



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 170 OF 2006

DAVID HODGES APPELLANT/ORIGINAL PLAINTIFF

VERSUS

PATRICK WANYOIKE MATAU RESPONDENT/ORIGINAL DEFENDANT

(Being an appeal from the Judgment of Hon. M Kaikai Esq, Resident Magistrate on 26th October 2005 in Civil Case No. 10648 of 2004 at Milimani Commercial Courts at Nairobi)

J U D G M E N T

I. INTRODUCTION

1. On the 2nd November 2002 at about 8.25 a.m., the plaintiff was lawfully driving motor vehicle registration number SCO 2ANE

(now KAQ 321G) a Jeep Cherokee, along the Langata – Mbagathi way roundabout. He stopped at the lights, when a vehicle driven by the defendant registration No. KYL 963 collided into his vehicle from the back and side.

2. None of the drivers were injured. They proceeded to the police station where a report was made.

3. The defendant, whilst at the scene of the accident, admitted that the breaks in his vehicle failed. He offered to pay for the damage to the vehicle. When there is a settlement between the parties, the police would not normally go further with the investigations save to issue a P3 form for the purposes of the insurance company.

4. The defendant failed to pay for the damages to the motor vehicle. This amounted to the following:

- | | |
|-----------------------|-----------------|
| a) Costs of repair | Ksh. 318,707.05 |
| b) Assessment fees | Ksh. 4,000.00 |
| c) Police abstract | Ksh. 100.00 |
| d) Investigation fees | Ksh. 9,101.50 |

5. Upon hearing the parties, the said learned magistrate dismissed the suit on grounds that no liability had been established against the said defendant.

6. The appellant did not appeal immediately to this High Court. An application to file leave out of time was duly granted by Osiemo J on the 10th March 2006.

II APPEAL

7. The appellant took issue of the subordinate court case, that there was the failure of the brakes that was occasioned to the defendant's vehicle. That the trial magistrate erred in not looking at the evidence and in apportioning the said evidence before court.

8. In his argument before this court, he pointed out that there had been admission on the part of the defendant that the brakes failed.

9. In reply the respondent stated there was discrepancy as to where exactly the impact to the motor vehicle had occurred. There had been no eye witness to the scene, liability was not conceded and this was denied. Whereas there was a claim that the defendant's vehicle was not in a good working condition. If that was the allegation then there must be proof of this.

10. The fault was on the plaintiff who failed to change lanes. The appeal should be dismissed.

III FINDINGS

11. The weight of the evidence between the original plaintiff and the original defendant requires to be adduced. In reviewing the matter in question here, I find that the evidence of the plaintiff is credible.

12. The said vehicle was stationary awaiting the signal from the traffic light. The defendant unable to control the vehicle collided into the plaintiff's vehicle.

13. Traffic rules hold the driver behind to be more cautious. In this case, the plaintiff was knocked from behind and to the left rear side along a three lane on the said road.

14. The police abstract that was put in by consent without calling the maker thereof, put the blame of the accident upon the defendant.

15. I would accordingly hold that the Hon. Magistrate erred on facts by his finding on liability. The judgment on liability is hereby set aside and substituted with one stating that the defendant is 100% liable for the accident.

16. As to quantum, the plaintiff has established that he incurred material loss damage to this motor vehicle and credentials:

a) Costs of repairs	Ksh. 318,707/05
b) Assessment fees	Ksh. 4,000/-
c) Police abstract	Ksh. 100/-
d) Investation fees	<u>Ksh. 9,015/-</u>
Total	<u>Ksh. 331,876/06</u>

17. From the documents put in as exhibits, I found that the following actual sum had been proved:

a) Costs of repairs	Ksh. 313,937/55
b) Assessment fees	Ksh. 4,000/-
c) Police abstract	Nil (no receipt supporting this claim)
d) Investigating fees	Nil (no receipts supporting this claim but an invoice of like amount given)
Total	<u>Ksh. 317,937/53</u>

18. I would accordingly enter judgment for the plaintiff on the material loss damage claim special

damages at Ksh. 317,937/53.

19. I would award interest on this claim from the date of filing suit.

20. I award costs of the suit in the subordinate court to the plaintiff and the costs of this appeal to the appellant/original plaintiff.

DATED THIS 16TH DAY OF DECEMBER 2011 AT NAIROBI

M.A. ANG'AWA
JUDGE

Advocates :

ii) *P Ongude instructed by M/s Walker Kontos & Associates for appellant/original plaintiff*

Advocates for ii) *J Juma instructed by M/s Rachier & Amollo & Co respondent/ original respondent*

Editorial Summary

1. *Civil Appeal*

2. *Subject of Subordinate Court Case*

TORT

- 2.1 *Material loss damage*
- 2.2 *Motor collision between two vehicles registration No. XDO2 ANE(KAQ321G) and KYZ 963.*
- 2.3 *Non injury claim*
- 2.4 *Plaintiff sues defendant for material loss claim/ damage to vehicle.*
- 2.5 *Defendant denies his brakes failed when he collided into the plaintiff's vehicle*
- 2.6 *Trial magistrate held appellant/plaintiff failed to establish a case against the defendant/respondent*
- 2.7 *Suit dismissed.*
- 2.8 *Leave to appeal out of time
Osiemo J 10th March 2006*
- 2.9 *Appeal filed 23rd March 2006*
 - a) *Issue of failed brakes not taken into account.*

- 2.10 *Argument by appellant*
- a) *Admission by respondent made, that the accident was caused due to a brake failure.*
 - b) *Court failed to assess contributory negligence*

2.11 *Arguments by respondent:*

- i) *Collusion in discrepancy as to whether right or left side of vehicle knocked.*
- ii) *No eye witnesses*
- iii) *Denied conceding liability*
- iv) *“Case” must be proved.*
- v) *If vehicle said not to be in good working condition proof upon he who pleads*
- vi) *Police abstract admitted by consent*
- vii) *Plaintiff failed to change lanes*
- viii) *Appeal be dismissed.*

3. *Held:*

Appeal allowed.

Judgment for appellant/original plaintiff for material loss claim cost and interest.

4. *Case Law:*

5. *Advocates :*

i) *P Ongude instructed by M/s Walker Kontos & Associates for appellant/original plaintiff*

ii) *J Juma instructed by M/s Rachier & Amollo & Co*
Advocates for respondent/ original respondent