REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 780 of 1998

NGARI KANYORO …….. PLAINTIFF

VERSUS

PATRICK NJUNIA KARIITHI …....…….. DEFENDANT

JUDGMENT

1. BACKGROUND PROCEDURE

1. A motor vehicle/cyclist road traffic accident was alleged to have occurred on the 18th July 1997 along the Karatina-Kagochi road within the central Province of Kenya.

2. The plaintiff-cyclist Ngari Kanyoro, filed suit against Patrick Njuguna Karithi, the registered owner of the motor vehicle in question No. KDY 513 and defendant herein, on the 3rd April 1998. No defence was filed. The plaintiff applied for Interlocutory Judgment to be entered. This was duly done on 27th August 1998 (Njai Principal Deputy Registrar (as he then was). The suit was then set down for hearing of assessment of damages under order 9a r 5 Civil Procedure Rules before Mitey J (10.11.98). He delivered his judgment on 11 June 1999 finalizing this suit. The defendant applied through his advocate for setting aside the exparte judgment (C/S 16 July 2001) on grounds that he had filed his Memorandum of Appearance and defence that he sent through the post. This application came for hearing before Rimita J (22.7.02) instead of Mitey J. This could be perhaps due to Mitey J not being in the station as envisaged under order 17 r 10 Civil Procedure Rules.

Rimita J allowed the setting aside of the exparte judgment by Mitey J. later, the plaitnfif alleged the and appealled against the order of Rimita J setting aside the exparte judgment. Apart from a notice to appeal to the court of appeal no action by the plaintiff appears to have been taken.

3. The plaintiff then proceeded to file an application of 23.2.03 for dismissal of the suit for "want of prosecution." Order 16 Civil Procedure Rules To counteract this application the plaintiff filed an application of 9th March 2003 to transfer the suit to the subordinate courts. The transfer to the Nairobi law courts was in itself an illegality as the "cause of action" arose in central province. Under seciton 15 of the Civil Procedure Rules the transfer would not have been sustained. As such the plaintiff withdrew the application of 9 March 2003.

4. I heard the application of 23.2.03 that sort to dismiss this suit. I accordingly dismissed the said

application as having no merits. The suit was then set down for hearing.

II: BACKGROUND OF FACT

5. The plaintiff came to court and gave evidence in the Kikuyu language (interpreted). He informed this court that whilst ridding his bicycle along the Karatina road on the 18th July 1997, he was descending down hill an oncoming vehicle was coming towards him ascending up the said hill. This motor vehicle belonging to the defendant coming from the opposite direction then knocked him (head on) and injured him on his left leg. (femur).

6. The defendant was in the presence of PW2 who also rode his bicycle and witnessed the accident.

7. The defendant (DW1) called the driver of the vehicle in question (DW2). It later transpired in cross examination that infact the said driver was the son to the defendant and as such related. DW2 informed the court how he was with two others in the vehicle as his passengers. One of them was also called to give evidence (DW3) the other passenger – a business man was not traced.

8. DW2 stated that he saw the plaintiff on a bicycle causing a load. He knocked a bump then was unable to control his bicycle which began to waiver. The plaintiff then had a self accident when he rode on his (DW2's) side of the road to the left then fall to the side of the road on a stone. His passenger DW3 stated that he also saw the plaintiff and his bicycle come down over a bump and served and fall on a stone and injured himself. The driver DW2 he state had actually stopped his vehicle.

9. DW2 stated that at no time did he ever knock the plaintiff down. The defence he had on behalf of the defendant was that the plaintiff had a self accident. The defendant proceeded to produce the proceeding of the lower court case that had been finalized on the 1 July 1998. This was four months after this suit had been filed and five months before the trial exparte hearing before Mitey J. The best practice should be that before a civil suit is filed in Tort the criminal court case should be heard and finalized first before a civil suit is filed in Tort . In our court, the wheel of justices is so slow that at times this may not be practicable (but it is not impossible to do).

10. Under section 34 of the Evidence Act Cap.80, the proceeding of the subordinate courts can be used in a subsequent court and witnesses need not attend court. The parties in this case called all their witnesses who gave evidence in the subordinate courts, with the exception to the formal witnesses. The proceeding were put in evidence without calling the maker thereof.

11. I have perused the said proceeding and noted that DW2, the driver and son to the defendant had been charged with a traffic offence of "failing to report" an accident. After trial where he gave an unsworn evidence (amounting to a sentence) the said witness was acquitted of all the charge preferred against him. His defence was that "there was no accident."

12 The law permits the plaintiff to sue in the civil courts in TORT for damages . This is regardless that the driver was acquitted in the criminal traffic court case whose standard of proof is much higher. The case that should have been heard in the subordinate court should have been 'careless driving" against the driver for "running down" the plaintiff. No such case was preferred. It would have the liability of that incident that ought to have been determined.

13. The plaintiff's explanation was when he was "run down" the driver took him to hospital and promised to pay his hospital bills. The matter would have ended there as the settlement was between the two of them. When the driver failed to pay the hospital bill the accident was belatedly reported to the police. At all times the defence stated that the plaintiff story was not true. There was no accident at all.

14. Who then is to blame for injuries sustained by the plaintiff? Was there in fact an accident

III: LIABILITY

15. I require to look closely at the pleading before this court. The plaintiff filed a plaint on 3 April 1993 in which he particularized the negligence of the defendant and or his agent/servant as:-

"i) Driving a speed excessive in the circumstances

ii) Driving without any or any due care and attention

iii) Failing to stop, brake, swerve or in any other way set control the said motor vehicle so as to avoid the said accident

iv) Failing to have any or any sufficient regard for other road users

v) Causing the said accident"

16. When requesting to set aside the Interlocutory Judgment the advocate for the defendant stated the Memorandum of Appearance and defence had been posted. These had been filed in person by the defendant. The Hon. Judge (Rimita J) (22.7.02) gave orders that the defendant "has 15 days of to days date within which to file his defence." The defence was filed on 24.2.02, two days after the orders being issued. That the motor vehicle had never come into contract with the plaintiff. The motor vehicle was not driven negligently but that the plaintiff was negligent in that he was:-

"i) Cycling on the wrong side of the road

ii) Cycling under the influence of alcohol

iii) Cycling at a high speed at a section of the road with road bumps

iv) Cycling on over loaded bicycle

v) Loosing control of the bicycle

vi) Cushing onto the road surface

vii) Cycling in a zig zag manner

viii) Cycling without due care and attention for his own welfare while on the said road."

17. The defendant also denied that this court has any jurisdiction to hear this case which point will be dealt with at a latter stage. What is to be noted at this time is that parties must particularize the negligence they allege on the other party. See Mukasa v Singh & Other (1969) EA 442 that was relied on in the case of:-

Mount Elgon Hardware V United Millers Ltd

Kisumu CA 19/96

Kwach, Omolo, Akiwumi JJA

18. In the above case being on appeal from the High Court to the court of appeal the respondent pleaded negligence. The appellant failed to traverse the same. The Hon. High court judge that the appellant admitted the negligence alleged in the defence of order 6 r 9(1) Civil Procedure Rules

"19. This order reads:-

"Subject to sub rule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party utensils it is traversed by the party in his pleading on a joinder of issued rules 10 operates as a denial to if.

2) _____**3) _____**

4) _____

10 (1) If there is no reply to a defence, there is a joinder of issue on that defence . . . "

20. The plaintiff filed reply to the defence – there is joinder of issue on that defence

21. The plaintiff most certainly sustained injuries as a result f an accident he incurred. The question arises as to whether he was drunk and whether he was unable to control his bicycle to such an extent that caused him injury? From the defendants evidence there was no contract made between the parties. DW2 stated the plaintiff was thrown into the air on being knocked. The injuries are not consistent with one being thrown into the air. If the defendant was ridding his bicycle to the left of the road, then the vehicle knocked him his injury should have been on the right femur and not the left femur. This is where the vehicle was travelling up hill. It the plaintiff was travelling down bill but on the right side of the road instead of his correct lane, the impact of the vehicle would have been to his left leg and damage to the vehicle to the left of the vehicle. The police stated the damage to the vehicle was to the right where a dent was noted. The indicator light at the rear was noted. Apart from this there was no pre accident defect to the vehicle.

22. In our advice any system of trial the plaintiff must demonstrate negligence clearly. The lower court proceeding was riddled with contradiction and inconstant with evidence before this court. I hereby find and an of the opinion that the plaintiff has failed torpoe this case on balance of probability. Regardless that DW2 the driver was very envisaged in giving evidence and his standing questionable.

23. I accordingly dismiss this suit. I am required by law to give my probable award:-

If purchase the plaintiff had been successful the following would have been my possible award.

IV: <u>QUANTUM</u>

<u>A) GENERAL DAMAGES</u>

i) <u>Pain and suffering</u>

24. The plaintiff was examined by two medical doctors who unfortunately are not Orthopedic surgeon and or traumatologist.

a) <u>W.M. Wokabi</u>

MB chB M.Med

Consultant surgeon

Date of report 26.9.06

Injuries:

a) Fracture of shaft of left femur

25. In examining the plaintiff the doctor looked at an earlier report by Dr. Bhanji (31.12.97) a traumatologist and x-ray films. There was deformity on the left leg. The mid-through had anter posterior bony. The doctor recommended corrective surgery (Through out the plaint did not specifically pleaded this).

b) Dr Kiura R.M.

Qualifications NOT disclosed

Date of report 25.9.06

Injury:

Fracture of left femur

26. The doctor not being an Orthopeadic Consultant recommended tht the plaintiffs be referred to one.

27. The finding of the doctors that the plaintiff sustained a fracture to his left femur, the advocate for the plaintiff relied on the case law of:- Joseph Mwaniki Mwai v Kenya Bus Service Ltd (State Coach International)

Nairobi Hccc 1954/97 (Mitei J)

28. The plaintiff in the above case had alighted from a public service vehicle/commonly known as a matatu in Kenya) when the was ran down by a motor vehicle as he walked on the pavement. He sustained:-

i) Head injury (cerebral concussion)

ii) Fracture of the right upper incisor took with loss of the fractured fragment

iii) Abrasion above the left wrist and hand

iv) Degloving injury to the left leg.

29. The court award Kshs.550,000/- under the head of General Damages pain and suffering.

30. I note there was no fractured borne. The advocate for plaintiff plaitnfif asked I aware Ksh.550,000/-. The defence prayed I award Ksh.150,000/-/

My possible award would indeed have been Ksh.150,000/- under the head of damages of pain and suffering.

II: Special Damages (agreed)

i) Medical report Ksh.2000/-

ii) Medication Ksh.1,500/-

Ksh.3,580/-

As parties ahd agreed to this subject to liability and as liability ahs not been successful the same is hereby dismissed. The same would have been a possible award.

31. The following claim are duly dismissed as not having proved.

31.i. Police abstract fee Ksh.100/-

31.ii. Loss of earning and future earning

31.iii) Loss of future medical expenses

31.iv) Court attendance fee

32. The reasons being that the plaintiff never produced the government of Kenya ksh.100/- receipts as required by law to prove this special damage. Failure to do so other claim is not entitled to be claimed by the plaintiff as it is meant to be a refund. There must be a refund of expenses not paid for. As to loss of earning and diminished earning capacity the plaintiff led no evidence on this head. No description was given by him in evidence as to what his income is and how he computed the sum of Ksh,8,000/-. This is accordingly rejected. Future medical costs was completely different to what was pleaded. This is rejected.

33. Court attendance fee by the doctor is not claimable through evidence. This is a matter for taxation. The Civil Procedure Rules lays down the procedure of summary witnesses to corut. This is duly paid for through the corut process and he same should be reflected by the taxing maser. See order XVR 2,3,4 and 5 where a witness fails to appear order XVr10 Civil Procedure Rules applies and attachment of witness property maybe applied for.

34. Under order 12 Civil procedure Rules when a witness is required to attend, the person who issues a notice of non admission where documents are requied to be produced without calling the marker thereof but insists ht he marker be called then tht said party becomes he witness expenses regardless that he succeeds in the case or not.

V) JURISDICITON

35. This accident occurred in central province. The suit was filed in the High Court of Kenya at Nairob8i. This corut ahs jurisdiction to hear this matter as the High Court as the jurisdiction is unlimited The only aspect is if the plaintiff was successful the taxation would have a lower scale being the same as the subordinate courts.

36. If the suit was originally filed in the subordinate courts at Nairobi when the cause of action occurred in central province then under section 15 the courts at Nairobi would not have had jurisdiction to hear the case.

37. I rule that this court has jurisdiction to determine this suit.

38. In summary

38.1 Running down cause

38.2. Collision between cyclist and motor vehicle

38.3. Male adult aged 37 years old in1998

38.4. Injuries

a) Head injury (cerebral concussion)

b) Fracture of left thigh borne femur

c) Soft tissue injuries to right limp

38.5. Liability – Nil - Not proved

38.6. Quantum (Possible award)

I: <u>General Damages</u>

i) Pain and suffering Ksh150,000/-

38.7 II: Special damages (agreed)

i) Medical report Ksh.2,000/-

ii) Medication Ksh.1,500/-

Total Ksh.3,580/-

iii) <u>Others</u>

a) Police abstract Ksh.100/-

Nil not proved

b) Loss of future medical expenses

Nil not proved

c) Loss of future medical expenses -

Nil not proved

d) Court attendance fee

Not to be part of claim but compliance Order 15 Civil Procedure Rules

39. This suit so hereby dismissed with costs to the defendant.

Dated this 4th day of December 2006 at Nairobi.

M.A. ANG'AWA

<u>JUDGE</u>

L.W. Kamau for W.G. Wambugu & Co. Advocates for the plaintiff

D.N. Mbigi for Mbigi Njuguna & Co. Advocates for the defendant