

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 161 of 2006

ANTONY OKOTH OTIENO. APPELLANT

VERSUS

GODFREY MWANGAGI KYUU. RESPONDENT

***(From the judgment and decree of E Maina, Principal Magistrate in Milimani Commercial Courts
CMCC No. 2483 of 2005)***

J U D G M E N T

In a plaint dated 9th March, 2005, the Plaintiff (herein the appellant) claimed General damages, special damages and costs and interests arising from loss and damage as a result of a motor accident allegedly caused by motor vehicle registration No. KAD 897X on or about 2nd August, 2003 along Nairobi – Thika Road.

The defendant (herein the Respondent) filed a defence to the claim. He denied being the registered owner of the motor vehicle registration No. KAD 897X. He also denied that such alleged accident was caused -by his alleged motor vehicle. He further denied that he carelessly drove or controlled the said vehicle at the material time or caused the said accident. He further denied that the plaintiff suffered the alleged injuries and denied the pleaded particulars of damages. And finally the defendant pleaded in the alternative, that if the accident occurred and the injuries were inflicted, then the same were caused by the negligence of the Appellant himself.

During the hearing of the suit at the lower court, the plaintiff testified and called the doctor who also testified and produced a medical report establishing the injuries inflicted on the plaintiff. The injuries included a compound fracture of the left tibia, a compound fracture of the left fibula, a compound fracture of the left radius, fractures of the two upper incisor teeth, a deep cut wound on the upper lip and a laceration wound on the left foot. The doctor established that the injuries had healed with a malunion which caused an angular deformity. He noticed some osteoarthritis in the right hand and he recommended cosmetic surgery on the resulting scars.

In his evidence the plaintiff described how the accident took place. He said he was crossing where there was a zebra-crossing. He also said that nearby there was a footbridge which he avoided to use to cross because it was dark and people used to be mugged thereon. That he was hit from behind and that he fainted. He also said that the driver of the same motor vehicle took him to hospital and gave him the registration number of the car that hit him.

In her judgment the trial magistrate, having carefully listened to and considered the evidence adduced by the Appellant herein, came to the conclusion that the plaintiff had failed to prove his claim on the balance of probability. She dismissed the claim. That is what provoked this appeal.

I have carefully perused and considered the grounds of appeal. They can be summarized into one or two grounds: - That the trial magistrate erred in law and fact in deciding against the weight of evidence and in awarding to the plaintiff, inordinately low general damages, if she was wrong in dismissing the claim.

Having considered the evidence independently as an appellate court, however, it is my independent

view and finding that the Appellant indeed failed to prove his undefended claim on the balance of probability. The Appellant saw a car coming with its lights on. He did not notice its registration number. He decided to cross the road along what he said was a zebra-crossing. Unfortunately he was hit. He called no additional evidence from the police to prove the identity of the car that hit him. He reported to Muthaiga Police Station on a date he did not give in evidence. He got this information from one Godfrey Mwangangi Kiyuu who was not called to testify in support of the Plaintiff/Appellant. These facts were too sketchy to form reliable evidence to base a proper finding on.

Although the motor vehicle registration No. KAD 897X appears to belong to the Respondent and may have been used to take the appellant to hospital, there is no reliable evidence that it was the one that hit the Appellant, since the Appellant did not identify it to be the one, having lost consciousness on impact.

It is also noted that the honourable trial magistrate was better placed to observe the demeanour of the Appellant as he gave evidence. Her conclusion on matters of fact can only be interfered with on very good grounds, for example if it can be shown that she failed to consider certain aspects of the evidence or took account of issues she ought not have taken not account. The issue of the zebra-crossing being next to the foot-bridge was a logical conclusion which the honourable magistrate made a conclusion on. I find no improper conclusion as the magistrate simply said that the two are not logically mutually inclusive. All she was saying, is that the evidence of the Appellant did not add up.

In the above circumstances, I find that this appeal has no merit. I hereby dismiss it with costs. Orders accordingly.

Dated and delivered at Nairobi on 7th day of March 2013.

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D A ONYANCHA

JUDGE