



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 35 OF 2013

RODGERS WANAMBISI.....APPELLANT

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION.....RESPONDENT

[Being an appeal arising from the judgment and decree of the Honourable S.K. Ngetich

(SRM) delivered in Court on 25th September, 2013 in Kitale CMCC No. 515 of 2010]

J U D G M E N T

1. This appeal **No. 35 of 2013** was consolidated and heard together with **Appeals No. 36 and 37 of 2013**. They all arise from the judgment and decree of the Senior Resident Magistrate delivered on **25th September, 2013**, in Kitale **CMCC No. 515 of 2010**, respecting the first appellant, **Rodgers Wanambisi**, Kitale **CMCC No. 517 of 2010**, respecting the second appellant, **Rose Simiyu Sikuku**, and **Kitale CMCC No. 516 of 2010**, respecting the third appellant, **Fred Wanyonyi**.

The appellants had separately sued the respondent, **Agricultural Development Corporation**, for loss and damages arising from a road traffic accident which occurred on 9th July, 2010, along Zea-Kobos road in Kitale involving the respondent's tractor Reg. No. KAY 874V New Holland in which the appellants were travelling as lawful passengers in the course of their employment with the respondent.

2. The appellants suffered bodily injuries as a result of the accident which they blamed on negligence on the part of the respondent's driver and prayed for both general and special damages as well as the costs of the suits and interest.

The respondents' defence in all the cases was a denial of negligence on the part of its driver and a contention that it was not the registered owner of the material tractor and that it was improperly sued by the appellants for actions and/or omissions of its driver.

Alternatively, the respondent contended that if the accident occurred, then it was solely and/or substantially caused by the negligence of the appellants. The respondent therefore prayed for the dismissal of the appellants' cases.

3. After trial, the learned trial magistrate concluded that the appellants had failed to prove that the accident arose from the fault of the respondent's driver as to make the respondent vicariously liable for loss and damages suffered by the appellants. The cases by the appellants against the respondent were then dismissed with costs. The learned trial magistrate was however, of the opinion that an award of Kshs.

100,000/= general damages would have been sufficient had the appellants succeeded in their cases.

Being dissatisfied with the decision of the trial magistrate, the appellants separately filed the present appeals which have now been consolidated. Written submissions were filed by both sides for and against the appeals.

4. The duty of this court was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. In that regard, the evidence adduced by the appellants and their witnesses was given due consideration against that adduced by the respondent through **Laurene Wasakwa Watitwa (DW1)**, who was the driver of the tractor and **David Sele (DW2)**, who was the tractor's turn-boy (whatever that means) both of whom implied that the accident did not occur as alleged by the appellants save for the tractor/trailer sliding to the roadside due to the slippery condition of the road due to rain. In this court's opinion, the evidence did not raise any substantial dispute with regard to the occurrence of the accident and ownership of the material tractor by the respondent. There was sufficient evidence to show that the accident occurred while the appellants and others were being transported from one point to another aboard the respondent's tractor. All the passengers in the tractor were casual employees of the respondent.

5. The driver (DW1) and "Turn-boy" (DW2) down played the magnitude of the accident but according to the appellants through the testimony of the first appellant **Rodgers Wamambisi (PW1)**, the accident was not just a mere insignificant accident in as much as it led to the injury of the appellants. He contended that it had rained on the material date yet the tractor was driven at an excessive speed thereby causing the accident. The driver (DW1) agreed that it had rained. He indicated that the wet condition of the road caused it to become slippery and as a result the tractor slid but without overturning.

6. The police officer, **P.C Francis Michira (PW2)** acknowledged that the accident occurred and that it was reported at Endebes police station. He carried out investigations and determined that the cause of the accident was overloading and careless driving. He indicated that he could not charge the driver of the tractor with a traffic offence because he disappeared. He produced the police abstract (P. Exhibit 3) which confirmed the occurrence of the accident, the ownership of the tractor and the involvement of the appellants in the accident in as much as they were lawful passengers in the tractor.

7. Basically, if the investigations carried out by the police officer revealed that there was an element of careless driving on the part of the driver of the tractor (DW1), then it was apparent that he was the person to blame for the accident and through him the respondent could not escape vicarious liability. The evidence that he drove the tractor at an excessive speed on a slippery and wet road was therefore credible in establishing his negligence in causing the accident. His disappearance to escape arraignment before a criminal court was an expression of his guilty inclination in causing the accident.

8. It is without doubt that a person who drives a vehicle at an excessive speed along a slippery and wet road is not only careless but also reckless in the manner of driving. This fact was herein established against the respondent's driver by the appellants on a balance of probabilities.

This court does not therefore agree with the finding by the learned trial magistrate to the effect that fault was not established against the respondent's driver by the appellant.

On the question of liability, this court would find for the appellants at **100%** against the respondent.

9. With regard to quantum of damages, the medical reports by **Dr. Aluda**, showed that the appellants suffered injuries which may be described as minor as they were expected to fully recover without residual permanent effects.

The learned trial magistrate opined that a sum of Kshs.100,000/= would suffice as adequate compensation in terms of general damages for pain, suffering and loss of amenities.

In their submissions, the appellants have proposed a sum of Kshs.250,000/= on the basis of the cited

authorities of the High Court.

The respondent did not make any proposal. On its part, the court is of the opinion that a sum of **Kshs.150,000/=** would be adequate and reasonable compensation in terms of general damages.

10. As for special damages, the appellants' claim for **Kshs.2000/=** for the medical reports and **Kshs.200/=** for the police abstracts was established by production of the necessary documents. They are therefore entitled to special damages in the sum of **Kshs.2,200/=**.

In sum, these appeals are allowed to the extent that the judgment of the trial court is hereby set aside and substituted for a judgment in favour of the appellants against the respondent for the total sum of **Kshs.152,200/=** being both general and special damages. The appellants shall have the costs of the suit in the lower court and the costs of the appeal.

Ordered accordingly.

J.R. KARANJA

JUDGE

22/7/2015

{Delivered and signed this **22nd** day of **July, 2015**}

ORDER

There be a stay of execution for 21 days from this date hereof as agreed by the parties.

J.R. KARANJA

JUDGE

22/7/2015