



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 546 OF 1999

KASARANI SPORTSVIEW HOTEL LTD.APPELLANT

VERSUS

JAMES MATHENGE MUNENERESPONDENT

J U D G M E N T

On 23rd October 1999 the respondent James Mathenge Munene was walking along Kenyatta Highway in Ruiru town when motor vehicle registration number KAG 443N knocked him down and injured him.

He was rushed to Thika District Hospital where he was admitted and treated.

He filed a suit in the court of the Senior Principal Magistrate in Nairobi to claim from the appellant damages for injuries he sustained claiming that at the time of the accident the said motor vehicle was owned or under the control of the said appellant.

The respondent blamed the appellant for negligence in the manner he drove, managed or controlled the said motor vehicle.

Particulars of negligence attributed to the appellant were stated in paragraph four (4) of the plaint.

A defence filed to this suit, while admitting the occurrence of the accident, denied that it was caused by the negligence of the appellant and put the respondent to the strict proof thereof – (see paragraph 4 thereof). Paragraph 5 of the defence, however, stated that the accident was solely caused or substantially contributed to by the respondent's negligence in cycling onto the path of the defendant's motor vehicle. Particulars of the respondent's negligence were stipulated in the same paragraph 5 of the said defence. The case was fixed for hearing and was indeed heard on 30th September, 1999 by the Senior Principal Magistrate (J.R. Karanja) when the respondent testified as to how the accident occurred and how he was rushed to hospital where he was admitted for a month. He produced to the lower court various documents relating to this incident including medical reports prepared by Dr. Maina Ruga and Dr. Hagembe.

In cross examination the respondent said he did not see the motor vehicle when it knocked him down.

Though the appellant asked for an adjournment of the case to another date, when the case was fixed for hearing on 16th November 1999, counsel by the name Macharia for the appellant said his client would not call any evidence. The court then fixed the case for judgment on 26th November, 1999.

In the meantime, counsel for the parties filed written submissions and judgment was delivered on 26th November 1999 wherein the learned magistrate found the appellant fully to blame for the accident and

awarded the respondent Kshs.250,000/= in general damages and Kshs.1,600/= in special damages.

The appellant was unhappy with the magistrates decision on both liability and quantum and so he lodged this appeal in court on 10th December 1999 in a memorandum of appeal which set out six (6) grounds of appeal as follows:-

1. The learned magistrate erred in fact and in law in holding that the respondent had established that the appellant was liable for the injuries suffered by the respondent when no official search on the registration of the motor vehicle had been produced to support the allegation that it belonged to the appellant.
2. The learned magistrate erred in fact and in law in holding that the respondent had proved his case on a balance of probabilities while the respondent had not seen the motor vehicle that knocked him.
3. The learned magistrate erred in fact and in law in holding that the respondent had proved his case while the respondent had not rebutted the allegations of negligence leveled against him in the appellant defence.
4. The learned magistrate erred in fact and in law in awarding the respondent general damages of Kshs.250,000/= which award was manifestly excessive taking into account the nature of injuries suffered by the respondent.
5. The learned magistrate erred in fact and in law in failing to take into account that the respondent had sufficiently recovered from the injuries sustained while making his award on the quantum of damages due to the respondent, and
6. The learned magistrate erred in fact and in law in holding that the respondent had proved his case on a balance of probabilities which finding was against the weight of evidence.

The appeal was heard in this court on 11th November, 2002 when counsel for both parties submitted thereon.

Counsel for the appellant challenged the decision of the magistrate on both liability and quantum saying that since the allegation in the plaint that the appellant was the owner of motor vehicle or in control of it at the time of the accident was denied in the defence the respondent did not adduce sufficient evidence to support this allegation, hence he did not prove ownership of the said motor vehicle.

That his oral evidence in this regard or production of a police abstract report was not sufficient.

According to counsel, the appellant had no burden to rebut the allegation; hence the respondent did not prove negligence on the part of the appellant.

That the respondent had no basis to sue the appellant or any basis for the award of damages. Counsel prayed that the appeal be allowed with costs.

Counsel for the respondent opposed the appeal and submitted that the appellant had made admissions in the defence as to the occurrence of the accident and ownership of the accident motor vehicle.

Counsel referred to the evidence of the respondent as to how the accident occurred and the fact that he did not see the motor vehicle which knocked him down did not absolve the appellant. Counsel submitted that as relates to damages, the learned magistrate considered the authorities submitted by both parties and correctly came to the award of Ksh.250,000/= as adequate compensation. He prayed that the appeal be dismissed with costs.

These are submissions made on this appeal for my consideration and decision.

Grounds 1,2,3, and 6 of the grounds of appeal dealt with the issue of liabilities while grounds 4 and 5 dealt with quantum.

It is true that when the respondent was knocked down by the motor vehicle he was immediately rushed to Thika District Hospital where he was admitted. He himself testified that he did not see the vehicle which knocked him down.

No independent eye witness was called to identify the motor vehicle which was involved in the accident or the owner and/or the driver thereof.

No police officer was called to testify on any observations he/she made on the visit to the scene or any sketches or plans drawn thereof to confirm the point of impact to assist the lower court as to who of the respondent or the appellant was to blame for the accident giving rise to the lower court case and subject to this appeal.

All these observations are necessary in order to assist the court in deciding on the issue of liability.

That only the respondent testified in the lower court does not give that court justification in not inquiring into all these standard procedures in a motor accident case.

However, in this particular case, the appellant's defence gave indirections as to how the accident subject to this appeal occurred.

Though the defence denied negligence on the part of the driver of the accident motor vehicle, it admitted the occurrence of the accident involving the respondent and the driver of motor vehicle registration number KAG 443N and that this accident was solely or substantially contributed to by the negligence of the respondent who cycled onto the path of the appellants motor vehicle.

These were admissions on the part of the appellant which assisted court and the respondent identify and associate the accident subject to this appeal with the appellant and motor vehicle registration number KAG 443N.

In such circumstances, it is not easy for the appellant to hide behind the fact that the respondent did not see the motor vehicle which knocked him down or call evidence in form of production of a search certificate to identify the owner of the motor vehicle involved in this accident.

Perhaps the position might have been different if the appellant had put up a blanket denial of the accident.

Moreover, much as the authority cited on this appeal (*C.A. No. 192 of 1996 – Thuraninra Karauni Vs Agnes Ncheche*) insist that where the defendant denies ownership of the motor vehicle – it is incumbent upon the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor vehicles showing the registered owner of the motor vehicle, though in the real sense the appellant in this appeal did not deny ownership or that he was the driver of motor vehicle registration number KAG 443N, I would wish to be corrected if I believe or suggest that the information entered in the police abstract form (P 10A) is as a result of a search made at the Registrar of Motor Vehicles.

If I am right in this belief then going back to the Registrar of Motor Vehicles for a search certificate would be a double exercise. And in view of the appellant's admissions in paragraphs 4 and 5 of the defence, it was incumbent upon him to testify in court in order to show how the respondent contributed to this accident otherwise his failure to call evidence in the circumstances worked against his case.

In view of these observations I am satisfied the lower court was perfectly correct in finding the appellant fully to blame for the accident which occurred on 23rd October, 1997 along Kenyatta Highway in Ruiru Township.

As for the award of damages two medical reports prepared by Doctors Maina Ruga and Mr. P.F. Hagemba dated 13th November, 1998 and 19th June 1999 respectively are on record.

They nearly agree as to the injuries sustained by the respondent including

1. Injury to the right elbow with fracture of lower end of humerous bone and joint dislocation.

2. Soft tissue injuri es to left elbow and back and

3. Head injury and loss of consciousness

As a result of these injuries the respondent suffered permanent incapacity of 20% with a stiff right elbow and flexion deformity in the left hand. In fact Dr. Ruga recommended a CT scan of the head and one cannot term these injuries of a soft tissue in nature to claim the award made by the learned magistrate were manifestly excessive. I believe the sum of Kshs.250,000/= awarded as general damages was commensurate with the injuries sustained, considering in particular the current value of the shilling and the High cost of living.

Though special damages were not prayed for, they were nevertheless pleaded and strictly proved. This appeal has no merit and I dismiss it with costs.

Delivered this 20th day of November, 2002.

D.K.S. AGANYANYA

JUDGE