



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 364 OF 2000

GERALD GATHE KIMANI APPELLANT

VERSUS

PATRICIA AMU EVANS RESPONDENT

JUDGMENT

The Plaintiff (hereinafter referred to as the Appellant) filed a suit against the Defendant (hereinafter referred to as the Respondent) in the lower court for damages arising out of a motor vehicle accident that occurred on the 17th April, 1994 along Ruaka Banana Road between the Plaintiff's motor vehicle Reg. No. KPV 685 and defendant's motor vehicle Reg. No. KXA 995.

Briefly the facts of the case according to the Appellant are that he was driving his motor vehicle along Limuru/Banana road after branching off at Ruaka from Redhill road; at a place where there was a bend, he saw the Respondent's trooper coming from the opposite direction, overtaking a white salon car. The two vehicles met on the Appellant's lane and collided. Both vehicles got damaged and the Appellant sustained bodily injuries. The Respondent denied liability.

The matter was heard and determined by the subordinate court. Hence, this appeal arising from the Judgment of the Senior Principal Magistrate Mrs. Muchemi dated 17th February, 1999. It is based on the following six grounds of appeal:

- 1. THAT the learned Magistrate erred in law and in fact by dismissing the Appellant's claim entering judgment against the Appellant and yet there was no proof of negligence on his part.***
- 2. THAT the learned Magistrate erred in law and in fact relying on the testimony or evidence of the Respondent who never called any independent witness to support his evidence.***
- 3. THAT the learned Magistrate erred in law and in fact in disregarding the injuries of the Appellant and proceeded to enter judgment against him.***
- 4. THAT the learned Magistrate erred in law and in fact in speculating about the appeal and proceeded to indicate that the Appellant shall be paid Kenya Shillings Two Hundred and Fourty Thousand (Kshs. 240,000/=) incase the Appellant appeals.***
- 5. THAT the learned Magistrate erred in law and in fact in condemning the Appellant for negligence relying on the traffic case where the Appellant was charged for driving a defective motor vehicle and yet this was never connected with the present case.***

6. THAT the learned Magistrate erred in law and in fact for accepting the evidence of the Respondent and yet no inspection was produced in court to prove the Appellant's motor vehicle was defective.

On the first, second and third grounds of appeal, the Counsel for the Appellant argued that the Magistrate was wrong in dismissing his claim on the basis that there was no proof of negligence established against the Respondent.

The Counsel for the Respondent, argued that the case had been proved in his favour on a balance of probability. He submitted that the Appellant was driving a motor vehicle with defective brakes.

Having followed the lower court's proceedings, I agree with the Magistrate that the respondent's testimony as to the occurrence of the accident is more credible than that of the Appellant. The Appellant alleges that the accident took place while overtaking. If it is so then the two motor vehicles would have collided head on; instead the Appellant's car was damaged on the right hand side of the driver's door while that of the Respondent was damaged at the front right corner. It is common knowledge that the accident occurred as the Appellant was swerving from the lane used by vehicles coming from the opposite direction back to his own lane, thus causing impact on the driver's door. More so, this could have been caused by the defective brakes.

Hence grounds 1, 2 and 3 fail.

On the fourth, fifth and sixth grounds of appeal, the Counsel for the Appellant submitted that the Magistrate erred by relying on criminal proceedings that the Appellant drove a defective motor vehicle. Secondly she relied on evidence of the Respondent which was not credible to prove liability

Counsel for the Respondent, submitted that the Appellant had pleaded guilty to driving a motor vehicle with defective brakes. He submitted that the pleadings in the Complaint were general and that specific particulars relating to the Respondent's negligence had not been spelt out. The parties are bound by their pleadings. He quoted the case of **Galaxy Paints Company vs Falcon Guards** Nairobi C A 219 of 1998 .

He submitted that the magistrate had heard all the witnesses and entered Judgment in respect of counter claim in favour of the Respondent having had the opportunity to observe the demeanour of the witness and quoted the case of Ogol vs Murithi (1985) KLR 359 .

Having perused the proceedings of the lower court and having considered the submissions of both Counsels, I am satisfied that the Magistrate made her Judgment based on the testimony of the witnesses before her. She had the benefit of observing the demeanour of these witnesses, and I am satisfied that she evaluated the evidence correctly, and came to a just decision. I have no reason to interfere with her decision, and I, accordingly, dismiss this appeal, with costs to the Respondent.

Dated and delivered at Nairobi this 22nd day of July, 2004.

ALNASHIR VISRAM

JUDGE