



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 583 of 2005

PETER NYAGA.....APPELLANT

VERSUS

KITHINJI MURUGU MAGERE.....RESPONDENT

*(An appeal from the decree of the Hon. Acting Principal Magistrate A.N. Ongeri (Mrs.) dated 28th July, 2005 in
CMCC No.653
of 2003at Nairobi)*

J U D G M E N T

1. The background to this appeal is that on the 28th July, 2002, an accident occurred along Jogoo Road in Nairobi. The accident involved motor vehicle registration No.KAB 296E belonging to Peter Nyagah (hereinafter referred to as the appellant) and motor vehicle registration No.KAH 400A belonging to Kithinji Murugu Magere (hereinafter referred to as the respondent). The respondent blamed the appellant for the accident and sued for recovery of Kshs.75,100/= being loss incurred by the respondent in repairing his motor vehicle.

2. The appellant denied the respondent's claim contending that the accident was in fact caused by the negligence of the respondent, and that the respondent undertook to repair the damage to his car which he conceded was very minor.

3. Hearing of the suit proceeded before the Ag. Principal Magistrate. Four witnesses testified in support of the respondent's case. These were, Sgt. Daniel Kareithi of Buruburu Division Traffic Office who produced a police abstract report of the accident, Job Njoroge Gatune the Service Administration Manager of D.T. Dobie who produced an estimate of the repairs necessary for the respondent's motor vehicle, Peter Mwangi Kamau a Clerk cum Messenger with Motor Care Ltd who produced receipts for Kshs.75,000/= issued by the company in respect of payment for repairs to the respondent's motor vehicle, and the respondent. Three witnesses testified for the appellant. These were, Alex Munyeti a Loss Adjuster who assessed the appellant's motor vehicle and estimated the costs of repair at Kshs.65,740/=, Bernard Mulu, who was driving behind the appellant at the time of the accident, and the appellant. Written submissions were duly filed by each party each urging the trial court to find in his favour.

4. In her judgment the trial magistrate found that it was not disputed that there was an accident involving the two motor vehicles and that both motor vehicles were damaged. The trial magistrate found that the appellant's motor vehicle hit the respondent's motor vehicle, and that it was no excuse that the respondent had just joined the inner lane as the appellant had a duty to drive his motor vehicle in such a manner as to allow sufficient distance between the two motor vehicles. The trial magistrate found the appellant entirely responsible for the accident and held him 100% liable. The trial magistrate further found the special damages of Kshs.75,100/= which was claimed by the respondent proved and gave judgment in favour of the respondent.

5. Being aggrieved by that judgment, the appellant has lodged this appeal raising 6 grounds as follows:

- (i) The learned magistrate erred and misdirected herself in finding that the respondent had proved 100% liability despite evidence to the contrary.
- (ii) The learned magistrate erred and misdirected herself in failing to rule on the basis of the value to be assigned the opinion of the police in light of the fact that no investigations were conducted with regard to the material accident.
- (iii) The learned magistrate erred and misdirected herself in allowing documents to be produced by persons other than their makers and failing to direct the respondent to answer material questions to his claim such as when his motor vehicle was repaired.

- (iv) The learned magistrate erred and misdirected herself in failing to make a finding on the duty to mitigate the alleged loss and the respondent's contradictory evidence on the nature and extent of repairs.
- (v) The learned magistrate erred in denying the appellant the same opportunity to adduce his evidence as that accorded to the respondent.
- (vi) The learned magistrate erred and misdirected herself on the evidence in its totality thereby arriving at a wholly erroneous judgment on liability and quantum.

6. Mr. Nyagah who appeared for the appellant reiterated the submissions which were filed for the appellant in the lower court. He pointed out that the accident occurred while the vehicles were travelling at a relatively slow speed as there was a traffic jam. Therefore it was not practical for the appellant to maintain a distance. Mr. Nyagah maintained that the respondent was untruthful in alleging that there was an agreement by the appellant to repair respondent's motor vehicle since the evidence was that the relationship between the two was acrimonious and no agreement could have been reached.

7. Mr. Nyagah further pointed out that contrary to the receipts produced in evidence which showed that the boot lid and boot panel of the respondent's motor vehicle were replaced, the respondent testified that these parts were not renewed but simply panel beaten. Finally Mr. Nyagah submitted that the respondent failed to mitigate his loss as the respondent was comprehensively insured, and all he needed to do to have his vehicle repaired was to pay the excess of Kshs.5,000/=. It was therefore submitted that the respondent's claim for Kshs.75,000/= was unreasonable and dishonest. The court was urged to allow the appeal.

8. For the respondent it was submitted that the respondent's motor vehicle was hit from the rear by the appellant's motor vehicle and that the impact being direct on the rear the question of moving from one lane to another did not arise. The court was urged to note that the police abstract report obtained by the appellant which blamed the appellant was disowned even by the police. The court was urged to find liability of the appellant proved.

9. On the issue of quantum it was submitted that the appellant's evidence showed that the damage to the appellant's motor vehicle was almost Kshs.70,000/= and therefore the damage claimed by the respondent of Kshs.75,100/= cannot be faulted. It was maintained that the respondent's claim was not exaggerated and the court was urged to dismiss the appeal as having no substance.

10. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. I have also considered the submissions made before the trial court and before me. I find that the trial magistrate who saw and assessed the demeanour of the witnesses believed the respondent's evidence that the appellant knocked the respondent on the rear and that the respondent failed to keep a reasonable distance. The trial magistrate did not believe the appellant's contention that the respondent suddenly changed lanes and tried to cut in front of the appellant on the inner lane.

11. Having examined the assessment reports produced in evidence in respect of the two vehicles, I am satisfied that the trial magistrate arrived at the correct conclusion. It is evident from the reports that the impact on the two vehicles, were directly bumper to bumper, the appellant's vehicle sustaining damages on the front bumper and headlamps and the respondent's vehicle sustaining damage on the rear bumper affecting the boot lid and panel. If indeed the respondent's vehicle had cut suddenly in front of the appellant's vehicle as alleged, the damage would have been at an angle and not so directly on the bumper to rear. The respondent's explanation that he slowed down his vehicle but that the appellant failed to slow down and hit the respondent's vehicle on the rear was the more likely version. I find that the appellant was to blame for the accident.

12. As regards the extent of the damage, the appellant produced an estimate from D.T. Dobie & Company (K) Ltd which is a well known company dealing in motor vehicles and repairs. The company assessed the repairs at a figure of Kshs.119,673/20. The respondent had the vehicle repaired at the little known Motor Care Limited at a cost of Kshs.75,000/=: thereby mitigating his loss. The argument that the cost of repairs claimed by the respondent was unreasonable cannot hold. It was further argued that the respondent did not need to incur the cost of repairs as all he needed was to pay the excess premium to enable his insurance company take care of the repair charges. That is a faulty argument because payment of the repair charges by the insurance company would not have exonerated the appellant from any liability as the insurance company would still have been entitled to recover the repair costs from the appellant under its rights of subrogation.

13. The upshot of the above is that I find no substance in this appeal and do therefore dismiss it with costs.

Dated and delivered this 12th day of May, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Kareu H/B for Nyagah for the appellant

Murithi for the respondent

Eric - Court clerk