



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 397 OF 1999

DOMINIC KAGIMA & ANOTHER APPELLANT

VERSUS

MAINA KAMAU RESPONDENT

J U D G E M E N T

This appeal arises from the judgement and order of the Senior Resident Magistrate (S.B.A. Mukabwa) in Githunguri, Senior Resident Magistrates court Civil Case Number 137 and 138 of 1998 delivered on 30th June, 1999.

In those two cases which were consolidated for the purpose of hearing, the appellants who were the plaintiffs therein were travelling in lorry registration number KAJ 226 E along Nairobi – Kiambu Road on 13th July, 1997 when the lorry met another motor vehicle registration number KAC 136 H at a bend where the accident subject to this appeal occurred.

The appellants were injured in the accident and blamed it on the negligence of the driver and/or owner of the other vehicle and this is why they filed the two suits against her claiming special and general damages for the injuries and loss sustained in the accident costs of the suit and interest.

The case was fixed for hearing on 26th May, 1999 and though the appellants appeared, the defendant did not. Both appellants testified with the second appellant who was the driver of the lorry, stating that on the date in question he was driving the lorry in question from Nairobi to Kiambu when he met a car at a corner; that the car moved into his lane but that when he attempted to swerve to his near side to avoid the collision he lost control of the lorry because some wheels were off the tarmac and the lorry was heavy and there were rains.

That then he heard a bang on rear wheels and his lorry hit some trees. That has and his cabin crew were injured and helped to Kiambu hospital where he was treated and discharged.

This appellant detailed the injuries he sustained in the accident and how the matter was reported to Muthaiga police station where he was issued with a P3 form and abstract report form.

The appellant also testified as to how he was issued with a medical report by a Dr. Muiru and how he was driving at only 40 k.p.h

The other appellant Dominic Kagima also gave similar evidence; that he was travelling home as a passenger in the lorry driven by Francis Githua when the lorry approached a sharp corner where it met a small vehicle.

That the small vehicle moved into the lane of the lorry and, in an attempt by the lorry driver to swerve to the extreme left in order to avoid collision, he lost control, ran into the bush and hit a tree.

This witness did not experience any impact but later learned that the vehicles had collided.

He detailed the injuries he sustained in the accident and how he was taken to Kiambu District Hospital where he was hospitalized for one month.

The rest of his evidence was about the report of the incident at Muthaiga police station where a P3 form and; abstract report form were issued, how he was examined by Dr. Okabi who issued him with a medical report and so on.

The learned Magistrate heard this case on 26th May 1999 and dismissed it with no order for costs on 30th June 1999 on the grounds that the appellants did not prove their case against the defendant on a balance of probabilities, hence this appeal.

The appeal was heard before this court on 30th April, 2002 with counsel for the appellants submitting that the evidence of the appellants proved their case against the defendant on a balance of probabilities and that the Magistrate was wrong in disregarding this evidence and dismissing the suit.

On the respondents' side, counsel supported the Magistrate's decision and submitted that the evidence of the appellants was insufficient to sustain the suit.

The appellants blamed the driver and/or owner of the small car for the accident because it moved into the path of the lorry at a sharp corner of the road thus forcing the driver of the lorry to move to his extreme left thus, losing control into the bush and hitting a tree or trees.

Surely without a police sketch map of the scene available, how was the learned Magistrate to verify this evidence before accepting it as true yet this was the evidence to pin liability for this accident on the driver and/or owner of the small vehicle!

Since it was alleged there were rains on the day of the accident, surely it would have been easy for police to mark out skid marks to confirm if the small vehicle came into the way of the lorry to force the latter off the road!

Without this evidence, the learned Magistrate was perfectly right in finding that liability had not been established against the defendant, even though she did not appear during the hearing of the case.

The Magistrate was also right in asking how the defendant was associated with the small car. That the abstract report gave her description as the driver of the motor vehicle was not enough to confirm her as the owner thereof without a search certificate at the Registrar of Motor Vehicles to confirm this.

That the defendant did not turn up for the hearing of the case did not lower the standards of proof and the onus was still on the plaintiffs to lay before the court all the facts placing liability upon the defendant in the case subject to this appeal and to show that she was negligent in the manner she drove the small car, if at all.

The learned Senior Resident Magistrate dealt with the issues in the case before him sufficiently and no reason has been advanced in this appeal why this court should fault his decision.

I dismiss this appeal with no order for costs.

Delivered this 17th day of May, 2002.

D.K.S AGANYANYA

JUDGE