



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 442 OF 2009

GEOFFREY MWANGI KAMAUAPPELLANT

VERSUS

BEN G. KARONGA1ST RESPONDENT

STEPHEN UMBIA KARONGA2ND RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's court at Milimani Commercial Courts, Nairobi delivered on 7th July, 2009 by the Hon. Senior Principal Magistrate Ms. Maina)

JUDGMENT

This appeal arises from the decision of the lower court delivered on 7th July, 2009. The case involved a road traffic accident between two motor vehicles registration Nos. KAN 644J and KAL 542C which took place along Juja road, Nairobi.

The summary of the facts was that motor vehicle registration No. KAL 542C rammed into motor vehicle registration No. KAN 644J thereby causing substantial damage. The appellant's prayer was for special damages amounting to Kshs. 394,320/= loss of use, costs and interest.

This was denied by the defendants who blamed the plaintiff for the accident raising a counter claim instead. After the trial, the lower court apportioned liability equally between the drivers of the two motor vehicles, thereby awarding the appellant half of the special damages claimed. Each party was ordered to pay their own costs. The court dismissed the defendant's counterclaim and ordered that the appellant be paid half the costs of the counter claim which was dismissed. The appellant was aggrieved by the said decision and filed this appeal.

The lower court was faulted for apportioning liability equally between the appellant and the respondents and holding that the appellant had not proved loss of use at the rate of Kshs. 2,500/= per day. The court was also faulted for holding that each party should bear their own costs of the suit and that the appellant was entitled to only half of the costs for the counter claim that was dismissed.

As the first appellate court, it is my duty to assess the evidence adduced in the lower court and come to independent conclusions. From the record, it is clear that it is the evidence of P.W. 2 John Kariuki Gathure and D.W. 1 Stephen Umbia Karonga which guided the court in determining the issue of liability. These two witnesses were the drivers of the respective motor vehicles and the only ones who testified as to the occurrence.

The learned trial magistrate in arriving at the decision on liability stated as follows,

“It is my finding that indeed what we have is one driver’s word against the other. That both accounts seem plausible and in the absence of an independent witness it is almost impossible to determine which driver was in the wrong.

In the circumstances I will follow the decision in Welch Vs Standard Bank Limited (1970) EA 115 and apportion liability at 50%: 50%.”

It is true that no independent witness was called and police evidence which would have offered an independent angle was not presented during the trial. I am unable to depart from the finding of the learned trial magistrate in the circumstances and therefore agree that liability should be apportioned equally.

The value of the motor vehicle was proved to the required standard and the learned trial magistrate was correct in that regard. The loss of use was not specifically pleaded and strictly proved and it was not enough for the plaintiff to throw figures at the court with the hope that a determination would be made in his favour. No tax returns or bank statements were presented in evidence to justify the claim.

The court was therefore correct in the assessment of that evidence and the finding that the appellant did not prove the loss of use to the required standard.

The award of costs was also well informed and I find no reason to disturb the finding of the learned trial magistrate. In the end this appeal must fail and is therefore dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 14th Day of February, 2017

A. MBOGHOLI MSAGHA

JUDGE