



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI**

Civil Appeal 192 of 1996

THURANIRA KARAUARI
APPELLANT

AND

AGNES NCHECHE
RESPONDENT

**(Appeal from the Judgment & Decree of the High Court of Kenya at Meru
(Justice Etyang) dated 23rd May, 1996**

IN

H. C. C. NO. 146 OF 1995)

JUDGMENT OF THE COURT

Agnes Ncheche, the respondent in this appeal (hereinafter called “the plaintiff”) sued Thurania Karauri, the appellant, (hereinafter called “the defendant) in the superior court, seeking to recover damages for personal injuries she claimed to have suffered in an accident on 6th November, 1988, involving a motor vehicle, an Isuzu lorry, KWT 840, which she said was owned by the defendant. According to her plaint dated 3rd November, 1994, and filed in court on 24th November, 1994, the plaintiff averred that she was travelling on the vehicle as a passenger along Embu-Kiritiri road when the accident happened. She said it was being driven negligently by the defendant’s driver and she gave the pro forma particulars of negligence. As a result of the accident she said she sustained a fracture of the left leg, deforming and scar on the medial aspect. She claimed special and general damages.

The defendant filed a defence on 31st August, 1995, in which he denied, owning the vehicle; occurrence of the accident; alleged negligence; and the injuries sustained by the plaintiff. The defendant also raised the defence of limitation claiming that the suit was time-barred under the provisions of section 4 (2) of the Limitation of Actions Act (Cap22) (the Act). In the reply to the defence filed on 13th October, 1995, it was averred that leave to file the suit out of time was duly granted by the superior court on 13th July, 1995.

At the trial before Etyang, J. only the plaintiff gave evidence. No evidence was led for the defence.

In her evidence the plaintiff told the Judge that she had hired the lorry to carry her property to mwingi. They had set off from Meru at 6 p. m. It was raining and the driver was going very fast when the lorry overturned at Gachoka at 11 p. m. She was taken to Embu Provincial Hospital. Among the documents she tendered in evidence were a police accident abstract, a P.3 signed by the Medical Officer, Nyambene, and a medical report dated 15th November, 1994 prepared by Dr. Maina Ruga. She admitted under cross-examination that she had been involved in a previous accident in 1983 in respect of which she had sought compensation and she was paid shs. 147, 000/=. It involved the same leg (left) though she said she had sustained only a bruise. She declined to give details of the case or pretended not to remember.

The Judge awarded the plaintiff shs. 324, 000/= for loss of earning; shs.

250, 000/= for her injuries, which we assume was for pain suffering and loss of amenities; and shs. 1, 350/= as special damages.

As the issue of Limitation goes to jurisdiction, we shall deal with it first. The plaintiff's answer to the defendant's plea that the claim was time-barred was that she had obtained the necessary extension from the superior court. She did not produce any such order and none was shown either to the Judge or to the counsel for the defence. We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction. The order for extension, if indeed obtained, as alleged, should have been served on the defendant with the plaint. And since it was not, the plaintiff's Advocate was under a duty to prove its existence as part of the plaintiff's case at the trial. Since this was not done, the defence of limitation raised by the defendant stood, and the plaintiff should have been non suited forever. In view of this failure, the plaintiff's suit was incompetent and should have been struck out. This finding alone is sufficient to dispose of this appeal but as there are other serious errors that occurred, we find it necessary to deal with them.

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 on 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.

Secondly, the medical report prepared by Dr. Maina Ruga was produced by the plaintiff herself in breach of the clear provisions of section 35 of the Evidence Act (Cap 8 Laws of Kenya). It was not produced by consent. Dr. Ruga should have been called to produce it. The Judge clearly erred in admitting it. The contents of the report itself were of little probative value. The doctor purported to express an opinion on injuries which were sustained six years earlier. The plaintiff had never been his patient prior to 15th November, 1994 when he saw her. As the plaintiff had been involved in another accident 5 years earlier, which she concealed, it is impossible to determine which injuries were caused by the accident involving the accident lorry. In our view, the award made in respect of pain suffering and loss of amenities was erroneous as there was no evidence to support it. It is accordingly set aside.

The claim for loss of earnings is a special damage. It must be pleaded and proved. That is the law. It was not pleaded. The plaintiff gave some evidence in which she said she used to operate a kiosk of some sort at Kasarani, near Nairobi, from which she made shs 50,000/= per month. She produced no documentary evidence to support this claim but even if she had, it would have been of no practical value because the claim was not pleaded. There was really no legal basis for the award and it is accordingly set aside.

In the final analysis, the appeal succeeds and is allowed. We set aside the judgment and decree of the superior court, and in view of our finding that the claim was time-bared, which rendered the suit incompetent, we substitute an order striking out the plaintiff's suit with costs to the defendant. The defendant will also have the costs of this appeal.

Dated and delivered at Nyeri this 16th day of May, 1997.

R. O. KWACH

.....

JUDGE OF APPEAL

G. S. PALL

.....

JUDGE OF APPEAL

S. E. O. BOSIRE

.....

AG. JUDGE OF APPEAL

I certify that this is a true of the original.

DEPUTY REGISTRAR