REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 497 OF 2000

BARI WAKO ISMAEL
(suing by next friend and father)

SULEIMAN HAMED ADOW …… PLAINTIFF

VERSUS

KAMULAT SUPPLIES LTD …….. DEFENDANT

J U D G E M E N T

On 9th October, 1995 the plaintiff, a minor, was walking along the second avenue, Eastleigh when motor vehicle registration number KAD 065 Z driven by the defendant/respondent driver knocked and injured him.

He filed a suit through his father as next friend on 22nd September, 1997 to claim from the respondents both special and general damages, blaming the latter in negligence.

The case was heard on 18th July, 2000 wherein the plaintiff called 3 witnesses who testified.

The defence called no witness but counsel for both parties made written submissions and the judgement was written and delivered on 14th August, 2000.

The suit was dismissed on the grounds that, being a minor suing through the next fried by advocate, the authority in writing to institute such suit was not given to such advocate as required by Order 31(2) of the Civil Procedure Rules.

The plaintiff filed an application for the review of judgement arguing that failure to file authority by the next friend was fatal and that the applicant had sent to the court authorities to this effect attached to a replying affidavit but that such authorities did not reach the court in time.

He argued further that the Magistrate who dismissed the suit had an obligation to indicate what damages would have been payable had the suit succeeded, hence the order sought for review.

Counsel for the respondent opposed that application saying there was no error apparent on the face of the record and that there is no rule that the court should assess damages – that the judgement can only be challenged on appeal and so forth.

The application was dismissed on 19th September, 2000, hence the appeal filed herein on 29th September, 2000.

There were grounds of appeal one of which was that the Magistrate erred in finding that failure to file an authority by the next friend of a minor was fatal.

This is in fact the main ground taken on the submission on appeal on 23rd January, 2002.

Counsel for the appellant was the only one who appeared on the hearing of the appeal though the hearing date was fixed by consent of counsel of both parties.

He took up the issue of filing the authority by the next friend to the advocate under Order 31(2) of the Civil Procedure Code saying it was not mandatory for such authority to be filed before the filing of the suit.

According to his submissions the judgement was based on the presumption that no authority had been filed when in fact one was filed with an amended plaint on 17th September, 2000.

That with the decision is in Civil Appeal No. 8 of 1989 having been brought to the notice of the Magistrate then was an error apparent on the fact of the record for her not to have followed this binding authority.

The appeal was against dismissal of an application for review. Under Order XLIV of the Civil Procedure Code, such an order can be obtained for an apparent error or mistake on the fact of the record, discovery of new and important matter or evidence not within the knowledge of the applicant when the order was made or some other cause which should be analogous to the first two.

These are really factual materials or matters which have nothing to do with the law.

But the applicants' arguments in the application for review were two folds, namely the authorities he had sent to the court over the filing of written authority by minors next friend to the advocate and failure by the learned magistrate to assess damages inspite of her having dismissed the suit.

As regards the latter, I do not think it is an error of law for a Magistrate or any court to fail to assess damages even if it dismisses a running down case. I would call this a guideline by the court of appeal to minimize assessment work in the event of the success of the appeal and could be a ground for an order for review. It does not come within the armbit of the grounds stipulated in Order XLIV of the Civil Procedure Code.

As regards the former, apart from the appellant raising it in the Resident Magistrate's court during arguments on the application for review, he has raised it in this appeal.

He has even produced the decision in Civil Appeal Number 8 of 1989 Kedowa Saw Mills Limited & Another vs Francis Hosaka & Another where the Appeal Judges interpreted Order 31 Rule 2 as giving the court a discretion to allow the next of kin file a written authority to the advocate filing a suit on behalf of a minor even after that suit has been filed in court contrary to the apparent spirit of the rule that this should be done before the relevant suit is filed.

Although technically this is not one of the grounds which is embraced in Order XLIV of the Civil Procedure Rules on an application for a order for review, yet it is an important legal point which courts should take judicial notice of, and if the learned Resident Magistrate had done so in the case subject to this appeal, she may not have arrived at the same decision which is now the subject of the appeal.

And when the court finds a case before it incontretent and wrongly filed there, I thought the propre order would be to strike it out so that if the aggrieved party is minded and subject to limitation of actions, he/she can file a fresh suit in the proper manner rather than have it dismissed.

I would allow this appeal, quash the learned Magistrate's judgement and/or order and remit the file back to the Chief Magistrate's court at Milimani Commercial Courts for the purpose of quantifying

damages.

Costs of this appeal and the court below will be paid to the appellant by the respondent after taxation.

Delivered and dated this 30th day of January, 2002.

D.K.S AGANYANYA

JUDGE