



NO. 2735

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 151 OF 2007

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

-VERSUS-

STECCY AWUOR LAWRENCE.....RESPONDENT

**(Arising from Judgment of Migori Principal Magistrate Ezra O. Awino delivered on 12th July, 2007
PMCC. No. 224 of 2005**

Consolidated with Civil Appeal no. 152 of 2007

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

-VERSUS-

DONFIN OGANGA

LAWRENCE.....RESPONDENT

**Arising from Judgment of Migori Principal Magistrate Ezra O. Awino delivered on 12th July, 2007
PMCC. No. 223 of 2005**

Consolidated with Civil Appeal No. 153 of 2007

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

-VERSUS-

LAWRENCE OGANGA.....RESPONDENT

**(Arising from Judgment of Migori Senior Resident Magistrate Ezra O. Awino delivered on 12th July,
2007**

PMCC. No.222 of 2005

JUDGMENT

These three appeals were on 22nd October, 2010 consolidated by consent of the parties involved for ease of hearing and as they arose from the same accident and trial in the subordinate court. South Nyanza Sugar Company Limited (Sony), brought these appeals challenging the decision of the subordinate court, given on 12th July, 2007 in which **Ezra O. Awino**, the then Principal Magistrate at Migori Law Courts gave judgment in favour of the respondents in the sum of Kshs. 70,000/=, 60,000/= and 50,000/= respectively as general damages. Sony challenges the decision of the learned magistrate on both liability and quantum of damages. Similar grounds of appeal were advanced in each appeal. They were :-

- “1. The learned trial magistrate erred in both law and in fact when he held that it was incumbent and mandatory that the defendant had to take third party proceedings against the owner and driver of motor vehicle KAS 093X in which the plaintiff had been travelling in order for him to apportion liability when all the evidence led by the respondent at the trial did not prove any negligence against the appellant but against the owner and driver of the said KAS 093X.***
- 2. The learned trial magistrate erred both in law and in fact when he held that the appellant was negligent 100% when absolutely no evidence was led at the trial in that regard.***
- 3. The learned trial magistrate erred in both law and in fact when he failed to hold that on the basis of the evidence led at the trial by the respondent, the respondent’s failure to sue the owner and driver of the motor vehicle in which he had been travelling was fatal to his case.***
- 4. The learned trial magistrate erred in both law and in fact when, in the absence of a reply to defence filed against the defence filed by the appellant at the time which had denied negligence as pleaded but attributed the same to other parties who owed the respondent a greater degree of care, he failed to have deemed that the accident had not been caused by the appellant but by the negligence of owner and or driver of motor vehicle KAS 093X.***
- 5. The learned trial magistrate erred in both law and in fact when he failed to hold that as a consequence of failure to file a reply to Defence by the respondent he was deemed by virtue of the provisions of Order NI rule 9(1) of the Civil Procedure rules to have admitted the matters of fact pleaded in the Defence and therefore no finding of negligence could be made against the appellant.***
- 6. The learned trial magistrate erred in both law and in fact when he decided the case against the weight of evidence and of the pleadings led at the trial.***
- 7. The learned trial magistrate erred in both law and infact when he failed to appreciate in evidence that it was motor vehicle KAS 093 X that had attempted to overtake the appellants motor tractor and rammed onto it and therefore there was no way the appellant could be blamed for this accident as he did erroneously.***
- 8. The learned trial magistrate erred in both law and in fact when he awarded a sum of Kshs. 70,000/= as damages for injuries suffered which amount is manifestly excessive and high in the circumstances and connotes an erroneous estimate of the damages suffered.....”.***

By complaints dated 24th February, 2005 the respondent on his own behalf and on behalf of his minor daughter (**Steccy Awuor Lawrence**) and son (**Donvin Oganga Lawrence**) impleaded Sony for general

damages following the injuries they all sustained in an accident involving motor vehicle registration numbers KAS 093 X in which they were travelling as passengers and a tractor KAC 478 G owned by Sony and at the time driven by its driver, one, **Peter Ooko Odhiambo**. The respondents averred in the complaints that the accident was caused by the sole negligence of **Peter Ooko Odhiambo**, an employee of Sony.

On 10th January, 2005 at about 11.30 a.m, the respondents apparently were travelling in motor vehicle KAS 093X Toyota station wagon along Muhuri-Migori road. Near Makasembo primary school, **Peter Ooko Odhiambo** in the course of his duties as an employee of Sony negligently drove his tractor registration number KAC 478G by suddenly making a U-turn thereby causing the vehicle in which the respondents were travelling as aforesaid to ram into the said tractor. As a result the respondents were seriously injured. The 1st respondent sustained cut wound on the forehead, blunt trauma on the head and blunt trauma to the chest. The 2nd respondent sustained blunt trauma to the upper hip with a cut in the inner side, blunt trauma on the head and loss of two frontal incisor teeth. Finally, the 3rd respondent suffered blunt trauma on the head, blunt trauma on the posterior iliac crest and contused chest.

The respondents attributed the accident to the negligence of Sony's employee aforesaid on the grounds that he drove the tractor without due care and regard for other road users, suddenly made a U-turn when it was not safe to do so and when there was no feeder road at all that he was turning into. As consequence of the said accident, Sony's employee and driver of the said tractor was subsequently arrested and charged with the traffic offence of careless driving contrary to section 49(1) of the **Traffic Act**. He was thereafter tried, convicted and sentenced to a fine of Kshs. 2000/= in default, one month imprisonment.

Sony entered appearance and filed a joint statement of defence on its own behalf and on behalf of its employee, **Peter Ooko Odhiambo**. It denied the description of its employee, its ownership of the tractor and though it admitted the occurrence of the accident, it denied absolutely that the accident was caused by the tractor or by its driver. It also denied that the respondents were passengers in motor vehicle KAS 093X. It went on further to deny the negligence and the particulars thereof attributed to it as well as the injuries sustained by the respondents. Finally, it averred that the said accident was solely caused by and or substantially contributed to by the negligence of the third party who was driving motor vehicle registration number KAS 093X in that he drove the same at a speed which was not only too fast but was obviously negligent and suicidal in the circumstances, failed to heed the presence of other road users notably KAC 478G, attempted to overtake the tractor when it was definitely and obviously not safe to do so and driving carelessly and dangerously in the circumstances.

The evidence in support of the respondents' claims was tendered by the 3rd respondent. Briefly, his evidence was that on 10th January, 2005, at about 11.a.m he left his house with his two children, the 1st and 2nd respondents respectively taking them to school in Migori. They all boarded a matatu registration number KAS 093X and at Nyabisawa area, they came across a tractor registration number KAC 498G driving a head of them in the same direction. The driver of the matatu hooted and started to overtake the tractor. However, the driver of the tractor suddenly and abruptly turned to the right forcing motor vehicle KAS 093X to ram into it violently. The respondents as a result were injured and taken to **Pastor Machage Memorial Hospital, Migori** where the 1st and 2nd respondents were admitted. The 3rd respondent was however treated and discharged at Migori District hospital. Later they were examined by Dr. **Idagiza** (PW3) who prepared respective medical reports on the nature and extent of their injuries. Indeed the injuries sustained were as per set out in the complaint already reproduced elsewhere in this judgment.

The respondents also called P.C. **Nyabasi** (PW2) as their witness. He is the one who received the report of the accident whilst at Migori Traffic Patrol base. He visited the scene and investigated the case which led to the driver of the tractor being charged with the traffic offence of careless driving. He was subsequently convicted and fined Kshs. 2,000/= in default, one month imprisonment. He confirmed that the tractor belonged to Sony according to the search certificate that he tendered in evidence. The respondents thereafter closed their case.

When the turn came for Sony to offer evidence in defence of the claim they opted not to offer any and

closed their case. In other words, Sony was not able to secure the attendance of any witnesses in support of its defence. In the absence of such evidence therefore the defence filed remained unsupported by any evidence.

In a reserved judgment delivered on 12th July, 2007, the learned magistrate found Sony and its employee liable fully for the accident. He stated thus

“...That being the case, I would find the defendants liable jointly and severally at 100%”. He thereafter proceeded to award damages as follows:-

1st respondent Kshs. 70,000.00

2nd respondent Kshs. 60,000.00

3rd respondent Kshs. 50,000.00

No award for special damages was made as it had not been pleaded by any of the respondents and proved.

When the appeal came up for directions, parties agreed amongst other directions, that the appeal be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

This is a first appeal. On the authority of among other decisions **Selle .v. Associated Motor Boat Company Ltd (1968) E.A. 123** this court has a duty of re-evaluating the evidence, assess it and make its own conclusion without overlooking the conclusions of the trial court and also bearing in mind that unlike the trial court it neither saw nor heard the witnesses.

The facts in this appeal are not in dispute since there was no evidence in a rebuttal tendered by Sony. There is no doubt at all that the respondents were travelling in the matatu. There is also no doubt that the said matatu was subsequently involved in an accident with a tractor which belonged to Sony when the driver of the said tractor, an employee of Sony , negligently, recklessly and without due regard to other road users suddenly made a U-turn on a main road. Before the matatu rammed into the tractor as it made a U-turn unnecessarily, the driver had alerted the driver of the tractor of his intention to overtake him by hooting. However, the tractor driver did not heed the warning. As a consequence a collision involving the two vehicles occurred. The resultant effect were injuries to the respondents. It is also common ground that following the accident, the driver of the tractor was subsequently arrested and charged with the traffic offence of careless driving, convicted and sentenced to a fine of Kshs. 2,000/= in default one month imprisonment. That conviction perse, is enough or sufficient evidence of negligence on the part of the driver of the tractor; which negligence attaches on Sony by virtue of the doctrine of vicarious liability.

Of course Sony has questioned the tendering in evidence of the police abstract as well as the certificate of official search by P.C. **Nyabasi**. According to it, he was least qualified to do so by virtue of section 35 of the **Evidence Act**. My simple response to that submission is that Sony was throughout the trial represented by able counsel. He never objected to those documents being tendered in evidence then by the said police officer. He cannot do so now. To my mind that submission is a red herring and an afterthought. In any event nothing stopped them from calling the investigating officer to tender in evidence the police abstract or an officer from the motor vehicle registry to produce the certificate of official search of the subject tractor.

Sony has also raised the issue that the respondents did not file a replies to the its defences and as such are deemed to have admitted the contents of the said defence. In so far as apportionment of liability was concerned. I do not think that these submissions are well founded in law and fact. Sony blamed the driver of the matatu for the accident. It claimed that he was negligent and proceeded to give the particulars of negligence it attributed to him. The respondents were neither owners and or drivers of the said matatu. They were mere passengers. They could not therefore have responded to issues which did not touch on them directly but which were addressed to the owner or driver of the matatu.

As regards, damages, I have been asked to interfere with the sums awarded. In **Kemfro Africa Ltd T/A Meru Express Service, Gathogo Karimi .v. A.M. Lubia and Another (1982)-88) 1KAR 727, Kneller JA** as he then was, rendered himself, as material as follows-

“.....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 for 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 .v. Mnayoka (1981) EA.705 at p.709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd .v. Kavoloto (1970) EA 414”. This court follows the same principles.

From the foregoing quotation it is quite clear that in assessing damages, a trial court exercises discretionary jurisdiction and such jurisdiction is always to be exercised on the basis of sound legal principles and evidence. The main complaint raised in the appeal before me on damages is that an unreasonably high damages were awarded. The respondents suffered what are generally referred to as soft tissue injuries in medical and legal parlance. The award for such damages at the time the learned magistrate delivered his judgment varied from as low as Kshs. 20,000/= to as his as Kshs. 250,000/= depending on the seriousness of such injuries. The awards herein fell within those peremeters. The trial court was able to see the respondents in court. The court was satisfied as to the nature and extent of the injuries they sustained. The court was therefore entitled to and had ample evidence before it to come to those figures. I see no basis for interfering with the figures.

All in all I have said enough to show that this appeal is without merit. In the result I order that it be and it is hereby dismissed with costs to the respondents.

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

ASIKE-MAKHANDIA

JUDGE