Elmi v Nagda (Civil Appeal E515 of 2022)
[2024] KEHC 1637 (KLR) (Civ) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1637 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E515 OF 2022

AN ONGERI, J

FEBRUARY 23, 2024

BETWEEN

MOHAMMED HASSAN ELMI ..... APPELLANT

AND

SONAL M NAGDA ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Judith Omollo (SRM) in Milimani SCCCOMM No. E971 of 2022 delivered on 8/7/2022)

JUDGMENT

1. The appellant was the claimant in SCCCOMM E971 of 2022 where he was seeking judgment in the sum of ksh.300,000 in respect of material damage to his motor vehicle registration no. KCT 898L when it collided with the respondent's motor vehicle registration no. KAZ 154W.
2. The respondent denied the appellant's claim. During the hearing the appellant said the respondent hit his car from the rear while the respondent said that the appellant suddenly entered the road ahead of him and he hit the car.
3. The trial court found that the appellant did produce the following;
    i. An itemized estimate of the costs of repair of motor vehicle prepared by a licensed mechanic or certified motor vehicle assessor.
    ii. An itemized receipt issued in acknowledgement of money paid by the claimant to a licenced mechanic or account of repairs already carried out on the motor vehicle.
4. The trial court dismissed the appellant's claim for reasons that the appellant did not prove his case to the required standard.

5. The appellant submitted that the Police abstract from Lari Police Station dated 22/1/2022 blames the Respondent for the accident. The Respondent's witness confirmed at the trial that he was present during the recording of the Abstract and did not object the recording thereof.

6. The appellant also produced receipts of payment evidencing the expense he incurred in the repair of his Motor Vehicle registration KCT 898L. The appellant called Mr Joseph Waweru Karoki who is a licensed mechanic for more than 10 years who testified on the damage and produced the itemized receipts.

7. The appellant submitted that the respondent did not lead any evidence countering or otherwise dislodging the appellant's evidence. The weight of evidence against the respondent points that the appellants case was more probable than not. The appellant pleaded material damage and led evidence in support of the claim.

8. The respondent alternatively submitted that the appellant testified that he incurred costs towards the repair of the Motor Vehicle and produced receipts that did not have revenue stamp.

9. Further he called one Mr Abi Rizak who testified that he was the one driving the motor vehicle on the material day, however on cross examination he was unable to explain why only the left side of the motor vehicle appeared to have been scratched and not the entire back bumper.

10. The respondent further indicated that the appellant called as a witness one Mr. Karoki Waweru who claimed to be the mechanic who repaired the Motor vehicle registration No. KCT 898 L. He produced a receipt No. 251.

11. Further, that the said mechanic was unable to explain why he charged Kshs. 35,000/= as towing charges yet there was no need for towing, and in any event the car was not towed at all.

12. It was the respondent's submission that he's driver correctly narrated what really transpired on the material day and blamed the driver of the motor vehicle KCT 898 L for wholly causing the said accident out of his sole negligence, recklessness and carelessness.

13. Further, that the Appellant did not call the police who prepared the abstract to come and give his testimony. No occurrence book was produced and that there were no sketches and photographs to demonstrate the way the accident occurred.

14. On this account, the respondent submitted that the abstract without evidence to corroborate it is not conclusive proof of liability as was noted in Mombasa Civil Appeal No. 8 of 2015, *Kennedy Nyangoya V Bash Hauliers* [2016] eKLR where the court held that:

> "....even if the police abstract indicated that DWI was to blame for the accident, the said abstract was not conclusive proof of liability in the absence of evidence being called to support it..."

15. On quantum the respondent submitted that there were clear contradictions as regards the amount which the Appellant purportedly spent on the repairs. And the related expenses.

16. That it was not clear whether the items were actually bought or just repaired and painted. The Appellant just threw receipts without revenue stamps and was not able to explain precisely most of them, especially the towing charges and the actual cost of items purported to have been bought.

17. Further, that the said testimony of the Appellant and his witnesses were contradictory, uncorroborated and not credible.

18. The respondent submitted that there is always a need to particularize and itemize the estimate of the cost of repair by a licensed mechanic or a certified motor vehicle assessor, so that the court can ascertain the correctness of the costs incurred.

19. Further, that he Appellant did not produce a Motor Vehicle Accident Assessment Report as to the cost of repairs in order to substantiate his allegations. In the absence of this, it was therefore not possible to establishing the monetary and residual value of the repair costs of the motor vehicle.

20. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court.

21. The issues for determination in this appeal are as follows;

    i. Whether the appellant proved his case to the required standard both on liability and prove of special damages.

    ii. Whether the trial court was right in dismissing the appellant's case.

22. On the issue as to whether the appellant proved his case to the required standard, I find that the trial court found it was the driver of the Appellant's motor vehicle who was to blame for the accident.

23. The Trial court also found that on the issue of the special damages, the appellant was supposed to specifically plead and prove the special damages.

24. Further, that the trial court found that the appellant did produce the following;

    (i) An itemized estimate of the costs of repair of motor vehicle prepared by a licensed mechanic or certified motor vehicle assessor.

    (ii) An itemized receipt issued in acknowledgement of money paid by the claimant to a licenced mechanic or account of repairs already carried out on the motor vehicle.

25. However, upon re-evaluating the evidence, I find that the person who was driving the Appellant's motor vehicle testified as well as the respondent and the police officer was not called to testify to say why he blamed the appellant.

26. It was not clear why the Trial court discarded the Appellant's testimony and chose to believe the respondent. I find that it was not clear who was to blame for the accident.

27. In the case of *Farah v. Lento Agencies* [2006] 1 KLR 123, it expressed itself as follows:

> " In our view, it was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

28. I find that it was not in dispute that the accident occurred and in the absence of clear evidence who was to blame, the Trial court ought to have apportioned liability at 50:50%.

29. I accordingly set aside the order of the Trial court dismissing the Appellant's claim on liability and I find that both parties were negligent and I apportion liability at 50:50%.

30. On the issue of the special damages, I find that the Appellant pleaded material damages of Kshs 300,000 and produced receipts amounting to the said amount broken down as follows;

    i. Rear bumper - Ksh. 80,000

    ii. Rear left tail light - Ksh. 45,000

    iii. Rear left boot light - Ksh. 35,000

    iv. Paint/repair - Ksh. 40,000

    v. Towing charges - Ksh. 35,000

    vi. Repair & painting of front Bumper - Ksh. 30,000

    vii. Labour costs - Ksh. 35,000

    Total - Ksh. 100,000

31. The respondent said the figures were exaggerated but did he did not say how much the repairs would have caused.

32. I find that the respondent did not counter that evidence but raised the issue that the receipts were not bearing stamp duty.

33. In the case of *Wycliffe Lubanga Kefa v Dennis Ochola & another* [2020] eKLR Musyoka J stated as follows;

> " Under the *Stamp Duty Act*, Cap 48 Laws of Kenya it is a mandatory requirement that any receipts produced in evidence must have a revenue stamp for them to be admissible except in criminal proceedings by a collector to recover stamp duty ....My understanding of the section is to ensure any document for which stamp duty is required to be paid for, should have stamp duty paid first before it can be received. Failure to pay stamp duty does not in my mind mean that the document is invalid or fatally defective but stamp duty that is required to be paid had not been paid; first before admission of the document as there is no bar in paying the stamp duty due thereafter or upon an order of the court to that effect."

34. Section 88 of the *Act* places the duty upon the receiver, not the payee to affix revenue stamps on a receipt and I agree with Justice Musyoka that there no bar in paying the stamp duty due thereafter or upon an order of the court to that effect.

35. I find that the appellant also called the mechanic who repaired the motor vehicle to testify and the material damages were specifically pleaded and proved.

36. I find that the appellant proved the special damages to the required standard and I accordingly set aside the order dismissing the Appellant's claim and I enter judgment in favor of the Appellant against the respondent in the sum of Kshs. 300,000 less 50% contributory negligence.

37. The amount payable to the Appellant is Ksh. 150,000. Each party to bear its own costs of both the original suit and this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

A. N. ONGERI

JUDGE

In the presence of:-

.....for the Appellant

.....for the Respondent