REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL NO. 184 OF 1999

PETER MURAGURI ……. APPELLANT

VERSUS

JAMES NJOGO MWANGI & ANOTHER ……RESPONDENTS

J U D G E M E N T

This appeal arises from the judgment and order of the Senior Resident Magistrate (Mrs. Wachira) delivered on 20th April, 1999.

The plaintiff in that case alleged that he was a lawful passenger in lorry registration number KXB Isuzu lorry 875 when it was involved in a road traffic accident on 9th March, 1993 in which he was injured.

Paragraph 3 of the plaint did not give the road on which the accident took place but stated that this Isuzu lorry rammed into another motor vehicle without also giving the registration number of that other motor vehicle.

As a result of this accident and the injuries sustained, the plaintiff filed the case (No.2318/1995) in the Resident Magistrates' Court Nairobi to claim both general and special damages from the defendant, owner of the lorry No. KXB 875.

The defendant filed a defence as well as third party notice against the owner of the motor vehicle in which the defendant's Isuzu lorry was said to have rammed, registration number KWM 614 belonging to Thangaini Farmers Co-operative Society Limited.

Though leave for third party notice appears to have been issued by the defendant and served upon the third party, there is no record of the said third party having filed memorandum of appearance or defence.

The case then proceeded to hearing on 2nd April, 1998 and 17th February, 1999 and judgement was delivered on 20th April, 1999 hence this appeal filed herein on 19th May, 1999.

The memorandum of appeal had 6 (six) grounds of appeal which faulted the learned Magistrate in apportioning liability against the appellant against the weight of evidence; for awarding excessive damages, that the plaintiff did not prove liability against the defendant on a balance of probabilities, that there was no rebutting evidence that the driver of motor vehicle registration number KWM 614 (616) was

to blame for the accident, that the Magistrate erred in holding that the plaintiff was an employee of the defendant and that she failed to direct her mind to the fact that the doctrine of Res Ipsa Loquitar was not pleaded.

The appeal was heard by this court on 2nd October, 2002 wherein counsel for both parties appeared either to urge or oppose the same.

Counsel for the appellant submitted that there was no evidence adduced in the lower court to prove liability against the appellant.

That the 1st respondent did not know how the accident occurred and did not say how the driver of the Isuzu lorry was negligent.

According to him the speed of the lorry alone could not prove negligent. That according to the evidence of the ton boy, the Isuzu lorry was stationery when hit by motor vehicle No. KWM 616 (614) – hence the latter motor vehicle was to blame for this accident but learned Magistrate did not address herself to this evidence.

That the finding of the Magistrate was against the weight of evidence. That the allegation of the 1st respondent as an employee of the appellant was not proved by evidence and that the court could not presume negligence on the part of the appellant.

On quantum, counsel for the appellant submitted that the award of Kshs.70,000/= was excessive and that about Kshs.20 or 30,000/= could suffice. He prayed that the appeal be allowed with costs.

Counsel for 2nd respondent (third party) stated that the issue of liability between defendant and 2nd respondent was not settled as no directions were taken in this regard; hence no order was made by the court that the two sets of liability be tried concurrently.

That in that case the issue of liability could only have been between the plaintiff and the defendant and that the third party had no obligation to call any evidence or defend his liability as against the defendant.

Thus the Magistrate could not have found liability as against the third party.

That in any event it was difficult to ascertain from the record how this accident occurred because the positions of the vehicles when the accident occurred was not clear.

Counsel wondered whether both vehicles were moving.

Counsel said it was not clear from the medical report – prepared about 4 years after the accident – and the 1st respondents' evidence, the area of the injuries and doubted whether there were no other intervening injuries unrelated to the accident subject to this appeal and prayed that his client should not be held liable in negligence.

Counsel for the 1st respondent submitted that there were no contradictions on the area of injuries. According to him, the accident occurred at the junction when the appellant's driver approached the main road without stopping and he collided with motor vehicle registration number KWM 616, which was on the main road.

That failing to stop at the junction was a sign of negligence. That the learned Magistrate favoured the evidence of the 1st respondent to that of DW2 because the latter did not offer an explanation as to how the accident occurred.

That there was no evidence to establish that motor vehicle registration No. KWM 616 was to blame for the accident and that the Magistrate's judgement was based on evidence adduced in court. That she did not rely on the doctrine of Res Ipsa Loquitar.6

Counsel submitted that the award of Kshs.70,000/= was not excessive and that, if anything, it was on the lower side. He prayed for this appeal to be dismissed with costs.

These are the submissions made in this appeal from which this court is being called upon to make a decision. In the plaint, the plaintiff was referred to as a lawful passenger in motor vehicle registration number KXB 875.

Then in the evidence, he said he was the defendants servant. But the defendant denied ever employing him as his servant.

One can be a paying passenger in a passenger motor vehicle or simply hike and have a joy ride in such vehicle.

There was no evidence that the appellant's lorry was a passenger motor vehicle. It was a vehicle for transporting and selling potatoes in various markets.

If this was so, then the plaintiff was not a paying passenger, to constitute himself a lawful passenger in the appellants lorry registration number KXB 875.

As to the plaintiff being the defendant's servant, it was his word against that of the defendant. www.kenyalawreports.or.ke 7

But according to DW2, there were only 3 passengers in the lorry, himself, the driver – who died in the accident and one Kimani Mbugua – whom he admitted was hired by him and the driver – because loading and unloading of potatoes would have been difficult for him alone as a loader.

That the plaintiff was paid his daily wages by the driver and not the defendant would suggest similar arrangement as that with Kimani Mbugua who was hired by the driver and DW2, most probably at the stage the plaintiff's services were required, otherwise the appellant appears to have been consistent during his evidence that he had not employed the plaintiff and that he did not know him. The plaintiff did not tell the lower court what the terms of employment were or where he was supposed to report to work everyday.

That he was picked up at Makuyu on the day of the accident. Suggest a person who got a job by chance – on the bases of touts who volunteer to do some work for a small tip and this is why his wages were paid by Mbugua Kimani who was in charge of collecting proceeds of the sale of potatoes.

If the plaintiff was employed by the defendant, I would expect him to have been reporting for duty at the home of the former and end the day by collecting his wages, even if daily, from the said defendant.

There was no evidence adduced that either Mbugua or the driver of the lorry had authority of the defendant to employ any casuals on this lorry and I am satisfied if the learned Magistrate had opened her mind in considering this evidences he would have agreed with the defendant that the plaintiff was not his employee.

This aside, the plaintiff did not know how the accident occurred as he was sitting at the rear of the lorry in potatoes.

Neither did the police officer visit the scene to measure and draw sketch plans of the scene to ascertain the place of impact.

And the evidence of DW2 was not clear as to the position of the vehicles and/or how the accident occurred or which of the two vehicles rammed into the other or from where.

In such circumstances it was not easy to ascertain who of the drivers of the two vehicles was negligent or in what form.

It was the duty of the plaintiff to canvass all these issues in order to establish liability against the defendant in the case but from the evidence and circumstances this was not done on a balance of probabilities.

Apart from this, though leave was granted by the court for the issue of third party notice, there is nothing on the lower court record to show such third party took any steps to come on record to contest its liability in the case neither was it represented at the hearing in the lower court save for filing written submissions therein.

That being the position I found it a little strange how the said third party came to be represented in this appeal without taking the initial step or regularizing its position on the record.

However, be that as it may, I agree with the counsel for the appellant that the respondent did not prove liability against the appellant in the case in the lower court as required by law.

There was no evidence of excessive speed on the part of the driver of motor lorry registration number KXB 875 which appears to have been the main basis of holding the appellant negligent for the accident, which occurred on 9th March, 1993. In any case, evidence of speed alone cannot be held to be proof of negligence.

And in absence of clear evidence of who was really at fault in this accident between drivers of the two motor vehicles, it would be difficult to say who of them failed to stop at the road junction in order to ascertain his blameworthiness.

And having ruled that there was no sufficient evidence to prove liability it is not necessary to say if or not the award of Kshs.70,000/= in general damages was either too high or low.

I allow this appeal and set aside the lower court record with costs to the appellant.

Delivered this 16th day of October, 2002.

D.K.S AGANYANYA

JUDGE