REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 199 OF 2001

STANLEY NJOGU NGUGI ……...…… APPELLANT

VERSUS

KENYA RENT & CAR LIMITED ……RESPONDENT

J U D G E M E N T

This appeal arises from the judgement of the Senior Resident Magistrate (S.B.A. Mukabwa) in Githunguri Civil Case No. 158 of 1999 delivered on 4th April, 2001.

On 14th November, 1998 the appellant was riding his bicycle along the Uplands-Githunguri Road when a motor vehicle, he says, was registration number KAH 731 N knocked him down from behind. He blamed this accident on the negligence of the defendant-respondent's driver servant and/or agent in the manner he drove, managed or controlled the accident motor vehicle at the material time.

All this particulars were stipulated in paragraph 5 of the plaint filed in court on 29th September, 1999 in which the appellant claimed special damages of Kshs.12,034/=, general damages and costs of the suit.

The case was placed before the Senior Resident Magistrate for hearing on 21st March, 2001 when only the appellant appeared and not the defendant, though it had been served with a hearing notice.

The case was therefore heard exparte when the plaintiffappellant and his witness (doctor) testified.

The plaintiff-appellant stated how the accident occurred and he was knocked from behind and thrown in a ditch on the left side of the road; then the accident motor vehicle took him to Githunguri Health Centre. That at the health center the appellant was referred to Kiambu General Hospital. He sustained injuries on the face, head, legs and arms and had a fracture of the right leg. His bicycle worth Kshs.2,800/= was damaged.

That he reported the matter to the police and was issued with an abstract report form. He prayed for general and special damages plus costs of the suit.

Dr. John Muiru who examined the plaintiff testified that he observed a multiple cut on the scalp, a cut on the right cheek, multiple bruises on both hand and right knee, and a fracture of the leg fibular.

In the Magistrate's judgement it was the finding of the court that negligence hand not been proved against the driver of the accident motor vehicle and he dismissed the appeal with costs.

This is why this appeal was filed through a memorandum of appeal which listed 7 grounds of appeal. He averred that the learned Magistrate wrongly rejected the appellant's evidence; regarding ownership of

the motor vehicle; that he made a mistake in considering the defence in absence of evidence to support it; that he erred in failing to realize that the failure by the respondent to testify meant a waiver of the defence and/or, admission of the appellant's claim; that he misunderstood and misapplied the concept of the burden of proof in the circumstances of the case, that he erred in holding that the appellant did not prove negligence against the respondent; that he erred in the manner he evaluated the evidence in relation to the pleadings on negligence and that he erred in failing to assess general damages in the event his finding was overturned on appeal.

The appeal was heard by this court on 16th July, 2002 when only counsel for the appellant appeared though the hearing date was taken by consent.

Counsel for the appellant submitted on the appeal and said sufficient evidence was adduced to identify ownership of the motor vehicle and that in this regard the police abstract report was sufficient because all its contents must have been provided by the owner thereof.

As to proof of negligence of the driver of the accident motor vehicle, the appellant's advocate stated that the fact that it is the accident motor vehicle which took the appellant to hospital and that it hit him from behind was also sufficient to establish negligence on the part of the driver of that motor vehicle.

That the view of the learned Magistrate that he would have expected the appellant to call further evidence to establish such negligence was contrary to the usual standard of proof in civil cases and therefore wrong.

Counsel prayed that this appeal be allowed with costs.

I have heard and recorded submissions made on this appeal by counsel for the appellant and considered them.

Contents of the police abstract form are usually provided by the owner of the motor vehicle and also from the documents he avails to the police, including the log book and driving licence.

This is why the name of the owner of the accident motor vehicle and the driver thereof are recorded there.

This is a public document which is admissible in evidence and unless there is evidence contrary to what it contains, and this can only be adduced by such owner, then there is no reason why the court should go on an unnecessary voyage to discover who the owner is.

That the defendant herein disputed the ownership of the motor vehicle in the defence was not sufficient to cast any doubt in the mind of the learned Senior Resident Magistrate. After all, the standard of proof in civil cases is on a balance of probabilities.

In the case subject to this appeal, if the respondent had any contrary information to that in the police abstract report there would have been nothing easier than for it to send a representative to the court to avail it, but to stay away from the court proceedings meant it had none.

This is not to shift the burden of proof from the plaintiff's side to the defence side but the only reasonable action to take in the circumstances. As regards the plea on negligence, the plaintiff identified the accident motor vehicle as the one which took him to the hospital or health center at Githunguri. He said this motor vehicle hit him from behind and the Magistrate did not discount this.

His only view was more evidence should have been called by the appellant to strengthen the blame worth on the part of the accident motor vehicle.

Failure by the driver of this motor vehicle to appear in court to explain the circumstances which led him to take the appellant to the health center was a grave error, otherwise there is a presumption of

negligence on the part of the accident motor vehicle when it knocks another motor vehicle or cyclist, as in our case, from behind. In fact this is a proper case where the maxim “Res Ipsa Loguiter” would suitably have applied.

Here too, the fact that the defendant’s defence denied the averments of negligence against the driver of the accident motor vehicle was not sufficient.

The advice given to the respondent to remain away from the lower court and this appeal was self-defeating and I am of the view that it was a misdirection on the part of the learned Senior Resident Magistrate not to hold the respondent liable for this accident.

I allow this appeal and set aside the lower court order with a direction that this file be remitted back to the lower court for the assessment of damages. Costs of this appeal and those of the lower court to be paid to the appellant.

Delivered this 30th day of July, 2002.

D.K.S AGANYANYA

JUDGE