



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 101 OF 2015

JAMES M. MBUKO.....APPELLANT

=VERSUS=

KISAINGU HOLDINGS LIMITED.....RESPONDENT

(Being an appeal against the Judgment of Hon. E. Kelly, Resident Magistrate, delivered on the 27th July 2015 in Nakuru Chief Magistrate's court civil case No. 450 of 2010)

JUDGMENT

INTRODUCTION

1. This appeal arise from claim filed by the appellant against the respondent seeking special damages of Kshs. 342,764/= plus costs and interest as a result of collision between his vehicle registration number KAD 145G and defendants motor vehicle registration number KAK 310C/ZC. Plaintiff availed two witnesses including himself and closed his case. The defendant failed to attend court on 27th January 2015 for defence hearing. The court ordered the matter closed. Defendant therefore never adduced evidence.

2. After considering plaintiff's evidence the trial magistrate dismissed the plaintiff's claim. Being dissatisfied with trial court's decision, the appellant/plaintiff filed this appeal on the following grounds:-

- a) That the trial magistrate failed to appreciate that the issue of material damage was an issue in the discretion of the court.
- b) That the trial magistrate erred in fact and law by taking into account irrelevant considerations and failing to take into account material consideration for proper exercise of discretion.

APPELLANT'S SUBMISSIONS

3. The appellant submitted that the standard of proof in civil cases is on a balance of probabilities; that the defendant never submitted any evidence. Appellant relied on the case of **National Newspapers Limited Versus Daniel William Mutichiro Nairobi Civil Appeal No. 224 of 1999** where the court held as follows:-

“True as I have pointed out the law requires such claims to be strictly proved. But we should not forget the fact that even in such claims the standard of proof is still on a balance of probabilities. To require more or better evidence than that adduced in this case which was not controverted by the respondent would be raising the standard of proof to fetish level beyond a balance of probabilities.”

4. Appellant submitted that the trial magistrate erred in relying on evidence of PW2 who in cross examination said he was not the investigating officer and that he had been instructed to come to court to produce the court file; that the witness not being the investigation officer did not have full facts of the case. He urged court to allow the appeal.

5. Further, the appellant submitted that the trial magistrate failed to interrogate and weigh evidence before her. He urged court reassess, reevaluate and analyze evidence on record.

6. The respondent never filed response to appeal or submissions. Despite the fact that no response to appeal was filed, being the first appellate court, I have a duty to reevaluate evidence on record and arrive at an independent determination.

ANALYSIS AND DETERMINATION

7. In his testimony, the appellant said that he was driving his motor vehicle registration number KAD 145G towards Nairobi direction from Nakuru, when he saw lorry registration number KAK 310 ZC O882 from the opposite direction overtaking another vehicle and in the process violently collided with his vehicle causing extensive damage.

8. Appellant/Plaintiff testified that the lorry driver was driving at excessive speed, encroached on his lane and failed to apply brakes to avoid hitting his vehicle. He denied having applied emergency brakes. In cross examination, Appellant/plaintiff said that he kept his lane and that the lorry pushed his vehicle to the side ditch. Plaintiff said he was compensated by insurance. His claim was for indemnity.

9. In his testimony, PW2 informed court that he was instructed by Base Commander to produce the investigating file in court. He testified that he was not attached to the police station at the time the accident occurred. He said KAD 154D hit KAK 310C from behind. He further said the front part of KAD 145D was damaged. He added that, from the record she could not tell who was charged with traffic offence.

10. PW2 further testified that there was no finding as to who was to blame for the accident. In re-examination, he said police abstract was filled on 25th May 2007; he produced it in court as exhibit. On perusal of police abstract, it shows that the matter was still pending under investigations.

11. Reason given by trial magistrate for dismissal of plaintiff's suit is failure by plaintiff to prove his claim on a balance of probabilities. He stated that plaintiff's testimony differed with testimony of PW2.

12. From record, PW2 said he did not carry to court investigations file and that he never participated in the investigations; he further said he was not attached to the police station at the time of the accident. What he had in court was police abstract, which indicated the matter was still under investigation. Factual evidence that was availed to court was therefore evidence of the plaintiff.

13. The plaintiff's evidence is that his vehicle was hit head on by the defendant's vehicle, which was overtaking another from the opposite direction at high speed. It is evident that PW2 did not have investigatory evidence which can be said to have contradicted plaintiff's evidence. In the absence of any contrary evidence, my view is that the plaintiff's evidence pointing at wrongful overtaking and driving in high speed was sufficient proof of negligence on a balance of probabilities.

14. On the other hand, the plaintiff never demonstrated any effort to avoid the accident. Having seen the other vehicle do wrongful overtaking, if he was moving at moderate speed, he should have made efforts to either brake or swerve to avoid collision or reduce impact. I find it appropriate to apportion smaller percentage of blame on the plaintiff. I do apportion 20% liability.

15. From the forgoing, I see merit in the appeal herein and proceed to allow.

16. In respect to quantum, I note that the plaintiff sought special damages of Kshs. 342,764/= plus costs of this suit and interest on both damages and costs. The following was proved by receipts:-

a) Assessor's costs.....	14,150.00
b) Towing fee.....	12,500.00
c) Motor vehicle total loss.....	285,000.00
d) Storage fee.....	6,000.00
e) Investigators fee.....	25,114.00
GRAND TOTAL.....	342,764.00
Less 20%.....	(68,552.80)
Net.....	274,211.20

FINAL ORDERS

1. Appeal is allowed.
2. Liability is apportioned at 20:80 in favour of plaintiff (plaintiff to shoulder 20% liability defendant 80% liability).
3. Judgment is hereby entered for plaintiff/appellant against the defendant/respondent for kshs two hundred and Seventy Four thousand two hundred and eleven shillings and Twenty cents only (274,211.20).
4. Interest on 3 above at courts rate from the date of this judgment.

5. Costs in trial court to be paid by the respondent/defendant to appellant/respondent.
6. Each party to bear own costs of the appeal.

Judgment Dated, signed and delivered at Nakuru this 25th day of April, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

SCHOLA/JARED COURT ASSISTANT

GATONYE HOLDING BRIEF FOR MATIRI COUNSEL FOR APPELLANT

N/A COUNSEL FOR RESPONDENT