



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 97 OF 2018

FREDRICK OLUOCH ODUOR.....APPELLANT

VERSUS

KIBOS SUGAR AND ALLIED INDUSTRIES LIMITED.....RESPONDENT

[Being an appeal from the Ruling of P.K. Rugut (SRM) in the Senior Resident Magistrate's Court at Tamu Civil Suit No. 17 of 2016 delivered on the 12th April, 2018]

JUDGMENT

The Appellant, **FREDRICK OLUOCH ODUOR**, has brought this appeal to challenge the dismissal of the case which he had filed against the 2nd Defendant, **KIBOS SUGAR AND ALLIED INDUSTRIES LIMITED**.

1. He said that the learned trial magistrate was wrong to have dismissed the case just because the Appellant was not an employee of the Respondent.
2. His view is that the trial court ought to have analyzed situations in which an employer would be held vicariously liable for the actions of his employee which had been committed against a third party.
3. In this case the Appellant asserts that the Respondent owed him a duty of care due to the torts which were committed by the Respondent's employee in the course of his duty or in the interest of the employer.
4. The Appellant went on to submit that at the time when the accident occurred, he was legally aboard the tractor. He pointed out that he had boarded the tractor with the full knowledge and consent of the driver.
5. Being the first appellate court, I am obliged to re-evaluate all the evidence on record and to draw my own conclusions therefrom. However, I am alive to the fact that I did not have the benefit of seeing the witnesses when they testified.
6. The Plaintiff testified that on the material day, he required the services of a winch, after their tractor got stuck in the mud.
7. It is clear from the evidence that the tractor which got stuck in the mud belonged to a gentleman named Sospeter. In other words, the tractor did not belong to the Defendant.
8. As the Plaintiff explained, a winch is a specialized "tractor" which is used to tow out other tractors from sticky places.
9. In this instance, the winch which the Plaintiff got is one belonging to the Defendant.
10. The Plaintiff climbed on board the winch, and he sat beside the driver.
11. It was the Plaintiff's testimony that the driver of the winch was driving fast, and that the Plaintiff was thrown off the winch when the said winch hit a pothole.
12. He explained that the winch ran over him, after he had fallen-off. He therefore brought the suit to seek compensation for the injuries he had sustained in the accident.
13. In his understanding, the accident was caused by the driver as he was driving fast.
14. Due to the driver's alleged negligence in the manner he drove the winch, the Plaintiff sued the owner of the said winch, asserting that the

said employer was vicariously liable for the actions of its employee.

15. **PW2, PC CALEB OMUSE**, was a police officer who was attached to the Awasi Police Station.

16. He said that the Plaintiff ought not to have sat on the mud-guard of the tractor. Therefore, the police officer blamed the Plaintiff for the injuries he sustained when the tractor ran over him after he had fallen off the tractor.

17. After **PW2** testified, the Plaintiff closed his case. Thereafter, the Defendant called two witnesses.

18. **DW1, DICK ODENY OPIYO**, described himself as a “Winch Operator”. His role included the towing of tractors that were stuck in muddy conditions.

19. On the material day, **DW1** was working in the Awasi area, where some tractors were stuck.

20. One of the tractors which **DW1** was asked to go and have towed out is that which belonged to Sospeter. And, Sospeter’s tractor used to be driven by the Plaintiff.

21. **DW1** testified that the Plaintiff boarded his winch and that as **DW1** was driving towards the place where Sospeter’s tractor was stuck, the winch hit a pothole, causing the Plaintiff to fall-off.

22. **DW1** said that the winch had only one seat. Therefore, the Plaintiff sat on the mud-guard of the winch.

23. **DW1** also said that he was driving the winch at about 10KPH.

24. During cross-examination **DW1** said that before the material date, he had already been working for the Defendant for 2 ½ years.

25. **DW1** testified that it was normal for tractors to ferry more than one person, and that persons did sit on the mug-guard of the tractors.

26. He said that it was a normal occurrence for a tractor to carry between 3 and 4 people.

27. However, **DW1** made it clear that it was unusual for the Plaintiff to sit on the mud-guard of the winch.

28. Interestingly, **DW1** said that even within the premises of the Defendant, people would sit on mug-guards, and that nobody had ever been dismissed because of sitting on mug-guards.

29. I find that piece of evidence “interesting” because, whilst the witness said that the Company had no circular prohibiting people from sitting on mud-guards, **DW1** said that;

“I didn’t do anything, despite our company directions. I was to blame for permitting him to sit on the mud-guard against our company policy.”

30. In the circumstances, I find that although the Company had not issued a Circular prohibiting the ferrying of persons sitting on mud-guards of their tractors, the Company had a Policy against the practice.

31. In the absence of a Circular or Notice or other Message, which was made known to the general public who may seek the Company’s winch services, the said Company’s Policy would not be known beyond those in the Company.

32. Therefore, it is understandable why **DW1** said that, as between him and the Company, it is he who was to blame for allowing the Plaintiff to sit on the mud-guard.

33. As there is no evidence that the Plaintiff was made aware of the Company Policy, I find that the Plaintiff cannot be said to have flouted the Policy.

34. But this claim is founded on tort, and therefore whether or not the policy existed and was flouted, unknowingly, that would not lead to the conclusion that the Defendant was not liable.

35. In the case of **TABITHA NDUHI KINYUA Vs FRANCIS MUTUA MBURI & ANOTHER, CIVIL APPEAL NO. 186 OF 2006**, the Court of Appeal said;

“The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of his employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course or scope of employment at the time the delict was committed. The test for establishing whether an employer is vicariously liable for his/her servant’s negligence was set out in this court’s decision on Joseph Cosmas Khayigila Vs. Gigi & Company Ltd & Another CA No. 119/1986 as follows:-

‘In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver

was the owner's servant or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied, or on his instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner."

36. In this case, there is no dispute about the fact that the driver of the winch was an employee of Kibos Sugar and Allied Industries Limited.

37. I find that the driver was driving the winch in the course of his employment.

38. He also had express instructions to go and tow tractors which had been stuck in the mud. The accident happened when he was driving towards one of the tractors that he was planning to rescue.

39. Was he negligent?

40. The driver testified that;

"It had rained heavily. The road was muddy with potholes. The tractor was going side to side, because of potholes. My tractor was swerving from side to side due to the rains and the potholes, when that happened. It was likely for one to fall when he boarded the tractor."

41. The circumstances portrayed by the driver were of a situation in which there was a high risk of an accident occurring.

42. If it is true that the accident happened when the tractor was moving at **10KPH**, it would imply that that speed was still too fast in the prevailing circumstances.

43. Therefore, I find that the driver of the winch was negligent.

44. It therefore follows that the Company, Kibos Sugar and Allied Industries Limited is vicariously liable for the negligence of their driver.

45. The Plaintiff called the police officer as his witness. It is therefore most surprising that the Plaintiff should now choose to cast doubt on the evidence which he consciously made available to the trial court.

46. A party who calls a witness in a civil case, is presumed to know what his witness will be telling the court.

47. It would not make any sense for a party to call a witness, and thereafter disparage the evidence tendered by that witness.

48. In any event, the Appellant has now described the condition of the road as pathetic.

49. The evidence on record confirms that it had been raining, and that tractors had got stuck in the muddy conditions.

50. Therefore, when the Plaintiff chose to sit on the mud-guard of a tractor that was being driven in such treacherous conditions, he knew or he ought to have known that there was a probability of an accident happening.

51. His own witness blamed him.

52. Considering that the driver of the winch neither fell-off nor got injured in the accident, I find that it is because the Plaintiff placed himself at risk that he sustained the injuries which he suffered.

53. But it is also true that if the Plaintiff sat on the mud-guard, but the tractor was not driven at all, there would not have been an accident.

54. In the circumstances, I find the Plaintiff and the Defendant equally blameworthy.

55. Therefore, the appeal on the issue of liability is allowed. I set aside the dismissal of the suit, and I substitute it with a finding that the Respondent herein is 50% liable.

QUANTUM

The trial court had assessed the compensation in the sum of

Kshs 1,200,000/=.

56. The Respondent submitted that that award was adequate to compensate the Appellant.

57. However, the Appellant says that he should be awarded Kshs 2,500,000/=.

58. The Appellant cited **JOSEPH ADERO ONIANGO Vs PORTS AUTHORITY, HCCC NO. 419 OF 1990** (at Mombasa).

59. In that case the Plaintiff suffered the following injuries;

(i) Compression fracture of lumbar vertebra (spine);

(ii) Fracture and dislocation of pelvis;

(iii) Fracture of the left foot;

(iv) Fracture of the left ankle; and

(v) Fracture of the right hand.

60. The Plaintiff in that case was in a hospital bed, on traction for 72 days.

61. The learned Judge awarded Kshs 550,000/= as General Damages and that was in 1992.

62. In contrast, the Appellant herein suffered the following injuries;

(a) Head Injury;

(b) Injury on the neck;

(c) Injury to the neck;

(d) Injury on the nostril;

(e) Fracture on the pelvis; and

(f) Injury to the abdomen and urine bladder.

63. The Appellant was in hospital for 8 days.

64. I find that the case of **Joseph Adero Oniango** is wholly distinguishable from that of the Appellant, whose injuries were far less serious.

65. In the case of **JAMES NJAU KARIUKI Vs MARY GORETI WAKWIBUBI & ANOTHER, HCCC NO. 2 OF 2005**, the Plaintiff sustained the following injuries;

(a) Closed head injury-lacerations on the forehead of 7cm;

(b) Bruises and facial cut wounds on the bridge of the nose and over the left eyebrow area;

(c) Deep cut wound on left knee;

(d) Dislocation of left knee joint;

(e) Fracture of left acetabulum with left hip dislocation;

(f) Fracture of the left Femur; and

(g) Soft tissue injuries on the left side of the chest.

66. The Plaintiff had to undergo a total hip replacement.

67. He was assessed to have sustained Permanent Partial Disability of 50%.

68. The learned trial Judge awarded Kshs 3,000,000/= as compensation. The court expressly held that the Plaintiff was unable to perform his conjugal duties due to inability to have sexual intercourse.

69. It was found that although the Plaintiff had the urge for sex, he was unable to engage in complete and unbridled sexual intercourse.

70. The learned Judge said;

“This is more severe injury or consequence than losing the libido in its entirety so that the Plaintiff does not have to go through the torment and frustration of a stifled and smoldered act.”

71. I find that the injuries in that case were far much more serious than those of the Appellant.

72. In the case of **JOHN KIBICHO Vs EMMANUEL PARSMEI MKOITIKO HCCC NO. 319 OF 2013** the Plaintiff suffered;

- (i) Displaced and comminuted Fracture of right mandible;*
- (ii) Multiple fractures of 2nd to 5th ribs;*
- (iii) Fracture of the right ulna;*
- (iv) Fracture of the right superior and inferior pubic ramus of the pelvic bone;*
- (v) Fracture of the right scapula;*
- (vi) Fracture of the left superior ramus of the pelvic bone;*
- (vii) Multiple lacerations and cut wounds on the right forearm and both legs;*
- (viii) Cut wounds on the head;*
- (ix) Contusion in the chest; and*
- (x) Blood loss, physical and psychological pains.*

73. The Plaintiff was awarded Kshs 1,800,000/= as compensation for pain and suffering and loss of amenities.

74. As the injuries sustained by the Plaintiff were evidently more serious, I find that the Appellant herein would be adequately compensated by a lower award.

75. On the other hand, the sum suggested by the Respondent appears to be low, considering that Kshs 400,000/= was awarded in the case of **MARGARET T. NYAGA Vs VICTORIA WAMBUA KIOKO, HCCC NO. 395 OF 2001**, which was determined on 21st April 2004.

76. Although the injuries sustained by the Plaintiff in that case are comparable to those which the Appellant herein sustained, I find that the Appellant could only be adequately compensated if the court took into account the inflationary trends prevailing in this country over the last 15 years.

77. Accordingly, I have come to the conclusion that the assessment by the learned trial magistrate, wherein she arrived at a figure of

Kshs 1,200,000/= is appropriate.

78. The said sum will then be discounted by 50%, after taking into account the Appellant's contributory negligence.

79. Finally, as the appeal is partially successful, I order that the Respondent will pay to the Appellant, the costs of the suit. However, each party will meet their respective costs of the appeal.

DATED, SIGNED and DELIVERED at KISUMU This 29th day of July 2019

FRED A. OCHIENG

JUDGE