REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 65 OF 2001

BISHOP HENRY PALTRIDGE ..... PLAINTIFF

VERSUS

JAMES MUGO MBUTHU ..... 1ST DEFENDANT

JACOB MUTHE M'RENYA ..... 2ND DEFENDANT

J U D G M E N T

Bishop Henry Paltridge, hereinafter referred to as "*the Plaintiff*" has in this court sued James Mugo Mbuthu and Jacob Muthe M'renya hereinafter referred to as "*the 1st and 2nd defendants*" respectively for a liquidated sum of Kshs.147,180/= on account of material damage arising from an accident between his motor vehicle registration No. KAC 576T and the 1st Defendant's alleged motor vehicle registration number KVC 568 which occurred on 24th October 1999 along Meru-Nkubu road. The material damage claim is for Kshs.147,180/= as well as costs and interest of the suit. His cause of action is based on the alleged negligence of the 2nd Defendant, who was the driver of the motor vehicle registration number KVC 568 allegedly owned by the 1st Defendant.

In paragraph 4 of the Plaint dated 17th January 2001 and filed in court on 10th April 2001 the Plaintiff has pleaded that the 2nd Defendant drove the subject motor in such a manner that he permitted the same to roll back into the Plaintiff's motor vehicle. The particulars of the negligence attributed to the 2nd defendant were that he drove the motor vehicle without due care and attention, failed to keep any or any proper lookout, failed to have any sufficient regard for the other traffic which was or might be expected to be on the said road, failed to steer the said motor vehicle properly, failed to have proper or sufficient control of the motor vehicle and finally that he failed to swerve or take any evasive action so as to manage or control the motor vehicle and avoid the collision.

The defendants filed their defence on 7th June 2001 denying the occurrence of the accident and or that the same was occasioned by the negligence of the 2nd Defendant. Further the defendants pleaded "contributory negligence" against the Plaintiff. Particulars of contributory negligence set out as against the 2nd defendant were that; he failed to keep any or any proper lookout or to have any or any sufficient regard for his own safety when driving his motor vehicle along the said road, stepping into the said road in the path of the 2nd defendant; Failing to pay any or any sufficient heed to the presence of the 1st defendant's vehicle in the said road, Stopping his motor vehicle when it was unsafe and dangerous to do so, Failing to see the defendant's vehicle in sufficient time to avoid the alleged collision or at all and

Causing the accident. Pleadings came to a close after the Plaintiff's Reply to Defence dated 11th June 2001, in which the allegations of contributory negligence aforesaid were denied.

Trial began on the 23rd of September 2002 with the Plaintiff testifying. His testimony was that he owned motor vehicle KAC 576T Toyota Starlet. It was involved in an accident on 24th October 1999. He was not within the country at the time of the accident. He was however told about the accident 2 days after since the motor vehicle was with his driver Gainson Muchuku.

PW2, **Gainson Muchuku**, testified that he was on the material day driving the Plaintiff's motor vehicle aforesaid from Nkubu to Meru at around 8.00 p.m. There was a lorry in front and in between them was another small car. The lorry was emitting a lot of smoke and was unable to climb the hill prompting the small car ahead to attempt to overtake the said lorry from the right side. Unfortunately for him, PW2 could not overtake the said lorry because of oncoming cars so he braked. In the meantime, the lorry started rolling backwards and in the process collided into the Plaintiff's motor vehicle.

PW3 produced a Police Abstract confirming the occurrence of the accident and an assessor's report that contained photographs and details of the parts damaged on the Plaintiff's vehicle. The photographs show that it is the front part of the Plaintiff's motor vehicle that was extensively damaged. That marked the close of the Plaintiff's case.

Hitherto the case had been presided over by **Juma J**. However by the time the defence opened their case, **Juma J**. had ceased to have jurisdiction in the matter. Accordingly parties agreed that the case should proceed before another judge from where **Juma J**. had left. It was on that basis that the defence hearing commenced before me on 31st March 2009.

The 1st defendants did not give any testimony in relation of the occurrence of the accident as according to him, he was neither the registered owner, nor was he at the scene of the accident. He produced in evidence a copy of search certificate from the registrar of motor vehicles to show that the motor vehicle did not belong to him. The 2nd defendant however testified and admitted that he was the driver of the mother vehicle KVC 568 at the time of the accident. He claimed however that the accident was occasioned by the negligence of the PW2, who he said came speeding and rammed into the rear of his motor vehicle. He went on to testify that his lorry was moving slowly as it was loaded with stones. It was carrying 7 tonnes of stones. That the lorry was going uphill after the Equator stage towards Meru town.

Arising from the pleadings, evidence tendered and respective written submissions filed and the authorities cited herein, I would want to imagine that the issues for determination by this court are as captured in the written submissions by the Plaintiff to wit:

(a) Whether the Plaintiff proved on a balance of probabilities that the 1st Defendant was the owner of motor vehicle registration number KVC 568,

(b) Whether the Plaintiff proved on a balance of probabilities that the 1st defendant was negligent.

(c) Whether the defendants proved on a balance of probabilities that the Plaintiff's driver was guilty of contributory negligent and if so, the degree thereof,

(d) In view of issues a, b and c what the awardable amount of damages are.

1ST ISSUE

When he gave his evidence, the 1st Defendant sought to distance himself from liability by stating that he was not the registered owner of motor vehicle registration number KVC 568 and that it was owned by his uncle who was deceased. He produced a copy of the certificate of search from Registrar of motor

vehicles which showed that the motor vehicle was in fact owned by one **Mugo Mbutu** and **CFC**. He also tendered in evidence a copy of his national identity card as well as judicial staff identification card which showed his names as **James M. Mugo Mbutu**.

This evidence is in contrast with what is contained in the Police Abstract produced by the Plaintiff which showed that the owner of the said motor vehicle was as **James Mugo Mbuthu.** Between the police abstract and certificate of official search from the motor vehicle registry I choose to believe the information contained in the latter document. It has been held in several cases that the only way to prove ownership of a motor vehicle was by way of a search certificate and that the police abstract cannot in any way prove ownership. See generally **Simon Kihara v/s Erastus Kiungu C.A. No. 262 of 2001** (UR) and **Manira Karauri v/s James Ncheche C.A. No.192 of 1996** (UR). Much as **Mr. Mugambi,** learned advocate for the Plaintiff argued that the search certificate did not show the status of the registration of the motor vehicle as at 24th October 1999 when the accident occurred which leaves an inference that it was perhaps in another persons preferably the 1st defendant's name. I do not think that there is any basis for such an inference. The Plaintiff should on his own have sought the information from the registrar of motor vehicle regarding the ownership of the subject motor vehicle as at the time of the accident. The defence of the 1st defendant's non-ownership of the motor vehicle was raised early in the proceedings so that the Plaintiff had ample time to investigate as to who was the real owner of the motor vehicle as at the time of the accident. It is as a result of the foregoing that I now hold that the plaintiff has not been able to prove that the 1st defendant owned motor vehicle KVC 568. Accordingly and as correctly submitted by **Mr. Kiogora**, the 1st defendant had no nexus whatsoever with the subject motor vehicle and was neither the employer/master of the 2nd defendant nor did he authorise the said person to drive the said motor vehicle. That being the position the 1st defendant, it would appear was wrongly sued. Indeed the testimony of PW2 on this issue is illuminating. He was categorical that the 1st defendant was never his employer. He had never known him before and that he saw him for the very first time in this court. Despite intense cross-examination on the issue by **Mr. Mugambi**, 2nd defendant remained firm and adamant as to the ownership of the motor vehicle. Accordingly it is my holding that the plaintiff has not proved on balance of probabilities that the 1st defendant was the registered owner of motor vehicle registration number KVC 568.

2ND ISSUE

The plaintiff having not proved on a balance of probabilities that the 1st defendant was the registered owner of the subject motor vehicle, he cannot be held liable in damages. However, I think that the 2nd defendant can be held liable in his own right. The only problem that the plaintiff may encounter is that he did not pray in his plaint for judgment to be entered against the defendants jointly and severally. He merely prayed "*for judgment against the defendant for:-*" It is not even against the defendants. So who is this defendant that the Plaintiff wishes to be held liable for the accident. Anyway, as I have already stated, I think that the 1st defendant having fallen by the wayside in these proceedings, the 2nd defendant can still be held liable in his own right. He admitted in his evidence that he was driving the motor vehicle and that the same was involved in an accident. I have no doubt at all that he was the sole cause of the accident. This is born out by the inconsistent and contradictory nature of his evidence when juxtaposed with that of his alleged independent witness. According to the 2nd defendant he immediately after the accident sent his turn boy to the police station to report the accident However DW3 was firm that the driver did not send his turn boy to the police station. DW3 did not know the 2nd defendant prior to the accident, yet he opted to spend the night guarding the motor vehicle together with him, and even followed him to the police station in the morning to take the motor vehicle there. What was his interest in matter of least concern to him? It is simply incredible. Yet the 2nd defendant never mentioned in his testimony that he spent the night with DW3 guarding the lorry. DW3 further stated in cross-examination "..... *He (DW2) never told me of the turn boy"*. It is incredible and unexplained by DW2, why, if his lorry was hit by the Plaintiff's vehicle (and the lorry was not damaged), why it could not move until the following morning. Why was the lorry even being taken to the police station if DW3's evidence is anything to go by? I think that the plaintiff has been able to discharge the burden of proof that the 2nd defendant and not

1st defendant was negligence and caused the accident.

3RD ISSUE

I do not think that the 2nd defendant has proved on a balance of probabilities that the Plaintiff's driver was guilty of contributory negligent I have looked at the photographs and the motor vehicle inspection report tendered in evidence. To my mind the photographs show that it is the front part of the Plaintiffs vehicle that was extensively damaged. This is not consistent with the 2nd defendant's testimony that the accident occurred as a result of the Plaintiff's motor vehicle attempting unsuccessfully to overtake his vehicle and on realising that there was oncoming vehicle swerved back into his lane and in the process crushed into his motor vehicle. If that was true the damage would have been on the sides of the plaintiff's vehicle. In my view the photographs clearly show that the damage sustained was consistent with a roll back collision account as given by PW2. Further if the 2nd defendant's story was to be believed there would have been no basis for him to have been charged as indicated in the police abstract. Yes, the 2nd defendant may have been charged with driving uninsured motor vehicle which may not have much relevance to the causation of the accident. However in the absence of the insurance cover, that vehicle had no business being on the road. There is evidence that the 2nd defendant's lorry was moving slowly as it was loaded with stones. It was also emitting a lot of smoke. This scenario clearly shows that the lorry had difficult in going up the hill at equator. It did not have sufficient power it would appear. That being the case, it is not beyond conjecture that the said lorry must have lost power and rolled back. Considering all the foregoing, I am satisfied that the 2nd defendant was the sole author of the accident. I cannot attribute any contributory negligence to the plaintiff's driver. He could not have reversed to avoid the accident as there were other vehicles behind him.

On the basis of the foregoing I am satisfied on the balance of probabilities that the 2nd defendant and not 1st defendant was negligent and is liable to the plaintiff in damages.

4TH ISSUE

The Plaintiff herein prays for special damages of Kshs.147,180/= being the pre-accident value of his vehicle, less salvage plus the assessor's fees and police abstract. The plaintiff in support of his claim called the assessor. He estimated the amount used for repair at Kshs.149,343/=. In his opinion it would have been uneconomical to repair it as its pre-accident value was Kshs.220,000/=. Though salvage value was put at Kshs.55,000/= it was subsequently disposed off at Kshs.70,000/=. He further stated that he charged Kshs.17,080/= as his fees for work done and services rendered.

I am satisfied that the plaintiff has proved his case for compensation for the material damages pleaded in his plaint. Under the common law and as correctly submitted by **Mr. Mugambi**, the basic principle in assessment of damages is restitution in integrum and that "*there is no loss without a remedy.*" As posited in **Winfield on Tort (17th Edition) (Authority No. 5) at page 791 thus:**

"**Where property is damaged, the normal measure of damages is the amount by which its value has been diminished, and in the case of ships and other chattels, this will usually be ascertained by reference to the cost of repair. It does not matter that the repairs have not been carried out at the date of the trial, or even that they are never carried out at all.....**"

In the present case, there was the unchallenged evidence by PW3 who produced an assessment report. showing that the Plaintiff's motor vehicle would have required Kshs.149,343/= to repair, while its pre-accident value was Kshs.130,000/=. It would therefore have been un-economical to repair the motor vehicle. The plaintiff now claims the loss of the vehicle. The value stated in the plaint was properly proved by the evidence of PW3.

In regard to non-admissibility of unstamped instruments in evidence, although the law under Section 19(1) of the Stamp Duty Act is that receipts not having a revenue stamp may not be admitted in evidence,

it is noteworthy that the defendant's lawyer did not object to their production in evidence during the hearing. He cannot now take the objection in his written submissions. All said and done I am satisfied that the plaintiff has proved his case on a balance of probabilities as against the 2nd Defendant who is liable to compensate the Plaintiff for the material loss occasioned to him in the sum of Kshs.147,180/= as well as costs and interest. That will be the judgment of this court.

Dated and delivered at Nyeri this 18th day of June 2009

M. S. A. MAKHANDIA

JUDGE