



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. 691 OF 2009**

**JOSEPH MATHENGE KANYORO.....APPELLANT**

**VERSUS**

**RAFIKI MILLERS LIMITED.....RESPONDENT**

*(An Appeal arising from the judgment of Gichohi (Mrs.) P.M. delivered on 10<sup>th</sup> November 2009 in Milimani CMCC No. 5629 of 2008)*

**JUDGMENT**

The claim by the Appellant against the Respondent for Damages in respect to mechanical damage to his motor-vehicle in a road traffic accident that occurred on 22<sup>nd</sup> March 2008 was dismissed by the Trial Court. The Appellant being aggrieved by that decision appealed.

In a plaint dated 8<sup>th</sup> September 2008, the Plaintiff averred that on 22<sup>nd</sup> March 2008, while lawfully and carefully parked at a designated parking area along Mama Ngina drive in Thika his motor-vehicle KXG 580 was violently rammed into from behind by the Respondent's driver and/or agent thereby occasioning him loss and damage. He blamed the accident on the negligence of the Respondent's driver and/or agent. He claimed damages of Kshs. 95,600/-, the cost of repairing the damage occasioned to his motor-vehicle.

In response, the Respondent filed a Statement of Defence on 15<sup>th</sup> January 2009. The occurrence of the accident was admitted though it was stated that it was due to the negligence of the Appellant wholly or partly as the motor-vehicle was parked in the middle of the road in disregard of other road users.

Following the evidence of the parties to the claim wherein the appellant and Respondent testified and called witnesses, the trial court in the judgment, that is the subject matter of this Appeal, found the Respondent 100% liable for the accident but noted that he had failed to prove ownership of his motor-vehicle and dismissed the suit on that basis alone.

The Appeal assails the said judgment on the following grounds -

- i. **The learned Magistrate erred in law and fact in finding that the appellant had no locus standi to file the suit.**
- ii. **The Learned Trial Magistrate erred in law and fact by failing to evaluate correctly the evidence by the witnesses and thereby arriving at a conclusion that dismissed the**

### **Appellant's claim.**

This Court has given regard to all the evidence tendered in support of the claim. The evidence by the Appellant was that his vehicle was rammed from behind as it was parked at a designated parking slot in Thika Town, by the Respondent's motor-vehicle which went on to hit five other motor-vehicles in the same accident scene. The Respondent's evidence was that he could not tell how the accident occurred as he fell unconscious after taking a soda only to learn later that the motor-vehicle he had been driving caused multiple accidents.

The learned Magistrate in her Judgment insisted that though the Respondent bore 100% vicarious liability he was only liable to the owner of the motor-vehicle KXG 580 which ownership the Appellant was unable to prove as he did not avail any documentation to that effect.

While the learned Magistrate's statement might seem right, it must be remembered that this is a civil suit whose standard of proof is on a balance of probabilities. Therefore, whereas the police abstract form produced during the trial among other documents including receipt issued after the motor-vehicle was repaired and satisfaction note produced by PW3 are not conclusive evidence of ownership of the motor-vehicle, it is noted that the defence did not challenge issue of ownership seriously.

The Learned Magistrate did not make any reference to the police abstract report which was tendered in court. One of the accident vehicles is shown as KXG 580 of P.O. Box 1042 Thika which is the same address given to the person who reported the incident (PW2) the son to the deceased and the driver of the motor-vehicle at the time of the accident. This fact was not challenged. The Appellant was not cross-examined on it, which means the Respondent was satisfied with the evidence. The evidence of ownership cannot be denied without any evidence to counter the Police Abstract produced by the Appellant.

Therefore, the appeal succeeds. There shall be judgment for the appellant for the total amount claimed and proved by way of receipt amounting to Kshs. 89,900/- with interest from date of filing suit. The Appellant shall also have Costs of the suit both in the lower court and in this appeal. Those shall be the orders of the court.

**Dated and delivered at Nairobi this 9<sup>th</sup> Day of March, 2016.**

**A.MBOGHOLI MSAGHA**

**JUDGE**