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| Case Number: | Civil Appeal 62 of 1986 |
| Date Delivered: | 31 Dec 1988 |
| Case Class: | Civil |
| Court: | Court of Appeal at Nairobi |
| Case Action: | Judgment |
| Judge: | Richard Otieno Kwach, Joseph Raymond Otieno Masime, James Onyiego Nyarangi |
| Citation: | Gideon Gitau Ndatha v Rosaline Mary Osborn[1988] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Appeal Dismissed |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram:nyarangi, MasimE JJA & Kwach Ag JA)**

**CIVIL APPEAL 62 OF 1986**

**GIDEON GITAU NDATHA.....APPELLANT**

**VERSUS**

**ROSALINE MARY OSBORN.....RESPONDENT**

**JUDGMENT**

November 9, 1988, **Nyarangi, Masime JJA & Kwach, Ag JA** delivered the following Judgment.

Gideon Gitau Ndatha (the appellant) filed proceedings against Rosaline Mary Osborn (the respondent) to recover damages for personal injuries alleged to have been sustained in a collision involving the appellant and a vehicle registration number KSL 624 owned and driven by the respondent. The accident occurred at about 8.00 o'clock at night along Kikuyu/ Dagoretti road. The High Court dismissed the appellant's claim and it is from that judgment that he now appeals to this court.

In his plaint the appellant stated that on August 14, 1982 at about 7.00 pm while he was lawfully walking alongside Kikuyu road, the respondent or her agent drove, managed and controlled motor vehicle registration number KSL 624 in such a careless or negligent manner that it violently hit and knocked down the appellant. He then sets out particulars of negligence, injuries and of special damages. The respondent filed a defence in which she denied that the accident was caused by any act of negligence on her part and in paragraph 4 she stated:

> "(4) The defendant states that the accident occurred solely as a result of the negligence of the plaintiff. Particulars of negligence:
>
> (a) Suddenly and without warning moving into the road;
>
> (b) Failing to see the plaintiff's motor vehicle with the lights on and moving into the road when it was not safe to do so, and
>
> (c) Crossing the road without due care and attention and failing to heed the presence of the plaintiff's vehicle."

There was no reply filed to this defence with the result that the allegations of negligence made against the appellant by the respondent in her defence were deemed to have been admitted under order 6 rule 9(1) of the Civil Procedure Rules. Order 6 rule 9(1) is in the following terms:

> "9(1) Subject to subrule (4), any allegation of fact made by a party in his pleading shall be

> deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a den of it."

The appellant has been throughout represented by counsel so the question of ignorance of the rules of procedure does not arise.

The appellant has given at least 3 different versions as to how the accident occurred. In his evidence at the trial he told the judge that he was walking along Kikuyu/Dagoretti road towards Dagoretti Trading Centre on his correct side of the road (left) when he saw motor vehicle lights from the rear. As he turned to look behind, the vehicle caught up with him and knocked him and he fell about 5 yards from the edge of the road where he lay injured and unconscious and where he was eventually found by a good samaritan.

Another version of the accident is to be found in the statement which the appellant made to the police at Kikuyu Police Station on September 8, 1982, in which he said he was walking along Dagoretti road towards Kikuyu alone and just past approval school he noticed a vehicle coming from the opposite direction and he stopped on the side of the road to let it pass. As he was standing the vehicle came close to him and hit him. He fell on the side of the road.

The appellant had also told Dr R P Shah one of the number of doctors who had seen him after the accident that on August 14, 1982 while he was standing a passing car knocked him down.

In her statement to the police and her evidence at the trial the respondent said she was driving along the said road when she saw three pedestrians walking on the other side of the road in the opposite direction. Suddenly one of them started walking towards her car with his hands in the air. She braked but could not avoid hitting him with the left front mudguard. She did not stop for fear of being beaten but drove straight to Karen Police Station where she made a report before driving to her home in Karen. The respondent's account of the accident is on all fours with the appellant's original version to the police and was to some extent corroborated by the evidence of Dr Mohamed Ashtay Sheikh, a Consultant Orthopaedic Surgeon, who after studying the medical report on the appellant's injuries came to the conclusion that they were consistent with a direct blow on the left outer aspect of the lower limbs in the region of the lower thigh and knee. This evidence was not challenged.

The appellant has listed 9 grounds of appeal the major ones being that the learned judge erred in disbelieving the appellant's version of how the accident happened; in not finding that the respondent had been driving for a considerable distance and may have been tired; in failing to find that the respondent was negligent; and in finding that the appellant's hospitalisation at Mater Misericordiae Hospital and no connection with the injuries sustained in the accident.

Mrs Maina, who appeared for the appellant submitted that had the learned judge directed his mind properly on the evidence before him he should have found that the respondent drove at an excessive speed and was therefore negligent. She also submitted that there was no basis for the judge's preference for the respondent's version as to how the collision occurred.

Looking at the evidence as a whole, it is plain to us that the learned judge could not have come to any other conclusion than that the respondent's account of the accident was the correct one. There was clearly no evidence to support Mrs Maina's submission that the respondent's concentration or ability to

drive had been affected by the fact that she had driven some considerable distance before the collision. Mrs Maina was not able to show us in what respect she claims that the learned judge had misunderstood the evidence.

There is no doubt that the appellant sustained severe injuries in the accident but it has not been shown on the evidence that these injuries were caused either wholly or in part by any act of negligence on the part of the respondent. Mrs Maina referred us to a number of authorities which were really of marginal if any assistance.

It follows that this appeal fails and is dismissed with costs.

**Dated and delivered at Nairobi this 9th day of November, 1988**

**J.O. NYARANGI**

**.....**

**JUDGE OF APPEAL**

**J.R.O. MASIME**

**.....**

**JUDGE OF APPEAL**

**R.O. KWACH**

**.....**

**Ag.  JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**