



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 68 OF 2016

An appeal from the Judgment of Hon J. Karanja, PM in Meru CMCC NO. 357 of 2012, delivered on 30th November 2016

(CORAM: F. GIKONYO)

KABIR MOHAMED FAROUK.....APPELLANT

-VERSUS-

POSTAL CORPORATION OF KENYA.....RESPONDENT

JUDGMENT

[1] This Appeal arises from the Judgment of Hon J. Karanja (Principal Magistrate) in Meru CMCC NO. 357 of 2012, delivered on 30th November 2016, in which the Learned Trial Magistrate dismissed the Appellants claim for special damages as a result of a road traffic accident that occurred on 15th June 2012, along Meru-Makutano road involving the Appellant's motor vehicle registration No. KBM 005A and the Respondent's motor vehicle registration No. KAN 228U belonging to the Respondent in which the Appellant's motor vehicle was extensively damaged.

[2] The Appellant was aggrieved by the said judgment thus provoking the instant appeal vide Memorandum of Appeal filed in court on 21st December 2016, in which he raised the following grounds of appeal;

- a). The Learned Trial Magistrate's judgment is against the weight of evidence placed before him.*
- b). The Learned Magistrate erred in law and in fact in that he rejected the Appellant's evidence which was clear and not challenged.*
- c). The Learned Magistrate erred in law and in fact on the issue of liability and quantum.*
- d). The judgment of the trial magistrate is bad in law and in fact.*

[3] Briefly it was submitted for the Appellant that it had not been denied that: the subject motor vehicles collided on 15th June 2012, as they were being driven in opposite directions and that after investigations; the traffic police recorded that the Respondent's motor vehicle was to blame; and that the Learned Trial Magistrate did not go or consider all the issues but confined himself to the issue of liability as far as ownership of motor vehicles were concerned.

[4] With regard to ownership of motor vehicle registration No. KBM 005A the Appellant maintained that the same belonged to him and that on cross examination, he stated that he had a log book though he did not have it in court and that further the police officer who gave evidence produced police abstract which was not objected to that showed the vehicle belonged to the Appellant. Similarly with regard to ownership of motor vehicle registration No. KAN 228U, it was submitted that the abstract was clear that motor vehicle registration No. KAN 228U was owned by the Respondent and insured by APA Insurance Limited. Consequently, the Appellant contended that it was clear from the evidence which was before the Learned Trial court that there was clear evidence of ownership of the motor vehicle and he should not have held that there was no evidence of ownership of the two motor vehicles.

[5] The Respondent took a different view of the matter and submitted that the evidence adduced by the Appellant in the lower court was not substantial to prove that the respondent and the Appellant were the owners of motor vehicles registration No. KAN 228U and KBM 005A respectively and that a police abstract was not sufficient proof of ownership of a motor vehicle.

[6] On special damages, it was submitted that the Appellant sought Kshs 240,907 being special damages which unfortunately did not justify or lay any basis in law for the Appellant to claim the said amount owing to the fact the said particulars of special damages was not substantially nor strictly pleaded. Consequently, the Respondent contended that the trial court was correct to disregard and totally disallowed the same.

DETERMINATION

[7] I have carefully considered this appeal and the rival submissions by the parties. This being a first appeal, the court should analyze and re-assess the evidence on record and reach its own conclusions except bearing in mind that it neither saw nor heard the witnesses testify. See Selle v Associated Motor Boat Co. [1968] EA 123 and Kiruga v Kiruga & Another [1988] KLR 348.

[8] As can be discerned from the record herein, the two main issues for determination in this appeal are as follows;

a). Whether the Appellant was able to prove that motor vehicle registration No. KBM 005A and motor vehicle registration No. KAN 228U belonged to the him and the Respondent respectively

b). If the answer to the above question is in the affirmative, whether the Appellant entitled to special damages and the quantum thereof.

[9] The Appellant in his witness statement which was adopted in court as evidence stated that he was the owner of motor vehicle registration No. KBM 005A and that the driver of motor vehicle Registration No. KAN 228U was to wholly blame for the accident. Under cross examination he reiterated that the car was his though he did not have the logbook.

[10] PW2 PC Leah Wangari a traffic police officer attached at Meru traffic office testified that there was a report of an accident on 15th June 2012 between two motor vehicles namely KBM OO5A and KAN 228U. She further testified that according to the abstract, the only owner of KBM 005A was Mr. Kabir Mohammed (the Appellant) while motor vehicle registration KAN 228U belonged to postal corporation of Kenya (the Respondent) and that the conclusion of the investigations officer was that the driver of motor vehicle KAN 228U was to blame for the accident. Again her evidence towards this respect was not challenged in cross examination. DW1 on the other hand while adopting his witness statement in evidence stated that he was employed as a driver by the Respondent, he was driving the vehicle involved in the accident and was testifying on behalf of the Respondent.

[11] Proof of ownership of motor vehicles involved in the accident herein is one of the major issues at the heart of this appeal. I am therefore content to cite the case of CHARLES NYAMBUTO MAGETO VS PETER NJUGUNA NJATHI [2013] eKLR where it was held as follows;

“From the interpretation of Section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership need to necessarily produce a log book or a certificate of registration. The courts recognize that there are various forms of ownership, that is to say, actual, possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report even, as held in the Thuranira and Mageto cases (supra) that the Police Abstract Report is not, on its own, proof ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the Police Abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership”

[12] See also the case of JOTHAM MUGALO VS. TELKOM (K) LTD KISUMU HCCC NO. 166 OF 2001 Warsame J (as he then was) rendered himself thus;

“Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence.”

[13] From the circumstances of this case and there being no other tangible evidence or challenge provided by the Respondents in rebuttal of the contents in the police abstract, I am satisfied that the Appellant was able to proof on a balance of probability that he was the owner of motor vehicle registration No. KBM 005A and that motor vehicle registration No. KAN 228U was owned by the Respondents. The abstract was not challenged at all.

[14] The Learned Trial Magistrate addressed himself inter alia on liability as follows;

“I have considered the submissions filed by both parties and the authorities relied on by the defdant. The plaintiff did not quote any case law. It is not in contention that there was an accident between the two vehicles KAN 228U and KBM 005A. In addressing myself on the issue of liability, I shall firstly consider whether the most fundamental aspect of proving liability has been established. That is ownership. The defendant denied ownership of the said motor vehicle KAN 228U. No evidence has been tendered that the defendant was the owner of KAN 228U as at the time of the accident that ownership may have been indicated in the police abstract is not considered sufficient proof for purposes of liability as has been held in case law from several authorities

