



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 161 OF 2007

FRED NDUNGU KANGETHE.....APPELLANT

V E R S U S

ATTORNEY-GENERAL.....RESPONDENT

(Being an Appeal from the Judgment of Mrs. A.N. Ongeru dated 22nd February 2007 (SPM) in the Senior Principal Magistrates Court at Nairobi in Civil Case Number 8850 of 2005)

JUDGMENT

In this appeal, the appellant was the Plaintiff in the lower court while the Respondent was the Defendant. The Appellant had sued for restitution of his motor-vehicle Chassis number VWE 24-007815 Engine Number QD 32-04762 and in the alternative a sum of Ksh. 950,000/= being the monetary value of the motor-vehicle, costs and interest.

In his uncontroverted testimony in the lower court, he stated that on 11th December 2004 his **motor vehicle a Nissan Engine No. QD 24046762**, which was in display in the Westwood Motors showroom, was driven away by police officers who claimed they were conducting investigations. According to him, the motor-vehicle was never returned to him. The purchase price was Kshs. 700,000/00. The Respondent did not bother to testify or lead some other evidence to controvert the Appellant's testimony that indeed police officers took away his motor-vehicle and he never got it back.

The Respondent was therefore sued in his statutory capacity under the Government Proceedings Act, Cap 40. He filed defence denying liability and put the Appellant to strict proof.

There are some four (4) grounds of appeal which may be reframed as follows –

- i. That the learned Magistrate erred in holding that the Plaintiff had not proved his case in spite of the documents tendered in evidence;
- ii. That the learned Magistrate erred in holding that special damages had not been pleaded and proved on a balance of probabilities;
- iii. That the learned Magistrate erred in failing to consider that at the point of trial the Plaintiff's evidence was by and large unchallenged;
- iv. That the entire decision was against the weight of the evidence.

The appeal was heard by way of written submissions.

The police impounded the Appellant's motor vehicle which he had imported from Japan in order to carry out investigations relating thereto. Apparently he never got his motor-vehicle back. The Attorney-General is therefore vicariously liable to the Plaintiff for the loss of his motor vehicle. It is not in contention that the Appellant proved his case on a balance of probabilities.

In the event, the learned trial magistrate erred in holding that the Appellant was not entitled to restitution of his vehicle and in the alternative refund of KShs. 700,000/- (the sum he actually paid for the motor vehicle). In the result the appeal is allowed in its entirety. The judgment of the lower court is hereby set aside and substituted with Judgment for the applicant in the sum of Kshs. 700,000/- being the cost of the motor-vehicle that disappeared in the hands of the police officers. Interest is awarded at court rates from the date of filing suit until payment in full. The appellant will also have costs both in the court below and of this appeal.

These will be the orders of the court.

Dated and delivered at Nairobi this 2nd day of June, 2015.

A.MBOGHOLI MSAGHA

JUDGE