



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 115 OF 1997

MARRY WANJIKU GAKURUAPPELLANT

VERSUS

JOHN KABITI MWANGIRESPONDENT

JUDGMENT

This appeal is from the judgment and order of the Senior Principal Magistrate (H.M. Okwengu) in Senior Principal Magistrate's Civil Case No. 8559 of 1995 delivered on 7th April 1997.

The appellant had claimed from the respondent a sum of Kshs.242,900/= on account of failure to deliver some 173 bags of cereals transported by the said respondent and/or his servants and/or agents to the appellant from Meru to Nairobi on 23rd October 1992.

This claim was made in a suit filed in court on 11th August 1995 where in it was claimed the respondent was negligent in leaving or allowing these goods to be stolen in Nairobi before they had been delivered to the appellant.

A defence filed by the respondent and dated 18th September, 1986 denied negligence on the respondent's part and said the goods were transported at the owner's risk as the appellant was incharge of the lorry after hiring it.

The case was placed before the learned Principal Magistrate on 3rd September, 1996, 27th September, 1996 and 14th October, 1996 when parties testified in the case and submissions were filed. Then judgement was delivered on 7th April, 1997 wherein the appellant was awarded compensation in the sum of Kshs.89,000/=.

She was not satisfied with this award and she filed this appeal in the High Court as stated herein before.

The memorandum of appeal listed six (6) grounds of appeal, all of which attack the quantum of the award made arguing that there was sufficient evidence to support the compensation sought in the plaint.

In this court on 26th June, 2002 both counsel for the parties appeared to present and oppose the appeal.

Counsel for the appellant urged that the appellant had adduced sufficient evidence to support her claim for the compensation sought in the plaint and the lower court was raising the standard of proof from a balance of probabilities when it ruled that the evidence adduced was not sufficient.

Counsel for the respondent submitted that the judgment of the learned magistrate was based on law and that it was reasonable. Counsel did not find any mistake with it and asked that the appeal be dismissed.

According to the appellant's evidence she had bought 100 bags of cereals from the respondent and hired out his lorry to transport the cereals to Nairobi.

That apart from the 100 bags, the appellant bought another 73 bags of cereals from other farmers, or traders.

That in total she had 130 bags of beans, 25 bags of groundnuts, 9 bags of peas and 9 bags of green grams.

That all these bags were loaded on the respondent's lorry to be transported from Meru to Nairobi with the appellant, the lorry driver (respondents son) and the ton-boy therein.

According to the appellant, the lorry left Meru at 6 p.m. and arrived in Nairobi at 2 a.m. on 22nd October 1992. That on arrival in Nairobi, the appellant was left at Pangani where she slept while the driver and the ton boy went to park the lorry and the contents thereon in the town centre.

The three were to meet at Nyamakima next morning but when the appellant went there she did not find the lorry, the driver and the ton boy.

She learned later that the lorry and its contents had been stolen and she reported the matter to Kamukunji Police Station.

The lorry with 54 cereals was recovered a day later at a home in Kikuyu and the owner thereof and another arrested.

They were charged in court and tried and that the case took about 1 ½ to complete but that by the time the case ended the 54 bags of cereals had gone bad and were given to the respondent who took them back to Meru.

The appellant then demanded her cereals from the respondent who promised to pay but he never did so and this is why the suit subject to this appeal was filed.

The respondent also testified in the case and stated how the appellant had bought 100 bags of cereals from him and also hired his lorry to transport them from Meru to Nairobi.

He denied owing the appellant any money and said since she traveled to Nairobi in the same lorry, she was in charge of her goods and was not entitled to any compensation.

The defence called three (3) witnesses who included the driver and ton boy. The ton boy testified as to how he was left by the driver at the tea room to sleep in the lorry and how robbers stole the said lorry with him therein and took it to some home in Kikuyu.

That he was later taken to some bush at Ngong where he was tied until next morning when he untied himself and reported the matter to Ngong Police Station.

The learned Magistrate's judgment held the view that the appellant's cereals were stolen due to the negligence of the respondent because no watchmen was assigned to guard the motor vehicle and that the ton-boy left in the vehicle was not guarding it but sleeping therein and this is why he was taken by surprise when the robbers struck.

That the respondent's servants and/or agents did not exercise the degree of care required in the circumstances.

On quantum, the magistrate did not award the appellant the sum of Kshs.242,900/= because she had merely given the values of the cereals per bag without calling evidence from the farmers or businessmen from whom she had bought the cereals to support the quantification, and also because there was an agreement on both sides as to the purchase of 100 bags of cereals from the respondent at Kshs.120,000/= which would not have amounted to Kshs.242,000/= even for 173 or 183 bags.

I have recorded submissions and perused the proceedings and judgment.

Subject to what I shall say hereinafter, a contract of hire as was done herein where one party hires out another's motor vehicle for a specific time and a certain amount, I would have thought the www.kenyalawreports.or.ke 7 property in that motor vehicle is temporarily transferred to him or her and that she/he is in control of it until the period of hire is over!

If within that period there are any mishaps in respect to the property the hirer would be fully responsible for the consequences.

Like in the case subject to this appeal, the appellant had hired the respondent's lorry from 22nd October 1992 for Kshs.9000/= and that she traveled in the same vehicle to Nairobi where the cereals were stolen.

In a properly documented and registered contract of hire then the appellant would have been responsible for her own fate because it would be expected she could have insured the safety of the goods by directing a safe place to park the lorry like a police station and not leave it to the driver and the ton boy to decide to park it at such dangerous place like the Tea Room, Nairobi.

However, perhaps since, in the case subject to this appeal the appellant used the respondents' son and ton boy to drive the lorry and look after the safety of the cereals, this arrangement did not fit in with the contract of hire in the real sense of the word as the lorry remained in the control of the respondent. This is why appellant only paid fuel money, and not all of it though, and that infact the driver and ton boy were still answerable to him. This is why he was telephoned about the loss of the lorry.

When all this evidence and the circumstances are considered then the learned magistrate was right in laying blame on the respondent for the loss of the appellant's cereals.

As to damages, the appellant claimed a quantified amount and it was in the nature of special damages.

The law on this nature of damages is that they should be specifically pleaded and strictly proved – *see Ouma Vs Nairobi City Council [1976] KLR 297.*

Counsel for the appellant submitted before me that by the appellant giving the number of bags of cereals lost and the price per bag, then she proved her claim on a balance of probabilities.

This is not in compliance with the authority quoted.

Where did the appellant get the price figures she placed on the beans, groundnuts, green grams and peas? And if her prices were correct how could she explain the price of Kshs.120,000/= for 100 bags of cereals from the respondent?

Apart from giving price figures, the appellant was obliged to bring or adduce evidence to support them, including production of receipts or invoices. The appellant did none of these and this is why the magistrate stated in her judgment that the appellant merely gave values of the cereals per bag and that there was no evidence in support of this quantification.

She was justified in making these remarks and I find no justification in interfering therewith or giving a contrary view.

And in awarding the appellant the sum of Kshs.89,000/= the learned magistrate was supported by the evidence of the appellant and the respondent that the former purchased from the latter 100 bags of cereals for Kshs.120,000/= and paid Kshs.80,000/= on the spot leaving a balance of Kshs.40,000/= and Kshs.9,000/= paid to the appellant in respect of transport charges.

The learned magistrate saw and heard witnesses testify before her and was in a better position to assess their credibility. She believed the evidence of the respondent and rejected that of the appellant as to the number of bags of cereals bought and their prices which she was entitled to do.

I have no basis of differing from her decision.

I dismiss this appeal with costs.

Delivered this 5th day of July, 2002.

D.K.S. AGANYANYA

JUDGE