



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 263 OF 2013

GODFREY MWANGI KIMANI..... APPELLANT

- V E R S U S -

JOHNNJOROGE NJENGA.....RESPONDENT

(Being an appeal from the judgement of the Hon. Mr. Oduor Senior Principal Magistrate delivered on the 25th day of April, 2013 in Limuru SRMCC No. 97 of 2012)

JUDGEMENT

1. The judgment is the outcome of the appeal against the decision of Hon. Oduor learned senior resident magistrate, Limuru Law Court. John Njoroge Njenga, the respondent herein, had filed a compensatory suit against Godfrey Mwangi Kimani, the appellant herein before the principal magistrate's court, Limuru. The respondent alleged that on 3.3.2012 he was driving his motor vehicle registration no. KBB 002K along Nairobi-Nakuru road at Manguo area when the appellant so negligently drove motor vehicle registration KAW 407 that it lost control and hit that of the respondent from behind causing it extensive damage. The respondent claimed he suffered loss and damage amounting to ksh.502,048/= being the cost of repairs. The appellant filed a defence to deny the respondent's claim and blamed the respondent for the accident. Hon. Oduor heard the suit and in the end he found the appellant liable and awarded the respondent judgment in the sum of ksh.641,118/- representing both special and general damages.
2. The appellant was dissatisfied hence he preferred this appeal.

On appeal the appellant put forward the following grounds:

1. ***That the learned magistrate erred in law and in fact in finding that the respondent had proven on a balance of probability that he was the owner of the subject motor vehicle registration number KBB 002K.***
2. ***That the learned magistrate erred in law and in fact in finding that the respondent was not obligated to prove the question of ownership of motor vehicle registration number KBB 002K when the question was in issue and to which the onus was on the plaintiff to prove.***
3. ***That the learned magistrate erred in fact and in law in finding that the details on a police abstract as to the owner of the subject motor vehicle registration number KBB 002K was sufficient evidence/proof of ownership.***
4. ***That the learned magistrate erred in law and in fact in awarding damages that were manifestly excessive and to which had been shown to be economical to the detriment of the appellant.***
5. ***That the learned magistrate erred in law and in fact in failing to give due consideration to the contents of the plaintiff's submissions and more specifically the issue of ownership of motor vehicle .***

6. ***That the learned magistrate erred in fact and in law in failing to analyze the evidence and/or submissions placed before it thereby arriving at an incorrect conclusion.***

3. When the appeal came up for hearing, learned counsels recorded a consent order to have is disposed of by written submissions. I have re evaluated the case that was before the trial court. I have further considered the rival submissions.
4. The parties invited this court to determine the question as to whether or not the respondent was the owner of the motor vehicle registration number KBB 002K and whether he was entitled to claim damages resulting from the accident.
5. The appellant has urged this court to find that the respondent had failed to discharge both the legal and evidential burden of proof as to the issue of ownership to enable hi file a claim for damages. The appellant further argued that it was wrong for the trial magistrate to find that it was not necessary for the respondent to carry hid log book during the hearing. The trial magistrate was also faulted for holding that the insured of the motor vehicle was also the owner yet no evidence of ownership was tendered.
6. The respondent on the other hand was of the view that the burden of proving the ownership of motor vehicle registration number KBB 002K rested on the appellant and not the respondent pursuant to the provision of Section 116 of the Evidence Act cap 80 Laws of Kenya. The appellant pointed out that the respondent did not call any witness to testify on his behalf and did not therefore produce any evidence in the trial court to controvert the respondent's evidence of ownership. The respondent stated that he produced the police abstract which had his name indicated as the owner of the aforesaid motor vehicle. The respondent further argued that the appellant did not deem it fit to challenge that piece of evidence. I have re-evaluated the evidence tendered before the trial court over this issue. The record shows that the respondent summoned three witnesses to testify in support of his case. P.C Nicholas Muthama (PW1) a traffic police officer produced the police abstract form as an exhibit in evidence. The police abstract PW1 produced had the name of the respondent recorded as the owner. John Njoroge Njenga (PW2) testified too. PW2 told the trial court in cross-examination that he was the owner of the aforesaid motor vehicle. He stated that he had left the log book at home the day of the hearing. In re-examination PW2 reiterated that he was the owner of the motor vehicle registration no. KBB 002K and that the same was registered in his name in the log book. In paragraph 3 of the amended plaint filed before the trial court, the respondent specifically pleaded that he is the owner of the aforesaid motor vehicle and that he was the one who drove at the time of the accident. In response to paragraph 3 of the plaint, the appellant in paragraph 3 of the defence denied that the respondent was the registered owner of the motor vehicle. At the time of hearing, the respondent orally stated that he is the owner of the same. He even produced in evidence a police abstract form showing he is the registered owner. The appellant opted to close his defence without calling for evidence to controvert the respondent's evidence. The trial learned senior resident magistrate formed the opinion that the respondent had on a balance of probabilities proved that he was the owner of motor vehicle registration no KBB 002K. In fact the learned magistrate found the respondent's police abstract evidence uncontroverted . He also pointed out that the policy document showed the respondent was the registered proprietor. The trial magistrate believed the respondent told the truth in his oral evidence under oath.
7. The provisions of Section 116 of the Evidence Act provided as follows:

“ When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

8. It is clear to me that the moment the respondent asserted that the motor vehicle which was in his possession was his, the burden shifted to the appellant to prove that the respondent was not the owner. With respect, I find no merit on this ground. The learned senior resident magistrate came

to the correct decision. The respondent in my view, proxed on a balance of probabilities he was and is the registered owner of KBB 002K. It is obvious that in view of the above findings that the respondent was entitled to claim damages.

9. The other main ground which was ably argued is whether or not the award given was inordinately high and excessive. It is the submission of the appellant that the award was high and excessive and yet all evidence showed that it would have been economical to sell of the salvage. I have carefully re-examined the evidence tendered by Charles Kariuki Mwangi (PW3) a motor vehicle assessor employed by Automobile Association of Kenya. PW3 was of the opinion that it would be uneconomical to repair the motor vehicle. He put the value of the salvage at ksh.230,000/=. He assessed the value of the motor vehicle before the accident at ksh.540,000/= what the respondent did was to instead seek for payment of the repair cost which was put at ksh.502,048/=

10. In my view, there is nothing wrong for the respondent to opt to repair his motor vehicle rather than have the motor vehicle declared a write off. I find the amount claimed as costs of repair to be reasonable. The same is neither high nor excessive.

11. In the end, I find the appeal lacking in merit. The same is dismissed with costs to the respondents.

Dated, Signed and Delivered in open court this 20th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent