



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 472 OF 2012

JOHN KIOKO MUSINGI.....1ST APPELLANT

TOM NZIMBE NDOYO.....2ND APPELLANT

V E R S U S

ZACHARY KABERIA.....RESPONDENT

(An appeal from the judgement and decree of Hon. C. O. Obulusa (Mr) SPM

in Milimani CMCC No. 2697 of 2010 delivered on 13th August, 2012.)

JUDGEMENT

1) Zachary Kaberia, the respondent herein, filed a material damage claim against John Kioko Musingi and Tom Nzibe Ndoyo, the 1st and 2nd appellants herein before the Chief Magistrate's Court, Milimani commercial Courts, Nairobi. In the plaint dated 5th May 2010, the respondent alleged that on 7th August 2009, his motor vehicle registration no KAU 565R was lawfully being driven along Lang'ata road when due to the negligence of the 1st appellant's vehicle registration no. KAA 568B caused the same to collide with motor vehicle registration no. KAU 565R thus causing it extensive damage. The respondent sought for judgment in the sum of ksh.270,800/= plus costs and interest.

2) The appellants filed a joint statement of defence to deny the respondent's claim. Hon. Obulutsa, learned Senior Principal Magistrate, heard the suit and in the end he entered judgment in favour of the respondent in the sum of ksh.271500/= plus costs and interest.

3) The appellants were dissatisfied with the decision hence they preferred this appeal. On appeal the appellants put forward the following grounds:

1. THE learned magistrate failed in finding the appellants wholly liable.

2. THAT the learned magistrate erred in fact and in law in failing to consider whether the plaintiff was the owner of motor vehicle registration number KAY 565R as at 7th August 2009.

3. THAT the learned magistrate erred in fact and in law in failing to consider whether the plaintiff had the requisite locus standi to bring the suit for recovery as against the defendants.

4. THAT the learned magistrate erred in fact and in law in failing to hold that as at 7th August 2009 the plaintiff was not the registered owner and/or beneficial owner of motor vehicle KAY 565R.

5. THAT the learned magistrate erred in law and fact in awarding the plaintiff the sum of ksh.271,500/=.

4) When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. Though the appellant has put forward a total of five grounds of appeal, those grounds revolve the question of liability and quantum.

5) On liability, the appellant argued that the trial magistrate erred to hold that the appellants were wholly liable for the accident. They pointed out that at the time of hearing the suit, the respondent failed to demonstrate that the accident was caused by the negligence on the part

of the 1st appellant's driver of motor vehicle registration no. KAA 568B. The appellants stated that the respondent had told the trial magistrate that he was informed by his driver of the occurrence of the accident and that he was not at the scene of the accident. The respondent heavily relied on the police abstract form. It is argued that the respondent failed to discharge the burden of proof of the occurrence of the accident and the particulars of negligence on the part of the appellants. The appellant further pointed out that motor vehicle registration no. KAU 565R did not belong to the respondent at the time of the accident, therefore he is not entitled to the claim. In response to the appellant's submissions, the respondent pointed out that the appellants expressly admitted that while driving towards town on Lang'ata road, he lost control left his side of the road, crossed over to the wrong side, crashed onto the respondent's motor vehicle and was only stopped by the fence bordering Wilson Airport, therefore the appeal as against liability lacks merit. The respondent also argued that the appellants failed to tender evidence to controvert his assertion that he owned motor vehicle registration no. KAU 565R. The record shows that the respondent testified and summoned two other witnesses to testify in support of his case. The respondent told the trial court that his driver explained to him how the accident occurred. The respondent however summoned Zacharia Maina (PW2) who was a passenger in the respondent's motor vehicle at the time of the accident. PW3 told the trial court that he was seated next to the respondent's driver and that on the fateful day, he saw the appellant's motor vehicle come from the opposite direction enter into their lane after crossing from the side and hit the respondent's motor vehicle forcing it to land in the ditch. It is clear that the respondent summoned an eye witness whose evidence was consistent and was not shaken in cross-examination. I am satisfied that the trial magistrate arrived at the correct decision on liability.

6) The vexing question on the ownership of motor vehicle registration no. KAU 565R. The respondent was emphatic that he had the motor vehicle for about two months before the accident having bought the same from Salim and was only awaiting for it to be transferred to him by Kenya Revenue Authority. The respondent's oral evidence over the ownership of the aforesaid motor vehicle was not controverted by the appellants. I am satisfied that the respondent tendered credible oral evidence which proved on a balance of probabilities that he was the owner of motor vehicle registration no. KAU 565R

7) The second issue which came up for argument is the question touching on the special damage pleaded. The appellants have challenged the award of ksh.271,5000/= given to the respondent. It was pointed out that the amount which was proved by the evidence tendered by the respondent was kshs.175,450/= and not the figure awarded. I have on my part re-evaluated the evidence tendered in support of the special damage and I cannot find any fault in the manner the trial magistrate assessed the award. I find no merit in the appeal as against damages awarded.

8) In the end the appeal is found to be without merit. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 31st day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents