REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 49 OF 2011

S A A (Minor suing through

the Father and Next Friend M L. N) ……APPELLANT

VERSUS

1. AGROLINE HAULIERS LTD

2. ERICK OTIENO …….....…RESPONDENTS

JUDGMENT

Background:

1. Being dissatisfied with the dismissal of the Kakamega Chief Magistrate's Court Civil Case No. 265 of 2007 (hereinafter referred to as '**the suit'**) on 01/04/2011, the Appellant herein **S A A** then a minor suing through his father and the next friend of M L. N preferred this appeal.

2. The trial Court had received evidence from the parties and their witnesses and after analysis was not convinced that the Appellant herein, then the Plaintiff, had proved his case as required in law. The cause of action allegedly arose at [particulars withheld] Area along Esishiru – Esumeyia road where it was alleged that the First Respondent's vehicle which was in the control of the Second Respondent unlawful hit the Appellant then a pedestrian causing him serious injuries. The Respondents denied the said allegations and availed the second Respondent who testified to that effect. On his part, the Appellant availed himself and three witnesses who were his father (PW2), Dr. Charles Andayi (PW3) and No. 39671 PC William Masinde Namasakha (PW4).

3. The Appellant and PW2 testified on how the accident occurred whereas PW3 confirmed the injuries the Appellant sustained as a result of the accident and PW4 testified on behalf of the Police.

The Appeal, Analysis and Determination:

4. The Appellant preferred eight grounds of appeal with two main prayers. He tailored the Memorandum of
Appeal as follows:-

> ***1. That the learned trial magistrate erred in law and fact in dismissing the appellant's entire case in the face of overwhelming evidence tendered by an or on behalf of the appellant and when negligence had been proved against the respondents to the standard required in law.***
>
> ***2. That the learned trial magistrate erred in failing to hold that the respondents were liable in***

negligence and that the accident in issue occurred at the location and in the manner described by the appellant and his witnesses who were eye-witnesses which version was consistent, corroborated and credible and he erred by dismissing that evidence out of hand and or failing to consider the same.

3. That the learned trial magistrate erred in law and fact in holding that the appellant failed to prove that tractor registration mark number KAT 960C belonged to the 1st respondent in the face of overwhelming evidence showing that the 1st respondent owned the said tractor including inter alia the police abstract form and insurance sticker which evidence was not rebutted by the respondents or at all and when the respondents never in evidence denied ownership of the said tractor.

4. That the learned trial magistrate erred in believing the 2nd respondent's allegation that he was driving tractor registration number KAL 049N when there was absolutely no evidence to support that assertion and when the work schedule tickets were not produced by the respondent.

5. That the learned trial magistrate erred in law and fact in accepting the version of the 2nd respondent when he admitted the 1st respondent had thirty tractors on the route in issue whose registration numbers or respective drivers he did not give and when his testimony was uncorroborated, contradictory, incredible and baseless.

6. That the learned trial magistrate erred in law and fact in failing to assess the quantum of damages the appellant would have been entitled to.

7. That the trial magistrate failed to analyze the evidence and or determine the correct issues or at all and he erred by failing to consider the appellant's evidence and or by considering the 2nd respondent's evidence alone which he considered piece-meal.

8. That the learned trial magistrate erred in failing to find in favour of the appellant in view of all the evidence on record and given all the circumstances of the case and his judgment and orders were arrived at in a cursory and perfunctory manner and are unfair, erroneous and indefensible and have occasioned a serious miscarriage of justice.

5. The appeal was admitted on 02/05/2013 and directions taken where parties agreed to dispose of the appeal by way of written submissions. Both parties complied hence this judgment.

6. This is the Appellant's first appeal. In that regard, the role of this Court as the appellate Court of first instance is well settled. This Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in ***Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278*** *and* ***Kiruga –versus- Kiruga & Another (1988) KLR 348.***

7. It was further held in the case of ***Hahn Vs. Singh (1985)KLR 716*** that the appellate court will hardly interfere with the conclusions made by a trial court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witness is crucial.

8. Having carefully perused the record and the parties' submission this Court has come up with the following issues for determination:

(i) Whether there was an accident involving the Appellant and a motor vehicle and if so, which vehicle was it?

(ii) The ownership of the accident vehicle;

(iii) The issue of liability of the parties;

(iv) The issue of damages.

These issues are hereinbelow dealt with singly.

(a) <u>Whether there was an accident involving the Appellant and a vehicle and if so, which vehicle was it?</u>

9. Paragraph 3 of the Plaint dated and evenly filed in Court on 03/07/2011 describes how the Appellant was knocked down by a vehicle registration number KAT 960 C/ZB 110231 make Tractor Trailer. The Respondents however denied that averment. The Appellant testified on how he was hit by a vehicle on 18/08/2006 along the Esishiru - Esumeyia road. He was eventually taken to hospital since he had been injured on the left leg.He was admitted for one month. The Appellant's father (PW2) as well confirmed the accident and as described by the Appellant. The Doctor, PW3 confirmed that the injuries sustained by the Appellant were consistent with a road traffic accident. PW4 produced a Police Abstract in further confirmation of the accident. This Court therefore finds with ease that indeed an accident occurred on 18/08/2006 along the said Esishuru – Esumeiya Road involving the Appellant and a vehicle where the Appellant sustained injuries.

10. Was the accident vehicle identified?

The Appellant who was then aged around 15 years old and in Standard 6 testified that on the 18/08/2006 at around 3.00 – 4.00 p.m. he was with his father walking home from the market. He was ahead of his father and walked on the left side of the road as one faced Esumeiya. On hearing a tractor approaching, the Appellant moved to the side of the road and onto the grass verge which was next to the said road. It was his evidence that as the tractor avoided hitting some pot holes, it veered off the road and hit him and as a result he was injured. The tractor was carrying cane. He gave the registration number as KAT 960C. It was his father who reported the accident to the police later on.

11. The Appellant's father, PW2, testified that he was behind the Appellant but on the same side of the road. He estimated the distance between the Appellant and himself to have been about 50 metres. He recalled seeing a tractor carrying cane pass him and soon saw the Appellant drift to the far left of the road as the tractor followed him. He then saw the Appellant fall down. On rushing to where the Appellant was, he found that the Appellant had been injured on the leg and he hurriedly took him to hospital. The Appellant was admitted as he reported the accident to the Police on 21/08/2006.

12. PW2 confirmed that there were many tractors on the said road on that day all carrying cane and that the tractor which hit the Appellant did not stop. He further confirmed that when the tractor passed him it was the trailer which was visible and that when a tractor pulling a trailer passes, one cannot see the rear of the tractor due to the trailer. He stated that had it not been the accident he would not have known the registration number of the tractor.

13. PW2 stated in cross-examination as follows:-

> ***"..... the tractor did not stop. I inquired from Mumias Sugar Company employee at a base nearby to confirm issues. I had by then reported to police. The Mumias Sugar personnel confirmed the tractor was there on material day. We wanted confirmation that it is the tractor that carried cane that day..... I do not know if a trailer has a number. Police confirmed the number of the trailer .....I saw tractor hit the Plaintiff ……. A trailer is always wider than a tractor. When a tractor passes one cannot see the rear of tractor due to the trailer. I have been to police station many times. They told me investigations were complete***."

14. According to the evidence of PW2, he made a report to the police two days after the accident, which

was on 21/08/2006. Thereafter he approached the Mumias Sugar Company personnel who were at a weighing base, which was near where the accident had occurred, to confirm if the tractor carried cane along that road on the day the accident occurred. In the course of police investigations PW2 also witnessed the police taking a document A57 from the driver of the tractor that hit the Appellant.

15. PW4 in producing the Police Abstract confirmed that PW2 reported the accident on 21/08/2006 under OB No. [particulars withheld] at 02.23 p.m. and reported tractor KAT 960C/ZB 11023 as having been involved in the accident. The Police commenced investigations and upon completion referred the matter to the vehicle's insurance company. The decision by the Police therefore leaves no doubt that the Police had indeed confirmed that the vehicle in issue had been so involved in the accident.

It is therefore evident, on a balance of probability, that the vehicle which was involved in the accident in issue was KAT 960C – Tractor/ZB 11023 – Trailer.

(b) <u>The ownership of the accident vehicle.</u>

17. The accident vehicle was KAT 960C – Tractor/ZB 11023 – Trailer. The Respondents strenuously contended that the Appellant failed to prove that the first Respondent was the owner of the accident vehicle for failure to produce any records from the Registrar of Motor Vehicles in such proof. He cited the **<u>Court of Appeal Case Nyeri Civil Appeal No. 192 of 1996 Thuranira Karauri vs. Agnes Ncheche (unreported</u>**) in support of the position.

18. In taking the contrary view, the Appellant cited the persuasive decision by Warsame, J. (as he then was) in **<u>Kisumu HCCA No. 166 of 2001 Jotham Mugalo vs. Telkom (K) Ltd (unreported)</u>** in support of his said position.

19. It is not in dispute that the Appellant relied on the Police Abstract in proof of ownership of the accident vehicle. I have equally and carefully gone through the Court of Appeal decision in **<u>Thuranira Karauri's case (supra)</u>** and would respectfully wish to distinguish the same from the circumstances of this case. I did note that the Learned Judges did not refer to the provisions of the Traffic Act in coming up with the finding that:-

> ***"..... As the defendant denied ownership, it was incumbent on the plaintiff to place before the judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry ....."***

I say so with a lot of humility and with utmost respect. A look at Part II of the Traffic Act, Chapter 403 of the Laws of Kenya (hereinafter referred to as '***the Act'***) (Sections 5-14 inclusive) reveal that there are some vehicles which are exempted from registration and in such a case there may be no such a certificate in proof of ownership. **Section 6 (1)** of the Act state as follows:-

> ***"6 (1) No person shall possess a motor vehicle or trailer,***
>
> ***other than a vehicle exempted from the provisions of***
>
> ***this part, unless such a vehicle is registered under this***
>
> ***Act."***

Section 11 of the Act further states that:-

> ***"The Minister may, by notice in the Gazette, exempt any***
>
> ***vehicle, class or description of vehicle from the***
>
> ***provisions of this part."***

20. In the foregone cases therefore, a search would not yield any desired results as there will be no records given that such a vehicle would not have been so registered. **Section 5 (1)** of the Act confirms that and in the following terms:-

> ***"The Authority shall keep records of all motor vehicles and trailer registered in Kenya, and shall cause every licensing offer to keep records of all vehicles registered by him."***

21. Further, the Act does not categorically state that the details of the person registered as the owner of a vehicle grants absolute ownership of such a vehicle to such a person. **Section 8** of the Act states as follows:-

> ***"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."***

And, in **Section 2,** the Act describes an ***"owner"*** as follows:-

> ***"In relation to a vehicle which is subject of a hire-***
>
> ***purchase agreement or hiring agreement, includes***
>
> ***the person in possession of the vehicle under that***
>
> ***agreement;"***

22. Whereas this Court fully agrees that a Certificate of Search is *prima-facie* evidence of ownership of a motor vehicle, it so finds that such a Certificate of search is not the sole and only way of confirmation of ownership of a motor vehicle. To that end this Court echoes the holding of *Warsame, J*. (as he then was) in the **Jotham Mugalo's case (supra)** when he presented himself thus:-

> ***".. Mr. Onyino Advocate, states that the production of a certificate of search signed by the Registrar is the only evidence which can attest to such issue. However, in my view the production of a certificate is a valid way of showing the ownership but it is not the only way to show that a particular individual is the owner of the motor vehicle."***

23. The question which therefore presents itself before this Court is whether, in the circumstances of this case, the Police Abstract can be held to be sufficient proof of ownership of the accident vehicle. The Police Abstract in this case appears in the Supplementary Record of Appeal filed on 19/03/2015. Under paragraph 11 thereof, it is clear that a Police Abstract is requisitioned by either an Insurance Company or a legal representative or any other Interested Party on stating the interest and/or connection such has with the accident. In this case the Police Abstract was requested by Appellant's father.

24. The above request was made to the Officer-in-Charge of Kakamega Police Division. It was premised on the fact that the Police are always accessible to the records held by the Authority hence the rebuttable presumption that the information provided in the Police Abstract has its origin from the records. **Section 5(2)** of the Act states that:-

> ***"Vehicle records maintained by the Authority shall be***
>
> ***open for inspection by any police officer or collector***
>
> ***of customs who shall be entitled to a copy of any entry***
>
> ***in such records free of charge."***

25. Under **Section 5(3)** of the Act, any other person can be availed the information held by the Authority upon payment of a prescribed fee and on satisfying the Authority that such a person has a reasonable

cause to such records. The said **Section 5(3)** states as follows:-

> ***"Any person who satisfies the Authority that he has reasonable cause therefore shall be entitled on payment of the prescribed fee to a copy of any entry in such vehicle records."***

26. It can therefore be rebuttably deduced that the information which a party expects to receive in the Police Abstract has its origin from the records held by the Authority and that is the same information available to a party on the issuance of a Certificate of Search by the Registrar. The only difference is that the Police do not pay for the information. This Court therefore finds that on a balance of probability, a Police Abstract is also *prima-facie* proof of ownership of a motor vehicle. The document therefore being a public document shifts the onus to the party alleging otherwise to disprove its contents. I therefore fully and further associate myself with the holding of *Warsame, J* (as he then was) in the **Jotham Mugalo's case (supra)** when he further expressed himself thus:-

> ***"According to the evidence of PW2 the motor vehicle belonged to the defendant and since the police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence. I am afraid to say that what I am determining is a civil dispute and the standard of proof requires only balance of probabilities. It is the defendant who has alleged that the motor vehicle which caused the accident did not belong to him, therefore it is upto them to substantiate that serious allegation. It is the responsibility of the defendant to bring evidence contradicting the documentary evidence produced by the plaintiff. Section 106 and 107 of the Evidence Act clearly places responsibility on the party making an allegation of fact to produce documentary evidence in support of those allegations. It is not just enough to make bare statement in one's defence, it must be supported by evidence controverting or contradicting what is already alleged by the opposite. The plaintiff herein gave evidence stating, how he was injured and the motor vehicle which caused those serious injuries KAJ 178S belonging to the defendant. The particulars of denials contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact. A fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence. And in this case the quality of the evidence tendered and the documentary evidence is a clear manifestation that the defendant is the owner of the motor vehicle and the said motor vehicle caused the injuries suffered to make bare allegations and expect the court to give reliance on such allegation, which are not supported by production of evidence."***

27. I have carefully gone through the trial Court's judgment and noted that the Appellant's case was dismissed on the ground that the trial Court was not satisfied that the First Respondent was the owner of the accident vehicle. However, going by the above analysis, it can be safely held that the trial Court's analysis did not address the issue of the information in the Police Abstract *vis-a-vis* the provisions of the Traffic Act and Evidence Act. I am of the strongest view that that had the trial Court done so it would have come to a different conclusion. I therefore set aside the finding that the ownership of the accident vehicle was not proved and substitute it with a finding that there was indeed on record evidence that the First Respondent was the owner of the accident vehicle.

28. The other issue which arises in this matter relates to the driver of the accident vehicle. The second Respondent, ERIC OTIENO admitted to be a driver who was at the material time in the employment of the first Respondent. He also admitted driving a tractor and howling cane in the said [particulars withheld] area but, allegedly drove tractor number KAL 049N Trailer ZB7248 instead. He identified some documents which allegedly confirmed that he drove a different tractor but did not produce the same as exhibits in evidence. He also admitted that the document known as a Weighbridge Book usually showed the tractor number and only one name of the driver and in cross-examination on the said tractor, he stated that:-

> ***"..... Referred to D-MFI-1 states it is dated 18/8/2006. I was on duty. It does not show the registration number of the tractor.....Referred to DMFI-3 states it doesn't show the registration number of the tractor. The document is for Eric. I am not the only Erick in Kenya ..."***

29. The second Respondent was right in stating that he was not the only person known by the name Eric in Kenya. However, he had earlier on stated that there were 30 drivers in the employment of the first Respondent managing 30 different tractors. Surprisingly he did not at least say that among the 30 drivers there were other drivers known by the name Eric. Further, PW2 in cross-examination stated that he saw the Police in the course of investigations taking a document A57 from the driver. The Appellant had pleaded that the second Respondent was the driver of the accident vehicle and surprisingly the second Respondent did not deny that he dealt with the Police in the course of the investigations. I therefore find on a balance of probability that the second Respondent was the driver of the accident vehicle. Be that as it may, even if that finding is wrong, still the first Respondent having been found to be the owner of the accident vehicle was sued as being vicariously liable for the negligent acts of its driver. Indeed it is not a mandatory requirement in law that the driver of an accident vehicle must be made a party as long the registered owner has been identified. The Court of Appeal in **Samwel Gikuru Ndungu vs. Coast Bus Company Ltd (2000) eKLR** had the following to say on the issue.

> ***"From the authorities it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employee's liability but to his negligence. Having come to that conclusion we are unable to agree with Aganyanya, J that the non-joinder of the driver in an action as the one which gave rise to this appeal renders the suit incompetent."***

30. In reiterating that the trial Court erred in dismissing the Appellant's case on lack of proof of ownership of the accident vehicle, I am reminded of the holding by Ojwang, J (as he then was) in **Chitavi Simba Mwangiti vs. Boniface Musyoka (2011) eKLR** when he expressed himself thus:-

> ***"But the main basis for determining this appeal, as foreshadowed in the grounds of appeal, and as clearly emerges from a reading of the trial court proceedings, is the mode of assessment of the evidence. As the very essence of then judicial task is invariably application of the law and assessment of evidence, a focused attention to the matters is vital; and this is expressly so for evidence, because it nearly always unfolds differently for every case. What is sought in the evidence is the true story; and an effective scrutiny of the evidence given, however long or short it is, will always illuminate the true position; the court's orders must be founded on the truth."***

I therefore and respectfully confirm the setting aside of the dismissal order.

(c) On liability:

31. The Appellant testified that he was walking home from the market along the Esishuru – Esumeiya Road. On hearing a tractor approaching he moved to the side of the road and onto the grass verge. He was heading in the same direction as the tractor; on the left side as one faced Esumeiya. It was his evidence that the tractor in a bid to avoid hitting pot holes veered off the road and hit him well off the road. He denied that he was hit when he attempted to cross the road.

32. PW2 who was an eye-witness was about 50 metres away from the Appellant. He saw the tractor pulling a loadful of cane as it passed him. He then saw the Appellant go to the far left of the road as the tractor followed him. The Appellant then fell down. He testified that:-

> ***"... I saw the tractor hit the plaintiff. It is the rear wheel of the left side which hit the plaintiff's left leg ....."***

33. PW2 stated that he saw the Appellant moving off the road and that it was the tractor that followed and hit the Appellant. This evidence remains uncontroverted.

34. Be that as it may, the **Kenya Highway Code** also places a responsibility upon pedestrians using roads where there are no pavements or sidewalks. In such cases, a pedestrian is supposed to keep to the right –

hand side of the road so that he can see any oncoming traffic and to so keep close to the side of the road.

35. As both the Appellant and the accident vehicle faced the same direction and PW2 saw the Appellant moving to the left side and off the road, it is evident that the Appellant had not adhered to the above requirement under the Highway Code. In effect, the Appellant also contributed to the accident, I so find. Given that it was still daytime and the driver of the accident vehicle had the advantage of using the natural light, he would have equally seen the Appellant and as so required of a prudent and careful driver taken steps to avoid the occurrence of the accident.
As the appellant stated that the tractors along that road were slow, then it can only be explained that the driver truly veered off the road and hit the Appellant. He did not therefore control the vehicle in the careful manner expected of him on a public road. The driver is also to blame for the accident.

36. On weighing between the Appellant's failure to adhere to the Highway Code in failing to keep to the right side of the road and the driver in veering off the road and hitting the Appellant, I come to the finding that the driver bears a higher liability than the Appellant. In the circumstances thereof, I find the Respondents 70% jointly and severally liable and the Appellant 30% liable for the occurrence of the accident.

(d) <u>Damages:</u>

37. I have equally noted in the judgment that the trial Court did not assess damages even though it had formed the opinion of dismissing the claim. The Court erred. It is usually required of a trial Court to proceed on and assess the damages in such instances even though it shall dismiss the claim.

38. According to the Medical Report by Dr. Andayi which was produced as Exhibit 4, the Appellant suffered severe soft tissue injuries of his left ankle and foot. He recovered with no incapacity although he was exposed to 25% chances of developing post-traumatic osteoarthritis of the left joint in the future. The healing resulted into a scar on the left ankle measuring 12 cm by 8 cm in size with occasional pain.

39. The assessment of damages in road traffic accidents is, by virtue of the Insurance (Motor Vehicle Third Party Risks)(Amendment) Act, 2013 which came into force on 28/01/2014, provided for in the Schedule thereto where the maximum payment in terms of compensatory awards is capped at Kshs. 3,000,000/= and all other injuries derived therefrom in terms of percentages.

40. The injuries sustained by the Appellant herein are partly provided for under item 34 (m)(ii) of the Schedule where the degree of compensation is between 2% to 5% under the special care of the foot; sporadic pain. However from the Medical Report the Appellant sustained further injuries to the left ankle. The Schedule however does not provide for such multiple injuries, but under item 40 where there are two or more categories of injuries or disablement, the percentage for the most severe or dominant injury takes effect. In this case therefore I will adopt 5% thereof as compensation thereby translating to Kshs. 150,000/= which amount is hereby awarded the Appellant as damages for pain, suffering and loss of amenities.

41. On special damages, the Appellant prayed for Kshs. 14,530/= in the Plaint. It is settled law that special damages ought to be pleaded and strictly proved. I have perused the record and seen Exhibit 5 which is a receipt from Lubinu Medical Clinic in support of Kshs. 4,000/= for preparing a Medical Report and filling in the P3 Form. This Court therefore awards the said Kshs. 4,000/= as special damages.

<u>Conclusion:</u>

42. The upshot is that this Court enters judgment for the Appellant against the Respondents jointly and severally for:-

(a) An order allowing the appeal;

(b) The judgment of the trial Court delivered on 01/04/2011 in Kakamega Chief Magistrate's

Court Civil Case No. 265 of 2007 be and is hereby set-aside;

(c) The Respondents herein be and are hereby held jointly and severally liable for the accident which occurred on 18/08/2006 involving the accident vehicle and the Appellant at 30% / 70% in favour of the Appellant;

(d) General damages for pain, sufferings and loss of amenities assessed at Kshs. 150,000/= (subject to liability) with interest from the date of judgment before the trial court.

(e) Special Damages of Kshs. 4,000/= is allowed with interest from the date of filing of the suit.

(f) Costs of this appeal as well as those of the Kakamega Chief Magistrate's Civil Suit No. 265 of 2007 be borne by the Respondents in this appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at Kakamega this 23rd day of July, 2015

A.C. MRIMA

JUDGE