



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 81 of 1995

(An appeal from the judgment of the Senior Resident Magistrate (Helen Owino (Miss) in Nakuru SRMCC No. 1082 of 1995 dated 25/9/95)

ROBERT NGARI GATERI.....APPELLANT

VERSUS

MANINGO TRANSPORTERS.....RESPONDENT

JUDGMENT

The appellant was the plaintiff in the original suit and he filed a case against the respondent claiming general and special damages as a result of injuries and loss due to an accident which he alleged to have occurred on 1st December, 1994 when he travelled in the respondent's bus registration number KAA 745Y as a fare paying passenger. He alleged that the accident was caused by the respondent's negligence and he set out the particulars in his plaint. He said that he suffered chest injuries and bruises on his left elbow and suffered loss of beef steak and mutton valued at Kshs.44,000/-. He further alleged that he had a medical report prepared at a cost of Kshs.1000/-.

The respondent entered appearance but failed to file any defence and interlocutory judgment was entered and the matter was set down for formal proof. The appellant testified that the said accident occurred at Tarn along Mombasa-Nairobi highway and the accident was reported at Mariakani Police Station where he was issued with a police abstract report which showed that he was a passenger in the said bus. The bus ticket which he was using had been bought by somebody else who later changed his mind about travelling that day and sold the ticket to the appellant, he stated.

The appellant further testified that he used to do a business of buying meat up country and selling it at Mombasa and on that material day, he was transporting 100 kilograms of beef and 200 kilograms of mutton which he would have sold for Kshs.44,000/- inclusive of the purchase price. He produced a certificate which had been issued to him for transportation of the meat. As a result of the accident, there was delay in delivery of the meat to Mombasa and by the time it arrived after 2 days it was already spilt. He said that he had paid for transportation of the meat but he had not been given a receipt.

The respondent did not adduce any evidence but filed written submissions and stated that the appellant had not proved his case on a balance of probabilities and urged the court to dismiss the same. The trial magistrate agreed with the respondent's submissions and dismissed the appellant's suit with costs. She stated that a police abstract from was not evidence that one was involved in a road traffic accident but it

merely meant that one reported to the police about the accident. She also held that the bus ticket belonged to somebody else and there was no evidence to support the claim that the appellant had obtained it. The trial magistrate concluded that the case was based on opportunism with a view to getting damages.

The appellant was aggrieved by the said findings and filed this appeal. His counsel raised the following grounds of appeal which were all argued together.

1. The learned trial magistrate erred in law in failing to appreciate that a final judgment had been entered in respect of the liquidated claim of Kshs.45,000/- and she could not therefore dismiss it in her judgment.
2. The learned trial magistrate erred in law in failing to appreciate that interlocutory judgment having been entered for the unliquidated claim she could only assess the general damages and could not consider the issue of liability.
3. The learned trial magistrate erred in law and infact in holding that the appellant did not sustain any injuries.
4. The learned trial magistrate erred in law in holding that the plaintiff had not proved his case on a balance of probabilities.
5. In all the circumstances of the case the decision is against the weight of evidence.

When the appeal came up for hearing the respondent's advocate did not attend court although he had been duly served with a hearing notice and an affidavit of service filed. Mr. Mutonyi for the appellant faulted the learned trial magistrate for dismissing the appellant's case on the basis that he had not proved his case while according to him the appellant had testified orally and produced documents in court in proof of his case and his evidence was unchallenged. He submitted that the appellant was truly a passenger in the said bus and that was borne by the bus ticket which he produced and the police abstract report. He cited a Court of Appeal decision in **SAMUEL GIKURU NDUNGU VS COAST BUS COMPANY LTD** Civil Appeal No. 177 of 1999 (unreported) where the court was considering a similar argument and their Lordships stated as follows:-

“As to whether the appellant was a passenger in the accident bus, the police visited the scene of the accident, and later prepared the abstract report in evidence, and no evidence was adduced to controvert it. The appellant is shown in that report to have been one of the passengers in the accident bus. The learned trial judge did not advert to this evidence. He appears to have thought that because the appellant had averred in his amended plaint that he was a fare paying passenger, his failure to produce the fare receipt he was issued was evidence that he was not a passenger in the bus at the time of the accident. Such a receipt is evidence but not the only evidence in proof of the fact of the appellant, or any other person being a passenger in a particular motor vehicle. In the case before us, the police abstract report on the accident and the appellant's oral testimony clearly established that the appellant was a passenger in the accident bus on the date and time of the subject accident. The finding by the learned trial judge to the contrary is clearly in error in view of that evidence.”

I am in total agreement with the views of their Lordships as quoted above. In the matter before me, the appellant had given oral evidence and described in details how the said accident had occurred, produced the bus ticket which he had used to board the bus and gave a sufficient reason why the same was not in his name. He also produced a police abstract report which indicated that he was a passenger in the accident bus. All that had not been challenged by the respondents and in the circumstances, the trial magistrate was in error to hold that the appellant was not a passenger in the said bus.

The appellant also produced a medical report by Dr. K.S.M. Mbatia, a Medical Examination Report (P3) duly completed as well as treatment notes and the receipt for Kshs.1000/- that was issued to him by the said Doctor upon payment of the medical report fees. He also testified regarding the injuries that he

received as a result of the accident. He explained why it took him some time to go to hospital for treatment. In light of the above, the trial magistrate erred in dismissing the appellant's claim for general damages when there was no evidence to controvert his evidence.

With regard to the appellant's claim for Kshs.45,000/- as special damages, interlocutory judgment had already been entered in terms of Order IXA Rule 3(2) of the Civil Procedure Rules which provides as follows:-

“(2) where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the court shall, on request in Form No.26 of Appendix C, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.”

A liquidated demand is defined in **THE SUPREME COURT PRACTICE** Volume 1 at Page 33 as follows:-

“A liquidated demand is in the nature of a debt i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum, even though it be specified or named as a definite figure requires investigation beyond mere calculation, then the sum is not a “debt or liquidated demand”, but constitutes “damages”.

The appellant's claim was for special damages, Kshs.45,000/-, general damages, costs and interest. As already stated, there was interlocutory judgment that had already been entered in respect of the aforesaid sum and the respondent had not applied to have the same set aside and in the absence of any defence having been filed, there was no basis of disallowing that claim. The learned trial magistrate should have proceeded to determine whether the appellant had proved the particulars of negligence as alleged in the plaint and if so then assess the general damages payable. In my view, the appellant proved on a balance of probabilities that he sustained injuries as a result of the said accident that was caused by the respondent negligence.

Having come to the foregoing conclusions, I hold that the dismissal of the appellant's case was unjustified and I set aside the said judgment. The trial magistrate, having dismissed the appellant's case, should have proceeded to state what she would have awarded to the appellant had he succeeded in proving his case. Having failed to do so and having set aside the judgment of the trial court, I will proceed to determine the case finally in terms of the provisions of Section 78(1) of the Civil Procedure Act.

The appellant suffered soft tissue injuries of the left lower chest, left elbow, right thigh and right buttock. The appellant's counsel had urged the trial court to award a sum of Kshs.80,000/- as general damages for pain suffering and loss of amenities. He had relied on the case of **RICHARD MUCHIRI VS JOSEPH MAINA** HCCC No. 3716 of 1989 at Nairobi (unreported) where the plaintiff therein sustained soft tissue injuries on the left leg, upper arm, right hand, chest and back and the court assessed general damages at Kshs.75,000/-.

He also sought to rely on the case of **MWALIMU ZANI KALI VS BONIFACE KOMBO** HCCC No. 1344 of 1989 at Nairobi (unreported) where the plaintiff sustained soft tissue injuries to the chest, shoulder, arm and back and was awarded Kshs.70,000/- as general damages for pain suffering and loss of amenities.

On the other hand, the respondent had submitted that an award of Kshs.10,000/- was reasonable.

Taking into account the kind of injuries that the appellant sustained and the authorities that were cited by the appellant's counsel, I assess general damages for pain suffering and loss of amenities at Kshs.60,000/-. I also enter judgment on account of special damages at Kshs.45,000/- plus costs both in the lower court and in this court plus interest at court rates. The interest on special damages will accrue from the date of filing this suit until payment in full.

DATED, SIGNED AND DELIVERED at Nakuru this 9th day of December, 2005.

D. MUSINGA

JUDGE

9/12/2005

Judgment delivered in open court in the presence of Mr. Mbiyu holding brief for the appellant N/A for the respondent.

D. MUSINGA

JUDGE

9/12/2005