



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
HCA NO. 141 OF 2010

DAN MURIUNGL.....APPELLANT

VERSUS

PHILIP MEME RIMBERE.....1ST RESPONDENT

DIOCESE OF MERU TRUSTEES REGISTERED....2ND RESPONDENT

SR.RINCY.....3RD RESPONDENT

MERCY JOSEPH.....4TH RESPONDENT

JUDGEMENT

This appeal arises out of the judgement of Principal Magistrate S.N. Andriessen dated 19th November 2010 in Meru CMCC No. 526 of 2004 dismissing the suit on the grounds that the ownership of Motor vehicle Registration KAR 848 N was not established.

That there was no Police Abstract to establish who the driver of the vehicle was at the time of the accident;

That the claim against the 4th defendant was barred by limitation of time and that no leave to file suit against 4th defendant out of time was obtained.

The trial magistrate found that the appellant had not established a case with the balance of probabilities and dismissed the entire suit.

The grounds of appeal in the memorandum of Appeal are that:-

1. The Learned trial magistrate erred in law and fact by demanding proof beyond reasonable doubt and therefore dismissing the appellant's case.
2. The Learned trial magistrate erred in law and fact by not considering that the respondents herein gave any evidence and therefore their defence remained mere allegations.
3. The Learned trial magistrate erred in law by not considering the many authorities submitted before her and therefore dismissing the appellant's case.
4. The Learned trial magistrate dismissed the appellant's case against the 4th Respondent despite the fact that no defence was filed by the 4th Respondent. Leave had been granted to join her and there existed an interlocutory judgment against her.
5. The whole judgment of the trial magistrate is against the weight of the evidence.

The appellant wanted the judgement of the trial magistrate to be quashed and appeal allowed with costs. The background of this appeal is that the appellant was 17 years old by the time the accident occurred along Meru-Chuka road on 15th May 2004 and he suffered fracture of the left ankle and bruises on the left elbow.

Motor vehicle Registration KAR 848 N caused the accident. The appellant's evidence was that the driver of the subject Motor vehicle was being driven at high speed when it lost control and in order to avoid ramming on motor vehicles packed on its side to the opposite side and knocked the appellant.

The duty of this court is to re-evaluate the proceedings in the lower court and establish whether the trial magistrate in arriving at the conclusion made took into account all relevant factors/issues or failed to take into account relevant factors/issues. I'm also to consider whether the trial court had a clear understanding of the relevant/applicable law in reaching at the determination appealed against. The suit herein was filed on 23rd August 2004. The accident happened on 15th May 2004. The 1st defendant was described as the driver of motor vehicle Registration KAR 848 N Toyota Surf at all material times relevant to the suit.

The 2nd defendant denied being registered owner of motor vehicle Registration KAR 848 N Toyota Surf in joint defence dated 27th September 2004 but admitted description in paragraph 1 & 2 including that 1st defendant was the driver of motor vehicle in question at all material times relevant to the suit herein.

There was no express denial that 1st defendant was driver of motor vehicle in question. At paragraph 5 the 2nd defendant denied being vicariously liable for the actions of 1st defendant.

The plaint was amended to join sister Rincy and removing Diocese of Meru Trustees registered as 2nd Defendants or by an amended plaint dated 7th July 2005. Sister Rincy was described in the amended plaint as registered owner of the subject motor vehicle. The victim had also become of age and his next friend removed from the suit. There was a further amended plaint dated 27th August 2007 returning Diocese of Meru Trustees Registered as 2nd Defendants to the suit.

In the amended joint defence dated 14th September 2007 the 1st defendant denies having been the driver of the motor vehicle registration KAR 848 N Toyota Surf on 15th May 2004.

The 2nd defendant Trustees also deny being registered owners of the motor vehicles in question. The 3rd Defendant Sister Rincy also denies being the registered owner of the motor vehicle in question and puts the plaintiff to strict proof.

By an amendment to further amended plaint filed on 7th October 2009 the plaintiff jointed a 4th defendant Mercy Joseph to the suit with claims that she was the registered owner of the accident motor vehicle. Father Biko received the summons on 12th November 2009. The summons are addressed to Mercy Joseph of PO Box 262-60200 Meru.

In the affidavit of service it is indicated that Father Biko who received service on behalf of Sister Mercy Joseph was the Administrator at the offices of Meru Diocese where sister Mercy Joseph previously used to work.

On 1st December 2009 a request for judgment against Mercy Joseph was made and it was granted on 17th February 2010. It is important to note that by the time the amendment to bring in Sister Mercy Joseph was made on 7.10.2009 the plaintiff had testified on 17th October 2008. PW2 had also testified on same dates.

On 20th April 2010 the plaintiff counsel closed the plaintiff's case after failing to get a police officer to produce Police Abstract. On 30.9.2010 when defendants and counsel failed to attend court, the trial magistrate was urged to close their case. However before closing the defendant's case the plaintiff's case was ordered reopened to enable plaintiff produce records from Registrar of motor vehicles and it appears a receipt which was produced as Ex P8 and ExP7 show 4th defendant was owner of motor vehicle. Defendants case was then closed and on 21st October 2010. It was confirmed both parties had filed submissions

There was no evidence that the 4th defendant Mercy Joseph was served and/or in what capacity the priest who was said to be an Administrator at the Diocese office in Meru was served on her behalf. It is not shown that he was authorised to receive service on behalf of the said Mercy Joseph and the request for interlocutory judgment that was granted by the court was improper and/or erroneous. The trial magistrate also conducted the proceedings in a jumbled up manner. After reopening the case for the plaintiff in the absence of the defendants and counsel and after allowing the plaintiff to produce records of motor vehicle – Ex P7 & Ex 8 showing Mercy Joseph was the registered owner she goes ahead to determine that ownership of the motor vehicle had not been proved.

When the trial magistrate decided to open up the plaintiffs case during defence hearing she ought to have given an opportunity and a notice to the defendants to interrogate the documents that were produced. It is true that no evidence was adduced to prove the 1st defendant was the driver of the accident motor vehicle as the police abstract marked by the plaintiff was not produced because the officer who made it was not called to produce it. Being that 1st defendant denied being the driver it was upon the plaintiff to prove he was the driver at the material time of the accident.

The trial magistrate noted that 4th defendant who appeared in Ex P7 produced by the plaintiff during defence case was sued 6 years and 5 months after the accident and therefore suit against her was barred by statute. The plaintiff's counsel did not deny this but relied on the fact that leave to amend the further amended plaint was granted. As rightly put by the trial court the plaintiff didn't seek leave to sue 4th defendant out of time. The plaintiff sought for leave to amend the further amended plaint. This was long after the plaintiff and his witness had testified and went against the grain and spirit of fair hearing as provided for by the constitution.

I do find that this appeal cannot redeem the appellants' case as it is too late in the day. The appeal is dismissed with no orders as to costs.

HON. A.ONG'INJO

JUDGE

RULING SIGNED, DELIVERED AND DATED THIS 17TH DAY OF MAY 2018.

In presence of:

Appellant: Ms Nyagah Advocate holding brief for Mwangi for Appellant.

Respondents:- Mr Mungai Advocate for Respondent.

HON. A.ONG'INJO

JUDGE