REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 120 of 2011

(An appeal from the Judgment of the Honourabel Mr. Makori,

PM datecd 9TH June, 2009 in Civil Suit No. 705 of 2005)

B E T W E E N

JULIUS MAJONI JUMA ..... APPELLANT

VERSUS

MIWA HAULIERS LTD. ..... RESPONDENT

JUDGMENT

This appeal emanates from the decision of the subordinate court Mr. Makori, Principal Magistrate in Mumias SRMCC No. 705 of 2005 in which judgment was delivered on 9th June, 2009.

In the said judgment, the learned trial magistrate dismissed the case of the appellant (who was the plaintiff) in the following terms –

"On liability I will state as follows:- There is a defence filed on record and it disputes the negligence as alleged by the plaintiff that this was a self involving accident. There is a service card produced to show that the defendant used to maintain the tractor. This was enough. I will find that the negligence attributed to the defendant has not been proved.

I would have awarded Kshs.200,000/= in general damages for the injuries as sustained by the plaintiff plus Kshs.1,500/= on special damages."

Therefrom arose the present appeal which was filed initially at Bungoma High Court by the appellant through his counsel Kulecho, Musomba & Company advocates.

The grounds of appeal are seven (7), as follows –

i) THAT the learned magistrate erred in dismissing the appellant's case while his case was uncontroverted.

ii) THAT the learned magistrate erred in law and in fact in finding that the plaintiff had failed to prove the negligence attributed to the plaintiff.

iii) THAT the learned magistrate erred in failing to find that the plaintiff had proved his case on the balance of probability.

iv) THAT the learned magistrate erred in failing to recognize that an accident had indeed occurred and the plaintiff was severely injured.

v) THAT the learned magistrate erred in finding that a service card of the suit motor vehicle was sufficient proof to discharge the onus of disproving negligence on the defendant's part.

vi) THAT the learned magistrate erred in law and in fact in making a decision on liability based on his own assumption unsupported by any evidence on record and his decision has caused a miscarriage of justice.

vii) THAT the learned magistrate erred in fact and in law in having found that there was a mechanical breakdown by discharging the defendants from any liability.

The appellant's counsel M/S Kulecho, Musomba & Company and the respondent's counsel M/S E. K. Owinyi & Company filed written submissions, which I have perused. I have also perused the pleadings, proceedings and the judgment of the subordinate court.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record afresh and come to my own conclusions and inferences – *see* ***Selle -vs- Associated Boat Co. Ltd. [1968] EA 123***.

It is also trite that the burden is on the plaintiff, in civil cases, to prove his or her case or claim against the defendant on the balance of probabilities – *see* ***Kirugi & Another -vs- Kabiya & 3 others [1987] KLR 347***.

It is further trite that an appellate court should be slow to interfere with the finding of fact of the trial court unless there are justifiable reasons to do so – see Ephantus Mwangi & Ano. –vs- Duncan Mwangi Wambugu [1982-88] KAR 278.

During trial in the learned trial magistrate's court, only the plaintiff gave evidence as PW1. No other witness testified. He is the only person who described how the accident occurred thus –

On the screw and trip at 5.00 there was a breakdown on the road. The oil pump failed. I was on a slope and it seemed the steering and brakes would not work. It fell in river Lusumu. I was thrown off and fractured my hand and left chest. I blame the company because the tractor was faulty. The steering pump was defective.

The defendant did not bring any evidence to attempt to explain how the accident occurred, or that they had checked the tractor after the accident and found it to be in good condition. The plaintiff gave his evidence on oath and was cross-examined. In my view, his evidence on how the accident occurred remained uncontroverted.

Indeed the respondent produced, by consent, a vehicle service chart for the said Tractor KAH 976Q for the period April to June 2003 which covers the day when the accident occurred which was 29/05/2003. The pages of the chart are headed "Daily Incoming Vehicle Report." Though there are entries for 29/05/2003 when the accident occurred, as well as the 30/05/2003 which was the next day, there was no report that the said tractor was specifically checked and inspected for what might have caused the accident.

In addition no witness came to testify in court to controvert the allegation of the plaintiff that the vehicle steering and brake system had malfunctioned. The court is left to speculate for the respondent, which it cannot do. The result was that the respondent left the evidence of the appellant as to the cause of the accident to stand unshaken.

The learned trial magistrate erred in relying on the defence filed to reject the plaintiff's case. This error is evident when the learned trial magistrate stated in the judgment –

"There is a defence filed on record. It disputes the negligence as alleged by the plaintiff that this was a self involving accident."

Courts have held that pleadings are mere allegations and remain so unless they are proven through evidence. The defence filed was not evidence, and remained an allegation because the defendant chose not to tender evidence to prove the allegations.

In my view, since the sworn evidence of the appellant was not controverted by evidence from the defence, his position stands. On the basis of that evidence of the appellant on record, I find that he had proved his case of negligence of the respondent on the balance of probabilities. This justifies me to interfere with the findings of facts by the trial court.

In the circumstances, and since there is no contrary evidential version of the occurrence of the accident from the defence, I find that the respondent is 100% liable in negligence for the accident, since it is not in dispute that the tractor belonged to them, they were duty bound to maintain it, and they gave the said tractor to the appellant to drive for their commercial benefit, the steering pump failed and the accident occurred injuring the appellant.

The subordinate court assessed general damages at Kshs.200,000/= and special damages at Kshs.1,500/=. I find no reason to depart from that finding.

Consequently, I find that this appeal has merits. I allow the appeal set aside the decision of the subordinate court and order as follows –

1. I find the respondent negligent to the tune of 100% for the accident.

2. I set aside the decision of the trial court and instead enter judgment in favour of the appellant.

3. I award general damages to the appellant in the sum of Kshs.200,000/=.

4. I award the appellant special damages in the sum of Kshs.1,500/=.

5. Special damages will attract interest at court rates from the date of filling suit in the subordinate court, while general damages will attract interest at court rates from today's date until payment in full.

6. The appellant is hereby awarded the costs of both this appeal and the proceedings in the subordinate court.

Orders accordingly.

Dated and delivered at Kakamega this 30th day of May, 2013

George Dulu
J U D G E