

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 492 OF 2004

PHYILIS MWINZA SINA APPELLANT

VERSUS

PHARIS GICHOHI NDWIGA 1ST RESPONDENT

SPARKO GENERAL STORES LTD 2ND RESPONDENT

(Being an appeal from the Judgment of Mrs. C.W. Meoli, Senior Principal Magistrate, in the Chief Magistrate's Court, Milimani Civil Case No. 10017 of 2003)

JUDGMENT

The Appellant's Counsel Mr. Nzavi and the Respondent's Counsel Mr. Adipo, by consent recorded just before I started hearing this appeal, agreed to use the record of appeal filed on the 19th April, 2005 only.

I subsequently heard the appeal and from what was brought to my attention during the hearing, in the light of the contents of the aforesaid record of appeal, this appeal has no merits and the same be and is hereby dismissed for the following reasons:

While it is correct that the Respondents did not adduce evidence during the trial before the Learned Senior Principal Magistrate, Mrs. C.W Meoli, and that therefore the Plaintiff's evidence on record was not challenged through evidence recorded by the trial Magistrate from the Respondents, the law requires the evidence so adduced to prove the case the party adducing such evidence has gone to the court to prove. In a Civil Case, the standard of proof required is that on the balance of probabilities. If the evidence on record fails to prove the party's case up to that standards, that party cannot get a judgment in its favour simply because there was no challenging evidence adduced from the opposite side.

What I can see in this appeal is that the evidence which the Appellant adduced to support her case, though unchallenged by evidence from the Respondents because no such evidence was adduced, did not reach the standard of proving the Appellant's case up to the Standard of the balance of probabilities. The Learned Trial Magistrate was therefore right in dismissing the Appellant's case.

That was a case where the Amended Plaintiff dated 28th October, 2003, after alleging in paragraph 3 that the 2nd Defendant was the registered owner of Motor Vehicle Registration number KAJ 493L and that the 1st Defendant was the motor vehicle's driver, was not supported by relevant evidence during the trial proving those allegations.

That was a case where what is alleged in paragraph 4 of the plaintiff is not intelligible yet that paragraph was the main basis of the Appellant's claims against the Respondents. That was a case where the Appellant claims there is vicarious liability yet adduced no evidence to prove that liability if indeed it is there. That was a case where the Appellant did not adduce evidence to prove the relationship between the two defendants, to prove that indeed the 1st Respondent was the driver of Motor Vehicle Registration No. KAJ 493L at the time of the accident which the Learned Magistrate found was caused by negligence as she did not at the sometime find that negligence connected with the 1st Respondent. That was case where,

as the Learned Trial magistrate found, the evidence on record left many loose ends, and therefore there are more short comings I do not have to mention in this Judgment as what I have said is sufficient for the purpose of this appeal.

In conclusion, the Appellant is at liberty to appeal against this first appellate Judgment.

Dated and delivered at Nairobi this 21st day of November, 2007.

J.M. KHAMONI

JUDGE