



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 213 OF 2011

CHARLES MAINA MWANGI.....APPELLANT

VERSUS

BERNARD KARANI.....1ST RESPONDENT

C.F.C BANK LTD.....2ND RESPONDENT

(Being appeal from the Judgment made on 23rd November, 2010 by the Hon. M. Nyakundi, Senior Resident Magistrate, in Nyeri C.M.C.C No.632 of 2009, between Charles Maina Mwangi =Vs= Bernard Karani)

JUDGMENT

Charles Maina Mwangi, the Appellant herein, was on 31/01/2009 involved in a road traffic accident along Umande -Muramati road while on board Mitsubishi Lorry registration no.KAW 818V. As a result of the accident the appellant got injured as follows:

- (a)Traumatic amputation of the right index finger.**
- (b)Soft tissue injuries on the left knee**
- (c)Deep cut on the right thumb with traumatic dislodgment of the nail.**

The aforesaid lorry is said to be registered in the joint names of Benard Karani and C.F.C Bank Ltd the 1st and 2nd Respondents. The appellant herein, sued the Respondents for compensation for the injuries he suffered due to the accident. The case was heard by Hon. Nyakundi, learned Senior Resident Magistrate who in the end dismissed the same. Being aggrieved the appellant preferred this appeal.

On appeal, the appellant put forward the following grounds:

- 1. That the learned Magistrate erred in law and fact by failing to appreciate that the plaintiff's case had been proved on a balance of probability and that there was no evidence to controvert the same.**
- 2. That the learned Magistrate erred in law and fact when she addressed herself on extraneous matters particularly on the issue of the 2nd plaintiff while there was only one plaintiff.**
- 3. That the learned Magistrate erred in law and fact in holding that there was no proof of ownership of the Motor vehicle registration No.KAW 818W Mitsubishi lorry while there**

was no evidence to the contrary.

- 4. That the learned Magistrate erred in law and fact in entirely dismissing the Appellants case when it was obvious he had proved his case to the required standard.**
- 5. That the learned Magistrate erred in law and fact when she misdirected herself as to the law and exercised her discretion unfairly.**
- 6. That the learned Magistrate erred in law and fact by ignoring submissions by the appellant and solely based her decision on the Respondent's submissions.**
- 7. That the learned Magistrate erred in law in assessing damages that were manifestly low in comparison with the injuries sustained by the appellant.**

Learned advocates appearing in this appeal recorded a consent order to have the appeal determined by written submissions. I have reconsidered the case that was before the trial court by way of re-evaluation. I have also considered the rival submissions filed herein. It is not in dispute that the learned Senior Resident Magistrate dismissed the suit on the basis that the Appellant did not enjoin one Godfrey Mwangi as a party yet he was the driver of the lorry. The trial Magistrate further stated that the owner of the lorry is one Gathura Bernard and not Benard Karani who was not sued hence vicarious liability could be established. The evidence on record shows that the appellant produced in his evidence a copy of the search at the Registrar of motor vehicles which indicates that the registered owners of the lorry are Gathura Benard and C.F.C Bank Ltd. He also submitted a police abstract form which shows that the motor vehicle is registered in the name of Benard Karani. It is also apparent on the face of the police abstract that the insurance policy holder is named as Benard Karani. Both Gathura Benard share the same postal address i.e P.O.Box 197, NaruMoru. It is important to note that the Respondents specifically admitted in paragraph 1 of their joint defence dated 17th February, 2010 that Benard Karani was the beneficial owner and driver of the aforesaid lorry which was jointly registered in his name and CFC Bank Ltd. The learned Senior Resident Magistrate therefore fell into error when she dismissed the case for the reasons she stated in her judgment. In the Plaintiff, the Appellant expressly stated that he was praying for judgment against the Respondents jointly and severally. The constant defendant in the case is CFC Bank, so, even if the action against one defendant fails the case against the other defendant survives. The learned Senior Resident Magistrate therefore, dismissed the appellant's case without any justification at all. The dismissal order must be set aside. The trial Magistrate did not seriously consider the evidence to establish liability, she simply dismissed the case on a technicality. She did not also consider the authorities cited to arrive at a reasonable award on damages. In my view, this is a case which should be subjected to a fresh trial for a fair determination to be arrived at.

In the end, I allow the appeal and order that the case be remitted back to the Chief Magistrate's court, Nyeri for re-hearing before another Magistrate of competent jurisdiction other than Hon. M. Nyakundi. Costs of the appeal is awarded to the Appellant.

Dated, Signed and delivered this 16th day of December 2013.

J.K.SERGON

JUDGE