



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 8 OF 2000 RD

JUMBO TRANSPORT CO (1971) LTD.....PLAINTIFF

=V E R S U S=

1. A.O. BAYUSUF.....1ST DEFENDANT

2. PETER NJEHA MUTHONDU.....2ND DEFENDANT

J U D G M E N T

The Plaintiff filed on 30/7/1999 claims material damage and loss occasioned to the Plaintiff when an accident occurred between motor vehicle registration number KAA 132F a lorry and Defendant's vehicle Mercedes Benz Trailer registration number KTU 043 ZA 1491 driven by 2nd Defendant driver employee or agent of 1st Defendant. The particulars of negligence of the 2nd Defendant are set out in the Plaintiff paragraph 4. The particulars of damage caused to the Plaintiff are set up under paragraph 5 of the Plaintiff.

In his evidence the Operations Manager of the Plaintiff Company said the accident occurred on 1/8/1998 (which is the date in the Plaintiff). However, the documents produced as exhibits namely, Police Abstract is dated 22/8/96, M. Gohil report and receipt for payment is dated 6/8/96 and 7.8.96 respectively, Exhibit 3(a) Delivery Note is dated 7/8/96. Also agreed issues number one asks "Did an accident occur on 1st August, 1998" PW.1 was not present at the scene when the accident occurred.

He further said that the 2nd Defendant Peter Njeha Muthondu was the Plaintiff's driver and that he was included in the suit by mistake. The report of accident was made by the driver. He got all information from the police Abstract "Exhibit 1".

He said he repaired the vehicle according to the assessors report and did not have a job card as the work was done at their workshop.

He produced the report of assessment by M. Gohil who indicated the claim for repairs and spare parts to be Kshs.260,130/-. His fees amounted to Kshs.12,052/-. The report said repairs would take two weeks. He also claimed non-user of the motor vehicle for 3 weeks at Kshs.100,000/- per week and loss of 22 bags of the goods carried in the lorry which he said were lost. He exhibited some pieces of paper showing "175 bags loaded out", "153 bags received to Atta Ltd."

That was the evidence of the Plaintiff when he closed his case.

Mr. Mogaka for 1st Defendant called no evidence for defence.

In his submissions the counsel for the Plaintiff submitted that the Plaintiff had proved his claim in the sum of Kshs.616,182/-. For this loss he claims Kshs.44,000/-. Of negligence, he was told by his driver

(who did not give evidence) that their lorry was traveling towards Nairobi while the other vehicle was coming from Nairobi and was traveling on the wrong side.

PW.1 explained that the Plaintiff is a transporter and charges for transportation of goods. Plaintiff's name Atta 1974 Ltd was changed.

The evidence was uncontradicted. He said the occurrence of the accident was proved by Police Abstract (Exhibit 1). As no evidence was produced by Defendant, judgment should be entered for Plaintiff.

Mr. Mogaka also made submissions and urged the court to dismiss this case.

I have considered the evidence and the proceedings. According to the issues agreed upon by parties, it is to be said that the accident did not occur on 1/8/1998. The accident must have occurred in 1996 according to documents produced and the pleadings. No evidence was produced to support allegation that the vehicle KTU 043Z 1491 was owned by 1st Defendant or driven by his driver, agent or authorized person. 2nd Defendant was not the driver of 1st Defendant but of Plaintiff. No one knows the cause of evidence as there was no eye witness. There being no proof of negligence against the 1st Defendant, no liability can attach to him.

The Defendant relies on Civil Appeal No.192 of 1996 in Court of Appeal where the court decided that if there is dispute as to ownership of vehicle a Certificate of Search signed by Registrar of Motor Vehicles should be produced.

On the whole I find that there being no proof of negligence on the part of the 1st Defendant, the Plaintiff's claim for Special and General Damages cannot be sustained.

The issue of the date when the accident occurred creates a doubt as to whether the Plaintiff is speaking of the same accident. The Police Abstract is also altered by wite-out on the part written the Plaintiff's name as to the ownership of the vehicle.

There is total lack of first hand evidence. The witness repeated only what he was told by the driver. In these circumstances I cannot confidently say that the Plaintiff has proved his case on a balance of probabilities. I therefore find the Plaintiff's case without proof and I dismiss the same with costs.

Dated this 25th day of February, 2004.

JOYCE KHAMINWA

J U D G E

25/2/04

Judgment read in presence of:

Mr. Mogaka – for Defendant

N/A – for Plaintiff

JOYCE KHAMINWA, J