



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT KISUMU**

**CIVIL APPEAL 122 OF 1996**

**YUO GUO JIANG SIETCO.....APPELLANTS**

**AND**

**A. A. KAWIR.....RESPONDENT**

**(Appeal from the judgement of the High Court of Kenya at Bungoma (Justice Tanui) dated 28<sup>th</sup> November, 1995**

**IN H.C.C.C. NO. 76 OF 1995)**

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**JUDGMENT OF THE COURT**

The appellants, the defendants in the suit, have appealed against the judgement and decree of B.K. Tanui J. dated 28<sup>th</sup> November, 1995 in Bungoma High Court Civil Case No. 76 of 1995. The learned counsel for the appellants has primarily attacked the judgement of the superior court on the following two grounds:

That the learned trial judge erred in awarding enormous sums of money for loss of business without sufficient proof.

That the learned trial judge erred wholly basing his finding upon judgement in Bungoma Chief Magistrate Traffic Case No. 1918 of 1995 as conclusive evidence of negligence which decision is subject of an appeal still pending for determination.

The background of this litigation is that on 17<sup>th</sup> May, 1995 at about 12.05 p.m. along Webuye, Malaba Road, within Bungoma District of Western Province the respondent's driver was driving motor vehicle registration No. AAK 8947/8424 when it was allegedly hit by the 1<sup>st</sup> appellants' motor vehicle 066 UAY and as a result there was extensive damage to the respondent's vehicle and the goods which were being carried by it. At the trial Ahmed Abdi Kawir (PW1) the owner of the said respondent's vehicle gave evidence and said that his driver Jamal Hussein was driving his vehicle. There is no evidence that he personally witnessed the accident or was present at the scene at the time of the accident. The respondent closed his case and did not call any further evidence. The appellant also did not adduce any evidence in the superior court. Thus, no evidence was adduced on the issue of negligence of the appellants as alleged in paragraphs 5 of the amended plaint. However, the learned trial judge had before him certified copies of proceedings and judgement in Traffic Case No. 1966 of 1995. According to them the appellants

driver was charged with careless driving and convicted of the said offence.

The learned trial judge said in his judgement: -

“Certified copies of the proceedings and judgement in Bungoma SPM Court in Traffic Case No. 1966 of 1995 were produced as exhibits. Under S.47A of the evidence Act a finding of a criminal Case is conclusive as to such issues as negligence of drivers. In the circumstances I would hold that the first Defendant is liable to the Plaintiff in damages which arise from the accident”.

Section 47A of the Evidence Act reads as follows: -

“47A. A final judgement of a competent court in any Criminal Proceedings which declares any person to be guilty of a criminal offence shall after the expiry of the time limited for an appeal against such judgement or after the date of the decision of any appeal therein which ever is the latest be taken as conclusive evidence that the person so convicted was guilty of that offence as charged”.

It appears that neither the counsel for the parties brought to the notice of the learned trial judge that an appeal against the said judgement of the traffic case had already been filed. It is High Court Bungoma’s Criminal Appeal No. 318 of 1995. The said appeal is still pending awaiting to be heard. Section 47A of the Evidence Act will apply only after the said appeal has been finally decided, and: if as a result of that conviction of the appellants’ driver is upheld.

Consequently, in the circumstances the trial judge did not have any evidence about the cause of the accident. He could not have therefore held that the 1<sup>st</sup> appellant was liable to the respondent in damages.

We accordingly allow the appeal and set aside the judgement and decree of the superior court dated 28<sup>th</sup> November, 1995. We order a retrial of the High Court Civil Case No. 76 of 1995 and we also set aside all consequential orders. We award costs of the appeal to the appellants.

Dated and delivered at Kisumu this 22<sup>nd</sup> day of November, 1996.

**R.O. KWACH**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**G.S. PALL**

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**JUDGE OF APPEAL**



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