REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NYERI

CIVIL APPEAL NUMBER 192 OF 2010

PETER MWANGI MAKUMI ……....…......APPELLANT

VERSUS

GATUNGURU TEA FACTORY ……… RESPONDENT

JUDGMENT

This is an appeal arising from the judgment and decree in Nyeri Chief Magistrate's Court Civil Case number 356 of 2007.

Through a plaint dated 13 June 2007 the appellant sued the respondent for;

a. General damages

b. Special damages of Ksh 2000

c. Costs of the suit and interest

d. Any other relief that the court may deem fit to grant

The claim is based on road traffic accident which happened on 14 October 2006. It is alleged that the appellant was engaged on the respondent's motor vehicle registration number KAL 129G as loader at Gondo tea buying Centre when the respondent's other motor vehicle registration number KAT 825S was negligently driven knocking plaintiff off from m/ vehicle KAL 129G causing him serious injuries, as a result of which he suffered loss and damage.

The respondent filed a defence on the 7th of July 2007 where he denied everything praying that the plaintiff 's suit be dismissed with costs to the respondent.

In the judgement delivered on the 28 October 2010 the trial magistrate dismissed the plaintiff's case stating that had the plaintiff proved his case she would have awarded general damages of Ksh 200,000 only as the special damages had not been proved.

The grounds of appeal were set out as follows;

1. That the learned trial magistrate erred in fact and law in failing to appreciate the cause of action in this matter

2. That the learned trial magistrate erred in fact and in law in failing to appreciate that the plaintiff's

case was on a balance of probabilities

3. That the learned trial magistrate erred in fact and in law in holding that negligence had not been proved whereas there was tacit admission of the same by the defence witnesses

4. That the learned trial magistrate erred in fact and in law in failing to address the main issue

5. That the learned trial magistrate erred by misdirecting herself on the evidence and authorities cited as to arrive at the wrong decision.

In the appeal the appellant prays that the judgment and decree of the learned senior resident magistrate be set aside and an order be made allowing the plaintiff's claim and any other relief that this honorable court may deem fit to grant.

As a first appellate court my role is primarily to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. See **Selle vs. Associated Motor Boat Company Ltd [1968] EA 123, (**Sir Clement de Lestang)

The court of appeal emphasized this position in the case of **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR from Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 in** which it had rendered itself thus: -

> "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence".

Alive to the above position I proceed to re consider, reevaluate the evidence and the submissions in the lower court.

The evidence and submissions

The appellant testified and told the court that he was a casual labourer. At the material time he was a loader at a Gatunguru Tea Factory and that on the material date he was loading motor vehicle KAL 129G at Gondo. The lorry was fully loaded with tea. As they were leaving, he hang onto the side of the lorry, together with others. The motor vehicle KAT 835S belonging to the same factory came from behind. It hit KAL from behind and continued to overtake of the left side where they were hanging on the lorry. He was hit and fell down. He suffered injuries. One of the others died. He was taken to Othaya dispensary and then transferred to Nyeri PGH where he was admitted for two weeks. Upon discharge he continued to attend clinic for three months. By the time of the hearing he said he had not healed fully. He produced in evidence his treatment documents, the discharge summary, the P3, and the medical report from Dr. Kibugi. He blamed the driver of m/v reg no. of KAT 825 S because he had overtaken the other vehicle from the wrong side.

On cross examination he said he did not have any document to prove that he worked at the respondent's factory but that his father was employed at the factory. He also said that he knew the dangers of hanging out of the lorry. When he was shown the factory register, he confirmed that his name was not in the list of employees/ loaders.

On re-examination by his counsel said that was hanging on the side of the lorry because the lorry was fully loaded with tea. He closed his case without calling any witness.

The defence called four witnesses. DW1 told the court that he was the driver of KAL 129G and that on 14 October 2006 he was driving to the Gatunguru tea factory. The lorry was fully loaded with tea. At a

corner he saw m/v KAT 825 S coming from behind. It was being driven by DW3. He slowed down, moved to the side and let him pass. It was then that he saw a person lying the ground. It was at night. He stopped and took the person to the factory.

He said he did not know the appellant and he had never worked with him.

Under cross examination he said that only two people were injured that day. He denied any knowledge the plaintiff.

DW2 told the court that at the material time he was the conductor in motor vehicle KAL 129G. Motor vehicle KAT 825S was following them from behind. DW1 moved to the side allowing KAT 825S to overtake them. When the m/v reg no. KAT 825S passed he heard people saying that other people had been injured. He denied any knowledge of the plaintiff. He said he never saw the plaintiff that night.

Under cross examination he told the court that he could not recall the names of the loaders.

DW3 was the driver of m/v reg no. KAT 825S. He conceded overtaking the m/v reg no KAL 129G on the left side. He said he did so because it was at a corner. He never heard of any accident that night. He later heard that two people a had been injured.

DW4 told the court that he was a supervisor at the tea factory, and had worked there from 1981. One of his duties was to allocate duties and he allocated work to loaders weekly. For the week that of 14th October 2006, he produced the list. He also said he had the record book for the years 2005 to 2007. He said that the plaintiff was not among the people he had allocated work. That though two people were injured the plaintiff was not one of them. He said he could not tell whether the plaintiff was at work that day, as there was a clerk who would pay them. He also said he never really met the loaders he allocated work physically but used their names. That the appellant's name was not among those names.

Before the trial court it was submitted for the plaintiff that an accident occurred on 14 October 2006 involving two motor vehicles belonging to the defendant. The motor vehicle KAT 825S overtook motor vehicle KAL 129G from the left side. In the process it hit the loaders who were hanging on the body of motor /vehicle reg no. KAL 129G which was fully loaded with tea. Two persons were injured, one of whom was the plaintiff. Further that from the defence point of view the only issue for trial was whether a second injured passenger was the plaintiff and whether he lawfully aboard the motor vehicle KAL 129G. It was also argued for the plaintiff that the police abstract confirmed that he was a passenger on the fateful day as one of the loaders of the defendant, that he was lawfully on the defendant's motor vehicle, and was exposed to danger by the act of omission of the defendant, that the driver of KAT 825S conceded to overtaking KAL 129G from the wrong side. Counsel urged the court to find that the defendant was negligent for causing injury on the plaintiff and sought general damages of Ksh 300,000.

It was submitted for the defendant that the plaintiff 's claim arose out of an alleged term of contract of employment and /or duty of the defendant to take all reasonable precautions for the safety of the plaintiff when he was engaged as a loader. Consequently, it was the plaintiff's burden was under strict proof to establish the existence of a contractual or other relationship between him and the defendant. It was upon the plaintiff to prove that he was an employee of the defendant and that he was lawfully on the defendant's motor vehicle. It was further submitted that the plaintiff had failed to prove negligence on the part of the defendant, and if anything Ksh 50,000 would suffice as general damages.

On appeal, parties filed written submissions. The opportunity to highlight taken by Mr. Nderi. He argued that the trial court had asked the wrong questions in arriving at the decision. He submitted that the claim was based on the cause of action of negligence and/ or breach of duty of care. That the fundamental question to be determined was not whether the appellant was an employee of the respondent, but whether the respondent was negligent, and that the issue of damages would flow from that question. He reiterated the fact that the accident was not disputed, the appellant was taken from the scene of the accident to the factory and to hospital, and that the Police abstract indicated that he was one of the persons injured from the accident.

On their part the respondent s advocates, the firm of Muthoga Gaturu and Co, argued that the appellant's claim was based on his plaint on "a term of contract of employment between the plaintiff and defendant/ the duty of the defendant - to take all reasonable precautions for the safety of the plaintiff when he was engaged as a loader, -not to expose him to any risk of damage or injury which they knew or ought to have known,- to provide and maintain safe and adequate plant -to take reasonable care of the place where the plaintiff carried out his work and ensure it was safe and -to provide and maintain a safe and proper system of work."

Hence by virtue of the above pleading the appellant was bound to prove that there was a contract of employment between him and the defendant with the terms above. The appellant had failed to so and that the trial magistrate had rightly found so.

It was also the appellant to prove negligence. It was argued for the respondent that the appellant had failed to do so. That the evidence of the DW1 and DW2 was that the driver of motor vehicle KAL 129 G gave way for the driver of KAT 825S to overtake. In their submissions for the respondent his counsel posed the question; *"At this point the question then is, how was the plaintiff hit?*

According to the respondent the appellant was "a trespasser hanging on the vehicle, where no one was even aware of his presence". It was submitted that the appellant placed himself in the way of harm was the author of his own misfortune.

The issues of whether the appellant was an employee of the respondent, and whether the appellant owed him a duty of care can only be stablished from the facts in evidence.

The fact of the accident is not in contest. Neither is it contested that the appellant was hanging on the body of the lorry KAL129G at the time of the accident. The respondent says he was a trespasser; the appellant says he was a loader on duty that day. So, how did the appellant happen to be hanging on the respondent's lorry on the material day and time?

The appellant's testified on oath that he was a loader on that day attached to m/v registration number KAL 129 together with others. He did not have any documentary evidence to prove the same.

The respondent produced two lists to show that there were persons allocated loader duties at the material time. For the period of 11th to 14th October 2006 the respondent produced DEX 2 a typed list headed;

"GATUNGURU TEA FACTORY COMPANY LIMITED GREEN LEAF LOADERS-For 011.10-2006 To 14-10-2006"

It has three columns, NAME, blank, VEHICLES.

In the <u>name</u> column there is a list of names, some typed, some hand written. In the <u>m/vehicle</u> column there are registration numbers of m/vehicles. The apparent relationship is that the names are of the loaders assigned the specific motor vehicle.

The list bears no signature, stamp, or anything to show that it actually had anything to do with the allocation of duties of loaders at the factory. Assuming it is the list of allocation of duties, there is no explanation regarding the scribbled names, or who scribbled the hand written entries, why and when. It is scribbled by hand that some of the persons there were absent. No explanation is given as to what was happening when some of the loaders were absent on dates when they had been assigned loading duties.

It appears to me that names of loaders could be added at any time if there was need. For example, in the typed list the name HENERY GACHAU is accompanied by a hand written name Anthony Githanga, JOSEPH MWANGI BENSON is indicated by hand as being absent on 13th for m/v KAL 129G. DAVID NGUNYI 'absent 14th'. There are five other hand written names. Without any evidence as to when all these changes were done, the document cannot be said to be proof that the appellant was not on casual work that day.

In addition, DW4 also alluded to the fact that there was a separate payment register. This created the impression that it was possible for one's name not to be on the duty allocation list, but appear in the payment register.

The other document produced was DEX 1, headed "MUSTER ROLL". There is what appears handwritten as the date "14/10/2006" and" 825 S /129G". It bears the stamp "FACTORY UNIT MANAGER GATUNGURU TEA FACTORY CO. LTD". It contains a list of names and what appears to be entries for a whole month showing the number of days or hours worked; it is not clear. The appellant's name is not on this list.

From the testimony of DW4 there was no explanation as to the relationship between these two documents save that the appellants name was not in them. None of the defence witnesses, just like the appellant produced any documentary evidence to support their testimony that they were employees of the respondent. Not even the DW4 who claimed to have worked for the defendant since 1981. Even the documents he produced DEX 1 and DEX 2 did not bear his names or signatures.

DW2 DAVID GATEI NGIGI told the court he was the conductor of KAL 129G on the fateful day. He said

> "We were four of us. I then heard people say that the other people had been injured. I was standing inside the lorry from behind. There is space for the loaders to stand. I cannot recall knowing the plaintiff. I was inside the lorry with some people. there were others hanging on the lorry. I did not see the plaintiff on that day because it was night…I cannot recall the names of the loaders. I was with the driver. I did not know who was injured in the said accident.

This DW2's name does not appear in the two lists, yet he was the conductor. Secondly, if his testimony is to be believed, as the conductor of the motor vehicle how would he not know the names of the loaders he had worked with from 11th October 2006 to 14th October 2006? How would he not know that at least one of his own, JAMES MWANGI MAINA, according to DW4's list, had died?

Secondly, he concedes that he was with three other loaders, he was inside the lorry, the others were hanging on the lorry. His testimony does not support the submissions that those hanging on the lorry were trespassers whose presence was not known. The conductor of KAL 129G knew that the other loaders of the lorry were hanging on the body of the lorry.

DW1 the driver of KAL 129G testified that the lorry had three loaders, Julius Gateri Maina, Benson, and John Mwangi who was supposed to be absent. There is no mention of James Maina who was on DW4's list. Neither is there mention of DW2 the conductor who said he was standing at the back of the lorry.

The appellant's testimony that he was holding on the side of the lorry KAL 129G as it with two others is supported by the testimony of DW2 the conductor, when he says the other three were hanging on the body of the lorry. The appellant named them as GATURU, and JAMES MAINA, who sustained fatal injuries. That is proved by the police abstract. This makes DW2's amnesia regarding the names of the other loaders on his lorry suspect.

All these beg the question, what other proof could the appellant have produced to show that he was a loader on the material day? In my view had the trial magistrate considered the entire evidence as above, she would have arrived at the decision that it was more probable than not that the appellant was among the three loaders on KAL 129 G on the material day.

Having placed the appellant among the loaders the only other issue for determination is whether the respondent was negligent.

In their testimonies DW1 and DW3 told the court that they were the drivers of the respondent on the material night and were transporting both loaders and tea to the respondent's factory.

DW3 told the court he overtook DW1 from the wrong side. DW1 said that it was after DW3 passed that he saw a person on the ground whom he took to the factory. He testified that two persons were injured in the accident. He does not give the name of the person he took to the factory after the accident. There is no doubt that the appellant was one of those injured. If DW3 had not chosen to drive on the wrong side of the road, he would not have hit the loaders hanging on the body of KAL 129G.

During the trial it was admitted that DW3 was an employee of the respondent and that the two m/vehicles belonged to the respondent. The respondent as the employer od DW3 and owner of the two lorries is vicariously liable for the DW3's negligence.

I find therefore, on the issue of negligence, had the trial magistrate assessed the evidence in its totality, she would have found that the driver of KAT 825 S was negligent in the manner in which he drove the said motor vehicle.

That brings us to the issue of general damages.

The trial magistrate found that as a result of the said accident, the appellant sustained injuries the following injuries;

- Cut wound on the frontal aspect of the face
- Bruises on the face
- Crepitus and transmitted sound on the left side
- Tenderness on the left side
- Haemopneumothorax in the left side of the throat.

The discharge summary from the PGH Nyeri, the P3 and the medical report by Dr. Kabugi confirmed that the appellant sustained injuries that left him confused, cut on the face and haemothorax and was admitted in hospital for two weeks. He healed well, with a healed scar on the forehead which would affect him psychologically for the rest of his life. Permanent injury was assessed at 0.5%. Otherwise all the other systems were normal.

While dismissing his case, the trial magistrate said had he proved his case, she would have awarded him Ksh 200,000 general damages. She would not award any special damages as none had been proved.

In the lower court the appellant had relied on the cases of **KIMILI HAULERS VS. JOSEPH CHERUIYOT CA NO 136 OF 2003** and **NYERI CMCC 320 OF 2009 CATHERINE KING'ORI VS. GIBSON THEURI** and sought a global sum of Ksh 300,000.

The respondent relying on **PAMELA OMBIYO OKINDA VS. KENYA BUS SERVICES LIMITED NRB HCCC 1309 OF 2002** offered the sum of Ksh 50,000.

The respondent did not challenge this award of damages on appeal.

I find no reason to interfere with this award.

In conclusion it is trite that;

> "…a court of appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on the wrong principles in reaching his conclusion" per Law JA and Hancox Ag JJA **in NKUBE VS. NYAMIRO [1983] KLR 403**.

I am properly guided.

Having considered all the evidence submissions and authorities that were placed before the trial court, the submissions and authorities place before me, I find that the trail court misapprehended the evidence and

arrived at the decision without an evaluation of the totality of the evidence before it. And further;

1. An analysis of the totality of the evidence before the trial court shows that the appellant was one of the loaders on mv registration no. KAL 129G on 14th October 2006.

2. That the respondent's lorry KAL 129G was fully loaded with tea on the material evening causing some of the loaders including the appellant to hang out of the lorry on the way back to the factory.

3. The respondent 's driver DW3 was negligence in the manner in which he drove the respondent's lorry registration number KAT 825S overtaking from the wrong side causing it to collide with the appellant.

4. The trial court erred in by not analyzing the totality of the evidence before the court and weighing it on a balance of probabilities as is the standard of proof in civil cases.

I find therefor that the appeal succeeds.

The award of Ksh 200,000 as general damages for loss, pain and suffering, which the trial magistrate would have made is confirmed. The special damages were not proved.

The appellant will have the costs here and in the court below plus interest at court rates.

Right of appeal 30 days

DATED, SIGNED AND DELIVERED AT NYERI THIS 31ST DAY OF MAY 2017

TERESIA MATHEKA

JUDGE

Nderi &Kiingati Advocates for the Appellant

Muthoga Gaturu and Co, Advocates for the Respondent

Court Assistant Harriet