



No 101

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 81 OF 2006

UNITED MILLERS LTD.....APPELLANT

-VERSUS-

BENJAMIN OKARI OIGO.....RESPONDENT

JUDGMENT

**(Being an appeal from the judgment and decree of the Honourable Principal Magistrate
Mr. S..M.S.Soita,**

delivered on 11th April, 2006 in KISII CMCCC NO. 624 OF 2005)

This is an appeal from the judgment and decree of the subordinate court (**S.M.S Soita-PM**) delivered on 11th April, 2006 in which the learned magistrate gave judgment in favour of the Respondent in the sum of Kshs. 200,000/= as general damages and Kshs. 6,500/= as special damages. The appellant being dissatisfied with that decision filed an appeal citing the following 7 grounds of appeal in its Memorandum of appeal dated 20th April, 2006 and filed in court on the same day:-

- “1. The trial magistrate erred in law and in fact in failing to appreciate the fact that the respondent had not proved his case, even on a balance of probability.***
- 2. The trial magistrate erred in law and infact in failing to dismiss the plaintiff’s case when all evidence pointed to negligence on the part of the Respondent.***
- 3. The trial magistrate erred in law and in fact in failing to consider the appellants (sic) submissions.***
- 4. The trial magistrates erred in law and in fact in failing to appreciate the fact that the appellant being a company cannot be found liable for negligence.***
- 5. The trial magistrate erred in law and in fact in failing to consider the evidence on record thereby finding the defendant 100% liable.***

6. *The trial magistrate erred in law and in fact in failing to appreciate the fact that no negligence had been established as against the appellant.*

7. *The trial magistrate erred in law and in fact in awarding damages that were clearly and overly excessive in the circumstances.”*

It is apparent from the foregoing grounds of appeal that the appellant is basically challenging the findings of the learned magistrate on both liability and quantum. This being a first appeal it is my duty to re-evaluate the evidence, assess it and come to my own conclusion, remembering that I have not seen nor heard the witnesses and making due allowance for the same. The cases of **Selle .V. Associated Motor Boat Company Ltd (1968) E.A. 123** and **Williamson Diamonds V. Brown (1970) E.A.1** are instructive on this aspect of the matter.

The respondent was the plaintiff whereas the appellant was the defendant in the suit filed in the Chief Magistrate’s court at Kisii through **Messers Khan & Katiku Advocates** in which he averred inter alia:-

“On or about the 21st day of February, 2005 the plaintiff was lawfully travelling in the defendant’s said motor vehicle Registration No. KAM 862 Z along Kisii-Kisumu road when near Oyugis or thereabouts the defendant’s driver, servant or agent so negligently drove, managed and controlled the defendant’s said motor vehicle along the said road that he caused or permitted the same violently to overturn....”

The respondent thereafter set out the particulars of negligence, followed the same with particulars of injuries and finally set out particulars of special damages. He then prayed for:-

“a) Special damages aforesaid

b) General damages to be assessed by this Honourable court.

c) Costs of and incidental to this suit

d) Interest on (a),(b) and (c) above at court rates

e) Any other relief that his Honourable court may deem fit and just to grant.”

The appellant filed a defence to the claim through **Messers Kalya & Company Advocates** in which all the allegations in the plaint were denied. In pertinent paragraphs it averred as follows:-

1. *The Defendant denies that it was the registered owner of motor vehicle registration number KAM 862Z at all material times as alleged in paragraph 3 of the plaint. The plaintiff is invited to strict proof.*

2. *The Defendant denies the allegations of the occurrence of an accident on 21st February, 2005 along the Kisii-Kisumu road near Oyugis. The Defendant further denies that the accident occurred as a result of the negligence of its driver, servant or agent. The particulars of negligence set out under paragraph 4 of the plaint are also denied and the Defendant is invited to strict proof.*

3. *Without prejudice to the foregoing, the Defendant avers that if any accident occurred, which is still denied, then the same was caused, substantially and or wholly contributed to and that its risk was assumed by the plaintiff.*

4. *The Defendant refers to paragraph 5 of the plaint and denies that the plaintiff suffered any loss and damage as a result of the alleged accident. The particulars of injuries, continuing effects of injuries and special damages set forth under paragraph 5 of the plaint are thus refuted and the plaintiff is invited to strict proof.*

5. The Defendant further avers that part of plaintiff's claim for special damages is incompetent as the same has not been specifically pleaded and the Defendant shall oppose any attempt to adduce evidence in the regard at the hearing hereof."

During the trial only the respondent and a medical doctor testified whereas the defence opted not to tender any evidence. It was the respondent's testimony that on 21st February, 2005 he was travelling from Kisumu in a motor vehicle registration number KAM862Z belonging to the appellant. On reaching Oyugis the motor vehicle overturned and he was injured on the left cheek, chest and was cut on the jaw. He was thereafter treated at Kisii General Hospital for the injuries aforesaid. Later he saw **Dr. Ezekiel Ogando Zoga** who prepared a medical report. For that service, **Dr. Zoga** charged him Kshs. 3,500/=. Subsequent thereto he obtained a police abstract. He tendered in evidence treatment records, the P3 form, medical report, police abstract and receipt for Kshs. 3,500 that he paid to **Dr. Zoga**. The respondent blamed the accident on the driver of the motor vehicle as he was over speeding and therefore unable to control the vehicle. They were going down hill and there was a bend. He had expected the driver to slow down. He admitted though that the motor vehicle belonged to the appellant who had employed him as a salesman. Infact when the accident occurred he was on duty. He was selling bread using the said motor vehicle. He conceded under cross-examination that in the police abstract he was shown as a driver and not a passenger of the subject motor vehicle. He could not explain why there had been cancellation of the word salesman in the police abstract though. He stated further that the driver of the motor vehicle on the material day was one, **Francis Baraza**. He suggested that it was incorrect that he had been indicated as a driver of the motor vehicle in the police abstract.

The respondent then called **Dr. Zoga** to testify on his behalf. The Doctor confirmed that he had examined the respondent a day after he had been treated at Kisii District hospital and concluded that the respondent had sustained multiple soft tissue injuries which were expected to heal. He sustained a cut wound on the forehead, left mandible and bruises on the lower jaw.

As already stated the appellant offered no oral evidence in its defence.

The learned magistrate having considered the evidence and the written submissions presented before him by respective parties to the suit came to the following conclusion in his judgment:-

***"No evidence was offered for the defence. I have carefully appraised the evidence on record. The evidence of the plaintiff on how the accident occurred has not been controverted. I do hold the Defendant 100% liable. Having considered submissions made before me and in light of the injuries sustained I am minded to assess for general damages at Kshs. 200,000=.* The Plaintiff also exhibited receipts for special damages amounting to Kshs. 6.500/=. I will award him this amount...."**

When the appeal came up for hearing before me on 3rd May, 2010, **Mr. Lwanga**, appeared for the appellant whereas **Mr. Ogweno** appeared for the respondent. They are all learned counsels. They agreed to canvass the appeal by way of written submissions. Subsequently they filed and exchanged their respective written submissions in which they cited various authorities which I have carefully read and considered.

The twin issue for determination in this appeal just like in the trial court was liability and quantum. Much as the appellant failed to call witnesses, it did not absolve the respondent from proving his case to the required standard in Civil proceedings. The appellant had denied ownership of the motor vehicle and or that the respondent was a passenger therein. It was therefore upto the respondent to show by evidence that (a), the appellant was the registered owner of the motor vehicle and (b), he was a passenger therein at the time of the accident. The respondent tendered in evidence a police abstract. The contents of the police abstract were neither challenged nor controverted. They show that the registered owner of the motor vehicle was the appellant. The police abstract also shows that the respondent was involved in the accident. However it is the capacity in which he was in the vehicle at time of the accident that is in contention. Whereas the respondent claims to have been a passenger, the appellant contends that infact he was the driver. Much as the appellant did not call any evidence in that regard, it placed much reliance on the contents of the police abstract which clearly showed that infact the driver of the said motor vehicle on that occasion was none other than the respondent. The police abstract is categorical that the driver of the motor vehicle involved in the accident was **Benjamin Okari Oigo**. That is the name of the

respondent. There is no suggestion that this was the name of any other person apart from the respondent. It is instructive that though in his pleadings, the respondent had not indicated any relationship with the appellant, he did however in his evidence concede that he was in fact a salesman employed by the appellant and that on the material day and at the time of the accident he was on duty selling bread on behalf of the appellant. Why was it necessary for the respondent to hide in his plaint the fact that he was in fact an employee of the appellant?

The respondent testified that the driver of the vehicle on the material day was one, **Francis Baraza**. This is in sharp contradiction with the contents of the police abstract. Indeed the police abstract indicates that the said **Francis Baraza** was a witness and not a driver as claimed by the respondent. One would want to assume that a police abstract is filled on the basis of the information provided by whoever is applying for the same. In this case, the respondent was the one who applied for the police abstract. He must have been the one who provided the information as to who was the driver and any witness to the accident. There is no evidence that soon after the accident the police came to the scene. It is therefore safe to assume that the information as to who was driving the motor vehicle must have been provided by the respondent. The contrary cannot possibly be correct. If indeed **Francis Baraza** was the driver, nothing stopped the respondent from saying so after all they must have been working together. Much as there is some erasure in paragraph 9 of the police abstract in which the respondent was initially described as a driver but subsequently replaced with salesman, paragraph 3(a) of the police abstract was not at all interfered with. The respondent was therein described as the driver of the fateful vehicle on the material day.

The respondent at one point whilst under cross-examination stated that the police abstract could have been wrongly filled. That could possibly be true. However it was up to him to prove that fact. Why was it so difficult for him to avail the police officer who filled the police abstract to attest to that fact. In the absence of such evidence, the contents of the police abstract as to the capacity of the respondent in the motor vehicle must remain as therein stated, he was the driver. Ofcourse in coming to this conclusion, I bear in mind the provisions of section 100 of the **Evidence Act** which is to the effect that when a language used in a document is plain and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. It is also important to bear in mind the provisions of sections 97 and 98 of the **Evidence Act**. These provisions are to the effect that where the terms of any matter in law require by law to be reduced to the form of a document have been proved according to section 97, no Evidence of any oral statement shall be admitted as between the parties to any such instrument or in their representatives in the interest of the purposes of contradicting, varying, adding to or subtracting from its terms.

There are however exceptions to that general rule. The respondent's case does not fit in any of those exceptions

The respondent's evidence was an attempt to vary a public document which is not permissible. He cannot purport by oral evidence to vary the entries in the public document that indicated him as the driver, and **Francis Baraza** as a mere witness. Even if we were to assume for purposes of argument only that indeed it was **Francis Baraza** who was the driver, why then did the respondent not sue him in these proceedings alongside the appellant. He had in his possession the information which he could have passed on to his lawyers when drafting the plaint so that the suit would have been against the appellant and Francis Baraza jointly and severally. That he did not do so clearly means that **Francis Baraza** was not the driver.

The appellant is a limited liability Company. It has no capacity to drive motor vehicles and therefore cause an accident. It can only act through human beings. In this case, for it to have been found liable for the accident, it was necessary that the driver of its motor vehicle at the material time be enjoined in the case. The appellant could only have been vicariously liable for the activities of its servant, agent and or driver. In the absence of such connection and or nexus, I cannot see how liability can attach on the appellant.

The upshot of all the foregoing is that the respondent was a driver of the subject motor vehicle. If he was negligent and caused the accident in which he was injured, he cannot blame it on the appellant. Thus the respondent was the author of his own misfortune and cannot be allowed to benefit from it. The trial

magistrate thus misdirected himself in fact and in law in finding that the appellant was 100% liable to the respondent in the circumstances. Further he failed to appreciate the fact that no negligence had been established as against the appellant. In any event, the appellant had pleaded contributory negligence in its defence. The respondent did not file a reply to the defence and as such he is deemed to have admitted the contents in the defence particularly with regard to negligence. Order Vi rule 9(1) of the **Civil Procedure rules** is emphatic that an allegation of fact in pleadings shall be deemed to be admitted by the opposite party unless it is traversed by the opposite party in his pleading. The mode of traverse may be made either by denial or by a statement of non admission either expressly or by necessary implication. In the case of **Mount Elgon Hardware .v. United Millers Limited KSM C.A. No. 19 of 1996(UR)** the court of appeal observed that a plaintiff who does not traverse, the particulars of negligence as alleged by Defendant, admits the negligence as alleged in the defence. The respondent having not filed a reply to the defence, the trial magistrate erred in holding the appellant 100% liable in the circumstances. He could not have done so, as having failed to file his reply, the assumption was and must be that he had already admitted the negligence as alleged and attributed to him by the appellant.

As for damages, both parties are in agreement that the damages awarded were overly excessive in the circumstances. The respondent has rightly submitted that the trial magistrate erred in law and in fact to have awarded the respondent Kshs. 200,000/= as general damages as he had only asked for Kshs. 180,000/=. The trial magistrate did not lay a basis for awarding a higher award than was prayed for. On his part, the appellant has submitted that it had tendered authorities to guide the court in its assessment of damages but the same were not considered and as a result the respondent was awarded damages that were overly excessive in the circumstances. In assessment of damages the general method of approach should be that comparable injuries, should as far as possible be compensated by comparable awards.

In Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1982-88) 1 KAR 727, the court of appeal through 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 .v. Manyoka (1961) E.A 705,709,7133, Lukenya Ranching and Farming Co-operatives Society Ltd.v. Kalovoto [1970] E.A .414,418,419. This court follows the same principles”.

No doubt the respondent was awarded damages in excess of what he had asked for. In reaching that decision it must be obvious that the trial magistrate must have taken into account irrelevant factor (s) since the amount is inordinately high as to amount to erroneous estimate of the damage. From the medical report produced by PW1, the respondent sustained a cut wound on the forehead and bruises to the lower jaw as well as anterior chest. These were soft tissues injuries. The fact that the respondent was treated and discharged on the same day and there being no evidence that he underwent any further treatment thereafter points towards a logical conclusion that the injuries sustained were not serious to warrant such an exorbitant award. At the time the award for damages for soft tissue injuries ranged from as low as 10,000/= to as high as Kshs. 120,000/=. Had I dismissed the appeal I would still have interfered with the award of general damages. In my view a sum of Kshs. 80,000/= would have sufficed as general damages. I would not have interfered with the special damages awarded though.

However in view of what I have held with regard to liability, this appeal is allowed, the judgment and decree of the subordinate court is set aside and in its place I order that the suit be dismissed with costs. The appellant shall have the costs of this appeal too.

Judgment dated, signed and delivered at Kisii this 30th June, 2010.

ASIKE-MAKHANDIA

JUDGE