



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 90 OF 2014

MOSES NDUNGU.....APPELLANT

- V E R S U S -

ELIJAH NDIRANGU GATIA.....RESPONDENT

(Being an appeal from the judgment and decree of the Senior Resident Magistrate Nairobi dated 22nd April 2003 M. A. Murage, Mrs, in CMCC No. 4578 of 1999)

JUDGEMENT

1. Moses Ndungu, the appellant herein, filed a compensatory suit before the chief magistrate's court for the injuries he sustained in a road traffic accident which occurred on 3.6.96 along Nairobi-Athi Road involving motor vehicle registration no. KAA 735P belonging to Elijah Ndirangu Gaita, the respondent herein. The respondent denied the appellant's claim stating that the aforesaid motor vehicle was not his. The suit was heard by Hon. M. N. Murage, the then Senior Resident magistrate who in the end dismissed the suit on the basis that the plaintiff (Appellant) had failed to prove his case. The learned trial magistrate also opined that had the plaintiff proved liability she would have awarded him kshs,80,000/= as damages. Being aggrieved, the appellant filed this appeal.

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

1. The Learned Trial Magistrate erred in law and in fact in failing to appreciate on a balance of probabilities, the production of the police abstract (exhibit 1) in the absence of any contrary evidence, was sufficient proof that the defendant was the owner of the motor vehicle registration number KAA 735P.

2. The Learned Trial Magistrate erred in law in shifting the burden of proof on the plaintiff as to ownership of the motor vehicle on the face of the plaintiff's stated pleadings which read in paragraph 4 thus:-

“On or about the 3rd day of June 1996, along Nairobi Athi River Road, motor vehicle registration number KAA 735P was so carelessly and negligently driven, managed and/or controlled by the defendant or his servant and/or agent that the same lost control and had an accident”

And which pleadings raised a presumption in law of ownership of the motor vehicle on the respondent, the presumption of which it was incumbent on the respondent to displace but did not

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3. The Learned Trial Magistrate erred in law in concluding that proof of ownership of a motor vehicle would not only be done by a production of a “registration certificate” and not by any other mode of proof as was done by the plaintiff/appellant at the trial.

4. The Learned Trial Magistrate was in error in awarding of only ksh.80,000 without any consideration or sufficient consideration of the plaintiff’s injuries of at all which damages were inordinately low.

3. When the appeal came up for hearing, the same proceeded for hearing in the absence of the respondent who failed to attend court despite being served by registered post.

4. Mr. Oduk, learned advocate for the appellant argued grounds 1, 2 and 3 together and ground 4 separately.

5. It is the submission of the learned advocate that the plaintiff(appellant) had tendered at the trial in evidence a police abstract form which indicated the respondent as the registered owner of motor vehicle registration no. KAA 735P. It is said that the respondent failed to present evidence to controvert the veracity that information. The learned advocate urged this court to find that the police abstract form was one of the modes of proving ownership of a motor vehicle.

6. I have re-evaluated the evidence that was presented before the trial court. It is apparent from the judgement of the trial court that the learned trial magistrate stated in her judgment that the appellant (plaintiff) had failed to discharge the burden of proof of ownership of the suit motor vehicle despite denial of ownership by the respondent. The learned magistrate further found that the appellant had failed to prove that the defendant (respondent) was the driver of the motor vehicle at the time of the accident. The record shows that the plaintiff testified and presented a police abstract form showing that the defendant (respondent) was the registered proprietor of motor vehicle registration no. KAA 735P. The record also shows that in cross-examination, the appellant admitted that he did not know the owner of the aforesaid motor vehicle. It is also specifically pleaded in paragraph 3 of the defence that the defendant was not the registered owner of the aforesaid motor vehicle. Despite being notified by the respondent that he was not the registered owner of the motor vehicle, the appellant did not deem it fit to present credible evidence to prove ownership but he instead relied on a police abstract form. The moment the defendant denied ownership of the motor vehicle the subject matter of the suit, the burden of proof shifted to the appellant to establish proof of ownership. A police abstract form cannot be used as evidence proving ownership of a motor vehicle. The appellant was also bound to tender credible evidence to prove that the appellant was the driver at the time of the accident or that the driver at the time of the accident was the respondents employee, agent or was under his direction.

7. The decision of the trial magistrate over this ground cannot therefore be disturbed.

8. The other ground which the appellant’s advocate argued is that the proposed award of kssh.80,000/= was low. I have looked at the kind of injuries the appellant suffered. The medical report prepared and presented by Dr. Wokabi (PW2) show that the appellant suffered soft tissue injuries on the shoulder and shoulder blade. I find the trial magistrate’s award of kssh.80,000 not low but the same is commensurate with the injuries suffered.

9. In the end, I find no merit in the appeal. The same is dismissed with no order as to costs.

Dated, Signed and Delivered in open court this 28th day of October 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent