule 1, Civil Procedure Rules regarding the mode of writing and delivering judgments. That the record does not indicate when the judgment was read and signed. That the notified date was 15.4.99 while the judgment was dated 24.11.99.

Beginning with this point, it does not appear to this court that that was such a default on the part of the learned trial magistrate as to warrant upsetting the judgment. No. prejudice is alleged or proved. The parties were heard in evidence and then, they submitted. It may not have been recorded as to when they were in court to receive the judgment but on 14.3.2000 they appeared before the learned trial magistrate

to assess costs. There was no mention of a judgment having not been delivered. So it is safe to assume that it was delivered in their presence. Of course, it is said that when this assessment of costs was adjourned to 1.2.2001, the appellant or his counsel did not show up. The exercise went on **ex - parte**. The appellant is not shown to have applied to set the costs aside giving any reason for not attending the procession. That can not be faulted now. Ground 6 fails.

The other ground was that the respondent did not reply to the defence to plead that the deceased did not wholly or substantially contribute to the accident (See Order 6 rule 9 CPR). It appears so and that is likely why the learned trial magistrate apportioned 25% liability to the deceased. This was on the balance of probabilities. Had it been impressed on the learned trial magistrate wholly that it was not so, he could not have apportioned liability. He heard, saw and evaluated the witnesses - a thing this court was not privileged to do. No more needs be said. These grounds 3 and 4 fail.

Ground 7 touched on damages. Mr. Musiega argued that a sum of Kshs 6,000/= was not clarified whether it was for loss of expectation of life or loss of dependency. The plaint prayed for general damages for loss of dependency or loss of dependency. The learned trial magistrate referred to the kind business, the defendant was engaged in - the recent occupation in transporting people on bicycles for reward ("**boda boda**"). He observed that it was a new trade yet to be established with particular patterns. Then he ordered that Kshs 6,000/= be the award. It must follow that that was a global sum the learned trial magistrate awarded at random and in the circumstances of the case. He cannot be faulted; he wanted to do justice and he did it. It was not a large sum, though.

As for the coffin and police abstract expenses where the learned trial magistrate gave Kshs 8,100/=, Mr. Musiega argued that it was not clear as to who between the respondent and his witness bought that coffin. Or that that special damage was not specifically pleaded and proved. The first limb of the argument here has no much merit. The respondent would recover a sum on that item whether it was donated or bought by some other person so long as she proved it. But it is right to argue that there was no specific pleading and proof of this funeral expense. The plaint simply averred that proof would be produced at the hearing. That was in error and the Khs 8,100/= is set aside.

In sum, the appeal is dismissed. The respondent did not attend the hearing thereof and so there be no order as to costs.

Judgment accordingly.

Delivered on 30/5/2006.

J. W. MWERA

JUDGE

JM/hao