



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

Civil Case 2429 of 1991

BERNARD MACHEA NGICHURU.....PLAINTIFF

V E R S U S

ATTORNEY GENERAL.....1ST DEFENDANT

J U D G E M E N T

In this suit the Plaintiff claims against the Defendant special and general damages and costs. The Defendant is sued on behalf of the Kenya Police Force.

The Plaintiff's suit as set out in the plaint is that in December, 1987 his motor vehicle registration No. KJK 213, make Toyota saloon, was stolen in Nairobi. He reported the theft to Pangani Police Station. On 6th January, 1991 he saw the motor vehicle being driven by a stranger along Jogoo Road in Nairobi. He reported the sighting to Buruburu Police Station. The police later recovered the motor vehicle and took it to Pangani Police Station. Subsequently the police unlawfully and illegally sold the motor vehicle to a third party as unclaimed property. The sale was unlawful and illegal because the Plaintiff had reported the theft and the sighting of the motor vehicle to the police, and they had his contact.

The Plaintiff therefore claims the value of the car at KShs. 50, 000/00 and loss of income from it at KShs. 350/- per day from December 1987 until judgement. He also claims general damages for the "inconvenience" occasioned to him by the unlawful sale of his motor vehicle.

At the hearing only the Plaintiff testified. The Defendant did not call or lead any evidence. In the course of his testimony the Plaintiff produced a number of documents, including:-

Exhibit P1: Sale Agreement dated 12th May, 1987 on
motor vehicle KJK 231.

Exhibit P2: Copy of Police Abstract on theft of motor
vehicle KJK 231.

Exhibit P5: Copy of registration (log) book of motor
vehicle KJK 231.

Exhibit P6: Notice dated 10th April 1989 by police to

the Plaintiff to produce the name and address of the driver of motor vehicle KJK 231.

I have considered the Plaintiff's testimony. I have also considered the written submissions filed on behalf of the Plaintiff. None of were filed on behalf of the Defendant, not even after time was extended to enable such filing.

It appears from the available evidence that the Plaintiff's motor vehicle registration No. KJK 231 which was being used as a taxi and was being driven by his servant or agent was in the early morning of 6th December, 1987 involved in a fatal accident along Outer Ring Road, Nairobi. The driver of the motor vehicle disappeared and the police could not trace him. The motor vehicle appears to have been impounded by the police on account of the accident.

I accept that the Plaintiff may not immediately have known about the accident, and he duly reported the disappearance of his motor vehicle and its driver at Pangani Police Station on 9th December, 1987. In April, 1989, that is about one year and four months after his car disappeared, the Plaintiff was served by the police a notice dated 10th April, 1989 requiring him to inform the police of the name and address of the driver of his motor vehicle on 6th December, 1987. The driver was being sought in connection with the offences of failing to stop after an accident, causing death by dangerous driving and failing to report an accident. The Plaintiff failed to do so and he was then charged with the offence of failing to keep records of the driver. He was arraigned at Makadara Law Courts. He pleaded guilty and was fined KShs. 300/00.

So, at least as early as April, 1989 the Plaintiff knew that his motor vehicle was in police hands. He did not then demand release of the same to him or take action towards recovering the same. In his testimony he had said that since its disappearance on 6th December, 1987, and after reporting the matter to the police, he had been checking with the police and was on the look out for the motor vehicle without any luck until he saw it being driven by a stranger along Jogoo Road on 6th January, 1991. But then he testified that in April, 1989 he had been charged with failure to keep records of his driver and he pleaded guilty. If he did not know where his motor vehicle or driver was, why did he plead guilty?

Upon the evidence before the court, I do not accept the Plaintiff's assertion that his motor vehicle was stolen and that it was never involved in an accident. The evidence points to the vehicle being involved in a fatal accident in the early morning of 6th December, 1987. The vehicle must have been towed to the police station. But its driver had disappeared. The Plaintiff may not have immediately known about the accident or the whereabouts of his driver. But, surely, he must have traced his motor vehicle to the police not too long afterwards.

For whatever reason, the Plaintiff, it is clear to me, did not want to lock horns with the police earlier on over his motor vehicle, most likely because it had been involved in a fatal accident and its driver had disappeared. But with the passage of time he finally gathered courage in 1991 and demanded release of his vehicle, only to learn that it had been sold as unclaimed property.

There was no evidence from the Defendant as to how the motor vehicle came to be sold. So, it is not known if necessary notices under the law were served upon the Plaintiff before the sale. I accept the Plaintiff's testimony that he was never served with any notice of sale of his motor vehicle as unclaimed property. The police obviously had his contact; that is how they had been able to serve him with notice to produce the name and address of his driver. I must therefore uphold the Plaintiff's plea that his motor vehicle was unlawfully and illegally sold. He is thus entitled to damages.

What will these damages be? He is entitled to the value of his motor vehicle. It was an old car manufactured and registered in 1970 (Exhibit P5). He purchased it some 17 years later in May, 1987 for KShs. 50,000/00 (Exhibit P1). The car disappeared in December, 1987, only seven months after he purchased it. There is thus only a slight element of depreciation. It is also possible that the car suffered

some damage in the fatal accident of 6th December, 1987, but it is not possible to assess such damage. Doing the best that I can, I will assign to the motor vehicle a value of KShs.40,000/00. This is what I will award the Plaintiff.

Regarding loss of income, I accept that the motor vehicle was used by the Plaintiff as a taxi to earn income. From Exhibit P8, a note-book of the vehicle's earnings kept by the Plaintiff for the period 27th May to 3rd December 1987, the car brought in gross earnings of an average of between KShs. 350/00 and KShs. 450/00 per day. But from this there must have been outgoings like fuel, maintenance of the vehicle and the driver's salary or allowances. In my estimation daily nett earnings were about KShs. 200/00.

Having said that, I have already held that the available evidence indicates that the Plaintiff must have found out soon after 6th December, 1987 that his motor vehicle was involved in a fatal accident and was in the hands of the police. He had his own reasons for not wishing to antagonise the police with a claim for release of the vehicle to him. He failed to give them the name and address of his driver. It was entirely his fault that he did not soon recover his vehicle and thus mitigate his loss. It was not the fault of the police. I would therefore not award him anything for loss of earnings. The claim for general damages is also not proved.

In conclusion I am satisfied that the Plaintiff has proved his case on a balance of probabilities. I will enter judgement and award him special damages of KShs. 40,000/00, the same being the value of his motor vehicle that was unlawfully and illegally sold by the police to a third party. There will be interest at court rates on that sum from the date of filing suit until payment in full. The Plaintiff will also have costs of the suit. There is no claim for interest on costs, and I will award none. There will be orders accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT

NAIROBI THIS 20TH DAY OF JUNE 2008.

H.P.G. WAWERU

JUDGE