



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL 43 OF 2005

KENYA REVENUE AUTHORITY APPELLANT

VS.

GEORGE JUMA OLANDORESPONDENT

JUDGMENT

The appellant, Kenya Revenue Authority brings this appeal against the respondent, George Juma Olando from the judgment of the Resident Magistrate at Busia wherein he entered judgment against the appellant for a sum of Kshs.149,000/= plus costs and interest.

The brief facts of the case before the learned trial magistrate were that the agents of the appellant officially known as Revenue Officers went to the home of the respondent to seize some alleged uncustomed motor vehicles. While at the residence of the respondent it was alleged that they caused some damage to a motor vehicle registration No.KAN957Y resulting in this claim.

Aggrieved by the said judgment, the appellant brought this appeal.

I have gone through the evidence adduced before the learned trial magistrate with a view to coming to an independent conclusion in respect thereof. It is true that the agents of the appellant went to the residence of the respondent. As customs officers they had all the authority to do so, and in fact at that residence found not only motor vehicle registration No.KAN957Y aforesaid, but another vehicle registration No. KN.0756P make, Susuki Escudo. This is the motor vehicle that was said to be uncustomed.

The evidence that allegedly led to the said damage was that one of the agents of the appellant who gave evidence in these proceedings as defence witness no.1 Peter Musau Nzioka removed the battery of motor vehicle registration No.KAN957Y in order to start the other vehicle registration No.KN.0756P. After starting the second motor vehicle, he is said to have returned the battery to the motor vehicle No.KAN957Y but in the process reversed the connections thereby causing the electrical damage.

PW3, one George Mathu Mwaura gave evidence in respect of the damage that was caused to the said motor vehicle that cost added to what the respondent said he spent to hire a motor vehicle when his was grounded added up to the total which was the subject matter of this suit.

The agents of the appellant, DW1 and DW2, Peter Musau Nzioka and Chief Inspector Kipsang Sambai denied the allegations in the plaintiffs' case and said they never at all participated in the connection of the

battery that was said to have caused the damage to the respondent's motor vehicle. If anything, it was the respondent's agent one Habib Mboya Ibrahim who gave evidence in this case as PW1 who removed the battery from the Toyota Corolla to the Escudo. The learned trial magistrate found for the respondent and condemned the appellant to pay the damage arising therefrom.

I have evaluated the evidence on record. As I have said, the appellant's agents had all the reason to go to the residence of the respondent. It is admitted that the motor vehicle Suzuki Escudo was in fact, uncustomed. The respondent's agent first of all told the appellant's officers that he had proper documents for both motor vehicles. In fact, he had only photocopies for motor vehicle Registration No.KAN957Y but not the Suzuki Escudo. Under cross-examination however, he said he did not have proper documents for motor vehicle Registration No. KN.0756P the Suzuki Escudo.

The statement from him that he gave to the officers to the effect that he had proper documents for both the vehicles contradicts what he said in respect of the same motor vehicles under cross-examination, and this points to his credibility. He also admitted under cross-examination that he had uncustomed vehicle in the compound. The respondent in his evidence in chief also said that motor vehicle Registration No.KAN957Y had proper documents but not the other motor vehicle Registration No.KN.0756P and, he also admitted, that because it had no proper documents, it was seized.

The evidence of DW1, Peter Musau Nzioka was corroborated in all material particulars by the evidence of DW2, Chief Inspector Kipsang. When they went to the residence of the respondent, their interest was in respect of the motor vehicle that had no documents.

It is with that background that I must revisit the judgment of the learned trial magistrate. He said:

“However, both the plaintiff and the defendants have given evidence to blame each other for the damage. DW1 and DW2 admitted on cross examination that upon entering the compound, they took charge of the two vehicles which were suspecting to be uncustomed. That being the position whatever followed was under their instructions.

The evidence is clear that the electrical system of the motor vehicle KAN9577Y was damaged when the battery was changed. The damage occurred when the officer had already taken charge of the motor vehicles.”

It is clear that the learned trial magistrate did not resolve the crucial issue as to who caused the damage to the said motor vehicle. It is also not the true position that DW1 and DW2 took possession and charge of the two motor vehicles. On the contrary, they only took possession of the motor vehicle that was uncustomed and which they seized. It is also not true that whatever followed was under their instructions because there is no evidence that they instructed PW1 to remove the battery from motor vehicle Registration No.KAN957Y to jumpstart the other vehicle.

It is also not true that the damage occurred when the officers had already taken charge of the two motor vehicles because they had taken charge of only one motor vehicle, and so the findings of the learned trial magistrate as to the damage was a misdirection.

Having said so, I must say that the evidence of PW1 as relates to the damage cannot withstand the evidence of DW1 and DW2 which was consistent and corroborative. With profound respect therefore, that issue must be decided in favour of the appellant.

The other issue that comes into play is the capacity of the Commissioner of Customs & Excise to be sued in a case of this nature. It was already pleaded in the defence of the appellant that the Commissioner of Customs was non-suited in these proceedings. With respect, I agree.

Kenya Revenue Authority is a body corporate with a capacity to sue and be sued and all servants working thereunder can only be sued in that capacity as agents of the authority. This clearly is the case under **section 3** of the **Revenue Authority Act**. However, that joinder did not cause any prejudice to the

appellant and it remains a moot issue.

In my judgment therefore, I must find, as I hereby do, that the respondent did not prove his case against the appellant on a balance of probability to warrant the judgment in his favour. That being the case, the appeal succeeds and must be allowed with costs to the appellant.

Orders accordingly.

A. MBOGHOLI MSAGHA

JUDGE

Countersigned, dated and delivered at Bungoma this 6th day of October, 2009.

F. MUCHEMI

JUDGE