



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 17 of 2004

JAMES NDUNG’U NJOROGE.....APPELLANT

VERSUS

JAMES OOKO OKWATE.....RESPONDENT

*(An appeal from the judgment delivered by Senior Principal Magistrate at
Milimani, R. Wendoh (Mrs.), on 18th February 1999
in CMCC No4952 of 1998)*

J U D G M E N T

1. This is an appeal arising from a suit which was filed by James Ooko Okwate (hereinafter referred to as the respondent). He had sued Charles Mangu and James Ndungu Njoroge, (hereinafter referred to as the 1st defendant and the appellant respectively). The respondent’s claim was for special and general damages arising from personal injuries suffered by him in a road traffic accident. The accident involved motor vehicle registration No.KWD 160 in which the respondent was lawfully travelling as a passenger. The respondent claimed that the motor vehicle KWD 160 which belonged to the appellant was negligently driven by the 1st defendant for whose negligence the appellant was vicariously liable.
2. The appellant filed a defence in which he admitted ownership of motor vehicle KWD 160, but denied that the 1st defendant was his lawful driver or agent. The appellant further denied all the allegations of negligence and liability for the accident. Without prejudice to his denials, the appellant alleged that if the accident occurred, then it was caused entirely by an act of God, and by an inevitable accident for which the appellant is not liable.
3. During the trial in the lower court, there was no evidence of service upon 1st defendant of summons to enter appearance, nor was any application made for judgment. The trial magistrate therefore dismissed the suit against the 1st defendant and there has been no appeal in that regard.
4. The respondent testified that he was employed by the appellant as a supervisor at the appellant’s petrol station. On the material day, he was sent by the appellant to accompany the driver of a petrol tanker registration No.KWD 160 to Nairobi to collect fuel. After the tanker had been loaded with fuel, as they were travelling back, the driver who was speeding lost control and the vehicle overturned.
5. The respondent was injured on the face, chest and left limbs and legs. He was admitted in hospital for two days. Later the respondent was examined by Dr. Warambo whose medical report was produced in evidence by consent. The respondent also produced a police abstract report of the accident and a receipt for Kshs.750/= paid to Dr. Warambo for the medical report. The respondent maintained that he had permission to travel to Nairobi with the appellant’s driver.
6. The appellant testified in his defence, contending that he never allowed the respondent to travel in motor vehicle No.KWD 160. He maintained that the respondent was off duty on the material day. He could not tell whether the driver of his vehicle was negligent in driving the vehicle as he was not with them.
7. In her judgment, the trial magistrate found that the appellant’s evidence in court was inconsistent with his defence which was filed. The trial magistrate found that the first defendant was the appellant’s authorized driver and was authorized to drive motor vehicle KWD 160 on the date of the accident. The trial magistrate held that the appellant was vicariously liable for the negligence of the 1st defendant, who was lawfully on duty, performing the appellant’s work.

8. The trial magistrate also found that the respondent was a passenger in the appellant's motor vehicle on the date of the accident and was injured. She noted that there was no evidence that no unauthorized passengers were allowed in the appellant's vehicle. She therefore found the appellant liable. The trial magistrate assessed general damages at Kshs.80,000/= but in her final judgment, gave judgment in favour of the respondent for Kshs.180,000/= together with costs and interests.
9. Being aggrieved by that judgment, the appellant has lodged this appeal raising 6 grounds as follows:
 - (i) The learned magistrate erred in law and in fact when she failed to appreciate fully that the injuries alleged by the respondent were contradictory and not proved.
 - (ii) The learned magistrate erred in law and in fact when she failed to appreciate that although the alleged injuries were suffered ten (10) years prior to hearing of the suit, there was no recent medical report produced to confirm the injuries.
 - (iii) The learned magistrate erred in law and in fact by awarding as general damages an award of Kshs.80,000/= for injury to thumb when there was contradiction as to whether it was right or left thumb that suffered injury and no authority towards such kind of damages was reduced.
 - (iv) The learned magistrate erred in law and in fact by awarding as damages a further Kshs.100,000/= without explaining the basis of the award and yet on record special damages were not proved.
 - (v) The learned magistrate erred in law and in fact by allowing the plaintiff's suit and awarding exemplary damages against the injuries suffered.
 - (vi) The judgment of the learned magistrate is against the weight of the evidence adduced.
10. Following a consent agreed to by both parties, written submissions were duly filed upon which this court is invited to determine the appeal. In his submissions, counsel for the appellant argued that the respondent was employed as a petrol attendant, and his work station was the petrol station and not elsewhere. Counsel for the appellant submitted that if the respondent was injured, he was an unauthorized passenger in the vehicle. The respondent was also on a frolic of his own and therefore the author of his own misfortune. Counsel for the appellant further submitted that the respondent did not establish any negligence on the part of the appellant's driver.
11. As regards quantum, it was pointed out that according to the respondent's evidence, he suffered injury on the left thumb. That evidence was contradicted by the medical report prepared by Dr. Warambo which showed that he had suffered sub-laxation of the right thumb. It was submitted that the award made by the trial magistrate was arbitrary and lacked merit. It was pointed out that having assessed general damages at Kshs.80,000/= the extra award of Kshs.100,000/= was completely unwarranted. The court was therefore urged to allow the appeal and order the sum of Kshs.135,000/= paid by the appellant towards execution refunded to him.
12. For the respondent, it was submitted that the appeal was defective as the record of appeal and the supplementary record of appeal were missing vital documents i.e. the respondent's submissions which were filed in the lower court. It was submitted that the trial magistrate gave her award based on soft tissue injuries which the respondent suffered. The soft tissue injuries were not in dispute. It was pointed out that the trial magistrate disregarded the injuries relating to the thumb which were alleged to be contradictory.
13. It was argued that the appellant, having failed to submit in the lower court on the issue of quantum, he should not be allowed to question the award. It was maintained that the trial magistrate delivered her judgment after hearing and considering all the evidence which were adduced before her. The court was urged to dismiss the appeal.
14. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. I have also considered the submissions made before me. I find that it was not disputed that the respondent was employed by the appellant at the appellant's petrol station. Although the appellant filed a defence in which he denied the respondent's claim, contending that the driver of the motor vehicle KWD 160 was not his agent, employee or authorized driver, the appellant conceded in his evidence before the trial magistrate that the vehicle was being driven by his employee whom he had sent to collect fuel.
15. The appellant's contention in his evidence that he was not liable to the respondent, because the respondent was an unauthorized passenger in the vehicle, was a complete departure from the defence which was filed by the appellant. Moreover, there was absolutely no evidence in support of that allegation. Nor was there any evidence to support the appellant's alternative prayer, that the accident was caused by an act of God, or that the accident was inevitable.
16. On the other hand, the respondent called evidence which showed that the appellant's driver was driving motor vehicle KWD 160 very fast, and that he lost control of the motor vehicle. While speed on its own may not necessarily be evidence of negligence, when coupled with loss of control of the motor vehicle without evidence of any other intervening circumstances, negligence must be inferred. I find that there was ample evidence before the trial magistrate to support the finding that the accident was caused by

an employee of the appellant for whose negligence the appellant was vicariously liable.

17. As regards the injuries suffered by the respondent, there was clear inconsistency regarding the thumb injury, which the respondent claimed was on the left thumb, but the doctor and the plaint indicated was on the right thumb. In her judgment, the trial magistrate noted this inconsistency and dismissed the respondent's contention in this regard contending that the left thumb may have been injured on a different occasion.
18. I find that in assessing damages at Kshs.80,000/= the trial magistrate only considered the respondent's soft tissue injuries. The trial magistrate cannot be faulted in that regard nor is her award excessive. In her final judgment, the trial magistrate gave judgment against the appellant for Kshs.180,000/=. That was obviously a slip of the pen as the trial magistrate having assessed damages at Kshs.80,000/= could not have intended to give judgment for Kshs.180,000/=. The appellant had claimed a sum of Kshs.1,850/= as special damages. This claim was not addressed by the trial magistrate. Had the magistrate done so, she would have found that the sum of Kshs.850/= in respect of the medical report and police abstract report were duly proved. While no evidence was offered in support of the claim for Kshs.1,000/= in respect of travelling costs.
19. The upshot of the above, is that I uphold the judgment of the trial magistrate on the issue of liability. I allow the appeal on the issue of quantum and set aside the judgment of Kshs.180,000/= and substitute thereof a judgment in favour of the respondent for Kshs.80,850/= together with costs and interest thereon from the date of the judgment of the lower court. The respondent shall be entitled to half the costs of the appeal. To that extent only does the appeal succeed.

Dated and delivered this 12th day of March, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Orwa for the respondent

Eric - Court clerk