REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 867 of 2003

JAMES HEATHER-HAYES…….....…..
……..APPELLANT

VERSUS

FRANCIS KARIUKI KARANI……..….....……..
RESPONDENT

J U D G M E N T

On 1/12/03, the appellant appealed against the Judgment of the Kiambu Magistrate's Court, in Civil Case No. 129/02, delivered on 4/11/03. The grounds of appeal are as under:-

1. The Learned Magistrate erred in law in finding that the appellant and his witnesses were not credible witnesses.

2. The Learned Magistrate erred in law in finding that there had been a road traffic accident, against the weight of evidence in that there was no point of impact and also ignoring the fact that the Investigating Police Officer did not produce any sketch plan of the alleged scene of the accident.

3. The Subordinate Court erred in law in arriving at a judgment on the same evidence as was given in the Limuru Traffic Case No. 3085 of 2001 which is at total variance with the findings in the Limuru Case.

4. The Lower court erred in law in not considering the incompetence of the Investigating Police Officer in failing to either prepare or produce any sketch plan or other evidence indicating the point of impact, or if in fact any road traffic accident ever occurred.

5. The Lower Court erred in law in that the evidence never established that any road traffic accident ever occurred and also failed to establish that the Respondent had been hit by any vehicle at all. The Lower Court ignored the fact hat had the Respondent been struck by a vehicle there would have been soft tissue injuries, and indeed massive injuries whereas there were none.

6. The Learned Magistrate erred in Law in ignoring the vehicle Inspection Report from the Kenya Police stating that there was no visible accident damage to the Appellant's vehicle.

7. The Lower Court erred in law in delivering judgment when the Respondent failed to submit in writing as ordered, and/or if the Respondent did submit, then no copy of the Respondent's submissions were served on the Appellant or at all.

8. The Lower Court erred in law in finding for the Respondent in the absence of any medical evidence from Kijabe Hospital or any Doctor at Kijabe Hospital including the surgeon who attended and treated the Respondent.

9. The Learned Magistrate erred in law in holding that notwithstanding absence of submissions by the Respondent he went ahead and awarded excessive damages of all types.

Wherefore the appellant prays for the appeal to be allowed and setting aside of the subordinate court's judgment delivered on 4/11/03, and the Respondents case be dismissed with costs to the Appellant.

The brief facts in this case arose from a road traffic accident on 21/7/01. On that day, the Respondent was cycling on the footpath along Nairobi Naivasha when the appellant so negligently drove, managed and controlled Motor Vehicle KAA 143 that it overtook another motorist and caused the trailer attached to his motor vehicle to sway and collide with the Respondent on the footpath. The Appellant was driving towards Nairobi, at an excessive speed not to mention in a reckless way. As a result the Respondent sustained fracture of the right tibia and fibula and incurred K.Shs.35,7000/- in medical expenses which he claimed as special damages.

The appellant, in his defence denied liability and contended that the Respondent's cap was blown off by the wind near Matches Shopping Centre to the middle of the Road and he tried to retrieve it. The appellant, averred that he, however was able to break the vehicle, without touching the Respondent. However, as a result of the Appellant's trying to evade the Respondent the trailer he was pulling detached from the vehicle, and on seeing the vehicle the Respondent jumped off his bicycle, jumped down the bank, breaking his leg.

The Subordinate Court found for the Respondent and awarded the Respondent K.Shs.360,000/- under general damages and K.Shs.35,700/- under Special Damages. It is against that judgment that this appeal was filed in this court, under the grounds given in the Memorandum of Appeal herein above.

Ground of appeal No. 1 avers that the subordinate court erred in lwa in finding that the Appellant and his witnesses were not credible witnesses.

In his submissions, Learned Counsel for the appellant, Mr. K.H. Osmond contended that there was no accident as a matter of fact. My perusal of the pleadings and the entire record from the lower court does not in any way lend support to such a submission. Even the Road Traffic Case, SRMC No. 3085 of 2001, clearly shows that there was an accident on the date and time, and place, as claimed in the plaint.

The learned counsel for the appellant seems to confuse liability on the part of the appellant and the event of the accident, as a fact. This is most unfortunate, and in my humble view, this ground of challenge on the lower court's judgment has neither the factual nor legal merit or substance.

Appellant, through his counsel, submitted that the judgment of the Traffic Case and that of the subordinate court herein, are totally at variance, and the Police Officer who investigated the case did not produce the sketch plan which he produced at the Traffic Case.

With respect to the appellant's counsel, this submission is flawed. The proceedings in the Traffic case were not produced as evidence in this suit. This is clear from the record before me. But most importantly, even if they were (which was not the case) it is trite law that criminal proceedings differ greatly from civil cases. This is so with respect to the standard of proof required in the two cases. Put differently, an acquittal in a Road Traffic Accident case of an accused person [the appellant in this case] does not necessarily mean no liability against him in a civil suit, as in this appeal before me.

To therefore submit that the judgments in the two cases are totally at variance is a worthless point, if at all a point.

Ground of appeal No. 2 is partly subsumed in the findings and holding in ground of appeal no. 1 above. But suffice it to add that from the record before me, the witnesses called by the Respondent and the evidence adduced there, I have no basis upon which I can differ with the Learned Magistrate. The record shows that there were eye witnesses of the accident, and the very spot where the accident occurred is clearly identified. Once again it must be stressed that failure by the Police Officer to produce any sketch plan at the Civil Trial is not fatal to the Respondent's claim. In my opinion, there are many incidences where the police, despite sketch plans, prefer not to prosecute. But that is no bar to a civil suit by the injured person – the Respondent in this case.

Ground No. 3 of appeal is fully and totally subsumed in my holdings in the previous two grounds of appeal, **supra**. So is ground of appeal No. 4.

Ground of appeal No. 5 alludes to the same issue of there having been no accident at all, which I have held is not supported by the evidence on record in the subordinate court. But the challenge raises a slightly different dimension – that the Respondent did not establish that he had been hit by any vehicle at all.

The Appellant's counsel did not clarify or address the point, if at all, the trailer is, or is not part and parcel of the vehicle. The evidence on the record, and common sense, does not draw that distinction between the vehicle and the trailer attached thereto.

The evidence from the witnesses who testified in the lower court shows that the Respondent was hit by the trailer when it detached from the vehicle.

If the trailer is not part and parcel of the vehicle, then the counsel for the appellant totally failed to make that point, both at this appellate stage, and at the lower court.

I have no doubt in my mind that that contention was not raised because it is as hollow as it is ridiculous.

It was also submitted by counsel for the appellant that there was no Medical Report to support the Respondent's case.

I find that submission very strange because it is not a legal, but a factual matter, and the Record before me clearly shows a Medical Report, dated 11/2/03, prepared and signed by Dr. Cyprian Okoth Okere.

What is surprising about the challenge is that it is Mr. Osmond, learned counsel for the appellant, who drew and filed the Record of Appeal herein, and who must have been aware of the contents of the Record of appeal he drew and filed in this court on 1/12/03. Worse still, Mr. Osmond was the counsel for the appellant at the subordinate court's proceedings.

In light of the above, there is only one inference that I can draw from the counsel's submissions. That is that the counsel was not candid with this court, and he was out to mislead, rather than assist this court, as he is duty bound to do, as an officer of this court.

Learned Counsel for the appellant submitted that, had there been any accident, the Appellant's vehicle would have been damaged. This is in support of ground of appeal no. 6, tied up with ground of appeal No. 5 which alleges that the absence of the soft tissue injuries on the Respondent, are evidence of there having been no conduct with the appellant's vehicle. These points have already been touched and dealt with in the holdings herein earlier. What I need to add here is that the Medical Report talks of recurrent pains in the right leg and the compound comminuted fractures of the right tibia and fibula. This court, and judge, does not boast of medical expertise. That issue as to whether there can be fractures of the right tibia and fibula without soft tissue injuries, should have been put to the Doctor, who was called at the subordinate court, and he should have been in a better position to expound on the point. The learned counsel for the

appellant was, again present – from the Records – at that stage and to me, having kept silent on the issue can only mean that this is an after thought.

But be that as it may, in my view, fractures of the right tibia and fibula are more serious injuries than soft tissue injuries which in any case must have been inflicted prior to what the Medical Report refers to as " **lacerated scars on the lower leg."**

Turning to Ground No. 7, which challenges the subordinate court's judgment on the basis of failure on the part of the Respondent to submit in writing, as ordered by the court, his submissions, I have perused the record. I agree with appellant's counsel that the Respondent did not put in any written submissions.

But having said that, I hold that that is no sound ground of appeal. A court's Ruling/Judgment is based on the evidence adduced before the court. To hold otherwise would be tantamount to a proposition that submissions are the basis upon which the court bases its judgment. It is my humble opinion that after the evidence by both parties, even without any submissions by either party or both, the court can deliver a valid and sound judgment on the basis of the pleadings and the evidence before the court.

I find no merit on that line of challenge of the subordinate court's judgment herein.

Finally, counsel for the appellant challenged the subordinate court's finding and conclusion that the appellant's witnesses were not credible at all, but gave no reason for such a conclusion. The Record does not support that challenge by counsel for the appellant. From the record, I am satisfied with the reasons given by the lower court in arriving at that conclusion.

The Appellant's witnesses were servant and wife of the appellant. From that relationship, the lower court's inference of lack of objectivity and influence cannot be termed unreasonable.

Secondly, there are glaring contradictions in the appellant's witnesses' evidence, as analysed by the Learned Magistrate. These include: the speed at which the vehicle was moving prior to the accident; the distance between the accident the Respondent, and why the appellant did not run over the Respondent if the witnesses accounts were truthful. Further the wife of the appellant was not there when the accident occurred. She was in another vehicle, behind the appellant's vehicle, and relied on what the appellant/husband told her. Hence, the inference of influence. Finally, the whole issue of the wind-blown hat of the Respondent was not mentioned in the Report- Statements to the police who came to the scene of the accident immediately. The hat came up only in the civil suit.

All the above issues are fully dealt with, and analysed, in the Learned Magistrate's Judgment. There is therefore sufficient reasoning as to why and how the lower court labeled the appellant's witnesses as not credible.

Finally, the Learned Magistrate has the advantage of assessing the demeanour of the witnesses, which no appellate court, like this one, has. The Lower Court's findings and conclusions cannot be easily faulted. I have no basis on which to interfer with his conclusions, given the above circumstances.

I conclude by a statement on the quantum of damages, which is raised in ground of appeal No. 9.

Learned Counsel for the appellant did not make any submissions on this point or elaborate on what is meant by "**excessive damages of all types."** nor was there any submission, at the lower court on the quantum of damages. In light of that; it is difficult to see what is excessive about the general damages awarded by the lower court. I zero on general damages because that is the only head of damages in this case, that can be challenged, or assessed by the court. Special damages, as held in **ZACHARIA WAWERU THUMBI VS. SAMUEL NJOROGE THUKU, HCCA**. No. 445 of 2003, special damages are not assessable by the court. Once pleaded and proved, the court has no option but to award the same.

In the appeal before me, the appellant alleges ' **award of all types of damages."** The record before me, has only two heads of damages: general and special. There are no other damages awarded by the

Learned Magistrate.

In the absence of the any submission to show how and why the general damages are termed "excessive" I find no merit in this ground of appeal, and reject the same as unsubstantiated.

All in all therefore, I dismiss the appeal herein with costs to the Respondent and against the appellant. The subordinate court's judgment is upheld.

DATED and delivered in Nairobi, this 24th Day of July, 2006.

O.K. MUTUNGI

JUDGE