



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 76 OF 2009

MUMIAS AGRICULTURAL TRANSPORTERS.....APPELLANT

V E R S U S

HARRISON NAMULANDA.....RESPONDENT

J U D G M E N T

1. The Memorandum of Appeal dated 11.8.2009 is premised on the following grounds;

“1. THAT the learned magistrate erred in law and fact in not properly evaluating evidence before the court.

2. THAT the learned magistrate erred in law and fact in delivering the judgment when the appellant had not been heard thus disregarding the principles of natural justices.

3. THAT the learned magistrate erred in law and fact in holding the appellant liable for the accident when the appellant had been indeed exonerated in Mumias SRM Traffic Case No. 474 of 2001.

4. THAT without prejudice to the foregoing, the learned magistrate erred in law and fact in giving an award that was excessive as general damages, all relevant factors considered.”

2. From the Amended Plaintiff dated 16.9.2002, the Respondent had sued the Appellant, inter-alia for general and special damages as a result of injuries he allegedly sustained when he was involved in an

accident on 5.7.2001 while travelling as “a lawfully authorized passenger” in motor vehicle registration no. KAJ 216 P belonging to Eldoret Hospice, the 5th Defendant in the suit. It was his case that the 2nd Defendant, Ibrahim Onyango Obonje, had driven a tractor registration no. KAK 961 E so carelessly that it collided with motor vehicle registration no. KAJ 216 P thereby causing serious personal injuries to him. The particulars of negligence and injuries were as follows;

“Negligence –

- i) Driving the said motor vehicle at an excessive speed in the circumstances.***
- ii) Driving the said motor vehicle without any special look out and/or due care and attention.***
- iii) Failing to keep proper control and/or have any sufficient regard to other traffic on the road.***
- iv) Causing or permitting the accident to occur.***

- v) Driving a defective motor vehicle.”***

Injuries –

- i) Laceration wounds to the right ear lobes, left shin (from part of the elbow), the knee and right index finger.***
- ii) Blunt injuries to the right left knee and nose.***

- iii) Bruises to the face.”***

3. In his judgment, the learned magistrate found the Appellant as the alleged registered owner of the tractor, vicariously liable at 100% for the conduct of the 2nd Defendant who was said to be its employee and awarded KShs.120,000/= in general damages and KShs.3,500/= as special damages. Costs were also awarded to the Respondent and the same were to be paid by the 1st and 2nd Defendants i.e. the Appellant and the driver of the tractor.

4. In submissions by the advocate for the Appellant, one issue was raised which I consider important to address at this stage; that there was no evidence that the tractor belonged to the Appellant and that being the case it could not have been held liable, vicariously or otherwise for the accident. Reliance thereon was placed on the Court of Appeal decision in Thuranira Karani vs Agnes Ncheche, C.A. 192/1996 (Nyeri) where the court held as follows;

“The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered

owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it.”

5. In the Appeal above and for the above reasons inter-alia, the suit before the High Court was struck off with costs.

6. What is the position in this suit, on the above issue? I note that in the Statement of Defence filed on 16.10.2001, the Appellant denied that tractor registration no. KAK 961 E was registered in its name and for avoidance of doubt, it pleaded as follows;-

“In further answer to the contents of paragraphs 2 and 3 of the plaint, the 1st and 2nd defendants deny that the 1st defendant was the registered owner of the motor vehicle registration number KAK 961 E Trailer Za 600 Massey Ferguson tractor thereafter referred to as the 1st Defendant motor vehicle and 2nd defendant was its driver, servant, or agent and or employee and put the plaintiff to strict proof thereof.”

7. That being the case, the issue of ownership of the tractor was a triable issue and the Respondent was obligated to prove that issue on a balance.

8. In evidence there is no record that the above contested issue was ever addressed by the Respondent who had the onus to do so. In the end, it was an error on the part of the learned magistrate not to address that matter and following the Thuranura Case (supra) once there is no evidence of ownership then liability would be difficult to prove.

9. For that reason alone, I will allow the Appeal save to add that on the evidence and the law, I would otherwise have had no reason to interfere with the judgment of the subordinate court.

10. In the end and sadly for the Respondent, I will allow the Appeal and will also strike out the suit before the subordinate court. Let each party bear its own costs as regards the Appeal only.

11. Orders accordingly.

Delivered, dated and signed at Kakamega this 17th day of February, 2011

ISAAC LENAOLA

J U D G E