REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 36 OF 2011

KENNEDY KIPKOECH KOSGEY…....................................APPELLANT

VERSUS

KORMOTO GENERAL AGENCIES…...............................RESPONDENT

(Being an appeal from the original judgment and decree of S. N. Riechi,

Chief Magistrate in Eldoret CMCC No. 583 of 2006 delivered

on 27th November 2009)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Chief Magistrates Court dated 27th November 2009. The appellant had brought a suit against the respondent for the tort of negligence. The learned trial magistrate found that the appellant failed to prove liability. The suit was dismissed with costs.

2. By an amended plaint dated 7th December 2006, the appellant pleaded that on 12th January 2005 he was driving a lorry registration number KAH 328L belonging to the respondent. At Sukunaga area along Eldoret- Nakuru road, a cyclist suddenly joined the road from an adjoining murram road. As he tried to avoid hitting the cyclist, he lost control of the lorry and it overturned. He suffered serious injuries. In his testimony in the lower court, he blamed the respondent for assigning him a defective vehicle. The vehicle was carrying about 35 to 40 cartons of liquour; they were stacked up behind the driver's cabin. Each weighed 20 to 25 kilos. He said he was doing a speed of 40 Kph. When he slammed on the brakes the carton boxes moved, fell on his hand and limited his capacity to maneuver the lorry. He claimed he had warned a manager of the respondent, Joseph Chemngorer, to install special boxes behind the driver's seat to hold the cartons. The respondent did not do so. The appellant's case was that the respondent was negligent for failing to provide safe working conditions.

3. His narrative on the accident was largely confirmed by his witness, Administration Police Constable Chepkonga (PW2). He was escorting the lorry. He was seated in the cabin with the driver and another police officer, Saina. PW2 saw the cyclist emerge from a side road. He said when the driver applied brakes the cartons fell on the three of them.

4. The appellant claimed general damages for pain, suffering and loss of amenities; loss of earnings and diminished earning capacity; special damages of Kshs 10,200; and, costs of the suit. The appellant sustained blunt trauma to the chest, fracture of the anterior ribs and dislocation of his shoulder. Permanent disability was assessed at 5%. The lower court opined that general damages of Kshs 400,000 would have

been sufficient. The court also found that special damages of Kshs 10, 200 were proved. As I have stated, the court found that liability was not established. The suit was accordingly dismissed with costs.

5. The appellant has challenged those findings through a memorandum of appeal dated 24th February 2011. The appeal was lodged out of time pursuant to leave of the court granted on 22nd February 2011. The appellant contends that the unauthorized load carried in the cabin contributed to the accident; that the learned trial magistrate erred in finding that the appellant had not complained of the danger of carrying luggage in the cabin; and, that the trial court erred in finding that negligence was not proved even in the face of uncontroverted evidence.

6. The appeal is contested by the respondent. The respondent submitted that negligence or fault was not proved. The respondent blamed the accident on the third party cyclist. The cyclist was not joined as a tortfeasor. The respondent denied that the accident was caused by the dislodged cartons. The respondent contended that the burden of proof was always on the plaintiff; and, that there was nothing for the respondent to rebut. It was also submitted that it was not the first time that the appellant was driving the lorry. The respondent's view was that the appellant must have been driving at a higher speed than he alleged. I was implored to dismiss the appeal.

7. The appellant has filed submissions dated 11th September 2014 with authorities annexed. The respondent's submissions were filed on 17th June 2015. On 22nd September 2015, I heard learned counsel for both parties. I have considered the appeal, the record of appeal, the pleadings in the lower court, the evidence and the rival submissions.

8. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.

9. I will deal first with the element of negligence. It was common ground that the appellant was employed by the respondent as a driver. The accident occurred in the course of his *employment*. The key question is whether the employer was negligent by failing to provide a safe working environment. Paraphrased, whether the accident was the result of the falling luggage carried in the driver's cabin. It was not the first time that the appellant was driving the suit vehicle under similar circumstances. Upon cross-examination (page 43 of the record) he answered-

> *"The motor vehicle was not defective. I could not have driven a defective motor vehicle. The brakes were not defective".*

10. The plaintiff claimed he was doing a speed of about 40 to 45 Kph. He saw the cyclist emerge on the road about three meters away. If the brakes were not defective, he should have been able to slow down the lorry, control it and avoid the accident. The evidence points to a lorry that was doing a higher speed than alleged by the appellant. Fundamentally, the accident was *caused* by the *cyclist* who suddenly joined the main road. The cyclist was not joined in the suit as a joint tortfeasor. The dislodged cartons could not have caused the accident. The lorry had been driven for some distance with the cartons intact. There was also no concrete evidence before the lower court that the appellant had complained to the respondent about the danger of carrying luggage in the cabin. For example, the appellant did not indicate the date or dates when he spoke to Mr. Joseph Chemngorer to mount "special boxes" behind the driver's seat to hold the cartons. There was no evidence he protested against taking up duties unless the changes were effected. He was not forced to drive the lorry on the material day. I got the clear impression that the allegations that the cartons contributed to the accident were an afterthought.

11. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock. See

Halsbury's Laws of England 4th edition volume 16 paragraph 562, *Mwanyule v Said* [2004] KLR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR.

12. The legal burden of proof that the employer had not provided a safe working environment was entirely on the shoulders of the appellant. See *Winfield and Jolowicz on Tort*, Sweet & Maxwell, London, 13th edition at page 23. True, the respondent did not call any evidence in rebuttal. That did not mean that the plaintiff's evidence *proved* negligence. It is a cardinal precept of the law of evidence that he who alleges must prove. See sections 107 and 109 of the Evidence Act. The point is that the respondent had by its *amended defence* dated 20th December 2006 denied the claim *in toto*.

13. From the evidence, I have reached the inescapable conclusion that the accident happened when the cyclist suddenly joined the road. The trial court arrived at the *correct* conclusion that the accident was caused by the cyclist. The cyclist was not a party to the suit. The appellant failed to establish that having luggage in the driver's cabin or the dislodged cartons caused or contributed *significantly* to the accident. The appeal on liability is thus devoid of merit and is dismissed.

14. I concur with the learned trial magistrate that the injuries to the appellant were serious. There was no evidence that the injuries to the appellant were caused by the falling cartons. The truth is that the lorry *overturned*. From the plaintiff's evidence, he was trapped in the vehicle; his safety belt still on; and, with the cartons pressing on him. The general damages proposed of Kshs 400,000 and special damages would have been reasonable. But that is now all water under the bridge.

15. The upshot is that the entire appeal lacks merit. It is dismissed. Costs are at the discretion of the court. The respondent was granted costs in the lower court. The appellant suffered serious injuries. Permanent disability was assessed at 5%. Considering the predicament he now finds himself in; and, in the interests of justice, I order that each party shall bear its own costs in this appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 29th day of October 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance by the appellant or his counsel.

Mrs. Mwaguni for Mr. Kamau for the respondent instructed by Kalya & Company Advocates.

Mr. J. Kemboi, Court clerk.