REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 424 OF 1999

RUTH GATHONI …………………………………………APPELLANT

VERSUS

KIMANI THUKU ……………………………………….RESPONDENT

J U D G M E N T

On 22nd March 1996 the appellant, through counsel filed a suit in the Principal Magistrate's Court at Thika to claim from the respondent both special and general damages plus costs and interest arising from a road traffic accident which involved the respondent's motor vehicle registration number KLQ 476 which overturned along Kenol – Thika road on 15.9.94 and in which the appellant, traveling as a passenger therein was injured.

The appellant blamed the accident on the negligence of the respondent, his agent and/or servant, particulars whereof were particularized in paragraph 4 of the plaint.

As a result of the accident the appellant sustained injuries on various parts of his body which were also particularized in the same paragraph (4) of the plaint and this is why he claimed the special and general damages as already stated herein before.

A defence filed in court on 23rd March 1998 denied that the appellant was in the respondent's motor vehicle on the date in question and put the appellant to the strict proof thereof.

The case was heard interparties on 22nd July 1999 when both parties testified in the case and judgment was delivered on 16th September, 1999 wherein the learned Resident Magistrate (G.N. Ngare (Mrs) dismissed the suit with cost, hence the appeal filed herein dated 6th October 1999 and amended on 3rd December, 2001; it listed three (3) grounds of appeal.

These grounds were that the learned trial magistrate erred in law and in fact in failing to hold the respondent negligent notwithstanding the availability of evidence in that regard; that she erred in holding that the appellant had not proved liability on a balance of probabilities despite overwhelming evidence and facts in support of the appellant's case and that she erred in dismissing the appellant's case.

The appeal was heard by this court on 14th October, 2002 when counsel for both parties submitted either in support or against the same.

Counsel for the appellant submitted that there was sufficient evidence adduced in the lower court and that the appellant had given particulars of the respondent's negligence in the plaint.

That the respondent had admitted ownership of the motor vehicle and the occurrence of the accident.

That the lower court recorded the appellant's evidence incorrectly mis-describing the registration number of the motor vehicle and the date when the accident occurred.

That the appellant had given the correct date of the accident as 15th September 1994 yet the magistrate recorded the date as 5th September, 1994.

That the judgment was written carelessly to the detriment of the appellant.

Counsel submitted that liability was proved by viva voce evidence and the documents produced – that the appellant was a passenger in motor vehicle KLQ 476 and that the claim was genuine.

He added that there was overwhelming evidence to prove liability and that the Magistrate made a mistake in dismissing the appellants suit. He prayed that the appeal be allowed with costs, lower court judgment be set aside and substituted by one in favour of the appellant.

Counsel for the respondent submitted in opposition to the appeal and stated that the appellants counsel on this appeal was not the one who represented her in the lower court.

According to her, there was no evidence of the respondent's evidence or that the appellant was a passenger in motor vehicle registration number KLQ 476 – both of which the respondent denied.

That the appellant did not adduce any evidence to prove the negligent acts particularized in the plaint.

That the appellant did not even know why the motor vehicle rolled and did not even know the date when the accident occurred.

That though the injuries sustained were severe, the appellant did not report the matter to the police until four (4) months after and that what was reflected in the police abstract was not correct.

Since the appellant did not prove that she was a passenger in the accident motor vehicle, no duty of care could be attached.

That no evidence was adduced to prove special damages to the extent of Kshs.17,080/= and that the proceeding were not properly on record as the decree was not certified. She prayed that the appeal be dismissed with costs.

In blaming the respondent in negligence in the accident in which the appellant was injured, 4 particulars thereof were cited in paragraph 4 of the plaint; namely:-

(a) Driving at an excessive speed in the circumstances,

(b) Driving without due care control and or attention;

(c) Failing to have any or sufficient regard to the safety of his passengers; and

(d) Failing to stop, slow or swerve to avoid the said accident.

When the appellant testified, however, he said this on 22nd July, 1999:-

> "On 15.9.94 I was traveling from Ruiru to Maragwa traveling in
>
> a pick -up registration number KLG (KLQ) 476. It was full of passengers.
>
> The pick -up overturned at the fly over and I became unconscious.
>
> I was taken to Thika District Hospital where I regained consciousness.

I sustained a fracture on left leg and bruise on the hand. I was issued

with treatment notes which I exhibit. I exhibit police abstract and P3 form.

Later Dr. Kaale examined me at K shs.1,000/=. I exhibit report and receipt

.My leg still pains. I am claiming compensation and costs ".

During cross examination the appellant answered to the questions thus:-

'Defendant was driving the vehicle. I boarded it at Ruiru. I do

not know wh y it rolled. It was 5.9.94 I sustained injuries on t

he leg and forehead. Report was made same day. I still experience pain on the leg".

This was the appellants' case and the onus was upon her to adduce evidence to prove first that she was a lawful passenger on the offending motor vehicle and secondly that the manner of driving of such motor vehicle by the driver was responsible for its rolling regard being had on the incidences of negligence. The appellant never told the lower court in what capacity she boarded the pick up vehicle, whether she paid for the trip and how much.

To say simply that she boarded the motor vehicle at Ruiru to go to Maragwa was not sufficient to establish that she was a lawful paying passenger thereon – hence she failed to establish in what capacity she travel led on the respondent's motor vehicle if at all.

At the same time, the appellant was bound to prove the negligence of the driver of the motor vehicle registration numbers KLQ 476, particulars whereof were given in paragraph 4 of the plaint. I have already reproduced them elsewhere in this judgment.

Throughout the evidence of the appellant she did not indicate or say that the motor vehicle was being driven at an excessive speed in the circumstances, or without due care, control and/or attention.

She did not say the driver of the motor vehicle failed to have any or sufficient regard to the safety of his passenger by, say, being careless or reckless in the way he drove or that he failed to stop slow down or swerve in order to avoid the accident. In fact the appellant said nothing about he manner the driver of the pick up drove it to enable the lower court make up its mind as to whether it was not that manner of driving which caused the accident.

And she crowned it all when she said during cross examination that she did not know how the vehicle rolled. The appellant called no other evidence to say something as to how the driver of the pick-up drove it and if the evidence she adduced in the lower court can be said to have been overwhelming to prove the respondent's liability for this accident (see paragraph 2(A) of the amended memorandum of appeal) then the standard of proof in civil cases has been rated too low to make any sense.

In the case of Berkley Steward v Waiyaki [1982 -88]1 KAR 1118 where two motor vehicles collided but none of the drivers could tell how the accident occurred, both were held equally to blame for the accident and liability apportioned at 50-50.

In this appeal, after evaluating the evidence adduced before the lower court and the submissions made herein. I have come to the conclusion that the appellant did not adduce sufficient evidence to convince the court below that the respondent was to blame for the accident which occurred either on 15th or 5th September, 1994.

Counsel for the appellant tried to impress on this court about the incorrect recording of proceedings by the lower court magistrate but all this would be easily corrected by perusing the original record as well as

all the other relevant documents produced; otherwise the attack on the learned magistrate in regard to this aspect does not appear genuine.

In my opinion, the lower court was justified in dismissing the appellant's case as it was not proved on a balance of probabilities.

I dismiss this appeal with a direction that each party bears her/his own costs thereof.

Delivered and dated this 23rd day of October, 2002.

D.K.S. AGANYANYA

JUDGE