



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 149 OF 2011

GABRIEL KAMAU.....APPELLANT

Versus

LAWY SUTCLIFFE

ANN SUTCLIFFE.....RESPONDENTS

(Appeal arising from the Judgment of Hon. J. Wambilyanga

Resident Magistrate Nyeri in Civil Case No. 40 of 2011)

JUDGMENT

1. By a plaint dated 22nd February 2011 and file in court on 9th March 2011 the appellant sued the respondent in respect of a road traffic accident on 17th December 2010 along Kiganjo - Nanyuki road involved motor vehicle registration No. KAT 990L and KAC 735W and attributed the said accident to the negligence of the respondents driver servant or agent as a result of which the appellant suffered loss of Ksh. 150,000/-.
2. The respondents filed a defence in which they denied the said accident and in the alternative attributed the same to the negligence of the appellants driver.
3. At the hearing before the trial court it was the appellants evidence through P.W.1 corporal Erick Kaaria that the two motor vehicles were heading towards the same direction and while KAT 990L had indicated to join the same road the driver of KAC 735W attempted to overtake the other motor vehicle and that the driver of motor vehicle registration No. KAT 990L was subsequently charged with driving uninsured motor vehicle and fined Ksh. 3000/- under cross examination P.W.1 indicated that the circumstances were not clear since the driver of the appellants had claimed that he had indicated while the respondents driver stated that he had not.
4. The appellants evidence was that he had indicated his intention to turn right when he was hit by the respondents driver from behind and produced receipts in support of his loss and under cross examination he confirmed that he was charged with the offence of driving uninsured motor vehicle. His evidence of loss was confirmed by the evidence of P.W.3 Peter Muli a motor vehicle valuer.
5. The respondent did not call in any evidence and based on the said evidence the trial court in her judgment found as a fact that the respondent should have maintained a distance between the two vehicle since he was behind the appellants motor vehicle but held that since the appellant was driving uninsured

motor vehicle he was not supposed to be on the road and therefore dismissed his suit.

6. Being aggrieved the appellant filed this appeal and raised the following grounds of appeal.

1. The learned trial magistrate erred in law in fact in failing to or misdirecting herself on the cause of action in this matter.

2. The learned trial magistrate erred in failing to appreciate the evidence of the plaintiff vis a vis the defendants statement already on record which wholly attributed negligence on the part of the defendants driver.

3. The learned trial magistrate erred in failing to appreciate that there was no traverse to the plaintiff's evidence to warrant a dismissal whereas the plaintiffs' case had been proved on a balance of probabilities.

4. The learned trial magistrate erred in fact and in law in failing to appreciate the entire case as a whole and hence arrived at the wrong conclusion.

SUBMISSIONS

1. Directions were issued that this appeal be determined by way of written submission which have now been filed. On behalf of the appellant it was submitted that by the respondents statement filed in court he admitted that he was trying to overtake the appellants motor vehicle and that the appellants case was dismissed since he was driving uninsured motor vehicle and therefore the court misdirected herself since the issue before her was to determine who was liable for the accident.

2. On behalf of the respondent it was submitted that in the statement the respondent submitted that the appellant indicated to turn right was abrupt as he had already started overtaking him and that the evidence of P.W.1 supports the respondents case and further that the appellant was charged with the offence of driving an uninsured motor vehicle and therefore the appellant was not entitled to compensation as stated by the trial court and in support thereof reliance was placed on the case of OLYMPIC SPORTS HOUSE LTD v SCHOOL EQUIPMENT CENTRE LTD NRB HCC NO. 190 OF 2012.

3. From the pleadings proceedings and submissions herein there is only one issue for determination that being whether the trial court was right in dismissing the plaintiff's suit. It should be noted that having found in hr judgment that the respondent should have actually maintained a distance between the two motor vehicles it then follows that the respondent was liable for the accident here the fact that the appellants motor vehicle was not insured not withstanding.

4. I therefore agree with the submission by the appellant that in dismissing the appellants case on this issue of his motor vehicle being uninsured the trial court fell into error for which the judgment is liable to be disturbed by this court. The fact that the appellant's motor vehicle was uninsured did not affect the liability of the respondent in respect of the accident herein.

5. The authority of OLYMPIC SPORTS HOUSE LTD (supra) deals with equitable remedy of injunction and is therefore distinguishable to this case herein.

6. This being a first appeal this court has the same rights as the trial court and having analysed the evidence tendered herein I would therefore allow the appeal herein and set aside the judgment of the trial court herein on liability.

7. Based on the evidence of P.W.1 and P.W.2 and the statement of Mark Lawson James filed in court on 22nd June 2011 I would appropriate liability herein on the basis of 15%:85% against the respondent.

8. I therefore allow the appeal herein and substitute the trial courts judgment dismissing the suit with one allowing the suit on liability at 15% : 85% and damages proved of Ksh. 150,100 - 22,517 judgment for

Ksh. 127,485/= with cost and interest thereon both of the lower court and of the appeal. The judgment to be served upon the trial court.

dated, signed and delivered at Nyeri this 16th day of May 2014.

J. WAKIAGA

JUDGE

16/5/14

Coram: Before Justice J. Wakiaga

Court clerk - Ndungu

Mr. Cheruiyot for Mr. Mugo for Respondent.

Mr. Kingori for Mr. Nderi for the appellant.

Mr. Cheruiyot: I seek stay for 30 days and a copy of the judgment.

Mr. Kingori: I have no objection.

Court: Stay is hereby granted for 30 days. Copy of the judgment to be supplied to the Respondent upon payment.

J. WAKIAGA

JUDGE

16/5/2014