



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 658 OF 2006**

**NATION MEDIA GROUP .....APPELLANT**

**- V E R S U S -**

**WATSON NJORA WAWERU .....RESPONDENT**

***(Being an appeal from the judgement and decree of the Hon. Magistrate T.M.C. Wamae in Nairobi  
SRMCC No. 1765 of 2005 delivered on 14<sup>th</sup> September, 2006)***

**JUDGEMENT**

1. Watson Njora Waweru, the respondent herein, filed a compensatory suit before the Chief Magistrate's Court, Commercial Courts, Nairobi, against Nation Media Group, the appellant. The cause of action arose out of an accident that allegedly occurred on 8<sup>th</sup> April 2006 along Sagana-Kenol road involving motor vehicle registration no. KAB 057F Peugeot 504 and motor vehicle registration no. KAN 957V Isuzu Tougher Pick up. The appellant filed a defence to deny the claim. It was the appellant's contention that the accident did not take place and if it took place, then the respondent substantially contributed. The respondent's claim against the appellant was for ksh.214,757 being the cost of repairs to his motor vehicle registration no. KAB 057F which was involved in the accident with the appellant's motor vehicle registration no. KAN 957V. Hon. T.W.C. Wamae (Mrs), learned Senior Resident Magistrate, heard the case and in the end she found the appellant wholly liable and awarded the respondent ksh.211,037 representing the cost of repairs plus costs and interest. Being aggrieved by the decision, the appellant preferred this appeal.

2. On appeal, the appellant put forward the following grounds in its memorandum:

- 1. The learned magistrate erred in law and fact in failing to find and determine that the respondent had not discharged his evidential burden of proving the ownership of motor vehicle registration no. KAB 057F.***
- 2. The learned magistrate erred in law and fact in failing to find or determine that the respondent by failing to prove ownership of motor vehicle registration number KAB 057F had no locus standi for file this suit.***
- 3. The learned magistrate erred in law in shifting to the appellant, the burden of proof of ownership of the said motor vehicle registration number KB 057F.***
- 4. The learned magistrate erred in law and fact in finding that the failure by the appellant to cross-examine an ownership of motor vehicle registration number KAB 057F amounted to an abandonment of the issue.***

**5. The learned magistrate erred in law and fact by failing to find that the plaintiff failed, neglected or ignored to prove vicarious liability by omitting to sue the driver of motor vehicle registration number KAN 957V or even to prove the allegation that the authorised driver and/or agent of the defendant was driving motor vehicle registration number KAN 957V Isuzu Tough Pick-up on the 8<sup>th</sup> April, 2003 and was doing so negligently.**

**6. The learned magistrate erred in law and fact by awarding special damages which were not strictly proved.**

**7. The learned magistrate erred in law and fact by finding that payment advices which are internally prepared documents by the plaintiff and not their service providers were proof of payment.**

**8. The learned magistrate erred in law and fact in awarding the amount of kshs.211,037/= for repairs in absence of assessors report as evidence of damage caused to the said motor vehicle registration number KAB 057F that made it necessary for the plaintiff to spend the said amount in terms of repairs.**

**9. The learned magistrate erred in law and fact by entering judgement for the plaintiff against the defendant in the sum of ksh.211,037/=(two hundred and eleven thousand, thirty seven plus interest and costs)**

3. When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions.

4. I have considered the rival submissions. I have further re- evaluated the case that was before the trial court. It is the appellant's submission that the trial magistrate erred when she failed to properly and diligently analyse the evidence presented before her. It is also the appellant's contention that the award given to the respondent is inordinately high given the circumstances of the case and the principles of making the award. The appellant further pointed out that the respondent had failed to prove ownership of the motor vehicle he allegedly claimed to be his. It is also pointed out that the respondent had failed to present documentary evidence to prove the expenses incurred in repairing motor vehicle registration no. KAB 057F to be ksh.211,037/=.

5. The respondent vehemently opposed this appeal arguing that the respondent's witnesses produced receipts and documents which established his claim. The respondent submitted that the appellant in the contrary did not summon witnesses to present evidence to controvert the respondent's evidence hence the trial court correctly found the appellant liable for the accident.

6. Though the appellant put forward a total of 9 grounds of appeal, it is apparent that those grounds can be summarised to two main grounds.

First, whether or not sufficient evidence were presented by the respondent to establish his claim against the appellant?

Secondly, whether or not the award of ksh.211,037 was inordinately high.

7. On the first issue, I have considered the arguments submitted by both sides. This being the first appellate court, I am bound to re-evaluate the case that was before the trial court. It is the appellant's submission that the respondent had completely failed to prove his case to warrant being given judgment. The record shows that the respondent summoned four witnesses in support of his case while the appellant closed its case without calling witnesses to testify in support of its case. Peter Mwangi (PW1), the driver of the respondent's motor vehicle registration no. KAB 057F, told the trial court that the motor vehicle registration no. KAN 957VV owned by the appellant was overtaking a lorry when it veered off to his side of the road thus colliding with the respondent's motor vehicle. PW1 stated that the respondent's motor vehicle was inspected and found to be without any defects. The respondent's witness further stated that

he was forced to swerve off the road to avoid a head on collision. The evidence of PW1 substantially explained how the accident occurred and who was the registered owner of motor vehicle registration no. KAB 057F. The evidence of PW1 was never rebutted by the appellant when it decided not to summon witnesses to testify. The learned Senior Resident Magistrate correctly observed that the appellant's advocate did not cross-examine the respondent's witnesses over the ownership of motor vehicle registration no. KAB 057F. I am satisfied that credible evidence were tendered that show that the appellant's driver of motor vehicle registration no. KAN 957V was wholly to blame for the accident. In its defence, the appellant denied ownership of motor vehicle registration no. KAN 957V. It also denied that motor vehicle registration no. KAB 057F was owned by the respondent. The respondent tendered the evidence of Loice Akoth (PW3) who presented before the trial court a copy of the records kept by the Registrar of Motor Vehicles shoeing that KAN 957V was owned by the appellant. The respondent further summoned P. C. Isaac Muthama (PW4) who produced a police abstract form as an exhibit in evidence. This piece of evidence which was not contested shows that motor vehicle registration no. KAB 057F belongs to the respondent. The appellant did not deem it fit to controvert the evidence of PW4. On my part, I am satisfied that the respondent tendered credible and believable evidence showing that the respondent owns the aforesaid motor vehicle. I therefore find no merit on the first ground of appeal.

8. In the second ground, the appellant is of the view that there was no evidence to establish that kshs.211,037/= was incurred. I have considered the evidence on record. The respondent presented the evidence of Loice Akoth (PW3) who produced documentary evidence showing that a sum of ksh.211,037/= was spent by the Insurer to repair motor vehicle registration no. KAB 057F. The appellant's counsel did not interrogate in cross-examination over her evidence. It is therefore not true that the respondent did not submit documentary evidence to prove his claim.

9. In the end, I find no merit in the appeal. It is dismissed in its entirety with costs to the respondent.

**Dated, Signed and Delivered in open court this 27<sup>th</sup> day of January, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent