REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 507 OF 2011

NAOMI W. MUCHAI.....APPELLANT

VERSUS

ACME STEEL KENYA LIMITED.....RESPONDENT

(Being an appeal from the Judgment and/or decree of the Hnourale M N Kiema

Resident Magistrate delivered on 8 September 2011

in Nairobi CMCC No. 10890 of 2005)

J U D G M E N T

1. Naomi W. Muchai, the Appellant filed herein a material damage claim against ACME Steel Kenya Ltd, the Respondent herein before the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi vide the Amended Plaint dated 31st May, 2011. In the aforesaid plaint the Appellant sought for payment of Ksh.392,036/- plus costs and interest.

2. The Respondent filed a defence to deny the Appellant's claim. Hon. M. N. Kiema, learned Resident Magistrate heard the suit and eventually had it dismissed.

3. Being aggrieved by the dismissal order, the Appellant preferred this appeal and put forward the following grounds: -

i) That the learned trial magistrate erred in law and in fact in dismissing the Appellants case against the Respondent as not proved when there was overwhelming evidence establishing negligence on the part of the Respondent's driver.

ii) That the learned trial magistrate erred in law and in fact in placing emphasis on the contents of the police abstract with regard to ownership of the Respondent's motor vehicle when the issue was not in contention as the Respondents witness in his evidence confirmed that motor vehicle registration Number KAL 966X belonged to the Respondent and the Amended Defense filed on 8th June, 2011 admitted as such.

iii) That the learned trial magistrate erred in law and in fact in making a finding that none of the motor vehicles mentioned in the police Abstract belonged to the defendant when the Police Abstract was clear that there was a hit and run motor vehicle registration number KAL 966X which fact was confirmed by DW 1.

iv) That the learned trial magistrate erred in law and in fact in dismissing the Appellant's claim on the basis that the Appellant Amended statement of plaint made reference to the road traffic accident on Waiyaki Way while PW 1 confirmed that the accident happened on Chiromo Road while disregarding the fact that the issue of where the accident occurred was no longer in contention after the Respondent admitted at paragraph 5(a) of the amended Defense that indeed the 2 motor vehicles were involved in a road traffic accident along Waiyaki Way and the eye witness that is DW 1 and PW 2 confirmed the same and in failing to take notice that the Police merely record events as narrated to them by others and re not firsthand witnesses.

v) That the learned Trial Magistrate erred in law and in fact in failing to find that the subject accident was well known to the Respondent and/or other driver.

vi) That the learned Trial Magistrate erred in law and in fact in making a finding that since the police did not blame anybody for the accident then the Appellant had not proved her case there at failing to consider the evidence on record point to the Respondent's negligence as clearly the Respondent was joining a main road and ought to have stopped and given way on traffic

on the man road to wit the Appellant's motor vehicle.

vii) That the learned trial magistrate erred in law and fact in failing to consider the Respondent's driver failed to report the accident to the police and therefore his evidence ought to carry little probative value.

viii) That the learned trial magistrate erred in law and in fact in not finding that the only issue in contention herein was who was to blame for the accident and also erred in addressing himself to irrelevant matters.

ix) That the learned trail magistrate erred in law and in fact in failing to analyse the evidence on record and in failing to give a reasoned judgment or at all.

x) That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's eye witness PW 2 testimony explaining how the accident occurred involving the 3 motor vehicles and the fact that there was no contact between motor vehicle registration number KAJ 513U and KAD 859L and that explanation was given that the vehicle that caused the accident failed to stop which was corroborated by the Respondent's witness own statement.

xi) That the learned trial magistrate erred in law and in fact in failing to make a finding on the issue of special damages whether the same was proved or at all.

4) When the appeal came up for hearing, this court directed the same to be disposed of by written submissions.

5) I have re-evaluated the case that was before the trial court. I have further taken into account the rival submissions. Though the Appellant put forward a total of 11 grounds of appeal, this court is of the opinion that two main grounds commend themselves for determination:

a) First, whether there was proof that motor vehicle registration No. KAL 966X was involved in the accident.

b) Secondly, whether there was sufficient evidence to establish liability as against the Respondent.

6. On the first issue as to whether motor vehicle registration No. KAL 966X was involved in the accident with the Appellant's motor vehicle Registration No. KAJ 513U, the Appellant is of the submission that the learned Resident Magistrate failed to analyse the evidence which confirmed that the Respondent's pick-up Reg. No. KAL 966X was involved in the accident on the material date. The Appellant pointed out that the Respondent in the amended defense conceded that the aforesaid motor vehicle was involved in a road traffic accident on 6th October, 2002 with the Appellant's motor vehicle. The Appellant further pointed out that the Respondent's witness (DW 1) admitted in his evidence that he was involved in a road traffic accident on the same date and time.

7. It is also the submission of the Appellant that the police records and witness indicate that motor vehicle Registration KAL 966X was involved in a road traffic accident on 6th October, 2002 but that the same was a hit and run. The Respondent on the other hand is of the submission that the decision of the trial Resident Magistrate should be upheld since it is sound.

8. The Respondent further argued that if the accident was that of hit and run, it was not conceivable for the details to be captured hence it is suspect how the registration details of KAL 966X were obtained.

9. For the above reasons, the Respondent was of the opinion that the Appellant failed to prove liability on the part of the Respondent.

10. In a one page judgment, the learned Resident magistrate noted that none of the motor vehicles involved in the accident belonged to the Defendant(Respondent) as confirmed by the Police Abstract Form. The trial Resident Magistrate further stated that the Appellant failed to prove liability on the part of the Respondent and that the Police Abstract did not show who was to blame.

11. After a careful re-evaluation of the evidence presented before the trial court, it is quite clear that the learned Resident magistrate failed to analyze the evidence presented before him. Had the learned Resident Magistrate done so, he would come to a different conclusion.

12. After analyzing the evidence on record, it is clear that the Respondent's witness, one Puran Patel (DW 1) told the trial court that he drove motor vehicle Registration No. KAL 966X along Chiromo Road and Waiyaki road the night of 6th October, 2002 and that the motor vehicle was hit from behind by a car which drove off without stopping. DW 1 denied causing the accident.

13. The evidence of Wilson Chege (PW 1) further stated that the driver of KAL 966X did not record a statement with the police. The evidence of PW 1 corroborated by the evidence of DW 1 who stated that he did not report the accident to the police. Stephen Njoroge Muchai (PW 2) stated that the details of KAL 966X were given to him by a Good Samaritan.

14. With respect, I am convinced by the submission of the Appellant that the learned Resident magistrate erred when he held that none of the vehicles involved in the accident belonged to the Defendant. DW 1 admitted that the aforesaid motor vehicle was involved in the accident while he was driving along the same road at the material time.

15. The second ground is the question as to who is to blame for the accident. I have already indicated that the learned Resident Magistrate was of the opinion that the Appellant had failed to establish liability on the part of the Respondent. He also pointed out that the police abstract did not lay blame on anyone.

16. The evidence on record show that the Respondent's motor vehicle emerged from a minor road to join the major road thus obstructing the

path of the Appellant's car thus causing the accident. This piece of evidence was presented by PW 1 and DW 1. It is clear that the Respondent was wholly to blame for the accident. DW 1 failed to give way to the Appellant's vehicle, which was on the main road as required in the Traffic Rules and Highway Regulations.

17. In the end, I find the appeal meritorious. It is allowed. Consequently, the order dismissing the suit is set aside and is substituted with an order of entry of judgment in favour of the Appellant as against the Respondent. The Appellant had entered credible evidence to prove the amount to claim in the sum of Kshs.392,036/-. The aforesaid amount includes costs plus interest at court rates from the date of judgment on appeal until full payment. The Appellant also have costs of this appeal.

Dated, signed and delivered at Nairobi this 16th day of August, 2017.

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J K SERGON

JUDGE

In the presence of

..... for the Appellant

..... for the Respondent