



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 248 OF 2008

PETERSON MBOGO KIMANI.....APPELLANT

VERSUS

VINCENT LIDAYA ONGAYE.....RESPONDENT

(Being an appeal from the Judgment delivered on 25th April, 2008 by Hon. Mr. J Were (Senior Resident Magistrate) Milimani Commercial Courts in CMCC No. 12117 of 2007).

JUDGMENT

1. Vide an amended plaint dated 5th December, 2005 the Appellant, Peterson Mbogo Kimani sued the Respondent, Vincent Lidaya Ongaye for damages arising out of a road traffic accident. The Appellant blamed the accident on the negligent manner that the Respondent's motor vehicle registration No. KAM 318R was allegedly being driven when it collided with Appellant's motor vehicle registration No. KAN 447F.
2. The Respondent denied the claim as per the statement of defence filed. It was contended that the accident was solely and/or substantially contributed to by the Appellant's motor vehicle.
3. The Appellant filed a reply to the defence, joined issues with the defence and reiterated the contents of the plaint.
4. Upon the conclusion of the trial the lower court dismissed the Appellant's case. That is what triggered this appeal.
5. The grounds of appeal are as follows:

1. That the learned magistrate erred in law and fact by holding that the Appellant had not proved that the Respondent was owner of the accident motor vehicle KAM 318R when there was uncontroverted evidence on record and without rebuttal evidence from the Respondent.

2. That the learned magistrate erred in law and fact by considering the statement of defence which denied evidence of ownership of the motor vehicle without hearing evidence from the Respondent to advance the said defence.

3. That the learned magistrate erred in law and fact by failing to appreciate that the Appellant had proved his case on a balance of probability as required under the law in view

of the uncontroverted evidence of the Appellant's witnesses.

4. That the learned magistrate erred in law and fact by failing to appreciate the Appellant's uncontroverted evidence that the Respondent was the driver of motor vehicle registration number KAM 318R which was blamed for the accident giving rise to the cause of accident therefore liable to pay damages.

5. That the learned magistrate erred in law and fact by failing to appreciate that the Defendant though having denied being the owner of motor vehicle KAM 318R was the driver on the material day when the subject collision occurred and he was therefore personally liable for the occurrence of the said accident upon which the Appellant claims damages.

6. That the learned magistrate misapprehended the law requiring proof in civil matters and instead seemed to require proof beyond reasonable doubt only attributable to criminal liability thereby raising the standard.

6. The appeal was canvassed by way of written submissions.

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

8. PW1 Mike Kangethe, a motor vehicle assessor testified that he assessed the Appellant's motor vehicle and found it extensively damaged and beyond any economic repair. He assessed the cost of repairs as Ksh.550,500/= and charged Ksh.5,000/= for making his report which he produced as an exhibit. PW1 maintained his evidence during cross-examination.

9. PW2 Peter Mbogo Kimani the Appellant herein testified that he was the owner of motor vehicle KAN 447F and the one driving the said motor vehicle at the material time. PW2 blamed the accident on the Respondent's motor vehicle KAM 318R for going onto his lane while overtaking motor vehicle KAN 241T. PW2 further testified that the Respondent's motor vehicle was at a high speed and that they had a head on collision. PW2's further evidence was that he repaired his motor vehicle at a cost of Ksh.550,500/= and paid ksh.5,000/= to the assessor. That he used the motor vehicle for his business and it was his only source of livelihood and used to make Ksh.3,500/= to 4000/= per day. He produced receipts for the repairs and records of his daily earnings. PW2 maintained his line of evidence during cross-examination and stated that his motor vehicle was in the garaged for 52 days.

10. PW3 Corporal Bernard Abala blamed the accident on the overtaking by the Respondent as the driver of motor vehicle KAM 318R without due care and attention. That the Respondent as the driver of motor vehicle KAM 318R was charged with the offence of careless driving and pleaded guilty and was fined Ksh.5,000/=. The police abstract was produced as an exhibit together with the O.B extract and incident register

11. The Respondent's side closed their case without calling any evidence. Consequently, the evidence by the Appellant's side was not controverted by any other evidence. The Appellant's evidence proved his case on a balance of probabilities. I find the Respondent 100% liable for the accident.

12. The police abstract produced reflects that motor vehicle registration No. KAN 447F make Toyota Nissan matatu was involved in collision with motor vehicle registration KAM 318 R make Toyota Corolla with the owner reflected as Vincent Lidaya Ongaye (The Respondent). Without this evidence of ownership as per the investigations by the police being controverted, the Appellant had on a balance of probability proven ownership of the motor vehicle KAM 318R.

13. As held by the Court of Appeal in the case of **Joel Muna Opija v East African Sea Food Limited [2013] eKLR:**

“We agree that the best way to prove ownership would be to produce document from the Registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

14. Receipts have been produced in support of the claim for Ksh.550,000/= claimed as the cost of repairs. No receipt was produced for the claim of Ksh.100/= for obtaining the police abstract.

15. Loss of user was claimed at 3,500/= for 52 days which came to Ksh.182,000/=. Although the record book produced reflects Ksh.3,500/= average income per day, the Appellant’s evidence gave no explanation why it took so long to repair the motor. In this courts view, 21 days is a reasonable number of days for the motor vehicle to have been repaired. This comes to $Ksh.3,500 \times 21 = 73,500/=$.

16. The total award therefore comes to Ksh.550,000/= plus 73,500/= which comes to Ksh.623,500/=.

17. Consequently I set aside the judgment of the lower court and substitute it with a judgment in favour of the Appellant against the Respondent for the sum of Ksh.623,500/= interest. Costs both in the lower court and this court to the Appellant.

Dated, signed and delivered at Nairobi this 7th day of March, 2019

B. THURANIRA JADEN

JUDGE