No. 2741

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 99 OF 2005

SOUTH NYANZA SUGAR CO. LTD ..... APPELLANT

-VERSUS-

JOHN OWINO .....RESPONDENT

JUDGMENT

(Being an appeal from Judgment and Decree of Hon. Mr. Ezra Awino, Principal Magistrate in Migori PMCC No. 45 of 2004 and

delivered on 18th May, 2005)

John Owino, the respondent in this appeal, hereinafter called ***"the plaintiff"*** sued **South Nyanza Sugar Company Limited**, ***"the appellant"*** herein, hereinafter called ***"the defendant"*** in the Senior Resident Magistrate's court at Migori. He sought to recover damages for personal injuries he claimed to have sustained in a road traffic accident on 13th August, 2003, involving motor vehicle registration number KAB 675F Tata, which he claimed was owned by the defendant and was at the material time driven by one, **John Oware Obonyo,** as its driver, agent and or servant whom he sued as the 2nd defendant.

According to his plaint dated 17th September, 2003 and filed in court on 23rd September, 2003, he averred that he was on the material day a lawful passenger in the said motor vehicle when along Awendo-Ulanda road past Mariwa Trading centre the 2nd defendant negligently and or recklessly drove the said motor vehicle that it overturned and as a result he sustained serious injuries. The particulars of negligence he associated the 2nd defendant with were that he drove the motor vehicle at a speed which was excessive in the circumstances, failed to slow down, swerve, apply brakes, stop or in any manner act so as to avoid the said accident, failed to observe the traffic rules, failed to keep any proper look out for other traffic and or road users and finally driving an overloaded motor vehicle.

The defendant filed a defence on 2nd March, 2004 in which it essentially admitted its ownership of the motor vehicle. However it denied that the accident was caused by and or contributed to by the negligent

driving of the 2nd defendant. It also denied the plaintiff's injuries which included chest contusion, Bruises on the left thigh plus soft tissue injuries. According to paragraph 7 of its defence, the doctrine of ***res ipsa loquitor*** and the highway code did not apply to the circumstances of the accident which it claimed ***"….was solely caused by and or substantially contributed to by the negligent driving of the plaintiff …".***

At the trial before **Hon. Ezra O. Awino**, then acting Principal Magistrate, only the plaintiff testified. No evidence in other words was led by the defence for reasons which are not apparent from the record.

In his evidence, the plaintiff told the Acting principal magistrate that on 13th August, 2003 he was going to cut sugarcane at Angaga and he was being ferried in the subject Motor vehicle when the said motor vehicle suddenly overturned. The reason for the motor vehicle overturning was according to him overspeeding. As a consequence, he was injured on the chest and left hip. He was taken to the defendant's Dispensary, treated and discharged. Later he recorded a statement at Awendo Police Station and was issued with P3 form as well as Police abstract. He later saw **Dr. Ajuoga** who examined him and prepared a medical report.

In a reserved judgment delivered on 18th May, 2005, the learned magistrate found the defendant 100% liable for the accident. On quantum, he awarded the plaintiff Kshs. 60,000/= and special damages of Kshs. 3,100/=. The defendant was aggrieved by the judgment and decree aforesaid and therefore lodged the instant appeal on six grounds to wit:-

"1. The learned trial magistrate erred in law and fact in holding but without finding that the respondent had proved negligence against the appellants.

2. The learned trial magistrate erred in both law and in fact in proceeding to award general damages in the sum of kshs. 50,000/= which amount was far too high and manifestly excessive in the circumstances, considering the basically soft tissue injuries alleged to have been suffered by the respondent.

3. The learned trial magistrate erred in both law and in fact in failing to note the material discrepancy between the respondent's pleadings and in the evidence which he led with regard to the suit motor vehicle alleged to have been involved in the accident and in failing to hold that the respondent in leading evidence to the effect that he was injured while aboard motor vehicle registration number KAE 675F as opposed to the pleaded motor vehicle KAB 675F went against the hallowed principle of law that a party is bound by his pleadings and in allowing evidence that ran counter to the pleadings.

4. The learned trial magistrate erred in law and in fact in holding that the respondent was a passenger in the appellant's motor vehicle and that he was injured in the accident, on suspect and insufficient medical evidence.

5. The learned trial magistrate erred in both law and in fact in holding that the appellants alleged motor vehicle had been over speeding and that the accident was caused by such over speeding when in fact no credible evidence was led in that regard and in failing to hold on the whole that no proof was led in regard to all and or any of the alleged particulars of negligence.

6. The learned trial magistrate erred in fact and in law in failing to dismiss the respondent's suit in the court below with costs for want of any and or sufficient proof and or evidence".

When the appeal came up for directions before me on 3rd November, 2010 **Mr. Odhiambo** and **Mr. Kerario**, learned counsel for the appellant and respondent respectively agreed that the same be canvassed by way of written submissions. Those written submissions were subsequently filed and exchanged. I have carefully read and considered them as well as cited authorities.

The defendant's six grounds of appeal can actually be crystallized into two broad ones, liability and quantum. It is the case of the defendant that the plaintiff did not establish that the defendant and or its driver was negligent in the sense that the particulars pleaded in the plaint were never proved by evidence. That claim cannot possibly be correct. The plaintiff was categorical in his evidence that the accident was as a result of over speeding. That aspect of the case was specifically pleaded in the particulars of negligence. It is instructive that the motor vehicle overturned. Ordinarily a motor vehicle does not just overturn unless someone and in particular the driver is negligent. There was no evidence from the defendants to counter the plaintiff's aforesaid assertion or explaining why the motor vehicle could have overturned in the absence of negligence on the part of its driver, agent and or servant, the 2nd defendant. It was up to the defendant to counter the plaintiff's assertion that speeding was the sole cause of the accident. They did not do so. The defendants too have raised the issue that the plaintiff did not unequivocally point out in evidence the number plate of the motor vehicle involved in the accident. He only mentioned that he boarded a Tata 675F which belonged to the defendant but not the vehicle KAB 675F as pleaded whatever they meant by that submission. To my mind this is a non-issue as it was not raised before the learned magistrate for his decision. It is being raised for the 1st time in this appeal and from the bar. For that reason, that submission is rejected. In any event, the defendant in paragraph 3 of its defence admitted the contents of paragraph 4 of the plaint in which the plaintiff had averred ***"…. At all material times to this accident, the first defendant was the owner of motor vehicle registration number KAB 675F TATA and the 2nd defendant was the driver of motor vehicle registration number KAB 675F TATA…".*** So what did it matter that in his evidence the plaintiff only talked of ***"… I was inside Tata KAB 675F of Sony…"***. The ownership of the motor vehicle and its registration number was already admitted by the defendant.

The defendant too has raised the issue that the ownership of the motor vehicle was not proved as required in law and sought to rely on court of appeal decision on the issue to wit, **Thuranira Karauri –vs- Agnes Ncheche, NYR C.A No. 192 of 1995 (UR).** However, in the light of its own admission as regards the ownership of the offending motor vehicle, that submission fades into a non-issue.

The defendant to has submitted that the plaintiff failed to prove liability on a balance of preponderance because the investigating officer was not called upon to testify and or to present the police investigation file to show the sketch plans, diagrams, statements to establish whether there was any negligence on the part of the defendant and extent of such negligence. For this submission it has relied on the case of **Nderitu –vs- Ropkoi and Another (2005) 1 E. A 334**. Again this authority does not advance the case of the defendant any further. The facts therein are clearly distinguishable with the facts obtaining in this appeal. It is not even apparent that such evidence was readily available and the plaintiff failed to call it. As stated in the case cited ***"….The burden of proof was with the plaintiff to discharge. There was however also the evidential burden cast upon both parties to prove any particular fact which they desired the court to believe in its existence….".*** Nothing therefore stopped the defendant from calling such evidence.

In this appeal I am also being urged to interfere with the award of damages made by the trial court. In **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini –vs- A. M Lubia and Olive Lubia (1982 – 88) 1 KAR 727 at pg 730 Kneller J.A** said:-

"…The principles to be observed by an appellate court in deciding whether it is justified in disturbing

the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango –vs- Manyoka (1961) E.A 705, 709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd –vs- Kavoloto (1970) E. A, 414, 418, 419…".

This court follows the same principles as the said decision is binding on this court. In other words the above stated principles continue to be applied by this court.
I have endeavoured to set out the brief background of the circumstances leading to this appeal. It arose out of a traffic road accident in which for reasons which are unclear the motor vehicle in which the respondent was travelling simply overturned. The respondent was among the passengers in the motor vehicle and sustained injuries as a result. His medical report was produced in evidence by **Dr. Ajuoga** who gave his professional opinion on the degree and extent of injuries sustained by respondent. They were the kind of injuries commonly referred to as soft tissue injuries in medical or legal parlance.

Having evaluated the pleadings, the evidence adduced and the conclusions reached by the learned magistrate, I would observe that he did not take into account irrelevant factor or left out of account a relevant one when he awarded the plaintiff 50,000/= as general damages for pain, suffering and loss of amenities. At the time when the award was made, soft tissue injuries attracted awards ranging from as low as Kshs. 20,000/= to as high as Kshs. 220,000/=. What the plaintiff was awarded, being Kshs. 50,000/= cannot by any stretch of imagination be deemed to be so inordinately high that it must be a wholly erroneous estimate of damages. It was definitely within the range for those kind of injuries at the time.

The end result of this appeal is that it lacks merit and is accordingly dismissed with costs to the plaintiff.

Judgment dated, signed and **delivered** at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE