



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

**Civil Appeal 51 of 2003**

**FELICAN MAINA..... APPELLANT**

**VERSUS**

**ANJIWA SHAMJI LTD. ....RESPONDENT**

**JUDGMENT**

**Felican Maina**, the appellant was the plaintiff in **Kericho SPMCC No. 1098 of 1999**. He has appealed against the judgment and decree of **Hon. Sylvester Onganyi** delivered on 28<sup>th</sup> May 2003.

In the suit before the subordinate court the appellant had initiated a personal injury claim against the respondent **Ajiwashamji** whereby he sought compensation for injuries as a result of a motor vehicle accident between vehicle registration No. **GK U 896** which the appellant was driving along Kisii- Kericho road and motor vehicle registration No. **KYM 394** which belonged to the respondent. The accident occurred on 23<sup>rd</sup> August 1995 and the appellant blamed the responded for the negligence and the injuries that he sustained namely a fracture of the right collarbone and the fracture of 3 side ribs.

The respondent duly filed a statement of defence and denied the claim of negligence and the particulars of negligence.

During the hearing the appellant gave evidence of how the accident happened. It is important to highlight that particular aspect of the evidence as it is found on the record of **"On 23<sup>rd</sup> August 1995 before the trial court.**

**Plaintiff (Adult sworn in English) states**

**"I am FELICAN KANGWANYA MAINA. I am a police officer attached to Provincial Headquarters, Nakuru.**

**On 23.8.95 at 4.10 p.m. I was on the former presidential escort duty from Kisii to Nakuru. I was driving one of the escort vehicles to clear the way for the President. It is motor vehicle GK U 896 – Toyota Corrolla. At Chebilit there are two other escort vehicles ahead of me. There were many vehicles which had been parked on the road side to clear the way for the president. One lorry Tipper Reg. No. KYM which had parked along the road-left side of the road facing Kericho direction suddenly entered the road traveling towards Kericho direction. I had just recovered at the sport. I hit the lorry in front of right hand side (off side tire).I lost control and rolled. I found myself at Kaplong Mission Hospital. The lorry had been covered by the police vehicles ahead of me by the president's convoy. He suddenly entered the road despite this. I got injured on the neck, back and ribs. I lost conscious till 8.00pm. I was admitted at the hospital for one day. I was transferred to Pine Breeze hospital for one month. These are the Kaplong Hospital cards (MFI-1). Then these are the cards from Pine Breeze (MFI-12). I reported to the police when I wrote my statement.**

I was issued with a P3 (MFI-13). This is his police Abstract from (MFI-4). The driver of the lorry cleared when the traffic case against him was still pending. Mr. Kiamba – a private medical practitioner- Nairobi prepared a medical report for me. This is the report (MFI-5). I paid him ksh. 2,000 for that report. This is the report (MFI-6). My names are FELICAN FREDRICK MAINA. Both Felican and Fredrick are my names. Sometimes my nose bleeds on cold weather. My ribs ache sometimes. My right arm is weak. The driver of the lorry that caused the accident was called Samuel Sigei. The owner of the lorry is ANJIWA SHAMJI. Pray for both general and special damages.”

The defence did not call any evidence but they filed written submissions. According to the respondents, written submissions, the driver of the motor vehicle registration No. KYM 394 had been charged with the offence of reckless driving contrary to **Section 47 (1) of the Traffic Act** and the charges were withdrawn under the provisions of **Section 87(a) of the Criminal Procedure Code**. Thus the respondent was absolved from any wrongdoing, but should the court be inclined to decide otherwise the respondents counsel submitted that liability should be apportioned at 20:80 in favor of the respondent. On quantum counsel for the respondent urged the court to award the appellant Ksh. 180,000 for general damages and relevant case decided was cited by the counsel for the respondent.

The court however dismissed the appellants claim ostensibly on the grounds that the treatment cards, Police abstract, medical report and receipts were produced by the appellant who was not the maker of the documents. While relying on the provision of **Section 35 of the Evidence Act**, and the case of Thuranira Karauri Vrs. Agnes Ncheche CA No. 192 of 1996, Nyeri, the trial court dismissed the plaintiffs suit.

Being dissatisfied with the said verdict, the appellant appealed and he has raised the following grounds of appeal.

1. **The learned trial Magistrate erred in Law in failing to make any finding of both fact and Law on the issue of Liability.**
2. **The learned trial Magistrate erred in Law in admitting all the documentary evidence at the trial and then disregarding it in his judgment.**
3. **The learned trial Magistrate erred in Law in holding that the production of the documentary evidence was breach of section 35 of the Evidence Act.**
4. **The learned trial Magistrate erred in law failing to hold that the Appellant had proved this case on balance of Probabilities.**
5. **The learned trial Magistrate erred in Law failing to draw issued for determination give his decision thereon and gives reasons for such decisions.**
6. **In all the circumstances of the case the decision is against the weight of the evidence**
7. **The learned Magistrate erred in failing to assess damages otherwise payable to the Appellant.**

The respondent did not defend the Appeal as their counsel **Mr. korir** who appeared in the course of the hearing, said he was unable to respond to the submissions as he was instructed to hold brief for a **Mr. Arusei** whose instructions were limited to apply for an adjournment.

I have considered the grounds of appeal, the submissions by counsel for the appellant and the authorities cited in support of the appeal. In evaluating this appeal, I will do so by considering the grounds of appeal in two thematic areas, firstly Whether the judgment as written failed to comply with the provisions of order 20 of the civil procedure rules and secondly whether the learned trial magistrate erred in dismissing the appellants suit on the grounds that the documents were not produced by the maker.

**Under Order XX Rule 4 of the Civil Procedure Rules:** Judgment in defended suits shall contain a concise statement of the case, The points for determination, the decision thereto and the reasons for such “claims.” With tremendous respect to the learned trial Magistrate, the nearly one page judgment in this case has not complied with the above requirements.

If this was the only deficiency, this court is empowered to reconsider the evidence on record and rewrite the judgment. However in this case, the defence did not offer any evidence and the only reason why the plaintiffs claim was dismissed was for reasons that the appellant produced the documents which he was not the author and he failed to lay a basis for such productions. The record shows that the documents were admitted without any objection from either the court or the defence and they were marked as exhibits No. 1 – 6.

If the court was not satisfied with the documents, they ought not to have been admitted at all, as authority. The documents to be marked as exhibits and then turning round to reject the documents in its judgment, the appellant must have been prejudiced. If the documents were rejected during the evidence, the appellant would have had a chance of not closing the case at that stage but perhaps considering to call the makers of the documents.

Apart from the above, the provisions of section 35 of the Evidence Act does not bar the appellant from producing original documents provided that:

(a) *"If the maker of the statement either*

(i) *Had personal knowledge of the matters dealt with by the statement or*

(ii) *...*

The documents produced by the appellant related to the injuries, that he personally, suffered, the report that he made to the police and as it can be seen from the submissions by the defence in their written submissions, they even relied on the information contained in the police abstract form.

For the above reasons, the learned trial magistrate erred in dismissing the appellants claim.

As regards the case of **Thuranira Karauri Versus Agnes Ncheche CA No. 192 of 1996**, the learned trial Magistrate did not give reasons why he relied on this authority. The ratio decided in that case was in respect of prove of ownership of the subject motor vehicle which was denied and therefore the respondent did not produce a certified copy of the register to prove ownership.

In the present case, the ownership of the motor vehicle was not in issue and the trial Magistrate should have evaluated the plaintiff's case and proceeded to ascertain liability based on the evidence and the material that was before court.

The evidence by the plaintiff which was not at all controverted was that he was driving motor vehicle registration No. GK U 896 in a presidential escort when the respondents lorry Tipper Reg. No. KYM 394 which had been parked along the left side of the road facing the Kericho direction suddenly entered the road and the appellant hit the lorry on the right side tire, lost control and rolled.

According to the submissions by the counsel for the defendant, the driver of the lorry was discharged and absorbed of any blame when the traffic charge was withdrawn under section 87 of the Criminal Procedure Code.

On a balance of probabilities and based on the above evidence, I would find that both drivers were to blame, although the road had been cleared for the presidential motorcade and the appellant was a driver of the presidential escort vehicle, he ought to

have looked out for other vehicles and I would thus apportion the blame equally between the two drivers. The driver of the lorry that belonged to the respondent similarly ought to have been on the look out of other road users and not to enter the road suddenly without due regard to other motorists.

On quantum, the appellant said that he suffered injuries on the neck, back and ribs and lost consciousness. He was hospitalized at Pine Breeze hospital for one month and he was out of work for a period of three months. Counsel for the appellant urged this court to award him a sum of Ksh. 450,000 for the injuries sustained. In this case counsel put forward the case of **TITO SEILENI vrs. JOHN KAYILI & another HCCC No. 245 of 1992 Mombasa** where the plaintiff was awarded Ksh.400,000 for suffering compound fractures of the cervical spine, chest injury with fracture of the first and second ribs, fractures of the right clavicle and right scapula lacerations of the legs.

He also referred to the case of **Masinde Evans vrs. Kenneth K. Turu & another HCC. No 50/1998 Mombasa** where the plaintiff was awarded Ksh. 350,000 for injuries of compound fracture.

I have also considered the awards made in the decisions that were cited by the respondents and the injuries that were suffered by the appellant. The appellant did not sustain the injuries of compound fractures and in the circumstances I hereby award Ksh.280,000 to the appellant for the injuries sustained.

The claim for special damages was not pursued and rightly so as the medical receipt did not have the revenue stamps and as such was not admissible in evidence.

Accordingly the appeal herein is allowed, the judgment and order of the lower court is hereby set aside with costs to the appellant and substituted with a judgment for the appellant on liability **50%** apportioned to each party.

On quantum the appellant is awarded **Ksh.280,000** less 50% contribution. Total **Ksh.140,000** with costs for the lower court and costs of this appeal.

It is so ordered.

**Judgment read and signed on 5<sup>th</sup> October 2006.**

**MARTHA KOOME**

**JUDGE**