



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 1 OF 2000

HISDORY MWAKIO MWASHUKE.....APPELLANT

V E R S U S

FRANCIS MURUKA SANDE.....RESPONDENT

J U D G M E N T O N A P P E A L

This appeal raises 8 grounds of appeal. It arises out of a trial in a running down claim. The claim was for material loss, cost of repairs and loss of user for 17 days @ Kshs.1,800/- per day.

The Appellant (Defendant) denied the claim and alleged contributory negligence on the part of matatu driver. The Plaintiff's evidence was given by his son who held a Power of Attorney. He produced certified copies of traffic prosecution in which the driver of KAD 766C was convicted and fined 3,000/-.

The son said the vehicle was repaired at Likoni Garage and he produced receipts for payments amounting to Kshs.285,000/-. He was supervising the business of the matatu vehicle on behalf of his father and was able to testify as to daily income of Kshs.3,000/= - Kshs.2,500/= on good and bad days. He claimed Kshs.210,600/= for the loss of user for 17 days. He alleged the driver of KAD 766C was negligent and was to blame for the accident. He was inside the vehicle when accident occurred. The son did not produce the Assessor's Inspection Report for repairs assessment. He said their documents were destroyed when their house was burnt during the Likoni clashes.

Evidence of the driver was produced. He said he was driving the vehicle at the material time and was hit as he had stopped for the passengers to alight. The Defendant gave evidence and said he was the driver of the owner of vehicle KAD 766C as an employee. He said he was hit by a vehicle and he became unconscious and was taken to hospital. He admitted having been convicted of causing the accident.

I have examined the record. There are matters which are not disputed. The witness for the Plaintiff (PW.1) was present when the accident occurred and he testified as to what had happened. That the accident occurred is admitted on both sides. That the driver – the Defendant, was charged in Kwale Traffic Court and was convicted on his own admission is not disputed. There is evidence of the Defendant owner's vehicle. It was obtained by counsel for Defendant from Kenya Revenue authority showing as belonging to one Ibrahim Mohamed who was the employer of the Defendant.

The issue which is in dispute is that of blameworthiness. Defendant pleaded contributory negligence but did not show why he thought there was contributory negligence. The Plaintiff showed that their vehicle was hit by Defendant who was driving fast and hit while vehicle was dropping passengers.

The other issue in dispute is that of proof of repair charges and loss of user. It is a matter of notoriety that the businessmen of matatu trade do not keep records once the owner or driver obtains a P.S.V. that is all that is required. No receipts are issued in this business. Every deal is in cash. Seeing that the damage was proved the court, rightly proceeded to assess the situation and taking everything into consideration assessed special damage – repair charges, labour and loss of user when the vehicle was being repaired coming to a figure which she thought was fair and just in the circumstances.

It must not be forgotten that there is no injury without remedy. I am of the view that the Plaintiff's case was proven on a balance of probability and it would have been unjust to dismiss the case without compensation for the injury suffered. I find there was no basis for the Trial magistrate to find contributory negligence on the part of the Plaintiff's driver. The Prosecution Witness, one, was present when the accident happened and was with direct evidence of the Plaintiff's claim.

The evidence showed that the person who was negligent was the Defendant who admitted he was employed by the owner of the vehicle as per certificate of ownership issued by Kenya Revenue Authority.

Whereas the rule is that special damages must be specifically proved the circumstances of this case warranted the Trial Magistrate to take the steps she took to redress the Plaintiff. The claim was for material damage and not special damages.

All in all I find no fault with the reasoning of Trial Magistrate in reaching the conclusion she came to. I therefore find no merit in the appeal and the same is dismissed with costs.

Dated at Mombasa this 20th day of July, 2004.

JOYCE KHAMINWA

J U D G E

Judgment read on 20/7/05

In presence of :-

Ms Anita Shah

And Mr. Kilonzo – H/B for Gichana

JOYCE KHAMINWA, J.

Ms Anita Shah

I ask for leave to appeal.

Court:-

Granted leave and copy of proceedings and Judgment to be supplied to Miss Anita Shah.

Ms Shah

In respect of Judgment I ask for stay for 14 days pending a

Court:

Order granted for 14 days.

JOYCE KHAMINWA, J.