



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 79 OF 2011

JOSEPH KIPRONO KIKWAI.....APPELLANT

VERSUS

CHRISTOPHER ALANDO OSIO.....RESPONDENT

J U D G M E N T

1). This appeal arose out of the lower court;s dismissal of the appellant's case on 17-5-2011. In that case the appellant had sued the respondent for:

- a. **Special damages of Kshs. 288,227/=.**
- b. **Costs.**
- c. **Interest on (a) and (b) above.**

2). The circumstances leading to the case are as a result of a road traffic accident that occurred on 16-8-2008 involving motor tractor registration number KAM 427B belonging to the appellant and motor vehicle Reg. No. KAU 968Y belonging to the respondent.

3). The appellant told the trial court that on the material day at around 10 am he had parked his tractor outside Gor Mahia hotel along Kisumu-Kakamega road when the respondent's agent or driver veered off the road and rammed into the appellant's tractor causing it extensive damage. The damage included:

- i. **Front axle broken at centre.**
- ii. **Front grille dented.**
- iii. **Left hand front steering end damaged.**
- iv. **Left hand ball joint damaged.**
- v. **Left hand front tyre 750 x 16 cut.**
- vi. **Left hand rim damaged.**

4). Subsequently the said motor tractor was towed, assessed and later repaired at a cost of Kshs. 288,227/= as prayed in the plaint.

The appellant called 3 more witnesses who included PW2 Eric Obura Orongo, a motor vehicle assessor, who produced the assessment report. PW3 PC William Oduoli Obara the traffic police officer who produced the police abstract form and PW4 Calavis Adhiambo who sold the motor tractor to the appellant.

5). After closing his case the defendant offered no evidence and closed his case on 25-3-2011. The only available pleading therefore for the respondent is the statement of defence which he has generally denied the occurrence of the accident and attributed negligence to the appellant. The exhibits including the

receipts for repairs inter alia were produced by consent.

6). In his appeal the appellant has cited 5 grounds namely:

- a. **The court completely misapprehended the evidence on record.**
- b. **The respondent did not rebutt the ownership of motor tractor.**
- c. **The magistrate raised the standard of proof beyond reasonable doubt instead of a balance of probabilities.**

7). The issue that needs to be determined by this court and being aware that this is the first appeal, is whether the accident indeed occurred and if it did so who is to blame. This court easily answers the first part of the question affirmatively. At least the production of the police abstract prima facie establishes this fact.

8). The next issue is to determine the author of the same. The appellant told the court that he had parked his tractor on the right side of the road facing Kakamega direction. Apparently, there was no evidence on the part on the part of the respondent to contradict the same. Though the police officer PW3 failed to produced the sketch maps or any other scene exhibits, I do not doubt the appellant evidence. Consequently in the light of the evidence on record I do find that the respondent was negligent in this regard.

The fact that the tractor was off the road suggest clearly in the absence of any contrary evidence that he veered off the road and hit the tractor. I therefore attributed negligence on the part of the respondent. This was broad daylight and there was no evidence to suggest any obstruction on the part of the appellant.

9). Was the appellant's tractor damaged? The answer would be yes. The motor vehicle assessor PW2 clearly demonstrated this by producing the assessment report. The receipts produced indicate the repairs so far undertaken.

10). The other issue which was raised and which the lower court relied on was the ownership of the motor vehicle registration number KAU 965Y. The ownership of the tractor was not disputed. Although the logbook was yet to be transferred to the appellant, he clearly established the ownership of the tractor through purchase.

11). Was there need to establish the owner of the motor vehicle? Respectfully I do not think so. The respondent who supposedly was the owner of the vehicle was well represented all through. There was no evidence to suggest that he did not own the vehicle. In any event, the appellant had established that the accident occurred between the vehicles. This position was buttressed by the police through their evidence.

12). The proof as is the rule in civil cases is always on a balance of probabilities and not beyond reasonable doubt. I do find that on a balance of probabilities and on the prima facie evidence on record, the respondent was the legitimate owner of the motor vehicle. If he was not then he had every chance during trial to controvert.

13). In Lake Flowers -VS- Gila Franklyn Onyango Ogonga & Another, Nakuru Court of Appeal No. 40 of 2000, the court said:

“Without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver for, it was difficult for it to contest the liability blamed against it by the superior court and or attempt to partly or wholly blame the said respondent for the accident on appeal. Neither can it deny the ownership of the mitsubishi canter without any evidence to counter the police abstract which shows it to be the owner of that motor vehicle”.

14). Exhibit 5 the police abstract clearly shows the respondent to be the owner of the vehicle. Consequently and in line with the aforequoted authority the lower court was in error when it demanded the appellant to bring further evidence to show the true owner of the vehicle.

