REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCA NO. 86 OF 1992

HUGHES LTD …… APPELLANT

VERSUS

HENRY MURIUNGI & 2 OTHERS …….…… RESPONDENT

(Appeal from the judgment of the Principal Magistrate at M
th
July 1992 in
Civil case
No. PMCC No. 6 of 1990

JUDGMENT OF THE COURT

The appellant herein M/S Hughes Limited was the defendant in Meru PMCC No. 6 of 1990 duly filed in court on 8.1.90. In the plaint, the plaintiff, Henry Muriungi Mungania (1st respondent herein) sued the defendant for the sum of Kshs. 10,300/=, costs of the suit and interest. From the plaint, the plaintiff alleges that he purchased from the defendant a motor vehicle registration number KXJ 749, Mazda Pick-up, which vehicle the plaintiff took possession of and started operating as a matatu business earning Kshs. 2,500/= a day. Paragraphs 5, 6 and 7 of the plaint read thus:-

"5. On 2.12.89 the plaintiff's vehicle was detained by the police for three days for traffic warrants issued before the plaintiff bought the vehicle from the defendant.

6. The plaintiff had to pay a total of Kshs. 2,800/= to get back his vehicle and lost earnings of Kshs. 7,500/= for the three days that the vehicle was detained.

7. The plaintiff claims from the defendant the sum of Kshs. 10,300/=.

That was how the plaintiff's claim against the defendant arose.

The defendant filed its defence on 31.1.90 denying the plaintiff's allegations as set out in paragraphs 4, 5 and 6 of the plaint. The defendant also denied liability to pay the plaintiff the sum of Kshs. 10,300/= and further averred that if there were any traffic warrants as a result of which the plaintiffs motor vehicle was detained by police, then those offences for which the warrants were issued were committed by third parties for whose actions the defendant was not liable.

On 12.2.90, the defendant filed application for leave to issue third party notices to the 2nd and 3rd respondents herein and subsequently the third party notices were issued on 5.6.90. The 2nd and 3rd respondents herein filed their defence in which they denied that they were liable to indemnify the defendant for the alleged claim in respect of the subject motor vehicle KXJ 749 Mazda pick-up as alleged or at all and put the defendant to strict proof. Paragraph 3 of the 3rd parties defence is worth noting and says:-

“(3) The third parties state that after the defendant repossessed the m/v Reg No. KXJ 749 and sold it to the plaintiff, there was a balance of Kshs. 10,374/60 due and payable to the third parties by the defendant. The third parties by a letter dated 15th December, 1989 authorized the defendant to pay to the plaintiff Kshs. 3,000/= out of those proceeds being the amount paid to court by way of fines as a result of the traffic case. But the defendant refused to comply and to date, has never paid the said amount to the third parties.”

At paragraph 4 of the defence, the third parties denied their liability to pay Kshs. 10,300/=, either to the defendant or to the plaintiff, and the defendant was put to strict proof.

In her judgment dated 9.7.92, the learned trial magistrate, Mary Mugo, found that the plaintiff was entitled to damages for the loss he incurred when the motor vehicle was detained in addition to the fines which the plaintiff allegedly paid for traffic offences committed before the plaintiff bought the motor vehicle. She put this amount for fines at Kshs. 2,500/=. A portion of the learned magistrate’s judgment went thus:-

“He (plaintiff) knows Hughes Ltd but not the third parties. The defendant Hughes Ltd had neglected to pay the balance to the 3rd parties tells that the defendant was probably expecting that there would be liabilities incurred when the vehicle went in the hands of the 3rd parties. I do not however believe that the plaintiff was making Kshs. 2,800/= per day as this is not proved to the satisfaction of the court. Probably the plaintiff could make Kshs. 1000/= per day which makes it Kshs. 3,000/= for the three days the vehicle stayed at the police station.”

The learned trial magistrate then went on to find, though not pleaded, that the plaintiff also suffered embarrassment when his vehicle was confiscated and detained by the police for allegedly committing offences which turned out to be offences committed by other people which in fact the defendant company ought to have known. On the basis that the third parties authorized the defendant to pay Kshs. 2,800/= being fines payable on the motor vehicle, for and on behalf of the third parties the learned magistrate concluded that the defendant was liable for any loss which the plaintiff incurred as a consequence thereof and proceeded to make the following award to the plaintiff:-

- · Loss incurred when vehicle was detained for three days as explained – Kshs. 3,000/=.
- · Amount of fine paid in respect of the traffic expenses as explained – Kshs. 2,800/=
- · General damages for embarrassment caused when the plaintiff’s vehicle was detained for offences he was not aware of – Kshs. 7,000/=

Total - Kshs. 12,800/=

The learned trial magistrate also awarded costs and interest. It is against this judgment that the appellant has appealed. The amended Memorandum of Appeal, filed on 31.3.02 by the firm of KIAUTHA ARITHI & CO. ADVOCATES sets out six (6) grounds of appeal. The appellant has faulted the trial magistrate for holding the appellant liable to compensate the plaintiff (1st respondent) even when the 2nd and 3rd respondents had admitted liability and further that the learned trial magistrate erred in law

and fact in holding the appellant liable despite the fact the illegal actions were committed by third parties who were independent of the appellant. That the learned principal magistrate's judgment was against the weight of evidence and that the learned principal magistrate erred in law in awarding Kshs. 3,000/= to the 1st respondent in special damages when the same was not strictly proved. That the learned principal magistrate erred in law in awarding Kshs. 7,000/= as general damages when the same was not pleaded and that the learned principal magistrate further erred in law in taking into account extraneous matters to arrive at her judgment.

The brief facts of the plaintiff's case are not in dispute. Sometime in the year 1989, the plaintiff bought motor vehicle KXJ 749 Mazda pick-up from the defendant at Kshs. 35,000/=. That on purchase, plaintiff started operating the vehicle as a matatu. Before the plaintiff bought the vehicle, the same had been repossessed from the 2nd and 3rd respondents who had bought the vehicle on hire purchase, but had failed to meet the monthly hire purchase repayments. By a letter dated 14.8.89 to the manager of the defendant, the 2nd and 3rd respondents informed the defendant that they were unable to meet the monthly installments required, as a consequence of which the vehicle had been possessed by the defendant. By the same letter, the 2nd and 3rd respondents authorized the defendant to sell the vehicle for not less than Kshs. 53,000/= to recover the balance of the H.P. amount. In the last paragraph, the 3rd parties said:-

"If the vehicle is sold in excess of the said amount, we shall appreciate to be refunded the balance."

On 2.12.89, the plaintiffs motor vehicle was detained by police for three days for traffic warrants issued before the plaintiff bought the vehicle from the defendant and that plaintiff had to pay Kshs. 2,800/= to recover the vehicle from the police and that he lost earnings totaling Kshs. 7,500/= for the three days that the vehicle was on the read. In the plaint, the plaintiff claimed the aggregate of these two figures amounting to Kshs. 10,300/= costs and interest.

During the hearing, the plaintiff produced three receipts – 'G 2140370 of 4.12.89 for Kshs. 300/= G 140610 of 18.1.90 for Kshs. 2,100/= and G 140369 of 4.12.89 for Kshs. 400/=. He stated that he was claiming the money he paid and the loss of business for three days.

During cross-examination, the plaintiff stated that the warrants were in force by the time he bought the vehicle from the defendants though no dates were given to the court. He also told the court that he used to make Kshs. 2,000/= everyday while operating the vehicle as a *matatu* , but that he kept no accounts and never used to bank the money. He also admitted that the defendant was only a car dealer and that the log book bore names of other people.

The defendant stated as much only adding that the defendant was not responsible for the acts of the third parties which led to the arrest and detention of the plaintiff's motor vehicle by police. Mr. James Gichuru Mugambi, also testified that the fact that the 2nd and 3rd respondents authorized the defendant to make payments on their behalf to the plaintiff in respect of the warrants was an admission by the 3rd parties that they were responsible for those offences. When questioned on why the defendant did not remit the money as instructed by the 3rd parties, the defendant said it was because the same amount was demanded of them through the demand notice produced as D exhibit 2.

The 1st third party (2nd respondent) told the court that they operated the motor vehicle as a *matatu* but that their drivers did not tell them that there were court fines to be paid. He disputed the plaintiff's claims for lost business but admitted that the plaintiff ought to be refunded the money he paid for fines. While under cross-examination, the 2nd respondent told the court that they had authorized the

defendant to pay the plaintiff the sum of Kshs. 3,000/= because they did not dispute the amount. This was also the evidence given by the 2nd third party (3rd respondent herein.)

Mr. Arithi for the appellant has urged the court to allow the appeal on the grounds that the 1st respondent failed to prove that which he alleged against the appellant on a balance of probability. Secondly that the 1st respondent did not show by documentary evidence that he made Kshs. 2,500/= per day from the alleged *matatu* business and that since the 1st respondent's claim was one of special damages, the same not only have to be specifically pleaded but must also be strictly proved. In this regard, Mr. Arithi cited Court of appeal decision in Civil Appeal No. 119 of 1995 between RYCE MOTORS LTD & ANOTHER and ELIAS MUROKI where the Court of Appeal held that it is not enough to give evidence to the effect that the matatu was bringing in so much in a day – that such claims must be supported by acceptable evidence. Mr. Arithi submitted that the award to the 1st respondent was erroneous and should be set aside. That the award of Kshs. 7,000/= for embarrassment was a figment of the learned trial magistrate's own imagination because the same was not pleaded. He relied on Court of appeal decision in Civil Appeal No. 23 of 1991 between PETER NJUGUNA JOSEPH & ANOTHER and ANNA MORAA. Further that the appeal should be allowed because the 2nd and 3rd respondents admitted part of the 1st respondent's claim for the payment of the fines, though the three receipts produced by the 1st respondent were in names of third parties whose relationship with the 1st respondent was not disclosed to the court, and that receipt No. G 140610 was paid some ten days after filing of the suit.

I have given careful thought to the submissions by all the three counsels – Mr. Arithi for the appellant Mr. B.G. Kariuki for the 1st respondent and Mrs. Ntarangwi for the 2nd and 3rd respondents. I have also carefully perused the pleadings, proceedings and judgment of the learned trial magistrate. On the basis of the above, I have reached the conclusion that the learned trial magistrate grossly misdirected herself in her findings and judgment in favour of the 1st respondent. I shall deal first with the award of Kshs. 7,000/= being what the learned magistrate called **"general damages for embarrassment caused when the plaintiff's motor vehicle was detained for offences he was not aware of**." The plaint is clear on the relief's sought by the plaintiff namely:-

1. Principal claim of Kshs. 10,300/=

2. Costs of the suit.

3. Interests thereon.

Nowhere in the plaint did the 1st respondent pray for the general damages that the learned magistrate termed **"general damages for embarrassment**." As rightly submitted by Mr. Arithi, the learned magistrate conjured up her own relief and made an award to the 1st respondent when the same was neither pleaded nor proved. Contrary to what Mr. B.G. Kariuki would have this court believe, there was no legal basis for such an award. The plaint discloses no such claim. With due respect, the learned trial magistrate misdirected herself in allowing a non-existent claim. The same can therefore not stand as it is based on no evidence at all. That award is thus set aside.

The 1st respondent pleaded Kshs. 10,300/= which from the evidence comprised of the sum of Kshs. 2,800/= in fines and Kshs. 7,500/= being lost earnings for the three days that the vehicle was detained. In her judgment at paragraph 3 thereof, the learned trial magistrate said the following:-

"……I do not however believe that the plaintiff was making Kshs. 2,800/= (though this should have been 2,500/= if the total figure of Kshs. 7,500/= pleaded was correct) per day as this is not

proved to the satisfaction of the court."

Having found as she did that the 1st respondent had not strictly proved the claim for Kshs. 2,500/= per day, she proceeded to speculate that "**the plaintiff could make Kshs. 1,000/= per day which makes it kshs. 3,000/= for the three days the vehicle stayed at the police station."** With respect, such speculation by the learned trial magistrate was not supported by evidence. The 1st respondent needed to strictly prove the special damages, whether it was Kshs. 2,500/= or Kshs. 1,000/= per day that he made from the business. In his evidence in chief, the 1st respondent said:-

"I used to get Kshs. 1,200/= monthly sometimes Kshs. 2,000/=. I used also to get an average of Kshs. 2,000/=."

When cross-examined by Mr. Riungu for the defendant (appellant) the 1st respondent said:-

"I made Kshs. 2,000/= everyday with my vehicle. This is cash that I collect in the evening. I kept no accounts. I never used to keep any money in the bank."

The evidence was thus clear that there was no proof of the 1st respondent's claim that he was making either Kshs. 2,000/= or Kshs. 1000/= per day from the vehicle. The case of RYCE MOTORS LIMITED & ANOTHER V. ELIAS MUROKI – civil appeal No. 119 of 1995 –Mombasa is relevant in this case. There was no evidence before the trial court to show that the 1st respondent kept proper accounting records specifically for the ***"matatu "*** to prove his daily earnings. All that the court had before it was the 1st respondent's word. Court of appeal decisions abound on the issue of special damages – that these must not only be specifically pleaded but that they must be strictly proved. The award that the learned trial magistrate made in this regard was not based on evidence but on her own view of the **"*matatu*** " business. That head of the award is therefore set aside. Mr. Kariuki submitted that the learned trial magistrate was entitled to assume that a ***"matatu "*** earns money everyday and that she was right in awarding the justified amount of Kshs. 1,000/=. With respect that is not the law and the argument is thus rejected for lacking a legal basis.

Finally, the 1st respondent pleaded to be paid Kshs. 2,800/= being moneys paid by himself for fines for some traffic offences. The appellant denied liability for these amounts. The 2nd and 3rd respondents, both in their pleadings (paragraph 3 of the defence) and in their evidence on oath admitted that this amount was payable. I have earlier on in this judgment set out the said paragraph 3 of the joint defence by the 2nd and 3rd respondents in which they admitted that the money was payable **"as a result of the traffic case.**" Mr. Arithi has submitted that the 1st respondent has not proved this claim because the receipts purportedly produced by 1st respondent to support the claim are in the names of people who are not identified to the court. The three receipts are as follows:-

1. Receipt No. G 140370 dated 4.12.89 for Kshs. 2,100/= is in the name of Dickson Mbaya in respect of traffic case No. 2077 of 1989.

2. Receipt No. G 140369 dated 4.12.89 for Kshs. 400/= is in the name of Silas Mbaabu for criminal case No. 1197 of 1989.

3. Receipt No. G 140610 dated 18.1.90 for Kshs. 300/= is in the name of John Murithi.

The three receipts were produced as exhibits but during the evidence in chief, the 1st respondent did not say who the three people were in whose names the receipts were issued though from the records, SILAS MBAABU would appear to be the 3rd respondent herein. If it is true that SILAS MBAABU the 3rd

respondent paid part of that money, then the 1st respondent cannot now claim to be refunded. Regarding the other two receipts, the evidence is that the moneys claimed by the 1st respondent were paid by other parties and not the 1st respondent and accordingly his claim based on the evidence of those receipts cannot stand and the learned trial magistrate should have found that as a fact. The 1st respondent should have adduced evidence to show that it is him who took out the money and paid on behalf of those other persons. In addition, the 1st respondent should have called Dickson Mbaya, John Muriithi and Silas Mbaabu (if not the 3rd respondent herein) to testify before court to prove this special damage of Kshs. 2,800/=.

I allow the appeal, set aside the judgment and orders of the learned trial magistrate in their entirety. Costs of the appeal to the appellant. Costs of the suit in the lower court to the appellant.

Dated and delivered at Meru this 20th day of December 2004**.**

RUTH N. SITATI

Ag JUDGE

20.12.2004