



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL 981 OF 2007**

**WILSON MWAURA KIMANI.....APPELLANT**

**VERSUS**

**SKYLAND TRANSPORTERS CO. LTD.....1<sup>ST</sup> RESPONDENT**

**Z K JUMA.....2<sup>ND</sup> RESPONDENT**

*(From the Judgment and Orders of A O Aminga, Resident Magistrate in PMCC No. 47 of 2005)*

**J U D G M E N T**

In an Amended Complaint dated 2<sup>nd</sup> May 2006, the Plaintiff/Appellant claimed against the Defendants/Respondents, a total sum of Ksh.101,439/20 being the value of trees and napier grass damaged and lost caused by the Defendants' motor vehicle registration No. KAE 337U and its trailer ZA 4995, on 23<sup>rd</sup> September, 2004. He also claimed Ksh.100/- being the cost of the Police Abstract.

The facts behind the case are simple. On 23<sup>rd</sup> September, 2004, the Defendants/Respondent's said motor vehicle with its trailer, was being driven by a driver employed by them, along Nairobi- Mai-Mahiu road near Mutarakwa, Limuru. There was no eye witness evidence as to what happened. However, the motor vehicle veered off the road, and rolled, into the Plaintiff's land next to the road. In the process, the vehicle damaged gum trees and napier grass.

The Plaintiff reported the accident to the Police Station from where he obtained a Police Abstract Report of the accident for which he paid Ksh.100/-. He later obtained the services of a District Agricultural Officer who visited the land, the scene of the accident, and valued the damage, as well as wrote a report of the accident and damage. The report showed that the trees damaged were 25 mature blue gum valued at Ksh.32,000/- at Ksh.1280/- each. There were 50 samplings each valued at Ksh.855/- whose total value was Ksh.42,750/-. Then there were 60 seedlings, each valued Ksh.427/-, bringing a total of Ksh.25,620/-. Finally, there was napier grass of 288 plants, at Ksh.3.40 per plant, bringing a total of Ksh.979.20. The grand total value came to Ksh.101,349.20 to which Ksh.100/- the cost of the Police Abstract was added. The final total claim became Ksh.101,449.20.

The Plaintiff had averred that the accident had occurred as a result of the negligence of the Defendant's driver, servant or agent and that the Defendants were accordingly vicariously liable. He had also alleged in the complaint that accident was caused because the Defendant's driver, drove without due care and attention, or that he drove in excessive speed, or failed to have any or adequate control of the vehicle, or failed to properly apply brakes, or failed to swerve to avoid the accident and that he therefore, caused the

accident.

In their defence, the Defendants denied almost everything and put the Plaintiff to strict proof of the matters averred in the plaint. They denied that they were the registered owners of the accident motor vehicle and trailer. They denied the allegation of negligence on their part, or their driver, and also denied the particulars of the special damages sought. They further denied liability, both direct and/or vicarious. They then alleged that the accident, which they admitted occurred on the material date and place, occurred notwithstanding the due diligence and care on the part of their driver, servant or agent during the driver's driving, managing and controlling of their said motor vehicle.

During the hearing, the Plaintiff and his one witness gave evidence. The Defendant cross-examined the Plaintiff, but did not adduce any evidence in response to Plaintiff's evidence.

The trial magistrate, having considered the pleadings and the evidence, dismissed the claim on two grounds, if I understand the judgment properly. First reason is that the Plaintiff failed to prove that he had a *locus standi* by proving that the ownership on which the damaged trees and grass were grown, was his. This, the magistrate said, he should have done by pleading and proving ownership of the land. Secondly, that the Plaintiff failed to prove the value of salvage which would reduce the level of the damages that he would eventually recover. This made the claim of special damages unproved.

The dismissal of the case naturally aggrieved the Plaintiff who then filed this appeal. He raised four grounds of appeal which can be summarized to two grounds: -

**1. That the learned trial magistrate erred in law and fact in failing to appreciate that the Plaintiff/Appellant, had pleaded and proved his locus standi, and his claim against the Respondent/Defendant, on the balance of probability.**

**2. That the learned trial magistrate erred in law and fact in failing to properly analyse and evaluate the Appellant's case evidence.**

I have carefully perused the pleadings from both parties. I have also perused the evidence adduced by the Appellant. In my view the pleadings appear adequate. The learned trial magistrate decided that the Appellant should have pleaded the registration particulars of his land in order to be entitled to the *locus standi* to claim the loss and damage caused to the trees and the napier grass. There would have been no harm if the particulars of the land were indeed pleaded from the onset. However, failure to do so did not, in my view, deny the plaintiff the right to claim for the loss and damage of his trees and napier grass.

Supposing the Plaintiff had planted the tree and grass on another person's land with permission, would he not have a right to claim if they were damaged by a third party? Put differently, the right to claim the loss and damage to the trees and the napier grass, arose out of the Plaintiff's ownership of the same to the exclusion of anybody else. The right did not arise from the fact that the land belonged to the Plaintiff, which in any case, was proved by the Plaintiff who produced his official search to the title deed in evidence. The result is that the learned trial magistrate erred in law and fact in basing the locus stand on the ownership of land rather than the trees and the grass damaged. His conclusion that the ownership should have been imperatively pleaded was also erroneous and it misled him, making him arrive at a wrong conclusion.

Turning to the second ground, for dismissing the Appellant's claim, the trial magistrate was of the view that the Appellant should have proved the value or amount of salvage from the damaged trees and grass. In my view, it was proper for the Plaintiff and indeed any person who suffers loss and damage, to mitigate their damage. In this case the Plaintiff said he did not mitigate such damage.

As I understand the principle, it leads into the Plaintiff's otherwise rightfully proven damage or loss being reduced, to the extent of the salvaged value. This automatically means that the person, who still suffers if salvage will not be taken into account, will be the person standing to bear or carry the liability of the original loss caused by him. It would therefore appear to me to mean that it will be upon the party who

will benefit if salvage is established to prove the salvage in order to reduce his burden of damages.

In this case the Respondent/Defendants should have been keen from the moment they realized their motor vehicle had caused loss and/or damage. They should have independently sought to know the damage or loss caused and the possible salvage, either by themselves or through specialized agents. They would then during the hearing have thrust such information in exact values upon the Appellant and pushed him to admit the same. And if the Plaintiff had not kept similar information, he would be forced to make admissions. In the alternative the court would be placed in a position to make conclusions on information before it, but not imagined.

In my view and finding, it was not the duty of the Plaintiff to prove for and for the benefit of the Defendants, the exact amount of salvage. Furthermore, failure to prove the exact value of salvage did not and should not have been the reason for dismissal of the Plaintiff's suit in general. In coming to such conclusion, the trial magistrate erred in law.

The result then is that the trial court should not have dismissed the suit on the grounds he did. The Plaintiff produced evidence that the Defendant's motor vehicle registration No. KAE 337U veered, rolled and fell on the Plaintiff's land, which land he properly identified by a search certificate. In the process, the motor vehicle caused loss and damage to trees and grass which were properly valued by an Agricultural Officer who produced a report. The value of the damage and loss formed the claim. The fact that the vehicle which ought to be traveling on the road, ended up in the Plaintiff's land, spoke a million words itself, in terms as to who was to blame for the accident.

The Defendants admitted the accident and did not deny that it led to damage and/or loss pleaded. They had opportunity to adduce evidence to show that it was not due to their or their driver's or agent's negligence that caused the accident in conformity to their defence pleadings. The Defendants chose not to do so when they opted for not calling any witness. The principle of *Res Ipsa Loquitur* applies in this case to establish that the Respondent's driver or agent must have driven, controlled or managed the relevant motor vehicle so negligently or recklessly as to let it veer off the road and cause the damage it did unless they adequately explained otherwise, which they failed to do.

I am aware that the learned trial magistrate was in a better position to judge the credibility or veracity of the evidence before him. For that reason an appellate court such as this, would be wary of interfering with the findings of the lower court arrived at after using his discretion. However, in this case the facts are not really in dispute. It is the learned trial magistrate's conclusions, both in law and facts that I find difficulty in supporting, as I have already explained hereinabove.

Having come to the conclusion I have, I will now turn to damages.

Although the Plaintiff's claim was in general damages, its nature as properly pointed out, was in the realm of special damages. To this end I am satisfied that the Plaintiff properly pleaded the actual damages and losses incurred. He as well, in my finding, produced sufficient evidence in proof of the special damages pleaded, of Kshs.101,439/20. The Defendants had opportunity to reduce the above figure by proving the actual, salvage value but failed to utilize the opportunity. In the circumstances the Plaintiff/Appellant is entitled to the whole sum.

The result is that this appeal has merit and is hereby allowed. The Defendants jointly and/or severally are hereby ordered to bear liability of the sum of Kshs.101,439/20 with costs and interests, the latter to apply with effect from the date of judgment of the lower court. Orders accordingly.

Dated and delivered at Nairobi this 27th day of March 2012.

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**D A ONYANCHA**

**JUDGE**