



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 2 OF 2007

1. GACHANJA MUHORI & SONS LIMITED
2. JOHN NDOLO.....APPELLANTS

VERSUS

CATHOLIC DIOCESE OF MACHAKOS.....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Machakos of Hon S.M. Mwendwa (R.M) Civil Case No. 1104 of 2004 dated 28th December 2004)

(Before B. Thurania Jaden J)

J U D G M E N T

1. The Appellants motor vehicle Reg. No. **KAK 807 X Suzuki Saloon** was involved in an accident on or about 31/7/2004 with motor vehicle **KAP 964 Z Toyota Pickup** allegedly owned by the 1st Respondent, **Gachanja Muhoro T/a Gachanja Muhoro & Sons** and being driven at the material time by the 2nd Defendant **John Ndolo**. The Respondent blamed the accident on the negligent manner in which he claimed the Appellants' motor vehicle was being driven at the material time.

2. By a plaint dated 17/12/2004 and orally amended in court on 13/11/2006, the Respondent prayed for judgment against the Appellants jointly and severally as follows:-

- i. General Damages.**
- ii. Special Damages of Kshs.185,092/40 cts.**
- iii. Costs of suit.**
- iv. Interests.**

3. The Appellants denied the claim as per the statement of defence filed on 14/1/2005. The Appellants blamed the accident as either wholly or substantially contributed to by the Respondent. The defence outlined the particulars of negligence on the Respondent's part. It appears no reply to the defence was filed.

4. The Respondent called three witnesses who testified in support of his case. The Appellants did not call any witnesses. The parties thereafter filed written submissions. The court entered its judgment for the Respondent against the Appellants jointly and severally as follows:-

- **Special Damages – Kshs. 185,092.40/=**
- **Loss of user at Kshs. 3,000/= per day for 90 days – Kshs.270,000/=**
- **Costs and interests.**

5. The Appellants were dissatisfied with the judgment and appealed to this court on the following grounds:-

- 1. The Plaintiff had not conclusively established the ownership of the motor vehicle.**
- 2. There was no proof that the repair works had been carried out on the Plaintiff's motor vehicle.**
- 3. There was no evidence to prove that the Plaintiff's motor vehicle sustained damage.**
- 4. The Special Damages claim of Kshs.185,092/40 was not specifically proved.**
- 5. The receipts produced in support of the Special Damages claim contravened the provisions of the Stamp Duty Act.**
- 6. The assessment of loss of user was not anchored on the pleadings or the evidence adduced.**

6. The appeal was canvassed by way of written submissions which I have duly considered.

7. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. *See for example Selle –vs- Associated Boat Co. Ltd (1968) EA 123.*

8. PW1 **Father Joseph Makile** a Catholic priest stationed at **Matuu Catholic Mission** testified that he was the driver of the Respondent's motor vehicle at the material time. His evidence was that he was driving from **Thika** towards **Matuu** while on the left side of the road as one heads towards **Matuu**. That he noticed the Appellants' motor vehicle swerve unto the road and he slowed down almost to a halt but the Appellants' motor vehicle hit his motor vehicle. The Appellants' motor vehicle then went off the road to the left and landed into a ditch. PW1 further stated that his motor vehicle was damaged and was towed to **Matuu Police Station** and later towed to **Benson Muendo Jones Garage** for repairs where it stayed up to July 2005. During that period he used alternative transport hired at Kshs.3,000/= per day. PW1 produced receipts for Kshs.13,000/= for towing charges and receipts for Kshs.171,992/40 for the repairs carried out on the motor vehicle. He also produced the log book for the motor vehicle **KAK 807X Suzuki Saloon**.

9. PW2 **Muthama Kaviya** of **Benson Mwendwa Garage** evidence corroborated PW1's evidence on the towing and repair charges at Kshs.13,000/= and Kshs. 171,992/40 respectively. PW2 further testified that the spare parts were difficult to get and **CMC** had to order for them. PW2 produced a quotation from **CMC** for Kshs.145,173/=.

10. PW3 **PC David Nderitu** from **Matuu Police Station** produced the police abstract as an exhibit and testified that the Appellant's driver was blamed for the accident and was charged with the offence of careless driving, pleaded guilty and was fined Kshs.3,000/= in default three months imprisonment.

11. The evidence in support of the ownership of the motor vehicle is that of the investigations carried out by the police as stated in the police abstract. The question is whether the Police Abstract without any Search Certificate from **Kenya Revenue Authority** is proof of ownership. The Police Abstract names the 1st Appellant as the owner of the motor vehicle **KAP 964Z Toyota Pickup** and the driver as the 2nd Appellant. No evidence was adduced by the Appellants. There is therefore no evidence to counter the

contents of the police abstract which shows that the 1st Appellant is the owner of motor vehicle Reg. No. **KAP 964Z** (See for example, **Lake Flowers –vs- Cila Franklyn Onyango Ngonga & Ano. 2008 e KLR** case).

12. The Appellants have raised the issue whether the Respondent’s motor vehicle sustained damage. The uncontroverted evidence by PW1, PW2 and PW3 is that the motor vehicle was damaged in the accident and towed at a cost of Kshs.13,000/= and repaired at a total cost of Kshs.171,992.40. However, no motor vehicle assessor was called to give evidence. The Respondents relied on the evidence by PW2 from **Benson Muendo Jones Garage**.

13. On the cost of the repairs carried out on the motor vehicle, the Appellants have contended that without the motor vehicle assessor’s report, there was no proof of the damage caused to the motor vehicle. There was nothing to show if the sum stated by the Respondent was properly spent to put the motor vehicle back on the road. The best evidence in this respect would have been supplied by the motor vehicle assessor. Although the receipts produced in support of the Special Damages claim have complied with the **Stamp Duty Act**, due to the aforesated reasons, the claim cannot succeed. (See **David Bagine –vs- Martin Bundi C.A. Nairobi 283 of 1996**).

14. On the loss of user, I agree with the Appellant’s submission that the same is a special damage claim and must be specifically proved. Although Kshs.3,000/= per day was pleaded in the plaint for loss of user, for 90 days, no receipts were produced to support thereof. The claim for the loss of user must therefore fail. Damages for loss of use of motor vehicle if proved can only be assessed for a reasonable period. This should be the period during which the motor vehicle could have been assessed and repaired (See **David Bagine** case supra).

15. Without the motor vehicle assessor’s report, it is difficult to tell what duration it would take to repair the motor vehicle. The evidence of PW2 that the spare parts were difficult to get at **CMC** is hearsay as nobody from **CMC** testified to that effect. The award of loss of user for a period of 90 was therefore not based on any cogent evidence.

16. With the foregoing, I find and hold that there was no proof of the damage caused to the Respondent’s motor vehicle. The claim for the loss of user was also not proved. The appeal has merits and I allow the same with costs to the Appellants.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **30th** day of **September** 2014.

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B. THURANIRA JADEN

JUDGE