REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 278 of 2007

JOSEPH NGOMA AMOLLO. ..... APPELLANT

VERSUS

RICHARD WANYAMA. ..... 1ST RESPONDENT

FIROZE JIRVER. ..... 2ND RESPONDENT

J U D G M E N T

This appeal arises from the judgment of the Senior Resident Magistrate, D A Okundi (Mrs.) dated 13th December, 2005 in which the Appellant's claim, arising from a motor accident for general and special damages, was dismissed.

The summary of the facts of the case are as follows: - The Appellant's tool box was damaged by the 2nd Respondent's lorry and he demanded for compensation from the 1st Respondent who was the driver of the motor vehicle No.Reg. KYK 394 belonging to the 2nd Respondent. The 1st Respondent and the turn-boy then, invited the Appellant to jump into the motor vehicle's cabin and be taken to the 2nd Respondent who would pay him some compensation. The Appellant did complied. A short distance away, along Globe Cinema roundabout, the turn boy with assistance of another person, deliberately pushed the Appellant out of the moving motor vehicle to the left side. As the Appellant landed on the road floor and the rear left wheel ran over his legs, causing some injuries. The friends and colleagues of the Appellant immediately took him to Kenyatta National Hospital where he was admitted and detained for medical treatment for a month. During the treatment his legs were casted on the Plaster of Paris.

It is also in evidence that the 1st Respondent failed to stop the motor vehicle Reg. No. KYK 394 during the whole mishap along Kirinyaga Road. A medical report dated 14th January, 1999 by a Dr. Wambugu, was put in evidence together with a second medical report by Dr. Hagemba of Nairobi Orthopedic Services.

PW I was a Police Constable, Okoth Awendo who testified that the Appellant had reported the incident to Central Police Station and a police abstract report dated 7th January, 1999 was issued to the Appellant. The incident was however shown as having taken place eight months earlier on 27th February, 2008 but reported to the Police Station on 10th September, 1998. The Appellant had amended his plaint and the Respondents had also amended their joint defence.

The honourable trial magistrate had found that there was no dispute as to the occurrence of the accident

on 27th February, 1993 and that it involved motor vehicle No. KYK 394. There was also no dispute that the motor vehicle belonged to the 2nd Respondent and that the 1st Respondent was its driver. It was also established by the evidence on the record, which evidence the honourable trial magistrate accepted, that the Appellant was unlawfully pushed out of the motor vehicle by the turn boy whose name was not known to the Appellant. It was not disputed either that this happened as the driver drove the motor vehicle which he did not stop even after the incident took place. It is clear however, that the trial magistrate refused to accept the complicity of the 1st Respondent who was the driver. She also did not accept the existence of vicarious liability in respect to the driver and the two other men in the motor vehicle one of who was said to be the turn-boy.

During the hearing of this suit, the Appellant who was the Plaintiff testified. He also called two witnesses, one of whom was another mechanic who witnessed the negotiations between the Appellant and the driver of KYK 394 and who later witnessed the accident after the Appellant was thrown out of the cabin of the motor vehicle. The second witness was a Police Constable who produced the police abstract report and the Occurrence Book report of the accident. It is also clear from the evidence record that the Appellant's evidence closely supported the pleadings in the amended plaint almost to the letter. Finally, the Respondents who had filed defences and had therein generally denied the Appellants claim, failed to call any evidence in support of the defences. They accordingly, had specifically failed to controvert the evidence recorded by the Plaintiff/Appellant during the hearing.

In his grounds of appeal, the Appellant complained that the learned trial magistrate erred in finding that he failed to prove his claims on the balance of probability. He also blamed the trial magistrate in failing to find that the Respondents had acted negligently or recklessly or that there was evidence proving vicarious liability of the driver and his turn-boy, upon their employer, the 2nd Respondent. Finally the Appellant also attacked the trial court for failing to make an alternative finding of damages in case her findings were overturned by the Appellate court.

I have carefully considered the evidence on the record after perusing the pleadings and after also perusing the written submissions of both sides. I find that I entirely agree with the findings of the trial magistrate to the effect that the accident occurred on 27th February, 1998 involving the lorry Reg. No. KYK 394; that the lorry belonged to the 2nd Defendant/Respondent and was being driven by the 1st Respondent; that the turn-boy unlawfully pushed down the Appellant as the lorry was moving and as a result the lorry's rear wheel ran over the Appellant's legs.

What I do not agree with is the argument and conclusion that the turn-boy and those who assisted him were not employed or were not doing what they did at the behest of the driver and his employer. In my view, once it was accepted that it was the turn-boy who threw out and down the Appellant from the lorry's cabin, the assumption arises that he was an employee the 2nd Respondent and was working in the lorry with the knowledge and authority of the employer, the 2nd Respondent. The evidence on record shows that he was a turn-boy who was in the lorry before the lorry went to the Appellant's working place. The lorry left with him after the driver and the same turn-boy persuaded the Appellant to come along to be taken to the 2nd Respondent to negotiate compensation arising from the damage to the Appellant's toolbox. Clearly, the turn-boy was working in cahoots with the driver for the benefit of the 2nd Respondent and must have been working, in the course of their employment. Whatever they did and however, unlawful, it was, they nevertheless operated in the course of their employment.

It was upon the Respondents to come out in evidence to show that the turn-boy was an intruder who forcefully joined in the continuing saga uninvited and acted in a frolic of his own. It was upon them further to show that the turn-boy was not their employee and vicarious liability did not exist. However, they chose not to shed that burden aside and away. They cannot blame anybody for their failure to clear themselves.

Looking at the totality of the Appellant's evidence as the Appellate Court and taking into account the fact that it was uncontroverted, it is the view of this court that the honorable trial magistrate seriously erred in fact and law in failing to accept it and find for the plaintiff. She failed to take into account evidence she

should have taken into account and came to a wrong decision on both facts and law. Had she acted properly upon the evidence on record, she would have found that the Appellant had proved his case on the liability of the Respondents.

Arising from the above conclusion, the honourable trial magistrate should have proceeded to assess damages as is the practice. She erred in failing to do so whether she concluded that the plaintiff had proved his case or otherwise.

I also find that this court will assess the said damages to avoid a further delay of justice in the matter.

Taking into account the medical evidence on record, I observe that Dr. Hagemba found that the Appellant's injuries were severe on the right leg where there was a compound fracture of the tibia. He had however properly recovered and was walking almost normally. He had spent Ksh.100/- to buy the Police Abstract and Ksh.1,500/- to pay for the medical report.

The Appellant quoted two cases to demonstrate awardable damages in such cases. These were **Nairobi HCCC No. 4503 of 1993 – John Kimani Kamau Vs Stephen Warui Kiarie** where the court in similar injury awarded Ksh.200,000/-. A second case was **Nairobi HCCC No. 4621 of 1988 – Alloyce Otieno Oppon Vs Kuria Karuri (1994) and** Ksh.250,000/- was awarded. Since then the shilling has reduced in value due to inflation. Taking the above cases and the present inflation into account, I would award Ksh.500,000/- as general damages for pain and suffering and loss of amenities.

In conclusion, therefore, I allow this appeal. I award special damages of Ksh.1,600/- and general damages of Ksh.500,000/- with interest at court rates with effect from the date of judgment of the lower court. Costs are to the Appellant, here and below. Orders accordingly.

Dated and delivered at Nairobi this 26th day of September, 2012.

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D A ONYANCHA
JUDGE