IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

High Court Civil Appeal No: HBC 03 of 2018 in exercise of the Appellate jurisdiction over the Magistrate's Court Nadi Civil Case No. 125/14

BETWEEN: CHOONSIK JEONG of Kennedy Avenue, Nadi.

APPELLANT- DEFENDANT

AND: GOVIND SAMI of Namaka, Nadi.

RESPONDENT-PLAINTIFF

Before	:	A.M. Mohammed Mackie- J
Counsel	:	**Mr. Anil J. Singh for the Respondent-Plaintiff**
	:	**Mr. Prakashan for the Appellant- Defendant**
Written Submissions:		**On 13th July 2018 by the Appellant- Defendant & on 20 July 2018 by the Respondent- Plaintiff.**
Date of Hearing	:	**12 September 2018**
Date of Judgment	:	**02 October 2018**

JUDGMENT

A. INTRODUCTION:

1. This is an appeal arising out of the judgment dated 17 December 2017, delivered by the learned Magistrate (Magistrate) of Nadi, whereby the Appellant -Defendant (Appellant) was ordered to pay unto the Respondent-Plaintiff (Respondent) a sum of $ 5,463.66, being the damages and loss of income, together with further sum of $ 1000.00 being the costs.

2. Being dissatisfied with the above judgment, the Appellant filed his Notice of Intention to Appeal and Grounds of Appeal on 21 December 2017, which was well within the prescribed time period.

B. FACTS:

3. The Respondent on 6 March 2014 filed his writ of summons, together with statement of claim before the Magistrate against the Appellant seeking the recovery of a sum of $ 7,136.66 being the loss of income and expenses incurred for repairs on his motor vehicle, together with a further sum of $ 1,900.00 being the costs.

4. The Respondent alleged that the Appellant on 27 July 2012 at Koroivolu Avenue, Nadi, carelessly drove his Motor Vehicle Registration No. FS 679 resulting in an accident with the Respondent's Motor Vehicle Registration No. L.T. 2306.

5. The Appellant denied the allegation and sought the striking out of the action. The Respondent and his driver gave evidence at the trial and though a no case to answer application was filed, the learned Magistrate having dismissed same called upon the Appellant to give or call evidence on his behalf. The Appellant chose not to adduce any evidence.

6. Accordingly, the Magistrate delivered the impugned Judgment on 17 December 2017 ordering the Appellant to pay the cost of repairs, loss of income and costs as stated above. It is against this judgment the present appeal is before this Court on 4 grounds of appeal.

C. HEARING OF APPEAL:

7. Learned Counsel for both the parties had filed their respective written submissions as stated above and when the matter came up for hearing on 12 September 2018, learned Counsel for the Appellant requested that the hearing be disposed by way of written submissions already filed. The learned Counsel for the Respondent, while conceding for this request, moved for substantial amount as cost of appeal.

D. ANALYSIS:

8. At the PTC, parties had agreed that both the Appellant and Respondent drove their respective Vehicles on the day of the accident and both vehicles were involved in a collision at Koroivolu- Nadi.

9. The Magistrate was called upon to try the following issues.
   a. *Whether the appellant had driven his vehicle no. FS 679 carelessly?*
   b. *Whether the Respondent suffered damages to his Motor Vehicle No. LT 2306 due to the careless driving of the appellant?*
   c. *Whether the Respondent's Motor Vehicle was out of business for 103 days from 27th July 2012 till 6th November 2012?*
   d. *Whether the Appellant should pay the loss incurred by the Respondent?*
   e. *Whether the Respondent is entitled for legal cost*

10. In order to examine the propriety of the impugned judgment entered after trying the matter on the above issues, I have carefully gone through the contents of the impugned Judgment and those in both the oral and documentary evidence led on behalf of the Respondent before the Magistrate. In addition to the above, the contents of written submissions filed by the learned counsel for both the parties have assisted me in weighing the merits of the grounds of appeal advanced on behalf of the Appellant.

Ground 1

"That the Learned Magistrate erred in law and in fact in relying on the Respondent/Original Plaintiff's receipt book as reliable evidence to prove loss of business when the same was insufficient evidence to prove loss of business".

11. The Respondent, as the owner of the Motor Vehicle No. LT 2306 (Taxi) by producing P.EX-2 and P.EX-6 had moved to prove that he was in receipt of $350.00 per week. He called his driver PW-2 to substantiate the income, who testified that he was in fact paying $ 350.00 per week. It is also in evidence that the Respondent's Taxi was later earning $200.00 to $ 220.00 through another driver after the accident. This evidence was not assailed by the defence. The fact that the Respondent's Taxi was not in business as claimed by the Respondent was not disputed by the Appellant. However learned Magistrate by objectively analysing the evidence, has arrived at a reasonable sum as the loss suffered by the Respondent, which is $220.00 per week.

12. The 1st ground of appeal, in my view, is misconceived. The Magistrate did not accept $350.00 as weekly loss, though she had both oral and documentary evidence before her to that effect. She has carefully examined all the evidence before her and arrived at this conclusion. Accordingly, she has found that the vehicle was out of business for a period of 3 months making the total loss of income to the volume of $2,828.00.

13. The Appellant chose not to adduce any evidence to contradict the Respondent's evidence that his vehicle was out of service for a period of 3 months. There was no evidence in rebuttal by the Appellant to discredit the witnesses in order to disbelieve the evidence adduced by the Respondent and his driver. Since, the proceeding is civil in nature, it is on the preponderance of the evidence the matter is adjudicated.

14. The Respondent's evidence remained unchallenged and the failure of the Appellant to give or call evidence on his behalf justified the learned Magistrate in arriving at her findings on the issue of lost income.

15. The Appellant chose not to come to Court and give evidence on his behalf. He knew very well that had he come he would have been confronted, with the contents of the Motor Vehicle Claim Form submitted by him to his Sun Insurance Company, wherein he had admitted in writing that he is responsible and none are to be blamed for the accident.

    The rule established in ***Jones v Dunkel (1959) 101 CLR 298*** is drawn to my attention which states that: *"An evidentiary rule at common law by which an inference may be drawn against a party by reason of the failure of that party to lead evidence, tender a document or other item of real evidence, or call a witness, in circumstances where it would have been expected that the party had it been before the Court. The inference should not be drawn where these is a reasonable explanation for the failure to take such action".*

16. Respondent's oral evidence on the expenses for the repair of his vehicle and the loss of income has stood adequately proved by the documentary evidence presented and this court cannot find fault with the impugned judgment of the Magistrate in this regard.

17. In the light of the above rule, it can be said that the Appellant, by being absent in court, deliberately avoided giving evidence and / or calling any witness because their evidence would have become detrimental and not assisted the Court in any way. Accordingly, I decide that the ground 1 has no merit and it should be disregarded by this court.

Ground 2

"That the Learned Magistrate erred in law and in fact in finding the First Defendant liable for damages when the Respondent/Original Plaintiff failed to produce a police report to confirm that the Appellant/Original First Defendant was negligent and had caused the accident".

18. In the light of what I have stated in foregoing paragraphs, with regard to the Appellant's admission of his fault for the accident, I see no merits in this ground of appeal and it has to necessarily fail necessarily.

19. The absence of a criminal prosecution or a conviction need not necessarily debilitate a civil claim arising out of an accident, on which the cause of action is founded. There is no rule of law that requires a mandatory police report to prove a civil case. Since the action before the Magistrate was for a civil claim the Respondent was expected to prove his case on preponderance of evidence, which duty he has duly discharged. The evidence and the contents of the impugned judgment clearly demonstrate it.

20. The accident was an admitted fact before the learned Magistrate. No evidence led by or on behalf of the Appellant to negate the allegation made by the Respondent. It was Respondent's duty to prove that the appellant was negligent and careless. Respondent's driver's evidence in this regard, who was the eye witness, is very clear and the learned Magistrate has accepted and judicially acted up on it.

21. The absence of the Police report need not necessarily hamper the Respondent's case. Evidence clearly shows that the Respondent's Vehicle driven by his PW-2 driver was stationary behind the Vehicle driven by the Appellant and it was the Appellant who, instead of moving forward, reversed his vehicle and collided with the Respondent's Vehicle. This fact stands very well corroborated by the Appellant's written statement to his own insurance Company. This document is already in record being annexed to the affidavit of, Arvendra Kumar, the Assistant Claim Manager of the insurance Company, which was initially the 2nd Defendant at the Magistrate's Court. It is also observed that by making an allegation that the Respondent did not maintain the distance between the two vehicles, the Appellant has tacitly admitted that he reversed his vehicle, instead of moving forward and collided with the Respondent's vehicle.

22. The standard of proof was for the Respondent to prove his case on the balance of probabilities. In *Miller v Minister of Pensions 1947 2 All E. R. 372* Lord Denning said the standard of proof regarding balance of probabilities as:

"That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not."

23. The Respondent has duly discharged his duty in proving the negligence of the Appellant for the Magistrate to arrive at the correct finding that it was Appellant's negligence that caused the accident, which resulted in damages to him.

24. Moreover, it is in the evidence of the Respondent that he had a conversation with the Appellant regarding police charge, where the Appellant has told according to the witness, "that the police did not charge him because he confirmed that he will repair the vehicle." His further evidence reveals that the Appellant had in fact undertaken to repair the Respondent's Vehicle. This shows the possible reason for not charging the Appellant by the Police. The above evidence stood unchallenged before the Magistrate. As such this ground too has no merits and should fail.

Ground 3

"That the Learned Magistrate erred in law and in fact by awarding judgment in favour of the Plaintiff when the evidence tendered by the Respondent/Original Plaintiff were inconsistent and the Respondent's witness failed to prove on the balance of probabilities."

25. This ground is also misconceived and bound to fail in the absence of notable inconsistencies on any material fact. The facts, such as that the Respondent was the owner of the vehicle, he was in taxi business operated through the PW-2, the fault was on the Appellant and the Respondent had to spend for repairs, while losing the income, have been proved beyond the required standard with no material inconsistencies.

26. When any discrepancy occurs as to the minor details due to short of memory, the documentary evidence can be resorted, which not only helps the witnesses to refresh their memory but also puts forth to the Court the incidents that happened at the time of the accident without any modifications. ***Lethbridge Motors Co. Ltd Et Al V Ameerican Motors Canada Ltd*** *40 D. L. R (4th) 544 at 545* where the Court gave more weight to documentary evidence when it came to faded memory. The Court in this case held that held:

"It is necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to dismiss for want of prosecution. ***In the present case, the only prejudice shown by the defendants was fading memories of witnesses over time. While that is an important factor, its impact depends upon the circumstances. In the present case, documentary evidence would be of considerable importance and the issue was such that fading memories would not constitute prejudice.*** *While the individual defendant had died, discovery had been accomplished despite his death and his evidence would not have been decisive."*

27. The inconsistencies cropped up during the trial are negligible. Although the Respondent's witness did not remember the contract between himself and the Respondent, he has recalled the same when the document was shown to him and also acknowledged his signature on the document.

Ground 4

"That the Learned Magistrate erred in law and in fact in awarding the judgment sum of $5, 463.66 to the Plaintiff when the fact of the case warranted that the Respondent/Plaintiff's driver and or agent was negligent".

28. There is no even an iota of evidence to establish that the Respondent's driver was negligent. The Appellant apart from his failure to adduce evidence to prove the negligence on Respondent's driver's part as alleged by him, has not even sufficiently challenged the Respondent's and his driver's evidence.

29. The Learned Magistrate has carefully analysed the evidence adduced before her, particularly on the expenses incurred for the repairs and on the loss of weekly income. She has not awarded anything more than what the Respondent had actually incurred for the repairs including purchase of parts. The amount awarded for loss of income too sounds reasonable. She did not accept everything that was adduced on behalf of the Respondent in this regard. She

gave a fair and balanced judgment. I don't see any merits in this 4th ground of appeal too.

E. CONCLUSION:

30. For the reasons stated above, I find that all the grounds of appeal advanced on behalf of the Appellant are without any merit and same should stand disregarded and dismissed. He appears to have made this appeal solely to frustrate the Respondent, who laid a valid claim against the Appellant and became victorious after a laborious litigation at the cost of time and money.

31. I stand fully convinced that the appeal should fail and the judgement against the Appellant should stand intact.

F. FINAL OUTCOME:

a. The appeal is hereby dismissed.

b. The judgment of the learned Magistrate dated 17 December2017 is affirmed.

c. The Appellant shall pay $1000.00 unto the Respondent being the costs of this appeal.

d. A copy if this judgment shall be despatched forthwith to the Registrar of the Magistrate's Court, Nadi, together with the original record.

A.M. Mohammed Mackie
Judge

HIGH COURT OF FIJI
LAUTOKA

High Court (Civil)
Lautoka
On this 2nd day of October 2108.

Solicitors:
For the Appellant- Defendant: Pillai Naidu & Associates
For the Respondent-Plaintiff: Anil J. Singh Lawyers