



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 90 OF 2006

D. MANJI CONSTRUCTION COMPANY LIMITED.....APPELLANT

VERSUS

JOSEPH MWAURA MWETHI.....RESPONDENT

(An appeal from the decision of Mrs. C. W. Githua, Principal Magistrate

delivered at Nairobi on 31st January 2006 in Nairobi civil suit Number 155 of 2002

between D. Manji Construction Company Limited and Joseph Mwaura Mwethi)

JUDGMENT

1. The appellant appeals is against the decision of the Learned Trial Magistrate, Mrs. C. W. Githua (as she then was) delivered on 31st January, 2006 on the grounds that;

- i. The Learned Trial Magistrate erred in law and in fact in coming to the conclusion that she did against the weight of available evidence.
- ii. The learned Trial Magistrate erred in law and in fact in dismissing the plaintiff's suit even though the claim of the plaintiff has been proved by evidence to the required standard of proof.
- iii. The Learned Trial Magistrate erred in law and in fact in dismissing the suit against the consent filed by the parties in Court on 14th June 2002 allowing judgment for the plaintiff against the defendant to the extent of 65%.

These are the grounds of appeal state in the amend Memorandum of appeal filed in Court on the 22/8/08. The appellant has asked this Court to allow the appeal, reverse the said decision and enter judgment for the plaintiff as prayed in the plaint.

CASE BACKGROUND

2. The plaintiff sued the defendant for Kshs. 320,900/- plus costs of suit and interests. The claim arose from a road traffic accident involving motor vehicle registration no. KAE 070W and KAG 925K as a result the plaintiff's motor vehicle was extensively damaged causing him loss and damages. The plaintiff blamed the defendant's servant, driver/agent negligence for the said accident.

3. On 23rd January, 2014 when the matter came for hearing parties proposed to proceed through written submissions. The plaintiff filed their submissions on 6th February 2014. Upon keen perusal of the Court file there are no submissions filed by the respondent and it is important to note that the respondent Counsel did appear in Court on 23rd January, 2014 and 11th March, 2014 when matter come up for highlighting of parties submissions.

4. The appellant in their written submissions argued that the Learned Trial Magistrate erred in law and fact in that the parties by a letter dated 4th June 2002 parties requested the Court to enter a consent in judgment for the plaintiff on liability to the extent of 65% and the same was adopted in Court on 18th June, 2002; that going by the said consent on liability the plaintiff need not have proved negligence or that the offending vehicle belonged to the defendant, that the issue of quantum was not challenged by the defendant and the Learned Trial Magistrate had acknowledged that the same was sufficiently been proved and that the defendant adduced no evidence at trial and consequently, the plaintiff's evidence was uncontradicted and that the matter came up for formal proof purely to prove damages as liability was not in issue. Counsel urged the court to allow the appeal.

FINDINGS

5. This being the first appellate Court it is incumbent upon the Court to re-assess and re-evaluate the evidence on record and arrive at an independent conclusion, but as I do so it must be remembered that I have neither seen nor heard the witnesses.

6. The appellant has drawn my attention to the judgment on liability that was recorded on the 18/6/2002. The letter bearing the said consent between the Appellant and Respondent is at page 13 of the Record of appeal. It is the consent the Court recorded on the 18/6/2014. It reads that,

“It is hereby ordered that Judgment be and is hereby entered on liability for the Plaintiff against the Defendant at 65%”

7. It is obvious that when the Trial Magistrate wrote the judgment she didn't refer to the said consent. It could be that she did not go through the Court file. The consent judgment was not signed by the Trial Court but the Trial Magistrate ought to have perused the Court whilst writing the judgment. I also note that the appellant didn't refer to the judgment on liability in their submissions. With the said consent on record it was not necessary for the Plaintiff to give evidence to prove negligence or ownership of the vehicle. I therefore find that the Trial Magistrate erred in law and in fact in dismissing the plaintiff's suit against the consent filed by the parties on the 14/6/02 allowing judgment for the plaintiff against the defendant on liability to the extent of 65%. What the Trial Learned Magistrate needed to have done was to assess quantum her Judgment.

8. From the supplementary record of appeal filed on the 25th November 2011, there is a fee note from Kenya Loss Assessors & Surveyors Ltd that shows a sum of Kshs. 4,248/- was paid, an invoice from Parklane Motors Ltd for Kshs. 306,521/50 plus the assessors fee note dated Kshs. 16/10/00 for Kshs. 10,030/- paid on the 23/10/00. From the evidence of PW1 Peter Nyiboro it is confirmed that the repairs were paid for and PW2 confirmed that they were paid Kshs. 4,248/- for the assessment on the plaintiff's vehicle. PW3 stated that the plaintiff's vehicle was assessed at a cost of Kshs. 306,521/50 and they paid the garage Kshs. 306, 522/- and that investigation fees were paid on 24/4/10. A claims disbursement voucher for Kshs. 306,522/- and Kshs. 4,248/- were produced as Exhibit 6 and 5 in the Lower Court plus a receipt of Kshs. 10030/- Exhibit 9. From this evidence, I find that appellant proved its claim for Kshs. 306,522/- being the repair costs, Kshs. 4, 248/ being the assessment fees, Kshs. 10,030/- being the investigation fees and Kshs. 100/- fees for the police abstract, giving a total of Kshs. 320, 900/-, less 35% contribution.

9. I therefore allow the appeal and reverse the decision of the Learned Trial Magistrate delivered on 31st January, 2006. I enter judgment for the Appellant/ Plaintiff against the Respondent/Defendant in the sum of Kshs. 208,585/-. The Appellant is awarded interest from the date the suit was filed in the Lower Court

together with costs of the said suit and costs of this appeal.

Orders accordingly.

Dated, signed and delivered this 3rd Day of **October, 2014**.

R.E. OUGO

JUDGE

In the Presence of:-

.....**For the Appellant**

.....**For the Respondent**

.....**Court Clerk**