

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 29 OF 2012

(Appeal from the judgment of [P.N. ARERI, RM) dated 20.2.2012 in the Chief Magistrate's Court at Kakamega in Civil Case No.56 of 2011)

CHANNAN AGRICULTURAL CONTRACTORS LTD..... APPELLANT

V E R S U S

FRED BARASA MUTAYI RESPONDENT

J U D G M E N T

The respondent was involved in a road traffic accident on the 29.10.2010 involving motor vehicle registration number KAW 248 R Toyota Pick Up and Tractor registration number KBD 434 W belonging to the appellant. The respondent filed Kakamega CMCC No. 56 of 2011 and was awarded KShs.250,000/= as general damages less 10% contribution. The appellant filed this appeal and the grounds are that the respondent did not prove negligence on the part of the appellant, that the trial court erroneously apportioned liability at 90:10 against the appellant, that the respondent did not discharge the burden of proof, that the respondent was not a lawful passenger and that the amount of damages awarded is excessive.

Parties consented to argue the appeal by way of written submissions. The totality of the submissions by the counsel for the appellant is that the allegations of negligence against the appellant were not proved. PW3 who was the investigating officer was not present during the occurrence of the accident or when the accident tractor was taken for inspection. The respondent failed to call witnesses and that the amount of damages is excessive. Counsel is proposing an award of KShs.80,000/= as damages.

On his part counsel for the respondent maintains that the appellant was entirely to blame for the occurrence of the accident and ought to have been held 100% liable. On quantum counsel for the respondent maintains that the award is fair.

The record of the trial court shows that three witnesses testified for the respondent and one for the appellant. The respondent was PW1. His evidence was that on the material day he was travelling on the pickup from Bungoma heading to Kakamega. It was about 8.00 p.m. He was at the back of the pickup. When they reached a place called Eluche they met two tractors. One tractor was ahead with no headlights while another tractor was behind with its lights on. The tractor ahead was using the lights from the tractor behind it. The tractor that was behind dimmed its lights and the tractor ahead hit the pickup. The driver of the pickup died on the spot. The respondent sustained injuries. **PW2 Dr. CHARLES ANDAYE** examined PW1 and summarised the injuries as moderate soft tissue injuries that were expected to heal in a period of 8 months. The injuries were blunt injury to the chest, cut wounds to the head and left leg. **PW3 PC GEOFFREY NTHUNGA MBERI** was based at the Mumias police station and investigated the case. He got a report of the accident at about 8 p.m. and went to the scene. He saw the pickup and the body of the deceased driver. On inquiry he was told that there were two tractors and one had no lights and it was escorted by another tractor which had lights. The tractors were heading towards Mumias and the tractor that was ahead knocked the pickup. the driver of the tractor registration number KBD 434 W was charged for failing to renew his license and he was also given a notice of intended prosecution for causing death by dangerous driving but was not charged.

The appellant called one witness who was the driver of the tractor registration number KBD 434 W. His evidence is that he was driving towards Mumias and saw a speeding vehicle coming from the

opposite side. He thought it was a motorcycle and only realized that it was a vehicle after the collision. He saw people armed with pangas running towards him and he drove off to Mumias sugar factory. He was charged for failing to renew his license. His further evidence is that there was another tractor behind him.

The trial court apportioned liability at 90% against the appellant and 10% against the respondent. The trial court blamed the respondent for travelling at the back of the pickup and thus exposing himself to injuries. From the evidence on record it is established that the accident occurred at about 8 p.m. and the respondent was a passenger in the pickup. Whether the respondent was a lawful passenger cannot be an issue as the owner of the pickup was not sued. I do find that the apportionment of liability by the court is reasonable. The 10% liability can also be attributed to the negligence of the driver of the pickup. I therefore find that the court properly apportioned liability.

On the issue of quantum PW2 produced the medical report which indicates the injuries sustained by the respondent. The injuries are a blunt injury to the chest and head and cut wound to the left leg. The respondent complained of chest pain and frequent headache. PW2 opined that the injuries were to heal in a period of 8 months. Before the trial court counsel for the appellant quantified general damages at KShs.60,000/= and relied on the cases of **MUNYOKI MWINZI MUTISYA V FACTORY GUARDS LTD. NBI HCCC. NO. 3678 OF 1985** and that of **RICHARD MUCHIRI NDIRANGU V JOSEPH MAINA WACHIRA NBI HCCC. NO.3716 OF 1989**. In the first case KShs.60,000/= was awarded for soft tissue injuries while in the second case KShs.75,000/= was awarded for similar injuries.

Counsel for the respondent quantified general damages at KShs.300,000/= and relied on the cases of **CATHERINE WANJIKU & 3 OTHERS V GIBSON THEURI (NYERI HCCC. NO. 320 OF 1998)**, **WIYUMIRIRIE SAWMILLS V PAUL KARIUKI (ELDORET HCCA. NO. 110 OF 2000)** and that of **ATANAS BARASA V JESCAH OLAL KANALI (BUNGOMA HCCA. NO. 62 OF 2008)**.

The medical report shows that the respondent sustained minor injuries that were expected to heal. Based on the authorities cited before the trial court I do find that the award by the trial court was a bit excessive. The respondent was not hospitalized and the doctor opined that he was to recover from the injuries completely with no resultant incapacitation. I do find that an award of KShs.150,000/= is reasonable. In the end the appeal on liability fails. On quantum the award is set aside and replaced with an award of KShs.150,000/= as general damages.

In the end, the appeal partly succeeds. The respondent shall be held 10% liable. A sum of KShs.150,000/= is awarded to the respondent less 10% contribution. The respondent shall have the costs of the trial court case. Each party shall meet his/its own costs of this appeal.

Delivered, dated and signed at Kakamega this 30th day of October 2013

SAID J. CHITEMBWE

J U D G E