REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.74 OF 2010

BETWEEN

EMMANUEL OTIENO KONGILI …..... 1ST APPELLANT

SOUTH NYANZA SUGAR CO. LTD. ….....2ND APPELLANT

AND

JIMMY JOSEPH O. OWUOR ….....APPELLANT

(Being an appeal from the judgment and decree of Hon. Oduor, SRM,dated 13rd March 2010 in Original Kisii CMCC No.229 of 2006)

JUDGMENT

1. By a plaint dated 22nd November 2005 the respondent sued the appellant in respect of a road traffic accident on 14th June 2004 involving tractor Reg. No.KAL 045 U owned by the appellant and M/V Reg. No.KAQ 884 Y Toyota Corolla registered in the name of the respondent as a result of alleged negligence on the part of the appellant's driver, particulars of which were stated in paragraph 6 thereof.
2. It was pleaded that as a result of the said negligence the respondent sustained injuries to the right hand and chest and the damage to the said motor vehicle to the tune of Kshs.171,100.00 being cost of repairs.
3. By a defence dated 24th November 2006, the appellant denied ownership of the said tractor and further denied that the respondent was the registered owner of motor vehicle Reg. No. KAQ 884 Y and further denied particulars of negligence, general and special damages and attributed the accident herein to the negligence and or contributory negligence on the part of the respondent.
4. The suit proceeded for hearing wherein the trial court found the appellant liable at 100% and awarded the respondent Kshs.97,000/= being the cost of repair, Kshs.70,000/= general damages and Kshs.217,000/= being loss of user.
5. Being dissatisfied with the said judgment, the appellant filed this appeal and raised the following grounds of appeal:-

1. *The Learned Magistrate erred in law when he decided the case against the weight of evidence led at the trial and in deciding the issue of liability at 100% against the Appellants.*
2. *The learned trial magistrate erred in fact and in law when he awarded against the appellants damages for loss of use without proof, this being a special damage claim which had to be specifically pleaded and strictly proved.*

3. *The learned trial magistrate erred in law and in fact when he held that the appellant was liable in damages for cost of hiring alternative transport at the rate of **Kshs.217,000/=** which damages were too remote and did not arise from the accident and were in fact never proved at the trial.*
4. *The learned trial magistrate erred in law when he in fact inferred negligence on the appellant on the basis of submissions of counsel for the respondent from the bar, as opposed to making definite findings of facts on the same from evidence led by the respondent at the trial and in proceeding to decide the case on the basis of alleged inferences of negligence against the appellant.*
5. *The learned trial magistrate erred in law when he failed in his duty as the trial court to evaluate the evidence, consider the pleadings and to make his own findings in his judgment from the evidence led at the trial and to note the material discrepancies and departure in the pleadings and in the evidence which the respondent led at the trial.*
6. *The learned magistrate thereby used his discretion wrongly in failing to apportion liability against the respondent for contributory negligence in the circumstances and in failing to consider the pleadings and the submissions urged on behalf of the appellant before him.*
7. *The learned trial magistrate erred in law and in fact when in his judgment he awarded **Kshs.97,000/=** as costs of repairs on the basis of estimates and without proof and when relied on documentary evidence and exhibits which were illegally produced at the trial by the respondent himself without the makers thereof being called to produce them contrary to the provisions of the Evidence Act.*
8. *The learned trial magistrate erred in fact and in law when he literally ignored and failed to take into account the evidence which was led on behalf of the respondent which tended to favour the appellant at the trial and instead embarked on a process of deciding the case on the basis of presumptions and not evidence and indeed when there was evidence that it was the respondent's vehicle that rammed on to the appellants' motor tractor which was ahead.*
9. *It is the appellants' case and contention that the Learned Magistrate erred in law and in fact in making an award of **Kshs.70,000/=** for pain and suffering which amount is manifestly high and excessive and constituted an erroneous estimate of the alleged damages suffered.*

1. Directions were given that the appeal be determined by way of written submissions which have been filed.

Appellants submissions

2. On behalf of the appellant it was submitted that the evidence on record did not support the finding on liability at 100% and that since the tractor was in the middle of the road he ought to have taken extra care which he failed to so do. It was therefore submitted that liability should have been apportioned on 50:50% basis since the case was not proved on a balance of probability. It was further submitted that since the respondent did not file a reply to defence on the authority of **Mount Elgon Hardware -vs- United Millers Limited Kisumu Court of Appeal Civil Appeal No.19 of 1996**, the respondent should have been held to have admitted particulars of negligence alleged in the appellants' defence.
3. It was further submitted that the respondent sustained soft tissue injuries which had healed as at the time of hearing and therefore an award of Kshs.70,000/= was excessive and erroneous. It was proposed that an award of Kshs.40,000/= would have been adequate and in support thereof the case of **Loise Nyambeki Oyugi -vs- Omar Haji Hassan Nairobi HCCC No.4150 of 1991**, where Kshs.20,000/= was awarded was used.
4. It was submitted further that the respondent took about two months to repair the M/V and used alternative means of transport during that time and that the respondent did not take reasonable steps to mitigate his losses since it took him between June 2005 and 28th August 2005 to repair the M/V at a cost of Kshs.97,000/=. It was submitted that the motor vehicle would have taken 8 days to repair and in support thereof the case of **African Highland Produced Limited -vs- Kisorio Nakuru Court of Appeal Civil Appeal No.264 of 1999 [2001] 1 KLR 171**was submitted.

Respondent's Submissions

5. It was submitted that since the police abstract was produced by consent, showing that the appellant

was the registered owner of tractor registration NO. KAZ 045U that was proof of ownership of the said tractor and the authority of **Ibrahim Wandera -vs- P.N. Mashru Ltd. Kisumu Court of Appeal Civil Appeal No.333 of 2003** was submitted.

6. It was submitted that the appellant produced no evidence to rebut the respondent's evidence and therefore the trial court was right in finding the appellant liable at 100%. It was further submitted that the trial court arrived at the correct assessment of damages. It was therefore submitted that an award of Kshs.70,000/= was reasonable based upon the case of **Ibrahim Mwangi Macharia -vs- Henry Chege & 3 others HCCC No.246 of 2001**.
7. It was submitted that special damages were pleaded and proved by evidence including the receipts in support of Kshs.217,000/= being hire of alternative transport for two months. It was submitted that objection was upheld by the trial magistrate who declined to admit receipts which were not produced by their makers but it was submitted that the receipts should have been admitted under the provisions of **Section 33 (b)** of the **Evidence Act** and therefore the court was urged to allow the same.

Evidence

8. This being first appeal, the court is entitled to evaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that it did not have the benefit of hearing and seeing the witnesses.
9. The respondent's evidence was that on 14th June 2005 at 7.30 p.m., he was driving M/V Reg. No. KAQ 884Y when the appellant's driver drove the tractor full of sugar cane in the middle of the road when the same hit his motor vehicle on the right side. He subsequently took the motor vehicle to Yomico Auto Service where it was repaired at a cost of Kshs.97,000/= after his motor vehicle was assessed by AAA. He further stated that he took two months to repair the motor vehicle during which period he hired another vehicle from one of his friends.
10. DW2 Dr. Okello John Robert testified and produced a medical report on the respondent and under cross examination confirmed that he examined the respondent on 8th February 2006 while the accident occurred on 14th June 2005 and confirmed that he suffered soft tissue injuries with a second degree shock.
11. DW3 Francis Ojwando Ayulo repaired the motor vehicle at a cost of Kshs.97,000/= which were his labour charges while the respondent bought the spare parts.
12. From the proceedings and submissions herein, the following issues have been identified for determination.

a. *Whether the respondent had proved his case on a balance of probability on liability at 100%*
b. *Whether an award of Kshs.70,000/= in general damages was high and ought to be interfered with.*
c. *Whether the court was right in awarding Kshs.217,000/= in loss of user.*

1. It should be pointed at this stage that the respondent did not file a counter appeal and that the appellant did not call any evidence to rebut the respondent's evidence. It was the respondent's evidence which stands unrebutted that the appellant's driver was driving the tractor in the middle of the road and that the tractor was full of sugar cane. There being no evidence submitted by the appellant to challenge the respondent's account on the occurrence of the accident, I would be reluctant to interfere with the trial court's finding of facts on liability and would therefore dismiss this ground of appeal.
2. The appellant has submitted that an award of Kshs.70,000/= was high since the respondent suffered soft tissue injuries and in support thereof submitted the case of **Loise Nyambeki Oyugi** (supra). It should be noted that the said case was decided in 2001 and therefore having taken the rate of inflation and the injuries sustained by the respondent which included second degree shock, I find that an award of Kshs.70,000/= was not excessive and erroneous and would therefore decline to interefe with the trial court's exercise of discretion in assessing general damages.
3. On the issue of loss of user, this is a special damage which must be pleaded and specifically proved. The respondent submitted in evidence motor vehicle assessment report dated 7th July 2005 wherein the estimated period of repairs was given as eight (8) days. The respondent was

under an obligation to mitigate his loss and there being no evidence tendered as to why the said motor vehicle was not repaired within the eight (8) days period, I would agree with the submissions by the appellant that the award of Kshs.217,000/= was unreasonable and not supported by evidence tendered. I would therefore allow this ground of appeal and set aside the award under this heading.

4. In the final analysis, I would partially allow the appeal herein and substitute the trial court's award as follows:-

a. **General damages for pain and suffering …..... Kshs.70,000/=**
b. **Cost of material damage …..... Kshs. 97,000/=**
c. **Medical report …..... Kshs.3,000/=**
d. **Police Abstract …..... Kshs. 500/=**

Total **Kshs.170,500/=**

5. The appellant should pay the respondent cost of the lower court but shall be entitled to half cost of this appeal.

Signed and dated 9th day of December, 2014

J. WAKIAGA

In the presence of:-

Nyagwencha for Odhiambo for Appellants

N/A for Respondent's

Mr. Bibu - Court Assistant