



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 370 OF 1999
RITHARIA NGATIA & ANOTHER.....RESPONDENTS
VERSUS
CMC AVIATION LTD & ANOTHER.....APPELLANTS
J U D G M E N T

This appeal arises from the judgment and order of the Senior Principal Magistrate (J.R Karanja) in Civil Suit No.9495 of 1997 delivered on 13th August 1999.

The suit filed in the court of the Senior Principal Magistrate at Milimani on 24.12.97 related to a claim by the respondent against the appellants for repairs to and loss of use of the former's motor vehicle registration number KAA 679 C which was hit and damaged by the latter's motor vehicle registration number KYJ 504 along Ngutu Road BuruBuru phase 4.

The claim was in the nature of specials and it included Kshs.100/= for police abstract report, Kshs.2620/= for assessment report; Kshs.62, 965/= for post accident repairs and Kshs.139,500/= loss of use of the respondent's said motor vehicle during the time it was at the garage for repairs.

The case was heard on 24th April 1999, 27th May 1999 and 30th June 1999. Submissions were filed on 5th August 1999 and judgment delivered on 13th August 1999 wherein the learned magistrate awarded the respondent the full amount claimed in the plaint – to wit Kshs.205,185/= plus costs of the suit.

The appellants were dissatisfied with this judgment as a result of which they lodged an appeal to this court on 3rd September 1999, amended on 14th June 2002 which listed 5 grounds of appeal. These grounds disputed proof of the respondents claim made in the plaint and in particular the claim for loss of use of the motor vehicle in the sum of Kshs.139,500/=.

In court on 25th May 2003, counsel for both parties submitted on the appeal.

Mrs. Kinyanjui for the appellants submitted only on the claim for loss of use of Kshs.139,500/= and stated that the respondent did not prove that he hired a motor vehicle from Arts and Safaris for which he paid Kshs.139,500/= during the period his motor vehicle registration number KAA 679 C was being repaired.

She submitted that no document was produced by the respondent to prove that motor vehicle registration number KAG 160 U belonged to Arts and Safaris and prayed that the appeal be allowed with costs.

Counsel for the respondent opposed this appeal and submitted that the Magistrate did not error in awarding damages for loss of use stating that as an insurance agent the respondent had to hire alternative means of transport between June and July 1986 to facilitate him carry out his duties.

That the evidence of PW3 confirmed this by production of hire purchase receipts for motor vehicle registration number KAG 160 U. According to counsel, loss of use being a special damage, it was specifically pleaded in the plaint and strictly proved. Counsel prayed that this appeal be dismissed with costs. The lower court record shows the appellants themselves did not testify in this case because when their counsel applied for adjournment on 14.9.99, this application was refused, but by then the said appellants had called a witness from the Registrar of motor vehicle registration unit, one Simon Mulwa, who produced a certificate to show that motor vehicle registration number KAG 160 U was registered in the name of one Christopher Wanganga. This is the same motor vehicle Rose Njeri Njihia (PW3) testified was hired out to the respondent and which, during cross examination, the witness affirmed belonged to the company. She answered to this question twice.

This evidence was not true because the evidence of Mulwa showed the motor vehicle belonged to Christopher Wanganga. There was no evidence of the existence of a contract between Arts and Safaris to hire out this motor vehicle from Wanganga to the Safaris for a sub hire to the respondent.

Looked at this way, the doubt which the appellant's counsel had expressed earlier in the case over the production of receipts for hire by the respondent came true because it emerged that PW3 gave false testimony about her company's ownership of motor vehicle registration number KAG 160 U.

That the appellant's failed to testify in the case did not affect the false testimony by the Arts and Safaris employee.

After all evidence was laid by DW1 to deny liability in respect to the loss of use by the respondent.

If the learned Principal Magistrate had considered the effect of this evidence and that of PW3, he would not have awarded the respondent damages for loss of use.

To this extend, I allow this appeal and set aside the magistrate's order as regards the award of damages for loss of use in the sum of Kshs.139,500/= and award the appellant ½ costs of this appeal.

Delivered this 8th day of April, 2003.

D.K.S AGANYANYA

PRINCIPAL JUDGE