



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 1020 OF 2004

CITY RADIATORS CO. LTD APPELLANT

- V E R S U S -

BENJAMIN STEPHEN MBINDYO.....RESPONDENT

(Being an appeal from the judgment of the SRM, Hon. Mrs. T. Wamae given

at Nairobi on 4th day of November 2004 in the Milimani SRMCC Civil Suit no. 1569 of 2003)

JUDGEMENT

1) Benjamin Stephen Mbindyo, the respondent herein, filed an action against City Radiators Ltd, the appellant herein, claiming payment of kshs.190,170/= being a refund of the expenses the respondent incurred in repairing his motor vehicle registration no. KZV 210 which had collided with the appellant's motor vehicle registration no. KNB 274. The accident is alleged to have occurred on 17.6.2001 along Mombasa Road at the Namanga road junction. The suit was defended by the appellant. It was heard and determined in favour of the respondent as prayed in the plaint. The appellant felt aggrieved, hence this appeal.

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

1. The learned magistrate erred in law and in fact in finding that the appellant's driver was 100% liable for the cause of the accident on 17th June 2001 pleaded in the plaint when in fact the evidence tendered pointed to the contrary.

2. The learned magistrate erred in law and seriously misdirected herself when she placed little or no weight to the defendant's witness in deciding on the liability aspect of the case.

3. The learned magistrate erred in law and seriously misdirected herself when she found that the purported special damages of kshs.181,570/= claimed by the plaintiff in his plaint were proved when in fact there was no evidence that the said sum was expended for the repairs directly caused by the accident.

4. The learned magistrate erred in law and seriously misdirected herself when she failed to accept the testimony of the appellant's driver in assessing the impact of the accident, which contradicted the plaintiff's allegations.

5. The learned magistrate erred and misdirected herself in law and in fact when she took into account the contents of a police abstract whose maker was not called in evidence in spite of

objections thereto raised by the appellant

3) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

4) I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. The brief background of this appeal is that on 17.6.2001 at 2.00pm the respondent was driving along Nairobi-Mombasa Highway while transporting some timber in his motor vehicle registration KZV 210 and upon reaching the junction to Athi River his car was hit by the appellant's motor vehicle which had joined the highway without giving way. As a result of the collision, the respondent's motor vehicle was extensively damaged. The police were called to the scene who came and carried out investigations and eventually towed the respondent's motor vehicle to Athi River Police station. Parties also recorded witness statements. The respondent blamed the appellant's driver for joining the main road without giving way at high speed. At the trial, the appellant tendered the evidence of a single witness while the respondent summoned two witnesses in support of his case.

5) Hon. T.W.C. Wamae, learned Senior Resident Magistrate considered the evidence presented by both sides and came to the conclusion that the respondent had established his case on a balance of probabilities.

6) Having outlined in brief the case that was before the trial court, let me now turn my attention to the substance of the appeal. Though the appellant put forward a total of five grounds on appeal, it is clear in my mind that those grounds boiled down to the question revolving on liability and quantum. On liability, it is the submission of the appellant that the evidence tendered by the respondent could not support the decision making the appellant wholly liable for the accident. It is the evidence of the appellant's driver, Patrick Kamau Waithaka (DW1), that he was driving motor vehicle registration no. KNB 294 on a murrum road off Mombasa road and before joining, he said he saw the respondent's motor vehicle a few metres before joining the main road. DW1 said that upon getting into the main Highway he was hit from the rear by the respondent's motor vehicle which he had seen before joining the road. DW1 denied that he was speeding because he was driving on a rough road riddled with pot holes. There is no dispute that the respondent's motor vehicle registration KZV 210 was driving along the highway while the appellant's motor vehicle was approaching the highway from a feeder road. It is also not in dispute that the appellant's motor vehicle was hit from behind. It is clear from the evidence that the appellant's driver was impatient and hence he joined the highway in a hurry. The law governing the traffic obligates those motorists joining the highway from feeder roads like the appellant's driver to give way to those motorists who are already driving on the highway. I am satisfied that the learned Senior Resident Magistrate came to the correct conclusion on liability. The evidence tendered clearly indicates the appellant's driver as wholly to blame.

7) On quantum, the appellant is of the view that the claim for ksh.190,170/= though pleaded was never proved in evidence. The appellant pointed out that the respondent did not submit receipts proving that the aforesaid sum had been incurred in repairing the respondent's claim. The respondent stated that he pleaded special damages and he went ahead to tender documentary evidence to establish the same. I have carefully examined the evidence tendered in evidence on invoice for ksh.181,570/= and various cash sale receipts. There was no objection to the aforesaid documents as exhibits in evidence. I am satisfied that the respondent's claim being a special claim was specifically pleaded and proved by credible evidence. The appeal as against quantum lacks merit.

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 March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent