REPUBLIC OF KENYA

THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 4280 OF 1983

BHIMJI KUNVARJI RAGHWANI t/a

RAGHWANI SHAH CONSTRUCTION CO …………................……. PLAINTIFF

VERSUS

KAMAU GICHUI (also known as Leonard Kamau Gichuhi) ….1ST DEFENDANT

PETER MBUGUA MWANGI …………………… ……………...2ND DEFENDANT

JUDGMENT

Before I write my judgment and deliver it, I apologize profoundly to the parties and their advocates and to my country, for the exceptional delay in rendering judgment in this case. In error, after judgment was reserved for consideration, the file was taken back to the registry, and as fate would have it, I understand that it was put between file covers of another case, so that efforts to trace it after inquiries made, were fruitless for all this time. I understand that it was only stumbled upon unexpectedly, and as I had expressed great concern, it was then immediately brought to my chambers a couple of days ago. I beg for forgiveness.

This is a judgment on the first defendant's counter-claim for Shs 31,800 after the plaintiff withdrew his claim against both of the two defendants. The second defendant, who was the driver of the first defendant's motor vehicle which collided with that of the plaintiff, passed away three years before the trial and his place in the suit was not filled. The claim arose out of a collision between two motor vehicles on a dual carriage way; and the evidence is that a vehicle belonging to the plaintiff hit the first defendant's lorry at the rear right side. Both motor vehicles were being driven towards the same direction.

The first defendant was in his motor vehicle as a passenger and the vehicle was being driven by his driver (the second defendant) who died three years before the case was heard. But as he said in his evidence, the first defendant did not see the plaintiff's motor vehicle before the accident. After the accident the first defendant remained in his lorry as he sent the driver to go and report the accident at a nearby police station. The police came to the scene of the accident, took measurements and had the two motor vehicles towed to the police station.

That is all the evidence, except to add that at the time of the accident the first defendant's lorry was being driven at a speed of 60 kph of a maximum speed limit of 80 kph, without changing lanes, between 3 pm and 4 pm. That is as far as liability is concerned. The other evidence is as to what the first plaintiff's vehicle was normally used for, the damage caused in the accident, repair time and loss of business.

There was no evidence as to the state of the road at the time of the accident. There was no evidence as to the weather and visibility in the area. There was no evidence as to the width of the road and the lanes at that point. There was no evidence on the behaviour of the other motor vehicle. There was no evidence on the state and condition of the first defendant's own vehicle. What became of the measurements said to have been taken by the police at the accident scene is not said, and there is no explanation as to why those measurements were not tendered in evidence. Were there obstructions or trenches or potholes in the road? No evidence.

Evidence on matters such as these and more, was necessary in this case if the first defendant were to succeed, because (a) liability for collision on a highway depends on the proof of negligence of those in

charge of the vehicles involved, and (b) the duty of care is grafted on the underlying principle of the law of the highway, that all those lawfully using the highway must show mutual respect and forbearance. For anyone who drives a vehicle on the highway, his duty is to use reasonable care to avoid a collision or causing damage; and reasonable care is the care which ordinarily skilful drivers would exercise under all the circumstances. If there is no evidence as to the circumstances obtaining at the time and place of the collision, the court has nothing by which to judge whether this duty was performed or not by either driver.

It will not do for a plaintiff or counterclaimant to say only that his motor vehicle was in its lane being driven at such and such a speed towards Y direction at 3 or probably 4 o'clock in the afternoon, when the other vehicle hit his vehicle. Such matters are too scanty to raise an inference of negligence on anyone, so as to expect of him to give his version of things with a view to showing that he took all reasonable precautions and was not negligent.

This court was not given sufficient evidence on which it can found any presumption of negligence. In negligence cases, slim evidence will not do when it leaves too many unanswered questions on material aspects. The counter-claim fails on the issue of liability.

But if I am shown to be wrong on this aspect, I would still find no evidence to justify an award of any damages. There was no evidence relating to the damage to the vehicle beyond saying that on the lorry being hit it was "damaged on the side where it was hit by the other vehicle" and the "supporting timber on which the carrier (body) rests was damaged on the right-hand side", whereupon the first defendant "took the lorry to Thika for repairs", and it cost him "shs 1,800 to replace the broken timber support" – it taking one month to repair the lorry because the right timber was not readily available. Surely one would have expected an assessment of damage report, job card receipt of the garage where the vehicle was repaired (if indeed it was taken there for repairs), receipts for payment of repair charges, and such-like matters.

Evidence was also missing on the other crucial aspects necessary for finding and assessing general or special damages. None was offered concerning the first defendant's alleged farm produce transportation business. He said that he suffered loss of shs 30,000 in the business. He said that he worked out the loss on the basis of what he used to do: the lorry would carry 100 bags of potatoes per trip, and in a day he made one trip. The prices of a bagful of potatoes varied between shs 90 and shs 100, with a daily expenditure of shs 1,500, which left him nett earnings of shs 1,000 per day.

All these things required evidence on his business system maintained by him, so that the court would be in a position to verify for itself this word of mouth of the first defendant. Well, he said that he used to keep receipts and records of his business, but that three years before the trial his house got burnt and with it all his property, including the business records in the house, got burnt and destroyed. It is not said why business records should have been in his (presumably residential) house and not in some business premises. Be that as it may, there was no evidence of a fire having occurred. How about documentation from persons with whom he had been dealing in his business - e g farmers from whom he obtained the potatoes, or purchasers or consumers of his articles of trade to whom he might have issued receipts for payments for the commodities? If documentation was not practised or was practised but there was the alleged fire destruction thereof, then the people he dealt with could testify as to that. He never suggested that such people were not available or were not willing to testify. Surely the garage where his lorry was allegedly repaired might have its own records relating to the alleged repairs. But the first defendant did not seek those records.

So the court was given nothing to assist it on the question of damages. The claim of shs 31,800 by the first defendant is not proved on a balance of probability.

For the reasons which have been set out in this judgment, on the facts furnished in evidence, this counter-claim is dismissed.

The plaintiff saw sense early, and abandoned his claim. Indeed, even before the hearing of the counter-claim the plaintiff had not been keen on setting down the case for hearing. This might have been due to his having reassessed his chances of success and failure and seen the futility of incurring further costs in

pursuing the matters. It was the first defendant who persisted in bringing the case up for hearing, only to fail to prove his counter-claim. I would have ordered him to pay the costs of the plaintiff for being detained in court on a counterclaim which turned out to be unsuccessful; but on further reflection, I consider it in the interest of justice that the parties should cease going for each other in turns – this time on matters of costs. Accordingly, I order that each party bears his own costs.

Signed and dated by me at Nairobi, this 23rd day of May, 2002

R. KULOBA
JUDGE
23.5.2002