



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 179 of 2003

(Being an appeal from the original determination and judgment of Hon. Mrs. S. Muketi – S.R.M in Nakuru Chief Magistrate Civil Suit No. 2282 of 2002)

MUIRURI KARIUKI APPELLANT

VERSUS

EUNICE NJERI KIMANI DEFENDANT

JUDGMENT

The appellant, **Eunice Njeri Kimani** was the defendant in S.R.MCC Nakuru number 2282 of 2002 where the respondent, **Muiruri Kariuki** had instituted a civil suit claiming damages for injuries sustained in an accident. The accident occurred on 16th October 2002 along Nakuru-Eldama Ravine road and the respondent blamed the plaintiff who was the owner and driver of motor vehicle registration number **KAJ 210P** for the accident.

The case was heard, wherein the respondent gave evidence and gave details of how the accident occurred and he produced the treatment card which was issued at the Provincial General Hospital, a medical report, a receipt for **Kshs.2,500/-** which is said he paid for the medical report and a police abstract form as part of his evidence.

The defendant did not offer any evidence. In a judgment delivered on 16th October 2003, the learned Senior Resident Magistrate awarded the respondent **Kshs.50,000/-** as general damages and **Kshs.2,600/-** as special damages with costs and interest.

The appellant being aggrieved by the said judgment as appealed and raised two grounds of appeal as follows: -

1. **The learned Magistrate erred in law in not upholding the submissions of the defendant that the plaintiff had failed to prove that the defendant was liable as the plaintiff did not adduce any evidence to prove ownership, by the defendant, of the motor vehicle at the centre of the plaintiff's claim.**
2. **The learned Magistrate erred in law and fact by finding that the nature of the injuries suffered by the respondent merited general damages of Kshs.50,000/-**

By way of further arguments, **Mr. Kiburi** who appeared for the appellant, submitted that the learned trial magistrate erred by not considering the respondent failed to prove his case against the appellant. No certificate of search from the Registrar of Motor Vehicles was produced by the respondent to prove ownership of the motor vehicle and in view of the decision of the Court of Appeal in the case of **Thuranira Karauri – vs - Ncheche Nyeri High Court Civil Appeal No.192 of 1996** where the Court of Appeal that a search certificate from the Registrar of Motor vehicle is necessary as prove of ownership especially where ownership is denied by the defendant this appeal should be allowed. This decision has also been followed in **Nairobi Civil Appeal number 118 of 2003 the case of Moitalel Ole Sapit - vs - Festurs Muchoki Kibira.**

The judgment was also challenged for failure to comply the standards set out under **Order 20 Rule 4** of the **Civil Procedure Rules** which requires that

“a judgment in defended suit contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”

The award of damages was faulted for being on the higher side, especially the special damages of **Kshs.2,600/-** which Counsel for the appellant said was not supported by a varied receipt containing a revenue stamp as provided for under the **Stamp Duty Act**. It is for these reasons that Counsel for the appellant urged this court to set aside the judgment and award the appellant the costs both in the lower court and for this appeal.

On the part of the respondent, **Mr. Mburu** opposed this appeal for lacking merit. He submitted that the defence did not contain any concrete rebuttal or categorical denial of ownership of the motor vehicle by the appellant. Counsel referred to paragraph 5 of the defence in which the appellant’s defence was that the accident was substantially contributed to by the respondent and she proceeded to give the particulars of negligence on the part of the respondent. That was a clear indication but the appellant was the owner of the motor vehicle and she was controlling the same. In this appeal therefore, the appellant is merely acrobating and reprobating.

In further response, Counsel argued that during the trial, no questions of ownership were put to the respondent. Similarly the facts that the appellant was the driver was not challenged. He therefore distinguished the case of **Thuranira Karauri (Suppra)** based on the fact that the appellant’s defence was just a mere denial and the evidence by the respondent was not at all controverted and the defendant did not offer any evidence.

Regarding the issue of judgment falling short of the provisions of **Order 20 Rule 4**, Counsel for the respondent argued that, that ground is not part of the grounds of appeal and the appellant should be bound by her pleadings.

On the issue of the assessment of damages, Counsel submitted that the award of **Kshs.50,000/-** is extremely conservative compared to the injuries the respondent sustained and considering this was based on the evidence and finding of facts before the trial court, this court can not interfere with the assessment of damages unless it is clearly based on the wrong principles of law.

It is the duty of this court sitting as the first appellate court to re-evaluate the evidence and come up with its own determination of the matter as provided for under **Section 78** of the **Civil Procedure Act**. The court should also bear in mind that it never heard or saw the witnesses as they testified. The first issue to consider herein is whether there was evidence to support the award of damages. The evidence was only given by the respondent who was cross-examined by Counsel for the appellant. The issue that I have to address, is whether there was prove of ownership of the motor vehicle by the appellant.

I have looked at the statement of defence especially paragraph 3, it contains a general denial of the contents of paragraph 3 of the plaint. However, the appellant’s statement of defence proceeds to admit that an accident occurred on the material time and date stated in the plaint and more importantly in paragraph 5, the appellant’s statement of defence attributes the negligence that caused or substantially

contributed to the accident on the part of the respondent. She proceeds to give the particulars of the negligence. Moreover, during the hearing, Counsel for the appellant did not raise any issue of ownership of the motor vehicle during cross-examination nor did they offer any evidence to controvert what was produced in the evidence by the respondent by way of a police abstract form as prove of ownership.

In further consideration of this aspect, I have drawn a parallel in the case of **Ouma –vs- Nairobi City Council KLR [1976] page 298** where an English case of **Stroms Bruks Aktie Bolag –Vs- John & Peter Hutchison [1905] A C 515** was approved as follows: -

“ ‘General damages’, as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the act complained of. ‘Special damages’, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly.”

In the present case, the respondent was involved in an accident which is not disputed, he gave evidence about the injuries he suffered, he produced the discharge summary of his hospitalization, a medical report and a police abstract form which evidence was not challenged. I am satisfied that he proved his case against the defendant and the trial court was correct to proceed and assess the general damages. The award of general damages in my view is rather conservative considering the injuries suffered by the respondent.

Furthermore, this being an appellate court, it is undesirable to interfere with the trial court’s discretion in assessing general damages unless it is proved that the said trial court proceeded on the wrong principles of the law or that it awarded damages that are inordinately high or inordinately low as to amount to an entirely wrong assessment or estimate for the amount awarded. (See the case of **Kitori V –Vs- Coastal Bottles Ltd [1985] KLR 56 and Hassan –Vs- Nathan Mwangi Kamau Transporters**).

As regards the ground of appeal that challenged the quality of the judgment that ground is not stated in the memorandum of appeal. According to the provisions of **Order 41** of the **Civil Procedure Rules**,

“The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against without any argument or narrative, and such grounds shall be numbered consecutively.”

Failure by the appellant to include this as a ground of appeal is tantamount to taking the respondent by surprise and I therefore reject this ground of appeal.

Taking all the circumstances of this appeal into consideration, I am not satisfied that the learned trial Magistrate erred in arriving at the judgment. Accordingly dismiss this appeal with costs to the respondent.

Judgment read and signed on the 17th day of November 2006.

MARTHA KOOME

JUDGE