



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 149 OF 1995

SAGOO RADIATOR LTD .....PLAINTIFF

VERSUS

MOHAMED ALI & ANOTHER ..... DEFENDANT

J U D G M E N T

A) JURISDICTION

This case is a part-heard suit by Juma J. The trial commenced on 9.10.97 and 14.10.97 respectively when it was adjourned to the 13.11.97. The Hon. Judge was not available. I believe that this may have been due to his assignment to the High Court of Kenya at Meru and later to the High Court of Kenya at Nyeri where he was transferred to. On the 5.3.02, Githinji, J (as he then was) made orders, with the consent of the parties, that this suit proceeds before any other judge. Between 5.3.02 and 2003 this file had been missing and or taken out of the cause list.

The parties came before me on the 15.3.04 for hearing. They continue where the trial judge had left. Namely, the plaintiff after calling three witnesses closed his case. The defendant called no evidence and closed his without a witness.

Both parties thereafter made their submissions. I am permitted to continue with the trial and finalize the same from where the previous Hon. Judge had left under Order 17 r 10 CPR.

“Where a judge is prevented by death, transfer or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules and may proceed with the suit or application from the stage at which his predecessor left it.”

This rule gave me jurisdiction to conclude and determine this suit.

B) FACTS OF THE CASE

Sagoo Radiators Ltd (the plaintiffs herein) were the registered owner of a motor cycle registration

KAD 800H Triumph Tiger whilst Mohammed Ali (the 1st defendant herein) was the registered owner of a motor vehicle registration number KAC 632W.

On the material day of the 24th day of September 1994 at about 4.30 p.m. one B. Chagan (PW2) was ridding the motor cycle. He was ridding along the Gitaga road towards valley Arcade. He was aged 19 years in 1994 and worked for the plaintiff company. The motor cycle as stated earlier was owned by the plaintiff.

As he approached the James Gichuru/Kigara road junction he noticed a vehicle had stopped along the James Gichuru road. Suddenly the said vehicle pulled out onto the main Gitanga road. The motor cycle was knocked at the front by the vehicle's mudguard. PW2 fell to his left and slid underneath the vehicle. The driver of the vehicle reversed. The witness sustained no injuries. It transpired that the driver of the vehicle are N. Ali had been driving the vehicle without a license. She is said to have had the license at her house.

Who then is to blame for this accident?

### LIABILITY

PW2 stated that he was on the main Gitaga road. On this road there are no stop signs. There are stop signs along the James Gichuru road and the Kingara road. Thus, PW2 had the right of way as he was on the main road.

A sketch plan was produced by the witness showing that a public service vehicle (matatu, so commonly called in Kenya) was stationary on the left side of the lane as one heads towards Valley Arcade and just before the James Gichuru junction. The witness (PW2) seems to have passed this vehicle and as he was exactly at the junction, the 2nd defendant pulled her vehicle onto the road thus causing the said accident. It is important to note that every road user has a duty of care to other road users. In this case the 2nd defendant was on the minor road having a stop sign. She was required to stop and ensure that the traffic was clear.

Though the 1st and 2nd defendant did not attend court, they did state in their joint statement of defence – at the particulars that the witness (PW2):-

- “i) Was driving at an excessive speed
- ii) Was driving negligently
- iii) The defendants denied that they rammed into the plaintiffs vehicle
- iv) That they further denied causing any damages”

From the evidence before court, the 1st defendant failed to attend court. I therefore only have the proof of the evidence of the witness. I have no evidence from the 2nd defendant as to what actually occurred.

In determining the agreed issues I hereby find that the driver of the plaintiff was lawfully and carefully ridding the plaintiff's motor cycle. That the second defendant was the first defendant's driver/ agent and or servant. I say so as in their joint defence at the Para 4 the defendants admit this point.

The advocate for the defendant tried to bring out the issue of the driving license. This was not an issue. It is though must be noted that at all times a driver must be in possession of their driving license whilst driving. The defendant was not in possession of one.

Further the defendants advocate relied on the case law of:-

Usha Bachubhai & Others

(1965) EA 433

to prove negligence.

The facts of this case is that “an action for damages was brought by the appellant in respect of the death of her husband in collision between two motor vehicles at a cross road in rural area.

The deceased was in a vehicle as a passenger driver on a minor road whilst the 2nd vehicle driven by the 2nd respondent was on the major road. There were no road signs at the two intersection. The Hon trial judge held that the first defendant who was driving along the minor road was wholly to blame. The 2nd defendant was under “no duty to stop, slow down or to keep particulars look out to the side”.

In this particular case then, it was the plaintiff driver and not the 2nd defendant who was in the main road. The minor roads had stop signs on them namely James Gichuru and Kigara roads. These signs were at the intersection. The Usha V Bachubhai & Others case (supra) saw no sign posts for any of the roads.

I find that there is a prima facie case established beyond any reasonable doubt that the 2nd defendant was negligent.

I hereby compute liability against the 1st and 2nd defendant at 100%. The 1st defendant is vicariously liable for the acts of his agent and or servant the defendant No.2.

The liability against the two defendants is jointly and severally.

C) QUANTUM

The plaintiff claim for the material loss only

Namely:

- i) Pre accident value    Ksh. 850,000/-
- ii) Salvage (possible)    Ksh. 200,000/-
- iii) Repairs                    Ksh.312,294/40/-
- iv) Import duty                Ksh.109,303.40/-
- v) Labour                        Ksh. 5000.00/-
- vi) Miscellaneous            Ksh. 1000.00/-

vii) Vat	Ksh. 76,957/-
Add excess paid	Ksh. 85,000/-
	Ksh. 504,564/-
Assessment fee	Ksh. 3,115/-
Police abstract fee	Ksh. 100/-.

From the evidence, PW1 of assessor East Africa Ltd made a report of the estimated repair costs. He came up with the above list. His comments was that he took photographs of the motor cycle. He then listed all the parts and price required for the repair to the said motor cycle.

The repair work required was:- “

- I) To renew handle bar
- ii) To renew lock put and its accessories
- iii) To renew foot rest iv) To renew front mudguard
- v) To renew front mid shield
- vi) To renew rear view mirror
- vii) To renew all steering parts
- viii) Lights and wiring required attention
- ix) Renew exhaust silencer
- x) To have a road test.”

The assessor came to the conclusion on obtaining the correct pricing of all the missing items that the total costs of spares would be Ksh.312,294/40. All these spares required to be imported at a cost of Ksh.109,303/- being the import duty. This gives a total of Ksh.421,597/40. Value added tax would be charged at Ksh.76,967/-. Add labour Ksh.5000/- and miscellaneous Ksh.1,000/- a total of Ksh.504,564.40 would be arrived at.

The insurance company deducted the excess to be paid of 85,000/- from this amount. This then gave a final figure of Ksh.419,564/-. They paid this amount of money to the plaintiffs.

What was very clear is, that the plaintiffs on being notified that the vehicle was recommended to be a write off, refused to write off the motor cycle. They instead retained the motor cycle and repaired the same.

This took them 4 – 5 months. They imported the spares themselves.

It is therefore not correct to say that the plaintiffs sold the motor cycle to arrive at salvage value of Ksh.200,000/-.

The information of the spare parts and importation duty was obtained by the plaintiff which the assessors used. There seems to have been no second quotation on the expenses that is to be incurred. The actual expenses incurred after repairs were never made available to court.

The advocate for the plaintiff stated that this was not necessary. Once the plaintiffs have proved the costs of repairs, it is immaterial to bring up the costs there after. He relied on the text book of:

McGregory on damages

13 Edition para 946 – 949

“As long as there is a prima facie case that damage was occasioned to a vessel it is the costs of repairs – the costs of putting the vessel in the same condition as she was before the collision.”

This statement was referring to ships where a collision occurred.

In the London Corporation case

(1935) CA page 70

In the above case two ships sustained slight damage when they rammed into each other whilst side by side. The parties agreed that the estimate costs would be. No repairs were actually done. The plaintiff vessel was sold to be broken up.

It was held that though the vessel had been sold and no repairs were carried out it did not discharge the onus “which was on the defendants proving that the plaintiff had suffered no damage”.

The advocate for the plaintiff tried to imply in his submissions that the assessors report is a fair indication of the repairs undertaken. This costs would therefore not be effected despite that the plaintiff never sold the motor cycle regardless being, so advised, as the same was uneconomical to repair.

The defendant was therefore not permitted to state that because the repairs were done instead of selling the motor cycle did not discharge the defendant to prove that the plaintiff suffered no damage.

What costs should the court take?

The costs that should be taken is the repairs only. This costs is at Ksh.312,294.40. I have no proof that there was indeed import duty paid for spares. This was an estimate. The plaintiff appear to have done the repairs themselves. They do not appear to have paid for labor 5000/-. Miscellaneous Ksh.1000 VAT Ksh.76,957/- nor the salvage of Ksh.200,000/-.

I would therefore find that in repairing the motor cycle themselves the plaintiff cannot claim Ksh.650.000/- being the cost of the motor cycle before repairs. This would have been the amount paid if no repairs were done and the motor cycle was sold.

A sum of Ksh.312,294/40 would be for spares and orders accordingly.

b) Assessors fees Ksh.3,115/20

There is an invoice produced. This is not supported by a proof of receipt to show payment. I dismiss this claim

c) Police abstract fee Ksh.100/-

There is no proof by way of a receipt that this had been paid for and receipt issued. I dismiss this claim.

By a certificate dated 16.12.94 Sogoo Enterprises confirmed that they were satisfied with their own repairs. There was no proof of the actual repairs by way of each itemized spares, the costs and thereafter whether such costs indeed was the same as the assessors report. I see in other cases where the assessor goes back to the said vehicle, in this case, the motor cycle which is then examined and ensured that the repairs are done.

I accordingly enter judgment for the proved claim.

#### In Summary

1) Material loss

2) Motor cycle/motor vehicle collision

3) Non injury claim

4) Claim for damages to motor cycle

a) Pre- accident value	Ksh .850,000/-
b) Salvage (possible)	Ksh. 200,000/-
c) Repairs	Ksh.312,294.40/-
d) Import duty	Ksh.109,303.40/-
e) Labour	Ksh. 5000.00/-
f) Miscellaneous	Ksh. 1000.00/-
g) Vat	Ksh. 76,957/-
Add excess	Ksh. 85,000/-
	<u>Ksh. 419,564/-</u>
Total	<u>Ksh. 504,564/-</u>
h) Assessment fee	Ksh. 3115/- not proved
i) Police abstract fee	Ksh. 100/-

Not proved

Plaintiff opts to repair motor – cycle instead of writing the

same off. Is entitled to normal damages only Ksh.312,294/40

for spare parts repairs. The balance of claim is dismissed.

5) Liability 100% against the 1st and 2nd defendants severally and jointly is entered accordingly Total Ksh.312,294/40/-

The costs of this suit be awarded to the plaintiff and interest on the damages from the date of filing suit.

Dated this 23rd day of March 2004 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

Shah & Parekh Co. Advocates for the applicant

Iseme, Kamau & Co. Advocates for the defendant

1) Running Down Cause

2) TORT Material loss

3) Motor cycle/motor vehicle collision

4) No injury claim

5) Claim for damage to motor cycle:-Pre accident value      Ksh.850,000/

Salvage (possible)      Ksh.200,000/-

Repairs

Ksh.312,29.40

Import duty      Ksh.109,303.40

Labour      Ksh. 5,000/-

Miscellaneous      Ksh. 1,000/

-Vat      Ksh. 76,957/-

Ksh.419,564/-

Add excess paid      Ksh. 85,000/-

Ksh.504,564/-.

Assessment fee      Ksh. 3115/- not proved

Police abstract fee      Ksh. 100/-not proved

6) Full hearing of suit before Juma J      9.10.97

14.10.97

ii) Judge unavailable      13.11.97

iii) Orders of Githinji J and  
Consent of parties that suit to  
proceed before any other judge      5.8.02

iv) Missing file and taking out of consent list 5.3.2002 to 2003  
Hearing

v) 15.3.2004 and 16.3.2004 Ang'awa,J.

Order 17 r 10 CPR.

Submissions by parties.

7) Issue

- a) The plaintiff notified motor cycle a write off
- b) Non availability of imported spare parts
- c) The plaintiff proceeds to repairs motor cycle and does so within 4-5 months. Is paid Ksh.419,564/-(excluding excess)
- d) Is subrogation claim permitted?
- e) Liability

8) Liability 100% against the two defendants jointly and severally

9) Quantum

- 1) Special Damages Ksh.312,294/40

10) Case Law

- i) The Law of Tort

Salmond and Heuston

19th Edition pg 265-268

- ii) Usha v Bachubhai & Others(1965) E.A. 433

iii) Mcgregor on Damages

13th Edition

- iv) The London Corporation

- v) 1935 C.A.70

- vi) Hahn v Singh

11) Statute law

The Traffic Act Cap.403 Law of Kenya

The Stamp Duty Act Cap.480 Laws of Kenya

The Civil Procedure Rules

Order 17 r 10 CPR.

12) Advocates:

T.T. Tiego Advocate for the plaintiff

M. Munyua advocate for the defendant