REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

H.C.CIVIL APPEAL NO. 35 OF 2003

1. MUGOYA CONSTRUCTION & ENGINEERING

2. JOSEPH SHIKOMELA …………………………………………… APPELLANTS

VERSUS

HARRISON W. MUINDI …………………………………………… RESPONDENT

Coram: Before Hon. Justice Mwera
Mrs. Tutui for the Appellants
Shikely for Respondent
Court clerk – Jason

J U D G E M E N T

This appeal was filed following the decision of the learned trial Magistrate dated 24th February 2003. In the lower court the present respondent sued the two appellants for damages following a road accident which took place on 18th March 1993 along Nairobi – Mombasa road at Maungu. It involved two motor vehicles ie the appellants' lorry / trailer No. KAA 243Q / ZB 1096 and the respondent's pick up No. KVZ 123. It was pleaded that the 2nd appellant so negligently drove the said lorry that it hit and damaged the pick up. The Respondent therefore sought Kshs. 110,800/- representing the towing and repair charges of his pick-up plus Kshs. 100/- for the police abstract.

The defence admitted the collision between the 2 motor vehicles but denied that it was due to negligence or that the respondent's pickup was even damaged. It was averred that the respondent wholly or substantially contributed to the said accident.

Before taking evidence liability was agreed and apportioned thus: 20% to the respondent and 80% to the appellants. The respondent was heard and cross – examined. The appellants, who admitted some exhibits to be produced, called no evidence and submissions followed. While Mr. Shikely gave a brief oral submission, the appellants filed a written script. This was followed by the learned trial Magistrate's short judgement that found for the respondent in the sum claimed plus costs and interest

. The short appeal had 3 grounds. Mrs. Tutui argued two of them together mainly that the learned trial Magistrate was in error to find that the respondent had proved his case on a balance of probabilities. That he had not proved damage suffered by tendering an assessment report and that no receipts were produced to prove strictly the expenses allegedly incurred.

By this Mrs. Tutui was impeaching the reliance placed on an invoice for the sum claimed which was not backed by a receipt. It was then questioned as to who paid the towing charges as per that invoice.

The other ground was that the learned trial Magistrate had not complied with O20 r. 4 Civil Procedure Rules which sets out how a judgement should be approached.

Mr. Shikely opposed the appeal mainly on the basis that liability was agreed, exhibits were produced by consent and the appellant's did not call evidence to rebut what the respondent said. And that they had not challenged the documentary evidence by insisting on the makers to present it.

The ground of O. 20 r. 4 Civil Procedure Rules was not touched on by Mr. Shikely. He cited the case

of GEOFREY OMONDI & ANOTHER VS EMERGENCY ASSISTANCE RADIO SERVICE, NRI CIVIL APPEAL 340/97 (H.C), whose course and circumstances in the lower court were more or less the same as we have them here: the defence not calling evidence in a material damage claim, and the use of invoices (not receipts) as basis of proving the claimed damages and awarding the same.

Dealing with grounds 1 and 2 together, this court is satisfied that the accident took place (see police abstract Exhibit P3) and the respondent's pickup was damaged (Exhibit P1 the inspection report). Both these were produced by consent. If the appellants wished to challenge the extent of the damage, they could have insisted on an assessment report to be produced by the respondent or they should have produced their own to show that the damage was not that extensive or otherwise. Otherwise since they admitted the occurrence of the accident and an inspection report that the respondents' pickup was damaged, it would not be along the tenets of administration of justice in civil litigation, to accept liability to an extent and challenge the extent of the damage on appeal. All that was for the trial court and the parties before it had the opportunity to challenge what each desired to do, down there. That that was not done, and that whatever evidence on damage put forth by the respondent was admitted by consent, that rests the matter there.

The same goes for the proof of the payment (for towing and repairs). The parties accepted that the invoice (Exhibit P2) was good enough to support the testimony by the respondent that on the same being tendered, he paid cash and no receipt was issued. Again the appellants did not challenge or recant that before the learned trial Magistrate. If they had done so either in cross – examination or by their own evidence or similarly insisted on getting the maker of the invoice to come to court and testify as to whether he was paid or not, then this court should at this point determine the non-production of a receipt. That bit of evidence was open to be challenged at the time it was given and not to accept it by consent and later impeach it. It is of course noted that the lower court record appears abit confusing especially when the respondent was under cross examination as to who paid the towing (not repair) expenses. Was it the repairing garage owner Mohamed Latiq (or Ratib as per the record) or the respondent? However, that was done, the appellants accepted the document evidencing the payments and that need not detain us here.

On these two grounds this court sees no merit to overturn the lower court judgment. It bears in mind that a party who claims special damages should not only plead it specifically but prove it in a similar way. But that does not mean that proof be beyond a reasonable doubt. It is enough that proof be on a balance of probabilities and in this case that was done (see the George Omondi case above). The last ground was that the learned trial Magistrate drafted his judgment in disregard to O20 r. 4 Civil Procedure Rules and that he made no reference to the submissions placed before him. O. 20 r. 4 Civil Procedure reads:- "4. Judgements in defended s uits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision." From the above provision of the law, the learned trial Magistrate did open his judgement with the brief case of the respondent and onto to his evidence. It is correct to say that there was no evidence that both sides "agreed [on] charges 110,700/ -." This was only in evidence and an invoice was tendered by the respondent. Note is taken that the appellant's side did not object to that evidence or method of tender. It is also noted that the defence was not concisely referred to in the judgment but liability that had been agreed, was. And also that the appellants did not call evidence. The learned trial Magistrate also stated, without elaboration that counsel submitted. And then he concluded that the respondent was entitled to his claim. The learned trial Magistrate could have drafted his judgment in a better way, yes. But having gone over the whole matter in this appeal, this court is not left with the impression that the economical way in which the judgment was drafted, occasioned injustice in the circumstances of the case, to the appellants.

In sum this appeal is dismissed with costs. Judgment of the lower court remains and is subject to the apportionment of liability as agreed.

Judgement delivered on 9th December, 2004.

J.W. MWERA

JUDGE