



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 368 OF 2003**

**EVANSON NGURE NDIRANGU.....APPELLANT**

**VERSUS**

**JOSEPH KIBE MUNGAI.....RESPONDENT**

*(Being an appeal from the judgment delivered by Honourable G.L. Nzioka (Mrs.) (Senior Resident Magistrate) on 13<sup>th</sup> June, 2003 in CMCC NO. 2035 OF 2001)*

**JUDGMENT**

1. The appellant filed a suit against the respondent and one Boniface Wainaina seeking special damages in the sum of Kshs.92,278/= plus costs of the suit and interest thereon before the Chief Magistrate's Court.
2. The appellant pleaded in his plaint that on or about 14<sup>th</sup> April, 1998 an accident occurred, involving the respondent's motor vehicle registration number KAH 360P and the appellant's motor vehicle registration number KAD 051V operated by his authorized driver, Jane Wamuyu Nguni.
3. The appellant further pleaded that the accident was caused by the negligent and reckless driving, which then resulted in damage to the appellant's motor vehicle.
4. At the hearing, three (3) witnesses were called to give evidence in support of the appellant's case. On his part, the respondent testified as the sole witness for the defence case. In the course of the suit, the appellant withdrew the suit as against Boniface Wainaina.
5. At the close evidence the parties filed written submissions on the suit following which the trial court rendered its decision, thereby dismissing the appellant's suit with costs to the respondent.
6. Being aggrieved by the dismissal order the appellant lodged this appeal and put forward the following grounds:
  - i) ***THAT the learned trial magistrate erred in law and in fact by refusing to grant the appellant an adjournment to call the maker of the police abstract.***
  - ii) ***THAT the learned trial magistrate erred in law and in fact by failing to appreciate that refusal to grant the appellant an adjournment would prejudice his case.***
  - iii) ***THAT the learned trial magistrate erred in law and in fact by refusing the appellant an adjournment to enable him appeal against the order denying the adjournment.***
  - iv) ***THAT the learned trial magistrate erred in law and in fact by holding that the appellant did not sue the correct person.***
  - v) ***THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant had proved on a balance of probabilities that an accident involving motor vehicles KAH 360P and KAD 951V occurred on or about the 4<sup>th</sup> of April, 1998.***
  - vi) ***THAT the learned trial magistrate erred in fact and in law by failing to appreciate that the respondent was liable for the damage caused to the appellant's motor vehicle registration number KAH 360P.***
  - vii) ***THAT the learned trial magistrate acted in excess of her jurisdiction by closing the appellant's case.***

7. The appeal was canvassed by way of written submissions. It would appear only the appellant filed his submissions. I have considered the

grounds of appeal and submissions thereon. I have also re-evaluated the evidence presented before the trial court as well as the impugned judgment.

8. Grounds (i), (ii) and (iii) will be considered together since they touch on adjournment sought before the trial court. Turning to the appellant's submissions, it is argued that in the course of the hearing of the suit, the respondent's advocate raised an objection to the production of the police abstract by the appellant, insisting that the same should be produced by its maker. The court upheld the objection.

9. That on 6<sup>th</sup> June, 2003 the appellant's counsel, sought an adjournment owing to the fact that the police officer from Buruburu Police Station who was to attend court on the said date was not present despite confirmation that he would be available.

10. The respondent's advocate opposed the application for adjournment on the basis that no evidence had been adduced to show that the said witness had been summoned. In the end, the trial court declined to adjourn the hearing of the matter.

11. It is the appellant's submission that the reason for seeking the adjournment was valid and that in any case, the respondent would not have been prejudiced should the same have been allowed, given that it is the respondent who insisted on production of the abstract by its maker to begin with.

12. I have perused the typed proceedings of the trial court and I am convinced by the sequence of events as portrayed by the appellant. The proceedings also reveal that the explanation given by the trial court for declining to grant the adjournment sought was that there was no evidence of issuance of summons, as well as the fact that the previous adjournment was prompted by the appellant.

13. On the subject of the application seeking for an adjournment for the sake of appeal, the proceedings portray the trial court's reasoning that the said application had no basis as it was only intended to defeat the order already in place and that in any case, there was no existing order staying the hearing of the case.

14. It is apparent from the record that no appeal was preferred against the trial court's decision to refuse adjournment. The proceedings confirm that the learned trial magistrate reminded the appellant of his right to appeal against her decision.

15. The question as to whether or not to grant an adjournment lies purely with the discretion of the court. The discretionary power of the court was emphasized by the Court of Appeal in *Hillary Rotich v Wilson Kipkore [2018] eKLR* as follows:

***“Whether to grant an adjournment or not is also at the discretion of the court depending on the circumstances of each case. That discretion is to be exercised judiciously and according to law and reason, not according to private opinion, whim, humour, arbitrarily, or fancifully.”***

16. I take the humble view that the learned trial magistrate properly exercised her discretion in declining the appellant's prayer for an adjournment and gave reasons for the same, as set out hereinabove. In the premises, this court finds no fault on the trial magistrate's use of her discretion. Consequently, grounds (i), (ii) and (iii) of appeal cannot stand.

17. Grounds (iv) to (vi) to be determined together. The appellant submitted that in his testimony stated that upon investigating the ownership of motor vehicle registration no. KAH 360P, the initial outcome was that the same was owned by Boniface Wainaina but that further investigations confirmed the respondent as the owner and that ownership was ascertained by the respondent.

18. Upon re-evaluating the evidence presented before the trial court initially it is apparent that the appellant had sued both the respondent and one Boniface Wainaina. However, for one reason or another the appellant chose to withdraw the suit against the aforementioned Boniface, leaving the respondent.

19. The appellant gave evidence as (PW1) which was to the effect that on the material day, while travelling along Mumias Road with his wife, Jane Wamuyu Ngure (the driver), he saw a motor vehicle approaching from the opposite direction moving at a high speed, hit a bump and rammed into their motor vehicle.

20. The appellant also testified that the driver of the motor vehicle that knocked theirs later introduced himself as Boniface and despite an indication by the police who attended the scene that the said Boniface was to blame for the accident, he was not charged with any offence at the criminal court.

21. PW 2 (Michael Kimani) and PW 3 (Samuel Maina) merely gave evidence as the motor vehicle assessor who assessed the damage done to the appellant's motor vehicle and as an employee of the appellant's insurance company respectively.

22. PW 3 however indicated that upon investigation on the ownership of motor vehicle registration number KAH 360P, it was established that the same was owned by Boniface Wainaina but that a further report showed the respondent as the owner as at the time of the accident.

23. On his part, the respondent who testified as DW 1 indicated that though he admitted ownership of the subject motor vehicle at all material times, he was not aware of the accident involving the appellant until he was served with a demand letter.

24. The respondent also gave evidence that he does not know anyone by the name Boniface Wainaina.

25. In her judgment, the learned trial magistrate reasoned that while it is not in dispute that the appellant's motor vehicle was involved in an accident on the material day, the investigating officer was not called as a witness, neither was the police abstract produced.

26. The said magistrate went ahead to opine that the evidence given by the appellant exonerated the respondent from blame, since the police abstract indicated Boniface Wainaina as being the driver of the subject motor vehicle as opposed to the respondent, and which fact was confirmed by PW 1's testimony as well as the investigation reports.

27. It was also the magistrate's reasoning that even if the respondent were to be sued under the doctrine of vicarious liability, there would have been need to show that Boniface was his servant/agent, yet the respondent denied knowledge of Boniface. In the end, the magistrate found that the appellant had not proved his case on a balance of probabilities.

28. That being the case and having re-evaluated the evidence, I concur with the learned trial magistrate that much as there was clearly an accident involving the appellant's vehicle, he did not place the respondent in the vicinity.

29. In fact, the appellant in clear terms pointed out that the driver of the vehicle that had knocked his introduced himself as Boniface. However, for reasons best known to the appellant, Boniface was withdrawn as a party to the suit.

30. I make reference to the Insurance Investigator's Report which forms part of the appellant's supplementary record of appeal. The same reads that Boniface was the owner of the motor vehicle that caused the accident to the appellant's motor vehicle. However, there is no mention of the motor vehicle registration number KAH 360P .

31. In my view therefore, the involvement of the aforementioned Boniface would have been necessary to shed light on the circumstances that took place on the material date.

32. There is no doubt that there is no credible evidence to show that the respondent was present at the scene or liable for causing the accident. Furthermore, the respondent denied knowing Boniface and the appellant has not shown any connection between the two.

33. The failure to call the investigating officer to give evidence and produce the police abstract form is fatal to the appellant's case.

34. From the foregoing, I am satisfied that the learned trial magistrate arrived at a proper finding therefore nothing turns out on grounds (iv), (v) and (vi).

35. The final ground of appeal closely tied to the first three (3) grounds. I have looked at the relevant proceedings. The same reveal that the trial court declined to grant the appellant's prayer for an adjournment. The trial court further ordered that the suit proceeds to hearing. This court has already found that the trial magistrate properly exercised her discretion hence nothing turns out on this ground. In any event, the appellant has not demonstrated that such discretion was exercised arbitrarily or in excess.

36. The upshot is that this appeal lacks merit. Consequently, the same is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 2<sup>nd</sup> day of May, 2019.

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent