Road Traffic accident
Motor cycle – Proof of evidence

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.1226 OF 1993

FRANCIS NDUNG'U MUIRURU ……. PLAINTIFF

VERSUS

SIMON NDIRANGU & ANOTHER ……. DEFENDANTS

JUDGMENT

A brief fact of this case is as follows:-

Francis Ndungu Muiruri, the plaintiff herein, was lawfully riding his motor cycle registration number KBM 447 (I believe this ought to be KUM 447) along the Githunguri Kiambu road. This was on the 20th of June, 1992. He noticed an oncoming vehicle registration number KQH 977 that approached him from the right side and knocked him on the left .

He was rushed to Kiambu Hospital where he was admitted for 3 days. He was then transferred to Kenyatta National Hospital where he was admitted for 6 months.

From the said accident he sustained a broken leg. (His plaint described the injuries as a fracture of the right femur and swollen thigh). An iron was placed in his leg. His leg again broke. This time he went to Kijabe Hospital for further treatment. He hired a private vehicle – namely a pick up for every trip he made to the hospital. He paid for this trip and said it totaled ksh.70,000/- which he wishes to now claim and be paid back.

Other expenses he spent at the Kijabe hospital amounted to Ksh.30,000/- which he also wished to have refunded to him.

He informed the court that he made a report to the police and obtained an abstract report. He further informed the court that the defendants were arrested, taken to court and were fined in a court of law. They paid their fine. The traffic case was in connection with the accident. No other evidence was called.

Mr. Mulisa of M/s R.N. Sitati for the plaintiff then closed his case. He stated from the bar that the plaintiff had been examined by the doctor as far back as in July 1999 up to date the medical report has not been ready. The court adjourned so he could get the doctor and or the medical report. The advocate returned to say that the doctor had been out of the country in Tanzania. He (he doctor) was now back but the report had not been ready. Mr. Mulisa then admitted that although the doctor had promised to ensure the report is ready, he Mr. Mulisa had not yet paid him. He made me understand that there was a credit arrangements with the doctor.

In his submissions to court the advocate -Mr. Mulisa produced no authorities in support of his case. He nonetheless prayed that I compensate "the plaintiff for injuries sustained, plus costs and interest."

All the documents relied on and referred to by the Plaintiff were never admitted as exhibits nor exchanged with the defendants.

The defendants were presented by M/s Njenga Mwangi & Co. who were duly served and failed to attend court.

From the file I noted they have never attended court despite service. When an advocate is on record he should always attend court.

If he does not with to do so he must file a notice under Order III of the Civil Procedure Rules that he wishes to cease acting as an advocate. He should serve the application on his client. The courts would not normally refuse such a prayer.

Thereafter the defendants would be free to engage an advocate of their choice.

The plaintiff has powers under Order III rule II to also remove the advocate acting for the defendant in certain situation where the circumstances arises and on application.

I would now wish to just lay down the basis on how proof should be brought in a running down case. I do so because this particular case is lacking due to certain omission that advocate for the plaintiff may have not done.

Once a plaint has been filed and summons to enter appearance filed, the same is served on the defence. They in turn enter appearance and file defence. (This had been done in this particular case).

Thirty days before summons for directions the plaintiff is to comply with Order 10 r II A Civil Procedure Rules whereby he and the defendant will make discovery by filing and serving "on the opposite party a list of the documents relating to any matter in question in the suit which are or have been in his possession or power"

Any party on whom a list of documents as served . . . may before a summons for directions is taken out give notice to the party making discovery requiring the rectification an affidavit of the list of documents and the affidavit shall be filed and served within 14 days on request.": Failure to comply by any party an application can be made requesting the court to limit the time in doing a certain thing. After the failure to comply still persists the party aggrieved may more to have the plaint or defence struck out for non compliance.

By the time the parties come for summons for directions under form No.26 of the appendix A Cap 21 Civil Procedure Act issues must have been agreed to. Directions as to who would prepare the agreed bundle of documents would be given under part II of the Summons for Directions Forms.

Any further request on directions must be made under Form 27 of the appendix A. Cap 21 Civil Procedure Act.

The crucial aspect for any plaintiff is to have documents under paragraph 13 of Form 26 to be put in without calling the maker thereof. The effect of this is that it cuts out calling witnesses to prove a document. This is for instance documents such as the police www.kenyalawreports.or.ke 6 abstract, death certificate, letters of administration and receipts of expenditures on special damages. These have to be inspected under paragrah 7,8 9 and 10 of Form No.26.

Where medical reports are concerned paragraph 19 of form No.26 is applicable. The parties are to agree whether to put the report in by consent without calling the maker thereof. It is not enough for the Deputy Registrar to give Orders No.18,22,23 the latter two dealing with the place and day of hearing.

No 18 must described how the medical report is going to be presented. What happens, as in this cases, the defendants have failed to co-operate. The advocate for the plaintiff should ensure they have all the original documents they intended to rely on. A list should be served on the defence. If there is any document referred by the plaintiff from the defendant , a notice to produce to issue or admit. (See order 12 rule 2, 3 Civil Procedure Rules). If the defendant still fails to co-operate an application to struck out the defence should be made or vice versa depending who is aggrieved.

I find in this particular case the advocate for the defendant did not comply with Order 10 r II Civil Procedure Rules. He did not compile a list of documents nor a bundle of agreed documents to be relied on.

Although the Deputy Registrar gave him under summons for direction prayer 18, 22 and 23, of which prayer 18 deals with the medical report – he took a hearing date before such medical report was ready, received and served on the defendants.

He failed to list all the special damages receipts and pray that the same be produced without calling the maker thereof.

Nonetheless, it is trite law that special damages must be pleaded and proved (See Order VI Rule 4 Civil Procedure Rules).

The plaintiff claimed transportation of Kshs.70,000/-. This was never pleaded. He can therefore not rely on it. No explanation was given why he went to Kijabe Hospital instead of Kenyatta hospital where he had been.

The special damages prayed for was for Ksh.4,800/-. The plaintiff claimed Ksh.30,000/-. He could claim the latter amount but the plaint must be amended to prove this. This was not done nor explanation of the receipts – no production made.

The plaintiff attempted to pray for the loss of his motor cycle. This too could have been made but again it was not pleaded in the plaint.

I find that in respect of special damages the case before court must fail. I dismiss this year. As to liability the proof of negligence is on the party relying on it. In this case the plaintiff. The easiest way of proving such evidence is by applying Section 34 of the Evidence Act. This is where a subordinate court or a subsequent case has heard evidence and made a finding. The same evidence can be used in another court to prove the allegations.

Therefore to prove his case on liability the plaintiff need only produce certified proceedings and judgments of the lower court through an executive officer or if agreed within his bundle of documents.

All I have now is the plaintiffs word that he had an accident. The defence before the court indicates that the plaintiff was in the middle of the road yet the defendants were said to have been convicted and fined.

I hold that better proof of liability could have been given. In the absence of the defendant not being in court to challenge this, I would hold that negligence on the part of the defendants has been established.

As to quantum no case law has been provided to me. I also have no medical report before me to prove injury. I would dismiss this prayer.

The law requires that in the event the plaintiff would have been successful what quantum would I have issued.

I would have assessed an award of Ksh.100,000/- for pain suffering and loss of amenities. Interest from the date of judgment.

As the case fails, I dismiss it with no orders as to costs. This is because the defendant (being duly served) failed to attend court.

Dated this 16th day of December, 1999 at Nairobi.

M.A. ANG'AWA

JUDGE