1) Material loss

2) Collision between two vehicles

3) Damage to plaintiffs vehicle

4) Insurance company paid

5) Plaintiff wants more compensation as amount paid by insurance inadequate

6) Driver of the vehicle plaintiffs wife – not called to give evidence

7) Liability – Nil

8) Material loss Nil

Held: Suit dismissed

9) Case law – Nil

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.1545 OF 1996

ANTHONY A. NGOTHO …….…….. PLAINTIFF

VERSUS

JAMES MATENO MUNONO ……....……... 1ST DEFENDANT

HOMEGROWN KENYA LIMITED ….....…… 2ND DEFENDANT

JUDGMENT

Anthony A. Ngotho filed this suit on the 25th day of June, 1996 against the 1st defendant James Matero Munamo as the driver to the motor vehicle Reg. KYS 657 Nissan lorry and against the 2nd defendant as Home Grown Kenya Ltd as owner of the said vehicle. The 1st defendant is said to have been so negligent as to cause a collision to the plaintiff's motor vehicle KTN 127.

The plaintiff came to court and stated that he was the owner of the Range Rover Reg. KTN 127. The said vehicle on the material day of 3rd July 1993 was travelling along the Nairobi – Kangundo road. It was being driven by his wife at the time when an accident occurred. He was not present when the said accident occurred and as such was not able to inform this court what actually happened to prove whether a collision did occur.

The plaintiff just required to call his wife, who was then the driver of his vehicle, to narrate what

occurred on the material day

I noted that he produced the proceeding of the lower court. According to the plaintiff, although he did not attend the court session where the 1st defendant was changed with the offence of causing the accident, he produced the proceedings. I understand what the plaintiff was doing. He was indeed complying with section 34 of the Evidence Act whereby the proceedings of another court can be used as evidence in a subsequent court without having to necessarily recall all the witnesses to attend court. Where the defendant has pleaded guilty then that guilt is conclusive evidence that he committed the offence and thereafter that proof (where no appeal has been lodged) can be then used in a subsequent case. See Section 47A of the Evidence Act Cap.80.

Unfortunately for the plaintiff the proceeding before the Resident Magistrate Court did not infact comply with the procedural rules of the court.

No trial was held.

It was a plea of guilty but no summary giving the facts were given.

The whole proceeding is produced herein under:-

1) “In the Senior Resident Magistrates Court at Kagundo Traffic Case No.224/93

Prosecutor …… Republic

Vs

James Matemo Munono …….. accused

Date of issue: 3.9.93

Nature of charges: Careless driving C/Sec.49(1)

Traffic Act.

Date of hearing: 3.12.93

Judgment accused fined: Ksh.3,000/-

In default 3 months imprisonment

Receipt No.04112 of 6.12.93.

S. Charo

Resident Magistrate

Kangundo”

The above proceedings are in essence an illegality. There has been no plea taken nor, as stated earlier, the summary of the offence that would have disclosed the driver and registration number and the offence committed.

The magistrate merely fined the offender who indeed paid the fine.

The advocate for the plaintiff should have realized that these proceeding would not have helped him with his case under Section 34 and 47A of the Evidence Act Cap.80.

He should have then had the plaintiffs wife (who was then the driver) attend court to give evidence. This of course would not have been necessary if the trial magistrate had recorded the correct proceedings as required by law.

The issue of liability therefore has not been proved. I would dismiss this suit with costs to the defendants.

I am required by law to state, in the event that plaintiff was successful what my finding would have been for this case.

The plaintiff admitted that he had insured his rang Rover for Ksh.185,000/- he paid Ksh.20,000/- as access fee. The insurance company then released to him Ksh.165,000/- at this point the plaintiff realized that he had under insured his motor vehicle. If in deed it was the correct amount insured, the insurance company would have repaired the vehicle or would have sold the vehicle if it was found to be a "write out" and paid the plaintiff the amount due. The insurance company would have then filed a suit to claim a refund of money paid under the subrogation rights. Instead hey paid the plaintiff Ksh.185,000/- less Ksh.20,000/- then they allowed him to retain the vehicle. I am not certain of these facts but it is an assumption.

On his own decision the plaintiff took his vehicle to a garage of his choice and gave instructions that the vehicle (which he was very much attached to) be repaired and that "the whole vehicle be rebuild."

This indeed was outside the scope of what the plaintiff could obtain from the defendants as the rebuilding involved repairs that may not necessarily have anything to do with the accident between the plaintiff's driver and the defendant's driver.

It seems that the garage owner was not available to come and give evidence. Nonetheless this was not crucial as he was not asked by the Insurance Company to do the repairers.

Further the "under insurance of the vehicle" was the plaintiffs fault. He cannot re claim this amount and as rightly seen from the plaint he deducted the same from the amount due to the repair works done of rebuilding.

The plaintiff is permitted to claim for repairs that was a shortfall of the ksh.165,000/-. In order to do this an assessor's report of the statement of the costs required to be included. This report should disclose whether the vehicle was treated as a write off or whether it was required to be repaired. If repairs were required the plaintiff was entitled to the difference of REPAIR not to the difference of rebuilding the whole vehicle thus subjecting the defendants to pay expenses that did not cover their fault

I would have therefore found that the defendants would have met the differences between the amount paid and the repaired for the damage caused NOT for the rebuilding of the vehicle.

I accordingly dismiss this suit.

In summary:

1) Material loss

2) Collision between two vehicles

3) Liability - Nil not proved

4) Held: Possible award would have been the difference between the payment by the Insurance company and actual repair costs of the vehicle

5) Suit dismissed.

Dated this 17th day of July 2002 at Nairobi.

M.A. ANG'AWA

JUDGE