



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 21 OF 2018

BASH HAULIERS LTD.....1ST APPELLANT

ABRAHAM JUMA KHAEMBA.....2ND APPELLANT

-VERSUS-

JOTHAM NJAMI MWARIRI.....RESPONDENT

(Being an Appeal from the Judgment of Hon. C.A Mayamba (SRM) in the Senior Resident Magistrate's Court at Kilungu Civil Case No.184 of 2016, delivered on 16th February 2018)

JUDGEMENT

INTRODUCTION

1. The respondent sued the appellants in the lower Court seeking payment of Kshs.3,436,400.00/= as compensation for material damage of his motor vehicle following a road traffic accident at Kingee area along the Mombasa Nairobi highway on 02/03/2016. He also prayed for costs of the suit and interest.
2. The appellants entered appearance, filed a joint statement of defense and after the preliminaries, the matter was slated for hearing.
3. Judgment was eventually delivered and the trial magistrate allowed the claim together with costs and interest.
4. Aggrieved by the entire judgment, the appellants filed this appeal and raised 5 grounds as follows;
 - a) *That the learned magistrate erred and misdirected himself in law and fact by finding that the motor vehicle in question was owned by the respondent which was not proven.*
 - b) *That the learned magistrate erred and misdirected himself in law and fact by awarding the plaintiff special damages where none were proven.*
 - c) *That the learned magistrate erred in law and fact in awarding the plaintiff special damages of kshs 3,486,400/= contrary to established precedent on evidence.*
 - d) *That the learned magistrate erred and misdirected himself in law and fact by applying the wrong and or did not apply the correct law, tests, doctrines and principles relating to evidence produced by the plaintiff.*
 - e) *That the learned magistrate erred in law and fact by taking irrelevant matters and or by not taking relevant matters/evidence into consideration.*
5. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.
6. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.
7. Having looked at the grounds of appeal, the rival submissions and the entire record, the following issues arise for determination;

a) Whether it was established that motor vehicle registration No. KBP 480E was owned by the respondent.

b) Whether the claim of Kshs.3, 486,400/= was proved to the required standard.

Ownership of motor vehicle KBP 480E

8. The appellant submits that from the evidence on record, the motor vehicle is owned by the National Industrial Credit Bank Ltd and Bemwa Stationers. Further, they submit that Bemwa Stationers has two owners as indicated in the business registration certificate and as such, a conclusion should be drawn that it is a partnership.

9. It is therefore their contention that the subject motor vehicle consisted of partnership property and the respondent had no right to bring the suit in his sole name.

10. The appellant also submits that because the National Industrial Credit Bank Ltd is listed as a co-owner and it is a limited liability company with separate legal personality, the respondent should have tendered evidence to show that he had the requisite authority to file the suit on its behalf. That failure to do that means he lacked locus standi to bring the suit and to claim compensation.

11. On his part, the respondent submits that Bemwa Stationers was registered on 02/05/1989 with two partners but on 03/09/1996, David Ben Muthui withdrew from the company leaving the respondent as the sole proprietor.

12. Existence of Partnership is a question of law and it is trite that he who alleges must prove. The Court cannot just draw a conclusion as suggested by the appellants and there is no evidence on record upon which the Court can make a finding of the existence of a partnership. The burden of proof is on the appellants and they have not discharged it.

13. In the application dated 14/08/14 in which the respondent sought leave to amend plaint, he indicated that the National Industrial Credit Bank Ltd was a financier at the time of purchase. The position of financiers has been articulated in various judicial pronouncements.

14. Their registration as co-owners is usually a security measure to ensure full payment of the funds invested in the financing arrangement. Such ownership is never sufficient to create vicarious liability in negligence suits. Similarly, there is no requirement that the authority of a financier should be obtained by a party before seeking legal redress with regard to the financed asset.

15. The upshot is that the business registration certificate produced by the respondent established the connection between him and Bemwa Stationers. Consequently, the trial magistrate did not err by finding that the motor vehicle was owned by the respondent.

Proof of the claim

16. The appellants submit that this is a material damage claim and the special damages must be specifically pleaded and proved. That the only document adduced in support of the claim was the assessment report which only stipulated the projected repair costs.

17. They contend that failure to produce the actual receipts means that the claim was not proved to the required standard.

18. The respondent submits that in addition to the assessment report, he also produced an assessors receipt for Kshs.10,000/= and a towing breakdown receipt for Kshs.45,000/=. That the maker of the assessment report attended Court and gave evidence as PW3.

19. The facts that an accident occurred and the motor vehicle was damaged are not in dispute. The main issue is whether the assessment report was sufficient proof of the indicated amounts.

20. In the case of **Nkuene Dairy Farmers Coop Society Limited & James Kimathi –vs- Ngacha Ndeiya (2010) eKLR**, in respect of whether an assessors report was sufficient to prove the value of material damage, the Court of Appeal expressed itself as follows:

***“In our view special damages in a material damages claim need not be shown to have been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damage item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent’s vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty.*”**

21. In this case, the assessment report clearly shows the extent of the damage, complete with photographs. It also indicates the parts to be replaced and assigns a value against each item. As rightly submitted by the respondent, the appellants did not provide any alternative assessment. Accordingly, the claim was proved to the required standard.

CONCLUSION

The court therefore finds that, the appeal has no merit and thus makes the following orders;

i. -The appeal is dismissed

ii. -Costs to the respondent

SIGNED, DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE