



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 217 OF 2002

WIGOT CONSTRUCTION CO. LTD.....APPELLANT

VERSUS

ERICK ODUOR OYIO.....RESPONDENT

JUDGMENT

This is an appeal from Judgment of the Chief Magistrate's Court Kisumu CMCC No. 633 of 2001 delivered on 5th September 2002.

On 26th June 2001 ERICK Oduor Oyio the respondent brought an action against Wigot Construction Co. Ltd the appellant at Kisumu Chief Magistrate's Court seeking damages for injuries arising from a road accident which had occurred on 21st June 1999 along Siaya – Luanda road. It was averred that the appellant was the registered proprietor of a motor vehicle reg No. KAJ 997 H in which the respondent was traveling at the time of the said accident. The respondent also claimed that the said accident was solely caused by the negligence and/ or recklessness of the appellant's agent, and / or employee. There were particulars of the alleged negligence, injuries and special damages. The appellant filed a defence in which it averred that the plaint was ambiguous and bad in law and that it was supported by a defective verifying affidavit. The appellant denied that it was the owner of the said vehicle reg No. KAJ 997 H and it further denied that an accident occurred on the date and at the place as alleged and it further denied that the accident occurred as a result of negligence of its driver and that the respondent did not suffer any injury , loss or damage at all.

The trial was conducted before Mr. Kinyanjui SRM. The respondent claimed that on 13/1/2001 while traveling in a vehicle reg No. KAJ 997H along Siaya – Luanda road he had an accident and that he sustained injuries on the left shoulder , lost 3 teeth from the lower jaw, injury to the right side of the face and left leg. PW1 claimed that the driver of the vehicle was driving very fast. Dr. Juma who had examined the respondent produced a report which he had prepared. According to Dr. Juma the respondent had sustained the following injuries:-

- (i) Loss of 3 lower and 3 upper teeth
- (ii) Cut on the left shoulder
- (iii) Cut wound on the left ankle
- (iv) Blunt trauma to the right eye

Amos Otieno Omollo who worked for the appellant as an accountant testified and claimed that on 12/1/2001 he gave away a vehicle to transport the body of a driver who had died. In his judgment

delivered on 5th September 2002 Mr. Kinyanjui SRM found that the appellant was liable to the respondent and awarded the respondent Kshs. 350,000/- general damages plus Kshs. 2,500/- special damages with costs and interest.

The appellant felt aggrieved by the magistrate's findings on liability and the assessment of costs and lodged this appeal. In his submission in support of the appeal Mr. Olago Aluoch contended that the ownership of the vehicle which caused the accident was not proved especially as the appellant had specifically denied that it owned it. He said that no evidence was produced by the respondent in support of his claim and that a police abstract of the accident is not sufficient proof of this ownership of the vehicle. Mr. Olago also contended that the date of the alleged accident is in issue especially as it had been pleaded that the accident took place on 21/6/99 but PW1 on page 5 of the proceedings said that it took place on 13/1/2001. The third ground relied on this appeal is that the pleading in respect to negligence is at variance with injuries stated in court by the respondent and his witness. It was Mr. Olago's contention that damages awarded were manifestly excessive in the circumstances of the case.

On the issue of the date of the accident, Mr. Mwamu for the respondent said that Mr. Olago does not appear to have looked at the amended plaint in which the accident is indicated to have occurred on 13/1/2001. However on the issue of ownership Mr. Mwamu claimed that DW1 had admitted that the motor vehicle belongs to the appellant and that the burden of proof was upon the appellant. On the issue of negligence Mr. Mwamu said that the testimony of the respondent that the vehicle was on a high speed was sufficient proof. It was Mr. Mwamu contention that an award of Kshs. 350,000/- was not excessive in view of the severe injuries suffered by the respondent.

It is correct that the respondent's averment that at the material time the motor vehicle reg No. KAJ 997 H belonged to the appellant was denied by the appellant in the defence. During the trial of the case all the respondent did on this issue was to produce a police abstract of the accident. It has been held that this is not sufficient proof of ownership of the vehicle. It was incumbent upon the respondent to put in as an exhibit a search certificate from the Registrar of the motor vehicles, so as to prove that the vehicle belonged to the appellant. As this was not done the respondent did not prove its case on the balance of probabilities.

On this ground alone I would allow this appeal. I set aside the orders of the trial Court. The appellant to have the costs of this Court and those of the lower Court.

Dated and delivered this 20th May 2004 in the presence of Mr. Onyiso for appellant and Mr. Mwamu for respondent.

B.K. Tanui

JUDGE