

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Appeal 12 of 2009

RAPHAEL OCHIENG CHUKA. APPELLANT

VERSUS

SAMUEL SAWENJA MALABA. RESPONDENT

(From the judgment and decree of M K Kiema, Resident Magistrate in Nairobi CMCC No. 2323 of 2003)

J U D G M E N T

The Appellant/Plaintiff, by a plaint dated 6th March, 2003 sought for general and special damages arising from a road accident involving motor vehicle registration No. KPQ 476, along 1ST Avenue Road Eastleigh, on 19th April, 2000. The Appellant had claimed that Respondent or his driver or servant, had so negligently or carelessly driven the said motor vehicle registration No. KPQ 476, that it hit and/or knocked the plaintiff, thereby inflicting on the plaintiff some soft tissue injury on the right Achilles tendon.

The Respondent/Defendant had filed his defence dated 11th August, 2004 in which he denied that the alleged accident occurred and that if it indeed occurred, then the same was caused by the sole or partial negligence of the Appellant/Plaintiff. The Respondent in the alternative also denied that the Appellant suffered any injuries.

During the hearing before the trial court, the Appellant alone testified. He said that on 19th April 2000 he and other people, were in the process of pushing a motor vehicle which had stalled along the side of the road. It was then that motor vehicle registration No. KPQ 476 came along and hit him on the right leg near the ankle. He was taken to the hospital where he got medical treatment which was paid up by the driver of the said motor vehicle. He said that he was thereafter released to go home but he continued with the treatment for 3 months. He blamed the said driver for negligence. He produced the treatment notes and a cash receipt for Ksh.200/- into evidence. He also produced a certificate of search and its receipt, plus the P3, a medical report by Dr. Kinuthia, and a cash receipt of payment made to him.

In his evidence he had also stated that branches had been placed on the road as one approached the stalled motor vehicle with a view with a view to warn on-coming drivers. He finally also had testified that he reported the accident to the police later and informed them when the accident occurred. He later obtained a Police Abstract dated 2nd June, 2000.

The trial court's judgment was brief. The honourable trial magistrate observed that the plaint averred that the accident occurred on 19th February, 2000. So did the Plaintiff/Appellant testimony in court. But the Police Abstract was filled on 2nd June, 2000, three months down the line, and it showed that the accident occurred not on 19th February, 2000 but on 2nd June, 2000. Similarly the P3 showed same information. On that basis the trial court discredited the Plaintiff's evidence and concluded that he failed to prove the claim on the balance of probabilities. The court accordingly, dismissed the claim with costs, triggering this appeal.

I have carefully perused the documents referred to above. I entirely agree with the trial court's conclusions. The Plaintiff/Appellant's evidence was conflicting in its material particulars and was

accordingly unreliable. Even his testimony in court did not improve matters because the Appellant first asserted that he reported the accident the same day it occurred.

On cross-examination he admitted that he reported the same three months down the line. A proper examination of the P3 as well, shows that it had its original contents altered. In particular the motor vehicle registration number originally written on it was not KPQ but KAH and KPQ was by hand superimposed on KAH. Even the signature was superimposed. It was no wonder, therefore, that the trial court could not believe the Plaintiff/Appellant. Nor does this court on its own and independently, believe the Appellant's trial court testimony.

In the above circumstances, it is clear that the trial court's decision was correct and this court has no good reason to interfere with it. The appeal has no merit. It is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 15th day of October, 2012.

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D A ONYANCHA

JUDGE