REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Appeal 141 of 1999

ANDREW KAMAU WAWERU ……………..…………………APPELLANT

VERSUS

GUCHU MURUGURI & ANOTHER …………...……………DEFENDANTS

J U D G E M E N T

This appeal arises from the judgement and order of the Senior Resident Magistrate at Nairobi (Milimani Commercial Courts) dated 7th April, 1999.

The brief facts of the case are that the plaintiffs were on 1.10.92 riding a bicycle from a place called Mackenzie trading centre going home, when along the way they collided with the defendant's motor vehicle registration number KNU 099 wherein both plaintiffs sustained injuries.

They blamed the defendant for negligence and filed a suit in the Chief Magistrate's court – Nairobi (Milimani Commercial Courts) to claim both special and general damages to compensate for the injuries sustained in this accident.

The case was heard on 22nd January, 1999, 24th February, 1999 and 7th April, 1999 when judgement was delivered wherein the 1st plaintiff was awarded Kshs.80,000/= in general damages and Kshs.1,500/= for specials while the 2nd defendant was awarded Kshs.160,000/= general damages and Kshs.1,900/- in specials.

The defendant was not satisfied with that judgement and award hence this appeal.

The second plaintiff was the one riding the bicycle while the first plaintiff was a pillion passenger thereon.

The plaintiff's evidence was that as they rode home, they saw a motor vehicle drive from the opposite direction and that near one Ngonya Kariuki's home, the vehicle swerved into the path of the bicycle and knocked the plaintiffs down.

In fact the second plaintiff testified that on seeing the motor vehicle approach, he swerved and rode his bicycle on the extreme left side of the road and that the motor vehicle was being driven at a high speed.

The defendant, on the other hand, blamed the bicycle riders for the accident. He stated that it had rained that day and the road was slippery.

That there were potholes on that road and the rider of the bicycle was doing so in a zigzag manner to avoid those potholes.

That when he drove round a bend on the road he slowed down but that the ride came on in the zigzag manner and hit the drivers door of the motor vehicle and both passengers on the bicycle fell down on the side of the road.

The defendant stated that the point of impact was on his side of the road. That he was not careless hence was not liable for the accident.

When the 1st plaintiff was cross examined, the impression intended to be created by the defendant was that the rider of the bicycle lost control when the pillion passenger peeped a head to see the motor vehicle which was approaching but the 1st plaintiff denied this.

That the motor vehicle came from a bend to knock the plaintiff's down.

And when the defendant was cross examined, he stated he ran away from the scene after the accident fearing for his life because he saw people who came round took stones to throw at the drunk or that he ran away from the same because he was in the wrong.

Though this accident occurred near Mackenzie – or Makanje trading centre, and that many people came round and even took stones to throw at the motor vehicle, none of them volunteered to come and testify in the case before the Senior Resident Magistrate.

And also though this case was reported either at Kandara police station or Kabati police post, no officer from either of those institutions appeared in court to testify or to produce any sketch plan, even if only to show the point of impact in regard to this accident. After all the evidence from the parties, the only eye witnesses showed that the accident occurred either on the plaintiff's or the defendants sides.

And though proceedings and judgement of Traffic Case No.269 of 1992 (R vs John Njoroge Njuguna) heard at Kandara court and which arose from the same accident were produced in the Magistrates' court case subject to this appeal, they do not explain the point of impact.

An though the police officer (P.C Kimeu) who alleged he took measurements at the scene and drew a rough sketch plan, such plan was not exhibited; hence the issue of print of impact was not resolved.

But in light of the evidence of both parties, I think this point was important in order to apportion the blame worthiness of either side if at all.

This police officer must have inspected the vehicle involved in the accident but did not tell the court whether he observed any damage to it or where.

In apportional blame, the learned Senior Resident Magistrate said this;

"On liability the plaintiffs' have testified the defendants driver DW1 was negligent in swerving the motor vehicle to their side of the road and causing the said collision. Indeed the driver was convicted of careless driving. I do find he is wholly liable and enter judgement on fully liability for the plaintiff against the defendant".

In light of this finding the learned Magistrate implied he accepted the evidence of the plaintiffs on this aspect but made no comment about the defendants case that this accident occurred when the rider of the bicycle was avoiding a pot hole and/or that the rider hit the drivers side door of the motor vehicle.

Or that because the driver was convicted in the traffic case and did not appeal, the this fact proved negligence on his part. (See Section 40(a) of the Evidence Act).

I do not want to be seen as sitting on appeal against the decision of the District Magistrate in Traffic Case No.269 of 1992. That case ended and the defendant filed no appeal.

Section 40(a) of the Evidence Act Cap 80 deals with the evidence in criminal cases the standard of proof of which is beyond reasonable doubt. I am not convinced this section applies to civil cases like ours per se.

That someone was or not convicted of a criminal case does not necessarily mean he did or not commit the wrong complained of in a subsequent civil case.

Many a times civil cases have successfully been prosecuted against wrong doers who were not been charged with criminal offences arising from their acts.

In the accident subject to this appeal each side blamed the other for the accident and there was no independent evidence to support either side.

The scene of the accident was not visited to confirm or not the evidence or existence of potholes. And if PW3 did so, he did not adduce evidence to confirm his observation of the said scene.

He did not produce the sketch plan of the scene to show the place of impact.

Though he said that he inspected the motor vehicle involved in the accident, he did not adduce evidence to show which side of it was knocked by the cyclist, if at all.

All this evidence was vital to support the evidence of one or the other of the parties and to confirm who of them was to blame for the accident.

The burden was not on the appellant to do all this but on the respondents, because this was their case. They failed to discharge this burden and, to my mind, the learned Senior Resident Magistrate had no firm basis for blaming the appellant for the accident.

Even if the said Magistrate believed the evidence of the respondents as to how the accident occurred, in the circumstances of this case, no basis, or a sufficient one, was laid for such belief.

I would allow this appeal and set aside the order of the Learned Senior Resident Magistrate. But since the appellant was not injured in the accident subject to this appeal I would order each party/parties to bear his/their own costs of this appeal.

On the other hand, if I had upheld the lower court's decision, I would have found the respondents 50% to blame for the accident.

These are the orders of this court.

Delivered this 25th February, 2002.

D.K.S AGANYANYA

JUDGE