



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 888 OF 2007

HUMPHREY M. LILECH.....APPELLANT/APPLICANT

Versus

KENYA AGRICULTURAL RESEARCH INSTITUTE.....1ST RESPONDENT

(Being an Appeal from the judgment and decree of Honourable Mokaya SRM, delivered at the Nairobi Milimani Commercial courts in CMCC No.12225 of 2004 on 26 September, 2007)

RULING

I. INTRODUCTION

1. The subject of the original suit in the subordinate courts at Milimani commercial courts is TORT. It concerned a motor vehicle accident which resulted to a “material loss” damage.
2. A brief background of the facts being, that the appellant/ original plaintiff Humphrey M. Lilech, herein referred to as the appellant was on the 6th September 2003, driving along the Nairobi - Naivasha road when he came to an area called Kinungi. He noted a Land rover in front of him. The bonnet of the vehicle came off and fell to its left. The appellant overtook the land rover but quickly noticed an on coming bus/vehicle. He swerved the vehicle back to his lane but unfortunately the vehicle rolled and was damaged.
3. The appellant sued the owner of the land rover only and claimed damages for material loss to his motor vehicle”.
4. During the trial, the magistrate came to the conclusion that the appellant had failed to prove liability. She then dismissed the suit.
5. The claim prayed for was for material loss and as liability had been dismissed, the issue of special damages was also dismissed.
6. Being dissatisfied with this Judgment, the said appellant appealed to this High Court.

II. APPEAL

7. In summary, the appellant stated in his Memorandum of Appeal that the Hon. Magistrate erred by finding that:

- i. No liability had been proved.
- ii. The trial magistrate’s decision was inconsistent
- iii. That there was no proof of Kshs.380,000/= material loss.
- iv. That the standard of proof applied to the case was much higher than the required standard of a balance of probability.

a. Argument by the Appellant

8. The appellant argued that the trial magistrate failed to find for the plaintiff/appellant a liability.
9. That it was the mistaken belief that the appellant swerved his vehicle for an on coming vehicle when in fact, appellant was avoiding the flying bonnet.
10. That there was proof of material loss.

b. Arguments by the Respondent

11. The motor vehicle Reg. No. that was pleaded in the plaint was KAJ 834 S, whilst the defendant's motor vehicle is KAJ 834 E. No conclusion to this had been made.
12. Liability was never proved
13. There was never proof of a master/servant relationship.
14. The issue of vicarious liability was never established.
15. Special damages was never proved.

III. OPINION

16. I have gone through the facts of this case before the trial magistrate and note that the evidence by the plaintiff is that of overtaking the land rover but swerving back to his lane to avoid the on coming vehicle, not the flying bonnet which in effect fell to the left side which was off the road. I do not see any evidence as given by the advocate from the bar, on record.

17. I find that liability most certainly has not been proved. The negligence attributed to the defendant/respondent has also not been proved to have affected the plaintiff/appellant. I would therefore not interfere with this findings.

18. The defendant is a master and or owner of a registered motor vehicle (The plaintiff made an error not to amend their plaint but amendment of plaint may be done at any stage within the trial which was not. Namely, quoting the wrong registration number)

19. The salient issue herein is that of master/servant. The plaintiff appellant required is prove that the respondent/defendant is vicariously liable for the accident.

20. This was not done.

21. I then look at the issue of Special Damages. In a civil matter proof of the case must be on a balance of probability. In a material loss claim, it is Special Damage claim. As stated in past decisions, Special Damages must be proved strictly.

22. It is clear that liability had never been established herein against the respondents. I therefore find that the decision arrived at by the trial magistrate was correct.

23. This appeal stands dismissed.

24. There be costs to the respondent/original defendant in this appeal and the original case before the subordinate court.

RULING DATED THIS 13TH DAY OF MAY 2011 AT NAIROBI

M. A. ANG'AWA
JUDGE

9. *Advocates*

- i. *B. Masinde instructed by the firm of M/s Macharia Mwangi & Njeru & Co. Advocates for the Appellant - present*
- ii. *M. Michuki instructed by the firm of M/s A. F. Gross & Co. Advocates for the Respondent - present*