REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL APPEAL NO. 1 OF 2005

HAYA SAFARIS AFRICA ……..…….……APPELLANT

VERSUS

A.I (Minor suing through her father I.H.J) ……..…. **RESPONDENT**

JUDGMENT

Haya Safaris Africa (Appellant) has filed this appeal against A.I (a minor suing through his father and next friend I. H. J) – the respondent.
The appeal contests the decision by the Senior Resident Magistrate Malindi Mr. K. Ogola in Malindi SRMCC No. 37 of 2002 where judgment was entered in favour of the respondent against the appellant on liability at 100% and award damages for pain and suffering at kshs. 150,000/- (one hundred and fifty thousands only).

No award was made for specials as the trial magistrate found that the same were not proved.

The background to the matter is that the respondent had filed an amended plaint following a road traffic accident involving motor vehicle Registration No. KAK 509D Mitsubishi Pajero which was stated to belong to the appellant as the registered owner, and minor respondent who was crossing the Mombasa Malindi Road at Kanu Office on 15-2-02. The said motor vehicle knocked the minor and she sustained injuries – the accident was blamed on the appellant's negligence whose particulars were pleaded to include driving too fast under the circumstances

(b) Failing to brake and/or halt the motor vehicle so as to avoid knocking down the respondent

(c) driving without due care the other road users

(d) Failing to give any signal to warn the respondent of the coming motor vehicle.

The evidence of the minor who testified as PW2 (A.I) was that she had come from school on 11-2-02 in the company of M and T. They stood beside the road at the roundabout intending to cross the road. Her companions crossed but she remained behind. A vehicle hit her where she stood and she fell down and sustained injuries.

Her companion M.S (PW3) testified that they were crossing the Mombasa – Malindi road on 15-2-02 with PW2 and one T and that they went ahead, leaving PW2 behind and a motor vehicle hit her.

According to PW3, they had checked the road before crossing but had not seen the motor vehicle which she described as "speeding" (which I understand to mean moving at a fast speed). She testified that the motor vehicle did not brake or hoot and blamed its driver for the accident.
Her evidence was:-

"The plaintiff was hit while in the process of crossing the road….there was no other vehicle on the road."

On cross-examination PW3 confirmed that she did not know the date of the accident but was certain PW2 got hit although she did not see her in the process of getting knocked, as she had been looking ahead as she walked. She only looked back after PW2 had been hit.

Initially she said she had seen the motor vehicle two kilometers away before it hit PW2, but changed this to say:
"I saw the vehicle when I was about to cross. I did not see the vehicle…I did not see the speeding vehicle…I did not see the accident happening. What I am stating is merely speculation. The plaintiff was hit while on the road."

Upon re-examination PW3 maintained that they had been crossing the road together, but PW2 remained behind while crossing the road. She then challenged her evidence to say PW2 was hit outside the road.

The doctor who examined PW2 is Dr. Ajoni Adede (PW1) and his findings were that the girl had suffered a fracture on the left claircle and a blunt injury to the left shoulder with bruises on the mouth and both elbows. His findings were that here was no likelihood of permanent incapacity.

The defence evidence was offered by Abdalla Abdul – Razak Sheikh (DW1) who worked as a travel consultant with HAYA SAFARIS. He stated that the defendant did not own motor vehicle registration no. KAK 509 D and produced a certificate from the Registrar of Motor Vehicles dated 03-03-03 showing that the motor vehicle's owner was one JULIUS WANDURUA MAINA. It is his evidence that HAYA SAFARIS was not leasing out its vehicles in the year 2000 and disputed the contents of the police abstract form.

The defendant therefore denied liability relying on the copy of records for the Registrar of Motor vehicles dated 3-3-03 and the trial magistrate observed that there was the police abstract form which showed that the subject motor vehicle was owned by the defendant (HAYA SAFARIS).

The Trial magistrate held that:

"The defendant's disclaim of ownership of the subject motor vehicle untenable because the certificate from the Registrar of motor vehicles …did not indicate who owned the vehicle as at 15th February 2000, the date of accident. Instead the Certificate is for the date 3-3-03."

The trial magistrate also noted the fact that although all the witnesses mentioned the motor vehicle involved as a MITSUBISHI PAJERO, the certificate produced referred to a motor vehicle described as a SUBARU STATION WAGON, and this is what the trial magistrate stated:
"Indeed as submitted by the plaintiff, the subject certificate is unreliable by reason of the fact that the same is incomplete. This is because the back part of the certificate was not filled. The police abstract was very clear that the accident vehicle was registration KAK 509D, a Mitsubishi Pajero. May be had the records of 15-2-2000 (date of the accident) been dug out, a more accurate ownership and description of the subject vehicle would have been arrived out. My findings are that defendant has failed to convince this court that the accident vehicle was not his property"

The trial magistrate was persuaded that the motor vehicle belonged to the defendant and was the one involved in the road traffic accident since the accident was not disputed.

The defendant was held liable for "speeding when it hit the plaintiff….then failing to hoot"

The findings of the lower court are challenged on grounds that:

(i) There was no evidence to support the finding that the motor vehicle KAK 509D belonged to defendant

(ii) The trial magistrate disregarded evidence tendered by defence, especially the certificate of search signed by the Registrar of motor vehicles and relied on the police abstract which was no sufficient proof of ownership.

(iii) The trial magistrate shifted the burden of proof onto the defendant, contrary to the provisions of the Evidence Act.

(iv) The trial magistrate failed to consider the submission by defence counsel especially on the ratio decidendi in Civil Appeal No. 192 of 1996 THURANIRA KARAURI V AGNES NCHECHE and gave undue consideration to the plaintiff's submissions which were not supported by any precedents.

(v) The police abstract recorded that the accident occurred on 15th February 2000 yet the cause of action was pleaded as 15-2-02.

(vi) Negligence was attributed to the defendant at 100% without a basis.

The appeal was disposed off by way of written submissions by both counsel.

Appellant's counsel Mr. Nyabena submitted that the pleadings clearly referred to the offending motor vehicle as referred to KAK 505 Mitsubishi Pajero, and the evidence of PW2 and PW3 never referred to the registration or model of the motor vehicle alleged to have been involved in the road traffic accident so that it was only the police abstract which referred to the motor vehicle registration and ownership.

This ground is opposed by the respondent's Counsel J. A. Abuodha, who submitted that the respondent had called a police officer who produced the police abstract and that the date of injury on the police abstract read 15th February 2000 but the reference on the said abstract read 2002 which was an error.

From the pleadings, the motor vehicle is referred to as KAK 505 Mitsubishi Pajero, and that is the same information contained in the police abstract, contrary to what the respondent's counsel submits, from the lower court record, no police officer testified or produced the police abstract – the same was produced by consent. So was this police abstract refering to the same accident in which A.I was involved on 15-2-02 or might this have been another accident? May be it was a different accident – which would explain why reference to the motor vehicle is Mitsubishi Pajero, yet the copy of records shows SUBARU STATION WAGON.

Even if the motor vehicle may have changed ownership between the year 2000 or is it 2002, and the year 2003 when the copy of records was obtained by the appellant, did it then also change its make from Mitsubishi Pajero to Subaru Station Wagon? The trial magistrate observed this anomaly but did not resolve it rationally. It is no clear who gave the information to police regarding the motor vehicle registration, model and ownership. Did they get this from the two girls, or did they visit the scene and obtain this from the motor vehicle driver?

Appellant's counsel also submitted that defence produced a certificate of official search showing that motor vehicle KAK 509D was a Subaru Station Wagon owed by JULIUS WANDURUA – admittedly as pointed out by the respondent's Counsel, these were records relating to the year 2003 – but the police abstract was no better, it related to the year 2000, yet the evidence was that the road traffic accident occurred in 2002. It is out of place by respondent's counsel to claim that there was an error in the police

abstract as regards the year entered since there was no evidence on record tendered by police or the plaintiff contesting the year entered in the police abstract as being erroneous – that was the plaintiff's document and she elected to rely on its entire contents, so there is no way some portions can now be disowned.

Although the trial magistrate held that occurrence of the accident was not disputed, the defence witness DW1's told the trial court that their motor vehicle was not involved in any road traffic accident on that day and yes I agree with Mr. Nyabena that the burden of proof remained with the plaintiff to prove;

a) That the road traffic accident occurred on 15-2-02

b) The motor vehicle involved belonged to the appellant With regard to the date of the accident, I have already alluded to that in the earlier part of this judgment, with regard to ownership, Mr. Nyabena submits that the trial magistrate misdirected himself on the law applicable because proof of ownership of a motor vehicle would ordinarily be by way of log book or a certificate of official search from the Registrar of motor vehicles.

He referred to the decision in THURANIRA KARURI V AGNES NCHECE C.A. NO. 192 OF 1996 (NYERI), which stated:

"The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent upon the plaintiff to place before the Judge, a certificate of search signed by the Registrar of Motor vehicle showing the registered owner of the lorry. Mr. Kimathi for the plaintiff submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."

It is Mr. Nyabena's contention that the information in the police abstract was clearly wrong and control dictating and did not prove ownership.

On this limb, the respondent's counsel submits that the appellant was aware of the accident – with all due respect, being aware of an event is NOT the same as being involved in it.

The respondent's counsel also submitted that the evidence in the police abstract was not challenged or rebutted citing the decision by hon. Justice H. M. Okwengu in the case of SAMUEL MUKUNYA KAMUNGE V JOHN MWNAGI KAMURU 2005)e KLR which held that a police abstract was sufficient proof of ownership. However that very decision stated was clearly that, this is the case ONLY where there is NO EVIDENCE TO REBUT the same.

In the present scenario, there was evidence to rebut the same, there was contradiction as to the model of the motor vehicle involved, the date of the accident which also then hinged on whether ownership changed hands, and of course the source of the information contained in the police abstract.

What's more the trial magistrate properly observed that the police abstract was unreliable due to certain omissions (which are now only compounded by the observations I have made as to the content), then he went ahead to rely on what he acknowledged as being unreliable ad incomplete.

With the greatest respect to the trial magistrate, that was erroneous – there can be no selective reliance on a document – either its contents are correct and therefore reliable, or it has such glaring irregularities in material content, that it becomes unreliable.

My finding is that the appellant has clearly demonstrated that the judgment delivered on 14th November

2003 cannot hold and the appeal here succeeds to the extent that the judgment is set aside and the plaintiff's suit in the subordinate court stands dismissed.

The costs of this appeal shall be borne by the respondent.
Miss Mango holding brief for Nyabena for appellant
No appearance for respondent

Delivered and dated his **2nd** day of **March 2011** at Malindi.

H. A. Omondi
JUDGE