



REPUBLIC OF KENYA

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

Civil Appeal 17 of 2006

FARMERS CHOICE LIMITEDAPPELLANT

VERSUS

PETER NJAU MUNGAI..... RESPONDENT

(An appeal from the judgment delivered by the Hon. Mr. Njuguna, Senior Resident Magistrate on 6th December, 2005 in the Resident Magistrate's Court at Gatundu in Civil Suit No. 166 of 2003)

JUDGMENT

1. This appeal arises from a suit which was filed in the Principal Magistrate's Court at Kiambu. Farmers Choice Ltd. hereinafter referred to as the appellant, had sued Peter Njau Mungai, hereinafter referred to as the respondent. The appellant was claiming special damages of Kshs.245,776/= being loss incurred by it as a result of a road traffic accident involving the appellant's motor vehicle registration No. KAP 116K, and the respondent's motor vehicle registration No. KAP 819E. The appellant maintained that the accident was caused by the negligence of the respondent or his agent, servant or driver.
2. The respondent filed a defence in which he denied the appellant's claim. In particular the respondent denied ownership of motor vehicle KAP 819E, or that an accident occurred or that the respondent was negligent. In the alternative the respondent contended that if an accident occurred then the same was wholly caused or substantially contributed to by the negligence of the appellant's servant and/or authorized agent.
3. During the hearing of the suit in the lower Court, the appellant called three witnesses. These were Joseph Kuria Kariri, (Kariri) a sales supervisor with the appellant, Peter Gitonga, (Gitonga) a claim adjuster employed by Jubilee Insurance Company and Njenga Kirimira, (Njenga) a motor assessor with Insurance Adjustment Services.
4. Briefly their evidence was as follows:

On the 7th of July, 2003, Kariri was driving the appellant's aforementioned vehicle. At about 11 a.m. he parked the vehicle in a parking lot opposite Kiambu Post Office. He was seated under a shade when he saw motor vehicle KAP 819E hit the appellant's vehicle which was at the parking. Kariri reported the matter to the police and was issued with the police abstract report.

5. The appellant's motor vehicle was insured by Jubilee Insurance Company. The appellant reported the accident to the insurance company and lodged a claim. The insurance company commissioned Insurance Adjustments Services to assess the damage to the appellant's aforementioned vehicle. Njenga examined the appellant's motor vehicle and prepared an assessment report in which he estimated the cost of repair at Kshs.236,310/=. Njenga also raised an invoice for Kshs.7,900/= being the assessment fee.

6. The motor vehicle was thereafter repaired at the appellant's garage. The appellant raised an invoice to the Jubilee Insurance Company for the repair costs less the excess payment. Jubilee Insurance Company paid the appellant a sum of Kshs.199,151/= through a cheque. A copy of the letter forwarding the cheque together with the payment voucher was produced in evidence. Jubilee Insurance Company also paid Strike Limited Investigators who investigated the accident a fee of Kshs.12,625/=. The insurance company further paid Kshs.7,900/= to the Insurance Adjustment Services for the assessment report. Forwarding letters and payment vouchers were produced for both payments. A search carried out at the Registrar of Motor Vehicles revealed that the vehicle registration No. KAP 819E was owned by Peter Njau Mungai. The insurance company therefore filed the suit in the lower Court in the name of the appellant under its rights of subrogation.

7. The respondent did not call any witnesses. Counsel for each party filed written submissions each urging the Court to find in favour of its client. For the appellant it was submitted that evidence had been adduced which established that the respondent's motor vehicle, rammed into the appellant's vehicle, pushing it into an obstacle. It was submitted that evidence was adduced showing the damage to the appellant's motor vehicle, the estimated cost of repairs and the actual payment for the repairs. The Court was therefore urged to give judgment in favour of the appellant.

8. For the respondent it was submitted that there was nothing to show that the total cost of repairs was Kshs.224,151.15. It was submitted that no receipts were produced to show how the amounts claimed were arrived at. It was maintained that the motor vehicle was not re-evaluated after the repairs were carried out. The Court was urged to dismiss the claim for repair costs.

9. In his judgment the trial Magistrate found that the accident subject of the suit, occurred, and that the appellant was to blame for the accident. However, the trial Magistrate noted that the claim which was for special damages of a liquidated amount, had to be specifically pleaded and proved. He found that the claim for the repair costs was not specifically proved by way of receipts. Applying the case of **Khanna vs. Samuel [1973] EA 225**, the Trial Magistrate held that the appellant was not entitled to recover the assessor's fees or the investigators fees as those were monies paid by the insurance company and not the appellant.

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

(i) The learned Magistrate erred in fact and in law in dismissing the plaintiff's suit.

(ii) The learned Magistrate erred in fact and in law in finding that the plaintiff had not proved special damages as specifically pleaded in its plaint.

(iii) The learned Magistrate erred in fact and in law in failing to appreciate the fact that the plaintiff had proved damages in light of the evidence adduced before him.

(iv) The learned Magistrate erred in fact and in law in relying on extraneous matters that were not in issue or canvassed before him.

(v) The learned Magistrate erred in fact and in law in finding that the plaintiff was not entitled to the assessor's fees and the investigator's fees, as it would amount to "unjust enrichment."

(vi) The learned Magistrate misdirected himself on law and fact with regard to proof of special damages in light of the evidence presented before Court.

11. At the hearing of the appeal, there was no appearance for the respondent although he was duly served. Ms. Ndumia who appeared for the appellant referred the Court to the evidence which was adduced in the lower Court and the exhibits produced, showing that the insurance company reimbursed the appellant for the costs of repairs. The Court was also referred to the forwarding letter and the voucher in respect of the payment for the assessor's fees, and the investigators fees, both of which were met by the insurance company. Also cited was *HCCA 565 of 1999, Omar Sharrif Ali and Abdalla Ali Abdalla vs. Teita Estate Limited* in which Visram, J. held that invoices showing a paid stamp with an indication of the cheque number and date of payment, was sufficient proof of payment. Ms. Ndumia also relied on *HCCC No. 2151 of 1991 Promod Patel vs. Esther Wanjiku and the Attorney-General*, in which Angawa, J. ruled that proof of payment can be obtained through witnesses who prepared and processed payment vouchers. It was submitted that the trial Magistrate was wrong in dismissing the appellant's claim.

12. I have carefully reconsidered and evaluated all the evidence which was adduced in the lower Court as well as submissions which were made before the trial Court and before me. I take note of the fact that mine is an appellate jurisdiction which has to be exercised with caution. However, I do note that the finding of the trial Magistrate regarding the proof of the appellant's claim was not consistent with the evidence which was adduced before him.

13. Having found that the appellant's motor vehicle was involved in an accident with the respondent's motor vehicle, and that the respondent was to blame for the accident, the issue was the cost of the damage to the motor vehicle and whether the same was paid. In this regard, there was clear evidence adduced by the assessor (Njenga) which confirmed that the appellant's motor vehicle was examined and the costs of repair of the damage estimated at Kshs.236,310/=. Indeed, the motor vehicle assessment report was produced as an exhibit. This evidence coupled with the evidence of Gitonga, the payment voucher and the letters forwarding the cheque for payment of Kshs.199,151/= left no doubt that the appellant was paid this money as costs for the repairs to his motor vehicle.

14. With regard to the payment in respect of the assessors fee and the investigators fees, again it is clear that these payments were met by the insurance company. The trial Magistrate failed to appreciate that the claim before him was a claim brought by the insurance company in the name of the appellant under its rights of subrogation, pursuant to the insurance cover provided by Jubilee Insurance to the appellant. The circumstances of this case were thus quite different from *Khanna vs. Samuel* (supra), which was relied upon by the trial Magistrate. In this case, the insurance company was thus entitled to recover the amount in the name of the appellant.

15. I find that the trial Magistrate's findings were inconsistent with the evidence adduced before him and the trial Magistrate failed to apply the principle of subrogation. The judgment of the trial Magistrate cannot stand. Accordingly, I allow the appeal; set aside the judgment of the lower Court and substitute thereof a judgment in favour of the appellant as prayed in the amended plaint. I award costs of the suit in the lower Court and costs of this appeal to the appellant.

Dated and delivered this 30th day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Ms. Ndumia for the appellant

No appearance for the respondent

Eric, court clerk