



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 92 OF 1999

KIMATU MBUVI &

JOSEPH MUSUMBI.....APPELLANTS

VERSUS

PETER MUTUA LAU.....RESPONDENT

J U D G E M E N T

This is an appeal that arises from Kangundo SRMCC 429/1998 where the plaintiff now the respondent had sued the defendants/appellants for damages for injuries suffered as a result of a road traffic accident. Judgement was entered for the respondent against the appellant. The appellant filed an application to have the said judgement set aside but the application was rejected. The appellant being dissatisfied with the said ruling filed this appeal.

In the memorandum of appeal the appellant claims to be appealing against the lower court's ruling of 25.6.1999. As correctly pointed out by the respondents counsel there is no ruling in the record dated 25.6.1999. The ruling that the appellant must be referring to is dated 7.5.1999.

In ground 1 of the memorandum of appeal the appellant also refers to the judgement of the lower court dated 19.11.1998. Again the respondent correctly pointed out that there is no such judgement on record of appeal. The only judgement on that record is dated 17.12.1998. Though the respondent asks that court to dismiss the appeal on that account of the appeal being misplaced, since there are not many judgements or rulings on the record to cause any confusion the court will disregard these mistakes and look at the substance of the appeal and disregard the mistakes in the dates and the dates are hereby amended on the courts own motion under section 100 Civil Procedure Act.

The appellant has cited 4 grounds in his memorandum which the court will consider in this judgement.

In the first ground it is contended that the Magistrate erred in law and fact by holding that there were no reasons to set aside the exparte judgement of 17.11.1998 whereas there were merits in the application and secondly that there was an application to join a 3rd party which was coming up for hearing on 4.12.1998 which the court should have allowed the defendant/appellant to prosecute. The hearing in this case proceeded on 19.11.1998 when the court satisfied itself that the defence counsel had been served with hearing notice but had failed to turn up for the hearing. In the application to set aside the judgment dated 17.12.1998 counsel for the appellant deponed that he had spoken to counsel for respondent on telephone on 18.11.1998 and that they had agreed to put off the matter since a 2nd medical report was required from the respondent and also that the respondent had a 3rd party application which was pending prosecution. Counsel for appellant did not therefore sent anybody to hold his brief as he trusted respondent's counsel.

In his replying affidavit the counsel for respondent vehemently denies having talked with Mr. Pramod Patel counsel for appellant prior to hearing of the case. Of course there was no evidence that the two counsels conversed on phone. It was the word of one counsel against the other. But if the counsels had indeed agreed as alleged by counsel for appellant they never agreed that that counsel should not attend court. Counsel for appellant should have attended court or sent somebody to hold his brief and make the relevant application for adjournment for it is the court that has the final say as to whether to grant an adjournment or not.

There was indeed a 3rd party application pending on record. It was due for hearing on 4.12.1998. In their defence the appellant had blamed the accident on the 3rd party. Looking on the record, the plaint had been filed on 2.9.1998, the defence was filed on 14.9.1998 and the matter came up for hearing for the first time on 19.11.1998 when the appellant's counsel failed to attend. The lower court record does not show whether they ascertained if the appellant was present or not as that was very important. The case had never been adjourned before and there is no evidence that the appellant was bent on delaying the matter in anyway. The failure to attend court was not the appellants but the counsels. These are issues the trial magistrate should have considered in the application to set aside judgement and with all the above considerations in mind I find that the trial magistrate erred in not considering the above reasons in exercise of his discretion as to whether or not to set aside the judgement.

On the hearing date the respondent applied to amend the plaint so that the date on which the cause of action arose changed from 22.10.1997 to 27.10.1997. The appellant contends that with such an amendment, which changed the cause of action they should have been allowed to amend their defence. The defence as filed does not refer to any specific date but admits an accident between motor vehicles KAC 520C belonging to appellant and KAH 579V. It is the same vehicles quoted in the plaint. I believe the date refers to same cause of action and there would have been no need to amend the defence.

The respondent was awarded Kshs.130,000.00 as general damages which the appellant claims were excessive in considering the injuries sustained by respondent. At the time of examination by Dr. Kibore on 27.10.1997 he found 2 loose teeth and a scar on right elbow. All plaintiff needed then was dental review. Respondent had suffered injuries to the lower hip, blunt injury to the chest and cut wound on right elbow. They were soft tissue injuries considering the authorities cited by appellants counsel that is ANDREW KIBERENGE V AHALA ENGINEERS HCC 6214/90. I would give an award of Kshs.80,000/= as general damages Kshs.130,000/= were excessive as of that time in 1999.

From the foregoing the court finds that the magistrate did not exercise his discretion judiciously in considering the application to set aside judgement and the court does allow the appeal and sets aside the ruling of the magistrate dated 7.5.1999 and set aside judgement of the same it entered them on 17.12.1998 and all consequential orders.

The appellant will pay the respondents thrown away costs and costs of this appeal.

Dated, read and delivered at Machakos this.....day of.....,2004.

R. WENDOH

JUDGE