



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 212 OF 1990

SAMUEL NGUTHO NGARUIYA P LAINTIFF

VERSUS

CRESCENT CONSTRUCTION CO. LTD. DEFENDANT

JUDGEMENT

It is not disputed in this case that the defendants were constructing a road along the Gatanga-Ndakaini road. It is further not disputed that though the construction was going on and the road closed to the public who lived along the road would infact still use the said road.

It is not disputed that the plaintiff Samuel N. Ngaruiya was a Resident who used one of the said roads.

It is further not disputed that on the night of 3.3.87 at 7.45 p.m., the plaintiff was travelling along the said road when without warning and or any light to indicate there was a trench that the said vehicle fell into the trench.

The members of the public helped him pull the vehicle out. He did not wish to leave the vehicle in the trench as he feared of some people coming to vandalise the vehicle was high.

He then towed the vehicle home. He made contracts with defendants M/s Crescent Construction Company about the incident. They retaliated by blocking his access road. As such he was unable to have his vehicle repaired. After writing a letter to the defendants through his then advocate, the defendants made the access road available.

He was then reassured that the matters would be looked into. For several months he wrote letters to the Resident Engineer of the Gatanga Ndakaini Project (see his letter of 8.1.88). No action was taken save that he was referred to the Insurance Company and the Engineer or defendant Company.

On 17.1.90 the plaintiff filed suit. This case has been pending in these court halls for the last decade.

In the meantime the defendants filed the defence denying any knowledge of the incident.

An amended Plaintiff was further asked as an application and dated the 13.8.97 after leave to amend the same was granted by consent by Hon. Justice Aluoch on 13.10.98.

I do not see anywhere that an amended plaintiff had thereafter been filed. It means I require to rely on the first Plaintiff. This Plaintiff claimed repair costs of vehicle at Ksh.18,350/-. Towing charges of Ksh.2,200/- Loss of user Ksh.191,100/-. He broke his spectacles at Ksh750/-.

The plaintiff on changing the advocates finally appeared on his own.

The evidence he gave to court was as narrated above. That he was travelling along the said road when it fell into the trench. He held the defendants accountable for the said accident. This was due to their negligence of not lighting up the way on the said road or give adequate warning. It was dark when the accident occurred.

The advocate for the defendant called no evidence. He prayed that the case be dismissed for lack of proof.

In the case of:-

J.F.A Ogol vs Wilson Mumbu Murithi

unreported CA 125/84 at Kisumu

Hancox, Nyarangi JJA & Gicheru Ag. JA.

The Court of Appeal held that where in a superior court the plaintiff produces his evidence and the defendant does not produce his evidence he cannot rely on "a no case to answer". The defendant must call his evidence namely:

"Once it was proved that the appellant was hit while on the pedestrian crossing, an accident blameable on the respondent was disclosed. The burden of proof was that on the respondent to explain and demonstrate that the accident was not due to any fault of his. See Cele vs. Trafford (1918)2QB 523.

That is not to say that the respondent had to prove how and why the accident happened. It would suffice if he was able to show that he personally was NOT negligent even if the accident remained in explicable."

I find in this case that the plaintiff stated his case and was able to prove that an accident occurred. He was enticed from 1987 to 1990 by the defendant that this matter was going to be settled out was not. I hereby hold the defendants liable at 100%.

As to quantum the plaintiff attempted to show that he required compensation for his broken spectacles glasses (He did not bring this to court).

That he wanted the compensation or the repair of his vehicle and loss of user whilst the said vehicle was under repair.

I would hold that all the plaintiff is entitled to nominal damages. (See McGregor on damages 10th Edition.) This is where the plaintiff has proved his case but not the award although he is entitled to it.

I hereby award him a nominal damage of Ksh.50,000/-.

I award interest from the date of this judgement.

I award costs to the plaintiff.

Dated this 2nd day of March 2000 at Nairobi.

M.A. ANG'AWA

JUDGE