



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CIV APP 379 OF 2000

NZIOKA MULIPLAINTIFF

VERSUS

KENYA BUS SERVICES LTD.RESPONDENT

J U D G M E N T

On 11th April 1998 the appellant Nzioka Muli was crossing Jogoo Road when Kenya Bus Services bus hit and injured him.

He filed a suit in the court of the Resident Magistrate at Milimani Commercial Courts, Nairobi to claim both special and general damages from the bus company blaming it for negligent. Particulars of negligence were specified in paragraph 4 of the plaint.

After a defence was filed which denied the particulars of negligence as specified in paragraph 4 of the plaint, the case was fixed to hearing on 22nd July 1999. Only that day only the plaintiff appeared and testified. Though the defence counsel appeared and crossexamined the plaintiff, the defendant himself did not appear in which case the case was really not contested. The evidence of the plaintiff was simply this:- "I am the plaintiff in this case. On 11.4.98 as I was crossing the road, just as I was about to complete crossing a bus crushed me I became unconscious. When I regained it people had surrounded me at the spot. The bus took me to hospital. I was not admitted. I reported the matter to the police. This is the abstract. I was examined by my doctor. I paid him Kshs.1,500/=. I ask for judgment for Special Damage, General Damage, costs and interest".

During cross examination, the plaintiff had this to say:- "Yes I was crossing the road. I had lifted my leg to step on the road kerb. The bus was on the road. I did not see any lorry as I crossed. There is no zebra crossing. I am 70 years old". In re-examination the plaintiff said:- "I did not see the bus before the accident" Judgment was written and delivered by the learned magistrate on 26th October, 1999 in which he dismissed the suit because, as he put it:- "There is no evidence of negligence that can be attributed to the defendant's driver. The fact that an accident occurred does not mean the driver of the motor vehicle was negligent". This appeal arises from this judgment. The memorandum of appeal which raised five (5) grounds of appeal was filed in this court on 26th July, 2000.

These grounds were that the proceedings and the record were defective; that there was an apparent error on the face of the record; that the magistrate did not consider the evidence before him, that the magistrate did not consider the plaintiff's submissions on both liability and quantum, and that the magistrate a mistake in finding that the plaintiff was entirely to blame for the accident. The appeal was fixed for hearing before court on 8th July 2002 when counsel for both parties appeared and submitted thereon. Counsel for the appellant complained that the plaintiff's evidence including the documents he produced

were not considered by the court. That even the evidence contained on the abstract report as well as the submissions of appellant's counsel on it were not considered.

Counsel was wrong in finding that the plaintiff was entirely to blame for the accident that failure by defence to adduce evidence in defence showed that they had no defence to the negligence allegations. He prayed that the appeal be allowed with costs. Counsel for the respondent opposed the appeal and said that there was a defence to the negligence allegations.

He prayed that the appeal be allowed with costs. Counsel for the respondent opposed the appeal and said that there was a defence filed which showed the plaintiff was entirely to blame for the accident. That it was the plaintiff to blame for crossing the road at a place where there was no zebra crossing and for not watching out for the oncoming bus. That the plaintiff did not prove his case on a balance of probabilities; and that police abstract is not proof of negligence.

Counsel stated that the defence was not obligated to call evidence and that a pedestrian has an obligation to take extra care when crossing the road. He prayed for the dismissal of the appeal. I have heard and recorded the submissions of counsel on this appeal and also considered the same. The liability of the defendant in this accident was based on the particulars of negligence specified in paragraph 4 of the plaint; namely

- (a) driving at an excessive speed in the circumstances,
- (b) failing to have any regard for the pedestrian, the plaintiff inclusive;
- (c) causing or permitting the said motor vehicle to knock down the plaintiff;
- (d) driving a faulty motor vehicle in the circumstances;
- (e) failing to follow the highway traffic rules;
- (f) failing to stop, slow down swerve and/or in any other way possible manage the motor vehicle to avoid the accident;
- (g) driving without due care and diligence;
- (h) Rer IPSA loquitor

The onus was on the plaintiff to prove all or any of these particulars by adduction of relevant evidence to establish them.

But the evidence adduced as reproduced herein before touched on none of these particulars. Infact the evidence adduced was so shallow and presumed that the defendant was to blame as if on the maxim Res IPSA Loquitor.

But this was not the case where the doctrine would apply and that the applicant was supposed to adduce evidence to establish that the driver of the defendant had committed any or all of these particulars before the back would have shifted to the defendants goal, if at all.

After all the plaintiff did not see the bus coming and could, therefore, not say if the driver thereof was in breach of any of the particulars outlined in paragraph 4 of the plaint.

In those circumstances, the learned magistrate had no basis to pin blame for the accident subject to this appeal on the driver of the defendant. And without establishing liability against the defendant, there was no way quantum of damages would have been assessed.

I support the magistrates finding in the case subject to this appeal and have no basis for upsetting it.

I dismiss this appeal with costs.

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

D.K.S. AGANYANYA

JUDGE