REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 66 OF 2013

SURAJ DISTRIBUTORS CO. LIMITED……APPELLANT

-VERSUS

FRANCIS ARASA OSIEMO……..……RESPONDENT

JUDGMENT

1. The appellant (then defendant) was sued by the respondent (then plaintiff) in **Nakuru CMCC No. 1275 of 2010** for damages arising out of injuries sustained by the respondent in a traffic accident involving the appellants motor vehicle registration number **KAD 979S**. The respondent was said to have been the appellant's driver and was driving the said vehicle when it crashed into a bridge around Kabartonjo-Kipsaraman road on 13/5/2008.

2. At the conclusion of the trial the court found the appellant liable and awarded the respondent Kshs. 453,200/= as general damages for pain and suffering and loss of amenities as well as costs of the suit and interest.

3. The appellant was aggrieved and filed this appeal on the following grounds:-

> ***(i) THAT*** *the learned magistrate erred in law and in fact and misdirected himself in finding that the respondents had proved their case to the required standard.*
>
> ***(ii) THAT*** *the learned magistrate erred in law and in act in misapprehending and failing to properly deal with the evidence adduced in court for the appellant and thus making a finding that is incongruent with doctrine of negligence, authorities and evidence adduced in court during trial.*
>
> ***(iii) THAT*** *the learned magistrate erred in law and in fact by shifting the burden of proving the state of repair the subject motor vehicle to the defendant and by holding that the motor vehicle was defective without any concrete evidence at all.*
>
> ***(iv) THAT*** *the learned magistrate erred in law and fact by failing to appreciate the centrality of the issue of causation (causal connection) between the purported defect and the accident in question when it was admitted by the respondent that the motor vehicle had been used in the state safely by the plaintiff on the material day and before.*
>
> ***(v) THAT*** *the trial court erred in law and in fact in failing to appreciate that even if the accident occurred as alleged by the respondent, that there was scope in law and on fact to apportion liability equitably considering respective statutory and common law obligations of the respondent as a driver and that it was erroneous to hold the appellant liable entirely on the fact of the case.*
>
> ***(vi) THAT*** *the learned magistrate put undue reliance on irrelevant and immaterial evidence and or misconstrued evidence adduced thereby reaching wrong conclusions and findings of fact.*
>
> ***(vii) THAT*** *the learned magistrate erred in both law and fact by not considering the submission and authorities tendered on behalf of the appellant.*
>
> ***(viii) THAT*** *the trial court erred in law and in fact in awarding general damages which are both excessive and incongruent with the proved injuries of the respondent.*

4. My duty as a first appellate court is to subject the evidence to a fresh analysis bearing in mind that I do not have the benefit of having heard or seen witnesses see **Selle vs. Associated Motor Boat Co. [1968] E.A 123; Peter Kanithi v. Aden Guyo Haro [2014]eKLR.**

Further I am conscious that the court should not disturb an award unless it is shown that the trial court took into consideration factors which it should not have or left out factors which should have been considered ,or that the decision was plain wrong.

See ***Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982 - 88] 1 KAR 5.***

5. Parties took directions to file submissions which they subsequently highlighted. From the grounds of appeal and the submissions of the parties it is my view that the appeal raises four critical issues namely;-

> *(i) Whether the respondent proved his case to the required standard and in particular whether the court appreciated the evidence relating to causation.*
>
> *(ii) Whether there was a case for apportioning of liability (if any) between the respondent and the appellant.*
>
> *(iii) Whether the damages awarded were excessive.*

6. The appellant submits that the trial court did not address the issue of causation between the accident and alleged defect in the motor vehicle. They argue that the appellant could not be held liable merely because his vehicle was alleged to be defective. They urge further that there was actually no proof that the vehicle was defective. They fault the trial court for shifting the burden of proving the soundness of the vehicle to the appellant. They cite various authorities including **Daniel Kipkurui Tenai V. Nyayo Tea Zone Development Corporation Eldoret H.C.C 170 OF 2007; Samuel Mwangi Waithaka v Mugoya Construction & Engineering Co. Ltd Nakuru H.CCA No. 7 of 1997.**

7. The respondent submits that the accident was solely caused by the failure of the motor vehicle's braking system. They argue that lack of proper service or repair must have been a contributing factor which means that the appellant failed to provide a safe system of work to the respondent. They conclude that the trial court was therefore right to find 100% liability on the part of the appellant.

8. Ownership of the motor vehicle by the appellant as well as the fact of employment of the respondent was not in dispute. The statutory duty of care was therefore not an issue. There is ample authority on the proposition that negligence would be attributed to an owner of a defective motor vehicle if it is shown that he failed to take steps to keep the vehicle in good repair. **See Nandwa v. Kenya Kazi Ltd 1988 KLR 488**. See also **Henderson vs. Henry E. Jemkins & sons [1970] AC 282.**

9. The respondent testified that the brakes failed as he was driving downhill towards the bridge. He lost control and the vehicle hit the bridge and plunged into the river. He stated that he had no prior knowledge that the motor vehicle had any mechanical problem.

10. The appellant's witness **(DW1)** one Peter Ogwaro testified that the subject motor vehicle was serviced regularly and that it was the duty of the driver to report any defects. He stated that the respondent had not reported any defects prior to the accident. He however confirmed that the motor vehicle had a functioning speed governor and that when he visited the scene he found "a round bend at a steep place on a bridge' and that the motor vehicle was in the river. The witness did not however produce an inspection certificate to show that the vehicle was in sound mechanical condition prior to the ill-fated trip.

11. It is not true that the trial court shifted the burden of proof to the appellant. The appellant is the one who maintained the vehicle and therefore any record of maintenance was a fact within their special knowledge and ought therefore to have rebutted the plaintiff's evidence. Once the issue of failed brakes was raised the appellant ought to have shown evidence of current or recent inspection and maintenance of the motor vehicle. As stated by the court of Appeal **Nandwa v. Kenya Kazi Ltd (Supra**):-

> "the formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the *prima facie* inference. In this situation there is said to be an evidential burden of proof resting on the defendants….."

12. In the final analysis I find that the respondent did prove on a balance of probability that the vehicle's braking system failed and that it was the duty of the appellant to maintain a safe working system namely: to keep the vehicle in a sound mechanical state. It is clear that the failed brakes led to the accident. On this account I am satisfied that the causal connection was proved.

13. The second issue raised by the appeal is whether the respondent ought to have borne some portion of the liability. The evidence as already stated is that the brakes of the motor vehicle failed. It has not been shown to me how the respondent was negligent and contributed to the accident. The evidence shows that the vehicle was downhill when the brakes failed. Indeed the appellants' own witness confirmed that the motor vehicle was fitted with a functioning speed governor. I would therefore dismiss the ground for contributory negligence.

14. The third issue I must consider is the appropriateness of the award. The appellants are of the view that the award was high while the respondent's view is that it was modest. I have considered the authorities cited to me by both parties *vis a vis* the injuries sustained by the respondent. It is my considered view that the award was appropriate. It was neither too high nor inordinately low and I find no reason to disturb it. As stated by the Court of Appeal in ***Bashir Ahmed Butt vs Uwais Ahmed Khan (supra)***

> "An appellate court will not disturb an award of damage unless it is so inordinately high or low as to represent entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehends the evidence in some material respect and so arrived at a figure which was either inordinately high or low."

15. For the reasons stated above, I find the appeal not merited. It is dismissed with costs to the respondent.

Ruling signed at Garsen on.....day of June 2018.

……..

R. LAGAT KORIR

JUDGE

Ruling delivered dated and Counter signed at Nakuru this 21st day of June, 2018.

……

JANET MULWA

JUDGE

In the presence of

……..CA

……for applicant

……for respondent