



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 16 OF 2000

NYAMU KIARA KIUNGA APPELLANT

VERSUS

STEPHEN NDUBI RESPONDENT

J U D G E M E N T

On 1st June, 1994 one Nyamu Ikiara Kiunga the appellant herein, was walking along Mfangano street within the City Centre when a motor vehicle came from in front of him to park within that area and knocked him down. He gave the registration number of the motor vehicle which hit him as No. KAA 397 B.

He said after the vehicle hit him, some people came therefrom and abused him. I guess it was the driver and the conductor.

That they tried to negotiate a settlement with him and then they left, but that by then he had taken the registration number of the accident motor vehicle as indicated above.

The appellant boarded a Kenya Bus Service Vehicle and went to Kenyatta National Hospital after attending Rhodes Avenue Clinic, where he was treated before reporting the accident to the Traffic Headquarters Nairobi but that he was, referred to Central Police Station when it was discovered this was a hit and run case.

According to the appellant, though the accident motor vehicle was later impounded, by the police it was later released and he decided to instruct his advocate to file the suit subject to this appeal at the court of the Chief Magistrate, Milimani Commercial courts on 28th September, 1994. The respondent, his servants and/or agents was blamed in negligence for this accident with particulars of negligence being stated in paragraph 4 of the plaint.

A defence filed herein by the respondent on 9th November, 1994 denied that his motor vehicle registration number KAA 897 S was even involved in any accident on 1st June, 1994 and that the defendant-respondent was a total stranger to the allegations of negligence contained in the plaint.

The case was first placed before the Senior Resident Magistrate (R.E. Ougo Mrs.) on 17th October, 1996 when it was heard ex parte and a judgement delivered thereon on 27th January, 1997.

The awards made to the appellant then was Kshs.90,000/= general damages and Kshs.2,100/= being special damages plus costs of the suit and interest.

There was then an application for setting aside this ex parte judgement and also for stay of execution

which was granted and the case heard inter partes on 25th August, 1998; and 5.11.98. Judgement was delivered on 31st March, 1999 when the suit was dismissed with costs.

The appellant was dissatisfied with this decision and he filed this appeal in the High Court through a Memorandum of appeal which listed 6 grounds of appeal. These grounds dwelt mainly on the Magistrate's misapplication of the burden or standard of proof in civil cases or shifting of such burden from the respondent to the appellant.

The appeal was placed before this court on 12th June, 2002 for hearing when counsel for both parties appeared to either present or oppose the same.

According to counsel for the appellant, the evidence he adduced in the lower court and the documents he produced were sufficient to prove his claim on a balance of probabilities.

That the learned Magistrate was wrong in using the "hit and run" phrase to create doubt on the identity of the motor vehicle and that fact of police impounding the suit motor vehicle was sufficient evidence to corroborate the plaintiff's evidence about its identity.

And that after the appellant had explained what happened, the burden shifted to the respondent to show the accident did not occur.

He prayed for the appellant to be allowed with costs.

Counsel for the respondent opposed the appeal and reiterated that the subject motor vehicle was not involved in the accident subject to this appeal.

That the respondent motor vehicle is usually parked at a different place for route 12 and not where the appellant was hit.

That police did not investigate to find out whether the respondents motor vehicle was involved in an accident on 1.6.94 and that they never visited the scene of the accident.

According to counsel the problem in this case was the identity of the motor vehicle which caused the accident which the appellant did not satisfy.

These are the submissions made herein for consideration and decision.

The difficulty the learned Senior Resident Magistrate found himself in was the appellants identification of the motor vehicle which hit him on 1st June, 1994; if at all.

The appellant stated to the lower court that he had taken down the registration number of the motor vehicle which had hit him on a piece of paper which he handed to a police officer he reported the accident to.

This must be the number included in the abstract police report produced in court as Exh.5. But while the number of the motor vehicle indicated is No. KAA 897 the letter S after that number was superimposed on another letter or number not identified.

That was the problem the Magistrate had. Any court would have had such problem.

The piece of paper the appellant made the report to or to whom he handed the piece of paper on which he recorded the number of the motor vehicle was not called to produce the piece of paper or to explain why or what happened to have letter "S" written on another letter or what that other letter was.

In such a situation any reasonable court would question whether it was motor vehicle registration number KAA 897 S or 897 with the other letter superimposed with "S" which caused the accident. And

when such question is asked it is not that a higher standard of proof being imposed upon the plaintiff then that required in civil cases.

The onus was on the plaintiff – appellant herein to adduced all available evidence to establish that it was the respondents’ motor vehicle registration number KAA 897 S which hit him and no other. This he did not do and the production of the police abstract report, without examining its authenticity did not help his case.

I am sorry but I feel the learned Senior Resident Magistrate had a genuine problem and the doubt created in her mind the unclear letter accompanying the registration number of the alleged accident motor vehicle was so substantial that she could not do otherwise than to dismiss the appellants’ suit.

I cannot dismiss her decision and would dismiss this appeal but direct that each party do bear his own costs of this appeal and the case below.

Delivered this 8th day of July, 2002.

D.K.S AGANYANYA

JUDGE