

**KENMUIR v HATTINGH (1974) ZR 162 (SC)**

SUPREME COURT (CIVIL JURISDICTION) 5

DOYLE CJ, BARON DCJ AND GARDNER JS

15th JULY 1974

SCZ Judgment No.31 of 1974.

**Flynote**

**Appeal - Findings of fact - Conclusions based on facts which were common cause or on items of real evidence - Position of appellate court.**

**Appeal - Questions of credibility - Appellate court not having had the advantage of seeing and hearing witnesses - Interference with findings of fact - When possible.**

**Appeal - Record indicating presence of sufficient evidence before trial court - 15 Reluctance of appellate court to order new trial - Circumstances in which new trial would be ordered.**

**Headnote**

The appellant appealed from a decision of the High Court dismissing his claim for damages arising out of an accident. His appeal was based on the ground that the trial judge made no findings as to distance or other 20 important issues raised by the evidence and that his finding that the plaintiff was solely to blame for the accident was against the weight of evidence. The respondent, while conceding that the trial judge made no findings on important issues submitted that there was in fact sufficient on record to enable the court to make its own findings of fact and to 25 determine the issue.

*Held:*

- (i) An appeal from a decision of a judge sitting alone is by way of rehearing on the record and the appellate court can make the necessary findings of facts if the findings were conclusions based 30 on facts which were common cause or on items of real evidence, when the appellate court is in as good a position as the trial court.
- (ii) Where questions of credibility are involved an appellate court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the 35 trial judge unless it is clearly shown that he has fallen into error.

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- (iii) An appellate court will normally be reluctant to order a new trial where it appears from the record that there was sufficient evidence before the trial court to make the necessary findings of fact. In such circumstances the normal course will be to send the matter back to the trial judge for these findings to be made. 5 Where, however, in addition to the necessity of making findings further evidence will be required in a number of important areas a new trial will normally be ordered, particularly where both parties indicate that they ask for a new trial.

Case cited:

- (1) *Powell v Streatham Manor Nursing Home* (1935) All ER Rep. 38. 10  
*A M Hamir, Peter Cobbett - Tribe & Co.*, for the appellant.  
*E A Gani, E A Gani & Co.*, for the respondent.

**Judgment**

**Baron DCJ:** This is an appeal from a decision of the High Court dismissing the plaintiff's claim for damages arising out of an 15 accident which took place at the mouth of what are now Lubutu Road and Matandani Close on the 25th January, 1972. The appellant (to whom I will refer as the plaintiff) appeals on the ground that the learned judge made no findings as to distances or other important issues raised by the evidence and that his finding that the plaintiff was solely to blame for the 20 accident was against the weight of evidence. The respondent (the defendant) submits that while he agrees that the learned trial judge made no findings on important issues there is in fact sufficient on record to enable this court to make its own findings of fact and to determine the issue.

It is quite clear that the learned judge made no findings on important 25 issues, although it is equally clear that the way in which the case was presented by both parties placed him in the position where he had singularly little evidence on which to make findings. Mr Gani, on behalf of the defendant, cites the case of *Powell v Streatham Manor Nursing Home* [1] as authority for his submission that an appeal from a decision of a judge 30 sitting alone is by way of rehearing on the record and that this court can make the necessary findings of fact. This would certainly be so if the findings were conclusions based on facts which were common cause or on items of real evidence, when the appellate court is in as good a position as the trial court. As the case of *Powell v Streatham Manor 35 Nursing Home* [1] makes clear, however, the position is otherwise where questions of credibility are involved, in such cases the appellate court, which has not had the advantage of seeing and hearing the witnesses will not interfere with the findings of fact made by the trial judge unless it is clearly shown that he has fallen into error. 40

Mr Gani, while conceding that the present case was not on all fours with *Powell v Streatham Manor Nursing Home* [1], submitted that the same approach should be adopted and that this court should not interfere with the finding that the plaintiff was solely to blame for the accident because it was not clearly shown that the learned trial judge was wrong 45

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so to find. This argument would have had force if the learned trial judge had made findings of fact. Unfortunately, save that he found that the plaintiff took no proper precautions and kept no look - out, the learned judge has made no findings. He has not considered the question of contributory 5 negligence and has made no finding in that regard, and completely ignored the defendant's counter - claim. While therefore on the approach urged upon us by Mr Gani it would be very difficult for us to disturb the learned judge's finding that the plaintiff kept no proper lookout, the absence of findings on other fundamental issues makes it 10 impossible to adopt this approach.

I cannot accept Mr Gani's further submission that there is sufficient on the record to enable this court to supply the necessary findings. Those findings would not be made without decisions as to which of two conflicting stories and accepts, anti these decisions would involve findings on 15 credibility.

I would normally be reluctant to order a new trial where it appeared from the record that there was sufficient evidence before the trial court to make the necessary findings of fact; in such circumstances the normal course would be to send the matter back to the trial judge for those 20 findings to be made. In the present case, however, in addition to the necessity to make findings where there was sufficient evidence to do so, further evidence will be required in a number of important areas. Both parties having indicated that in the event of this court being unable to decide the appeal they would ask for a new trial, I would so order. I would 25 order that both here and in the court below costs be in the cause.

**Judgment**

**Doyle CJ: I agree.**

**Judgment**

**Gardner CJ: I concur.**

*Trial de novo ordered*

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