



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 141 OF 2002

GEORGE KANIARU KANYUTU.....APPELLANT

VERSES

FARNCIS MUHOHO NGUGI.....RESPONDENT

JUDGMENT

The plaintiff (hereinafter called the Appellant) filed a suit against the Defendant (hereinafter referred to as the Respondent) for damages arising out of a motor vehicle accident that allegedly occurred on the 14th July 2000. In the Plaintiff dated 3rd October 2000 and filed on 19th October 2000, the Plaintiff sought from the Defendant special damages of Kshs. 235,952.00 arising from the said road accident.

It was alleged in the Plaintiff that whilst the Appellant's motor vehicle Registration Number. KAM 929N was driven along Thika- Nairobi Road the Respondent's motor vehicle Registration Number KAC 491F rammed into the rear of the Appellant's vehicle thereby causing damage.

The matter was heard and determined by the subordinate court. The suit was dismissed by the learned trial judge. .

The appellant being dissatisfied with the judgement of the subordinate court has appealed to this court. The appeal is based on the following grounds:

1. The learned magistrate erred in law and in fact in holding that the agent/driver of the defendant should have been joined as a defendant to the suit whereas submission were made to the contrary.
2. The learned magistrate erred in law and in fact in holding that the Appellant had not proved his case on a balance of probabilities whereas there was overwhelming evidence presented by the Appellant that was not rebutted by the respondent.
3. The learned magistrate erred in failing even to apportion liability if any between the parties herein despite enough evidence warranting the same.
4. That the learned magistrate erred in law and in failing to award the plaintiff the damages claimed despite the appellant having specifically pleaded and strictly proving them.
5. The learned magistrate erred in dismissing the Plaintiff's suit with costs.

On the first ground of appeal, the counsel for the appellant argued that the magistrate was wrong in dismissing this suit on the basis that the respondent's driver was not joined as a party to this suit.

The counsel for the respondent, on the other hand argued that no liability was proved against the respondent. He submitted that the respondent was the owner of the vehicle and not the driver and that accordingly it was wrong of the Appellant to sue the Respondent. He further claimed that no acts of negligence were proved against the owner.

I have perused the proceedings in the subordinate court and note that this is a case of vicarious liability. In accordance with the law, vicarious liability is liability imposed on an employer to a third party for the tort of his employee committed in the course of employment. From the proceedings in the lower court the respondent has not disputed the fact that the accident occurred. Neither has the respondent denied that his driver was in control of his motor vehicle when the accident took place. Thus the relationship between the respondent and his employee/ driver is undisputed.

I have also looked at the decision of the Court of Appeal in **SAMUEL GIKURU NDIRU –V- COAST NUS COMPANY LIMITED CIVIL APPEAL NO.177 OF 1999**. In the above matter the Court Of Appeal held that the mere fact that the driver of the accident motor vehicle is not joined as a party in the suit against his employer arising from his driving is not fatal.

Accordingly, I am bound by the decision of the Court of Appeal in the abovementioned decision and find that the non-joinder of the driver as a party to this suit should not have been fatal to the suit. Hence, the first ground of the appeal succeeds.

On the second ground the Appellant's counsel submitted that the Respondent did not have any eye witness and that the Appellant's evidence was not rebutted. He submitted that the respondent's vehicle hit the appellant's vehicle from the back and that- that in itself was sufficient evidence to prove negligence on part of the respondent and/or his servant and/or agent.

The respondent's counsel on the other hand submitted that the plaintiff had not proved their case on the balance of probabilities. He argued that the grounds of negligence were not proved. He stated that evidence shows that there was a pile of cars and that the Plaintiff was wrong in that he failed to change lanes in order to avoid the collision. Additionally the respondent's argued that the Police abstract did not show in the face of it which part was to blame. He argued that the police were not called to testify and that according to the counsel that was fatal.

I have perused the proceedings and have considered the submissions of both counsels. There is no dispute that the Respondent's driver managed and/or controlled the motor vehicle in such a manner that it rammed into the rear of the Appellant's vehicle. I think that in itself is sufficient evidence to determine liability. The accident is not disputed by the respondent's. In fact in his testimony he states '... my motor vehicle got damaged in the front bumper'.

It is well established in law that any driver of motor vehicle should ensure that the distance between his/her motor vehicle and other should be such that, it would enable him/her to control/manage the vehicle in a manner that would prevent a collision from occurring.

I find that the respondent's driver and/ servant/ agent failed in keeping a safe distance between his motor vehicle and the appellant's vehicle such that he was unable to avoid the collision.

Accordingly, I am of the opinion that the respondent is 100% liable for the accident.

On the third point, the counsel for the appellant submitted that in view of the above it was curious that the magistrate did not apportion any liability to the respondent at all. I believe that this point has been dealt with by myself herein above.

On the fourth ground of appeal, the appellant's counsel submitted that damages on part of the appellant were pleaded and proved and that the magistrate was wrong in attaching tremendous weight to the assessor's report.

The learned magistrate had found that the assessor was commissioned by the insurers and not the Appellant and had accordingly dismissed the suit.

On this ground, the respondent's counsel submitted that special damages must be specifically pleaded and proved. He suggests that the evidence on record bears a different amount than what was pleaded and proved.

The respondent's counsel argued that there was no evidence to suggest that the respondent was to blame. No liability was found against the defendant and that no loss of user was proved. He accordingly submitted that the appeal should be dismissed.

In reply to the submissions, the counsel for the Appellant pointed out that the receipt for the repairs was exhibited.

I have looked at the proceedings in the lower court. The Appellant has specifically pleaded special damages at paragraph 4 of the plaint, where he has pleaded that the material damage to the car amounted to 158200/-

At the hearing thereof, the Plaintiff in his evidence produced an invoice and receipt for money paid to Nyaka agencies. The total amount that the Appellant claimed that he paid for repairs was Kshs.165, 000/-.

I do agree that there has been some inconsistency in the pleadings. While the Appellant claims that he paid Kshs. 165,000 for repairs; he has only pleaded a sum of Kshs. 158200/- for material damage to motor vehicle. He did not amend his plaint to plead the full amount. Accordingly, I award the sum of Kshs 158,200/= as amount pleaded and material damage to the motor vehicle.

Turning to the issue that the insurance company commissioned the motor vehicle assessor, I have the following to say. It matters not whether the Insurance Company assisted the appellant in getting a motor vehicle assessor. What really matters is whether the appellant proved his case on a balance of probability.

The other issue is whether or not the appellant paid the assessor for his costs or whether the same was paid by the insurance company. I do not find any evidence on record to show that the Appellant paid the assessor a sum of Kshs. 5652/- and therefore I decline to make any award to this effect.

I have also looked at the evidence provided by the Appellant in respect to the loss of user. Loss of user is a special damage claim. It must be specifically pleaded and proved. The book which was provided as an exhibit to show proof of this claim is quite inadequate. It has notes and figures scribbled all over, with no authentication with any other evidence such as income tax returns. This claim is, therefore, rejected.

In the result, and for the foregoing reasons, I allow the appellant's appeal, set aside the trial magistrate's order dismissing the suit with costs and substitute therefore a judgment in favour of the Appellant for a total of Kshs 158,200/- for special damages with costs.

Dated and Delivered at Nairobi This 29th Day of April, 2004

ALNASHIR VISRAM

JUDGE