REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 127 OF 2006

OSCAR OMONDI ONOKA ……………………….………APPELLANT

VERSUS

H. S. AMIN & CO LTD t/a Tamango Enterprises….RESPONDENT

JUDGMENT

The appellant being aggrieved by the judgment of the Chief Magistrate H. I. Ongudi (as she then was) dated 3rd October 2006 appeals against the same on two grounds namely:-

(i) The Learned Chief Magistrate erred in law and fact in condemning the appellant to liability of 30% without any basis in law and fact.

(ii) The Learned Chief Magistrate erred in fact failing to evaluate the evidence adduced to arrive at a rational decision on liability.

According to the amended plaint on record, an accident occurred on 28th June 2011 while the appellant was traveling as a turn boy in motor vehicle Registration number **KAK 073 G** along Nakuru – Eldoret road near a place called Mukinya. The appellant’s plaint attributed negligence on the part of the driver who was an employee of the defendant. The defendant on the other hand filed their defence on 6th July 20011 and attributed negligence upon the appellant. The Appellant filed his reply defence on 17th July 2004.

When this matter came up for hearing on 16th November 2005 it was the appellant’s testimony that the motor vehicle lost its brakes while on down hill. Their motor vehicle was following another motor vehicle namely Registration number **KYB 921**. The driver Mr. Wanga attempted to brake but all was in vain. The said vehicle hit the KYB 921 and the appellant was injured on the left ankle as his leg was trapped. He was subsequently assisted and taken to hospital. He went a head to produce the treatment chits, P3 and Police Abstract among others. In concluding his testimony he blamed the defendant for not maintaining the vehicle in a road worthy manner.

In cross examination the appellant contented that as a consequence of the said failure of the brakes, he panicked. He said:-

“…….I panicked when he told me about the brakes. I tried to assist myself. I wanted to go to the seat behind us. I unfastened my sit belt in preparation to go to the back…………..”

On Re-examination he said “ **Yes I unfastened safety belt. My intension was to move to the back seat to escape eminent danger…..”**

I have quoted extensively on this as this issue formed the substance of this appeal and why the trial magistrate apportioned liability of 30% against the appellant.

I have read the trial court judgment and contrary to the appellant’s assertion that there was no evaluation of the facts, it’s my humble opinion that the court indeed evaluated all the evidence before it. The issue of negligence and blameless against the respondent was well articulated including whether or not the appellant was the employee of the respondent.

The question for determination is whether or not the court was right in attributing liability of 30% against the appellant. The court in its judgment on page 14 of the record of appeal line 20 states:-

“On the other hand the plaintiff also contributed to the sustaining of the injuries he did sustain. He has admitted that he unfastened his safety belt in order to move to the back. Had he stayed put on his chair with a fastened seat belt would not have suffered those injuries at that magnitude…………”

The court went ahead to apportion liability as stated above. I have equally heard the able submissions by both counsels for the Appellant and the respondent. **Mr. Kirenga** and **Mr. Ragot** respectively. The question for determination is whether the trial magistrate was right in apportioning liability against the Appellant whom according to his counsel was a passenger.

My understanding is that although a turn boy or a conductor can be referred to as a passenger he is however a passenger of a special kind. His business is to assist the driver.Ordinarily a passenger in the normal daily business is ferried for a specific consideration or at times for free. In this case the appellant was specifically employed to assist the driver, which in his evidence he has clearly admitted. Was he therefore entitled to follow all the traffic rules including tying the safety belt?. The answer is in the affirmative. He could however contended that by unfastening the belt as the accident occurred mitigated the injuries that he would have sustained. In his evidence at the trial court the appellant contended that he wanted to move behind. He said he panicked.This in my opinion was a subjective move.

The driver apparently seemed not to have suffered any injury.

It was therefore incumbent upon the appellant to establish that by virtue of the action he took he mitigated the injuries. In other words had he not unfastened the belt he would have sustained serious injuries.

The business of this court is to evaluate both the facts and the law. The Traffic Act Chapter 403 Laws of Kenya provides rules and guidelines on this subject of safety belts which is for determination in this appeal.

Section 68 (1) of the Traffic Act states

68 (1)The Minster shall prepare a code (in this Section referred to as the Highway Code) comprising such directions as appear to him to be proper for the guidance of persons using roads, and may from time to time revise the Highway Code by revoking, varying, amending or adding to the provisions in such manner as he thinks fit..

68 (3)A failure on the part of any person to observe any provisions of the Highway Code shall not of itself render that, person liable to criminal proceedings of any kind but any such failure may in any proceedings (whether Civil or Criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings”.

Rule 22 A (1) of the Traffic Rules state:

22 (1) No Motor vehicle shall be used or driven on a road unless its fitted with seat belts in the following manner".

22 (3) No person shall be in a motor vehicle which is in motion on a road and occupy a seat in that vehicle in respect of which a seat belt is fitted in accordance with this rules without wearing a seat belt.

22(4) A person who does not wear a seat belt as required under paragraph 3 shall be guilty of an offence and liable to a fine of five hundred shillings".

In my analysis, from the above Sections of the Traffic Act, it's abundantly clear that every motor vehicle ought to have a seat belt. The vehicle which the appellant used had a seat belt. It's further compulsory that every person in a motor vehicle which is on motion must wear a seat belt.

The appellant indeed had strapped a seat belt while the vehicle was in motion. This was as per the law quoted above. Was he therefore wrong when he unfasten the belt at the risk of the accident?. The answer is only known to himself. The law however is very clear. He has to wear the seat belt while the vehicle is in motion. Careful reading of the Traffic Act doesn't create any exception. The court takes judicial notice further that by fastening a seat belt most accidents are averted.

In my assessment, whatever panic the appellant was in he should have retain his seat belt till the vehicle came to a stop. By unfastening the belt he run contrary to the law. I shall uphold the law. The trial courts assessment and evaluation was factual. The attribution of liability of 30% was sound. Granted, the appellant had no control of the motor vehicle but he had control of himself. I shall therefore not disturb the trial courts finding. I shall proceed to dismiss the appeal with costs to the respondent. Since the parties have limited themselves to the issues on the Memorandum of Appeal I shall not dwell on any others.

Orders accordingly.

Dated, signed and delivered this 26th day of October 2011.

H. K. CHEMITEI
JUDGE
HKC/aao