



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 6 OF 2012

B.O.G. MISYANI GIRLS SECONDARY SCHOOL....APPELLANT

-VERSUS-

JOSEPH MUTISO KIOKO.....RESPONDENT

(Being an appeal against the Judgment delivered by Hon. S.N. Mwangi (R.M) in Kangundo PMCC No. 286 of 2009 on 16.12.2011)

JUDGEMENT

1. The suit in the trial court arose out of what is said to be an accident in which the Respondent was a pedestrian along Tala- Kinyui earth road on 17.12.2007 when the appellant's agent requested the respondent to assist in pushing the motor vehicle KAL 070U that was stuck in mud and that the appellant occasioned an accident in which the Respondent was injured and who pleaded negligence. The respondent sought special damages and general damages in respect of injuries as particularized in Paragraph 5 of the plaint.
2. The appellant in its defence dated 17.2.2010 denied ownership of the suit vehicle, denied the occurrence of the accident in the manner described by the respondent, denied negligence on his part as well as the particulars of loss and injuries. The appellant pleaded that the accident was as a result of the sole and contributory negligence of the respondent as particularized in paragraph 5 of the defence. The appellant pleaded "*volenti non fit injuria*".
3. The decision of the trial court gave rise to this appeal by the appellant that was filed on 11.1.2012. The appellant's appeal is on quantum and liability. The parties agreed to canvass same via written submissions which they filed and exchanged.
4. Learned counsel for the appellant submitted on two issues that were considered errors; that is proof of liability and quantum. On the issue of proof of liability, counsel submitted that the respondent did not prove his pleadings and did not rely on the doctrine of *res ipsa loquitur*. Counsel submitted that Pw2 testified and confirmed that the appellant's driver was not to blame and that the said Pw2 described the occurrence as an incident and not an accident. Reliance was placed on the case of **Alfred Kioko Muteti v Timothy Miheso & Another (2015) eKLR**.
5. Learned counsel submitted on the defence of *volenti non fit injuria* that by volunteering to assist the appellant's driver, the respondent was aware of the danger that he was getting into. Counsel added that the respondent held onto the car and this was why he was injured hence the respondent did not prove its case and the same ought to be dismissed with costs. Reliance was placed on the case of **United Millers Limited & Another v John Mangoro Njogu (2016) eKLR**.
6. Learned counsel submitted that an award of Kshs 200,000/- was sufficient to compensate the respondent. Reliance was placed on the case of **Simba Posho Mills Ltd v Onguti (2005) eKLR**.
7. The Respondent submitted on two broad issues namely liability and quantum. On the issue of liability, counsel placed reliance on the case of **Israel Mulandi Kisengi v The Standard Limited & 2 Others (2012) eKLR** and argued that for the defence of *volenti* to succeed, there must be proof that the plaintiff agreed to the breach of the duty of care owed to him by the defendant and that the plaintiff consented to waive his right of action against the defendant in respect of that breach. Counsel argued that the appellant ought to have informed the respondent of the nature of the risk involved and added that the defence of *volenti* was not available to the appellant hence the court was not wrong when it found the appellant 100% liable. On the issue of quantum, counsel submitted that the award of Kshs 400,000/- was in order and reliance was placed on the case of **Sino Hydro Corporation Ltd v Daniela Atela Kamuda (2016) eKLR**. Counsel submitted that though the respondent pleaded special damages of Kshs 4,760/-, the court assessed the same at Kshs 6,560/- and there was no error in so doing.
8. The role of the Appellate court is now a matter of judicial notice, that is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and reach an independent conclusion as to

whether to uphold the judgment. This was observed in the case of *Selle v Associated Motor Boat Co. [1968] EA 123*

9. The evidence that was rendered before the trial was as follows; Pw1 was Dr. Carolyne Mwangi who testified on the examination carried out on the respondent and the report that she tendered and was marked Pexh 1. She noted that the respondent suffered amputation of the fingers and laceration of the right hand. On cross examination, she testified that the respondent suffered 6% disability.

10. Pw2 was IP Rotich who testified that he received a report of a road traffic accident and the investigations showed that the driver of the suit vehicle sought assistance from the members of the public in respect of the subject vehicle that was stuck in mud and that the respondent was a passerby who offered help and as a result the jack of the suit vehicle slipped and fell on the respondent who was injured. On cross examination, he testified that the driver of the suit vehicle was not blamed as a result of the investigations that were carried out.

11. Pw3 was the respondent who testified that he was requested to assist the driver of the suit vehicle that had got stuck and he obliged whereupon he was not informed that there was a jack in place and in the process of pushing the bus, the jack moved and cut his right hand index and mid fingers. On cross examination, he told the court that he had no protective gear and on re-examination he told the court that the driver drove as he pushed the bus but that anyone can push a stuck bus as it needed no expertise. The respondent closed his case and the appellant was put to the stand.

12. DW1 was Joseph Kiso Kii who told the court that he was employed as a driver of the appellant and that on the material day the suit vehicle skid and landed in a ditch. He told the court that he put a jack to lift the vehicle and was unable to hence it was agreed to give money to the persons who were to help. It was his testimony that the respondent came and held a step that was behind the vehicle as he tried to lift up the motor vehicle and the jerk slid injured him and he was taken to hospital by the appellant. On cross examination, he told the court that it was agreed that the persons who helped the appellant would be paid and that the respondent got hurt when helping but however the school paid for his medical expenses. The appellant closed its case.

13. The trial court found that the respondent was in the process of assisting the appellant in pushing the motor vehicle that was stuck in mud and set 100% liability against the appellant. The court awarded general damages of Kshs 400,000/- and special damages of Kshs 6,560/-.

14. Cognizant of my duty in the appellate court, having analyzed the evidence that was adduced by both parties together with the pleadings and the submissions in support and against the appeal, the issues for determination in this appeal are:-

1) What is the cause of action in this case and whether the suit discloses a cause of action against the appellant.

2) Whether negligence has been proven against the appellant and if so what is the extent of liability.

3) Whether the case for disturbing award herein has been made.

15. The 9th Edition of Black's Law Dictionary at page 251 states that a cause of action is "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person."

16. Therein, Edwin E. Bryant is cited as defining a cause of action in the *Law of Pleading Under the Codes of Civil Procedure 170 (2d ed. 1899)* thus:

"What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be – (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property."

17. The Respondent pleaded that he was a pedestrian injured because of the negligence of the appellant in driving the suit vehicle negligently. He testified that he was injured whilst helping the appellant who had offered to pay him in exchange for getting the suit vehicle out of the mud.

18. Negligence as a tort is the breach of legal duty to take care which results in damage undesired by the defendant to the plaintiff. Thus its ingredients are (a) A legal duty on the part of A towards B to exercise care in such conduct of as falls within the scope of the duty, (b) Breach of that duty (c) and consequential damage to B See **Winfield on Tort Eighth Edition Page 42.**

19. In Attorney-General v Oluoch [1972] 1 EA 392 in deciding whether a suit discloses no cause of action the East African Court of Appeal sitting at Nairobi held at page 394 that:

"In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the pleadings and assumes that the facts alleged in it are true."

20. The suit discloses no cause of action where the Plaintiff sues a party against whom there is no cause of action as held in **Auto Garage vs. Motokov [1971] EA 514 at 519.** Spry VP in summarizing the essential ingredients of a cause of action held at 519:

"In addition, of course, the Plaintiff must appear as a person aggrieved by the violation of the right and the Defendant as a person who is liable. I would summarize the position as I see it by saying that if a plaintiff shows that the Plaintiff enjoyed a

right, that the right has been violated and that the Defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment.”

21. The evidence on record departs from what was pleaded. It came out during the evidence that the respondent was not injured because of driving the suit vehicle and that the respondent was not a pedestrian and was not injured as such.

22. What is apparent is that the respondent was promised a reward for his services in getting the suit vehicle unstuck and in the process of rendering his services he got injured. It suffices to state the case of **Combe v Combe [1951] 2 KB 215 relying on Central London Property Trust Limited v High Trees House [1947]** “Where one person has by words or conduct made to the other party a promise or assurance which was intended to affect the legal conditions between them and be acted on accordingly, then once the other party has taken him at his word and acted on it the one who gave the promise cannot afterwards be allowed to revert to the previous relationship as if no such promise had been made.”

23. A contract of employment is an agreement between the employer and employee giving rise to obligations between employer and the employee which are enforceable or recognizable by the law. Such a contract, like other contracts, may be inferred and implied from the conduct of the parties concerned. See: **Cassidy v Minister of Health [1951] 1 All ER 574.**

24. In the case of Rosemary Vassaux v Kenya Power & Lighting Co. Ltd [2014] eKLR, the court observed that duty of care flows from [that] contract. From the facts I am satisfied that the appellant owed the respondent a duty of care not as a result of a road traffic accident but from what appeared to be an employment relationship and the respondent did not plead this fact.

25. It is trite law that the court cannot sit to rewrite the pleadings of the parties and it commends me to find that the suit as filed does not disclose a cause of action against the appellant and it will be needless to address the other two issues framed for determination.

26. In the result the appeal succeeds though not in the manner envisaged by the appellant. Consequently the judgement by the trial court is set aside and substituted with an order dismissing the respondent’s suit against the appellant. Had the suit succeeded the respondent would have been awarded general damages of Kshs 400,000/ for pain and suffering subject to contributory negligence of 30%.

27. Each party shall bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 17th day of December, 2019.

D. K. Kemei

Judge