No. 117

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 47 OF 2004

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

-VERSUS-

SOLOMON ISEDA BUSAKA …..…….RESPONDENT

JUDGMENT

(***Being appeal from the judgment and decree of A.M. Kariuki, SRM at Migori dated 14th January, 2004 in Migori SRMCCC.No. 84 of 2003)***

SOLOMON ISEDA BUSAKA, hereinafter "**the respondent**" obtained a judgment against **South Nyanza Sugar Co. Ltd**, hereinafter ***"the appellant"*** on 14th January, 2004 on account of injuries which he claimed to have sustained when a lorry registration number KAA 416P which was then owned by the appellant and in which he was travelling as an employee of the appellant being taken to work was involved in a road traffic accident on 9th January, 2003 along Migori-Awendo road. He was as a result awarded Kshs. 70,000/= as General damages and Special damages of Kshs. 3,000/= by the Senior Resident Magistrate's Court at Migori. He was also successful with regards to the costs of the suit.

Being aggrieved by the judgment and decree aforesaid, the appellant preferred the instant appeal. In its memorandum of appeal dated 19th January, 2004 and filed in court on 20th January, 2004 it lamented that:-

"1. The learned trial magistrate erred in both law and in fact in holding that the respondent had proved negligence against the appellant.

2. The learned trial magistrate erred in law and in fact in holding that the respondent suffered injuries pursuant to the accident on 9/1/2003.

3. The learned trial magistrate erred in both law and in fact in awarding the respondent the sum of Kshs. 70,000/= as General damages which amount was manifestly and exorbitantly harsh and excessive in the circumstances.

4. The learned trial magistrate erred both law and in fact in failing to hold that even though there was an accident on 9/1/2003 involving appellant's motor vehicle, and cane cutters among them the respondent, none of the cane cutters, including the respondent suffered any injuries which warrants (sic) compensation.

5. The learned trial magistrate erred in both law and in fact in disregarding in his judgment all the evidence given at the trial by the appellant's witness and the submissions urged at the trial on behalf of the appellant.

6. The learned trial magistrate erred in law and in fact in failing to dismiss the respondent's suit manifesting no cause of action against the appellant.

7. The learned trial magistrate erred in both law and in fact in failing to hold that the treatment chits, P3 form and the medical report and the evidence of PWII Dr. P.M. Ajuoga led at the trial on behalf of the respondent were all made up purely for purposes of seeking compensation and had no actual and truthful evidential value and in failing to disbelieve and dismiss the same in his judgment."

The brief facts of this case were that on 9th January, 2003 the respondent was being ferried to work in Masaaini in a lorry registration number KAA 416P owned by the appellant. At Kakrao area the said lorry was involved in an accident when allegedly the brakes failed forcing it to hit a building. The respondent as a lawful passenger therein was injured as a result on both legs, waist and chest. He was treated at Stella Medicare and discharged. Later he was seen by **Dr. Ajuoga** who prepared a medical report. He paid him Kish. 3000/=. He attributed the accident to the negligence of the appellant, its driver, servant and or agent.

The defence it would appear by the consent of parties adopted the evidence that it had proffered in Civil case number 86 of 2003 in the same court. However that evidence did not form part of the record of this appeal nor has the original record in respect thereof been availed in this appeal. Accordingly I have no evidence of the appellant on record. However according to the defence filed, the appellant admitted the presence of the respondent in its said lorry as a lawful passenger. It also admitted the occurrence of the accident. However it attributed the accident to circumstances beyond the control of its driver. Above all, its main point of departure was that much as the respondent was involved in the accident he was not at all injured as a result. It was the contention of the appellant further that the injuries sustained by the respondent if at all were fake and the respondent was merely seeking fraudulent compensation.

The fact that the appellant's lorry was involved in an accident after its brakes failed is not in dispute. It is also not in dispute that at the time of the accident, the respondent was a lawful passenger in the very same lorry. In my view the twin issues for determination in the case before the subordinate court and indeed in this appeal is whether the respondent was injured in the said accident and whether the accident was as a result of the negligence of the appellant, its servant, agent and or driver.

When this appeal came up for directions, parties agreed to canvass the same by way of written submissions. However it later transpired that only the appellant filed its written submissions. I have carefully read and considered them alongside cited authorities.

That notwithstanding I have as is expected of me, this being the first appellate court, re-evaluated the pleadings and the evidence on record with a view to arriving at my own conclusions and also to establish whether this appeal is meritorious.
I do take note of the fact that following the accident, the respondent was treated at Stella Medicare and discharged. This was on the same day of the accident. That evidence was neither challenged nor controverted. Indeed there is no other evidence on record to counter that assertion or contention. The respondent could not have been treated at the said medical facility unless he had been injured in the accident. Indeed the appellant admits that the respondent was in the lorry at the time of the accident. He must therefore have been injured in the accident. The police issued him with a P3 form which was duly filled and signed. In issuing him with the P3 form the base commander Migori must have been satisfied as to the respondent having been involved in the accident and the injuries he sustained therefrom. The P3 form was duly filled by **Dr. Ajuoga,** consultant surgeon who noted the injuries. The respondent was also issued with a police abstract form duly filled and signed which shows and confirms that he was indeed involved in the accident. Attached to the police abstract is a list of the passengers in the lorry on that fateful day and the decree of injuries that each sustained. The name of the respondent features therein

prominently. The degree of injury sustained is indicated therein as harm. To my mind therefore, I find it hard to believe that the respondent would have pulled strings with all these people in pursuit of a fake claim. Just like the learned magistrate, I am satisfied therefore that the respondent was involved in this accident and as a consequence thereof he was injured. His injuries are genuine and not fake as claimed by the appellant.

The appellant from its defence seem to suggest that there was no negligence on the part of its driver, servant and or agent that may have caused or contributed to the accident. That the accident was caused by brake failure which did not connote negligence. Accordingly the accident was due to circumstances which were well beyond the control of its driver and that its driver did all that he could in the circumstances to avoid the accident and was in no way therefore negligent. This could well be true. However where is the evidence to back up those averments? None whatsoever. In its defence exhibit 2 it is stated therein ***"….when the lorry reached Kakrao trading centre just before linking the main tarmac road, the driver applied brakes in order to stop and enable some cane cutters who had gathered there to board but the breaks allegedly failed (emphasis mine) forcing the lorry to speed across the road and rammed into the veranda of a commercial isolated building operated as a shop cum hotel….."*** From the foregoing it is apparent that the security manager who authored the aforesaid report was not even convinced at all that the accident was actually caused as a result of brake failure. But even if we were to accept that indeed that was the cause of the accident, the possibility that the brakes failed due to the negligence of the appellant cannot be eliminated. They may not have been serviced by the appellant as and when required which would then connote negligence. The appellant cannot thus escape liability.

The upshot of all the foregoing is that I find no merit in this appeal. Accordingly it is dismissed with costs to the respondent.

Judgment Dated, signed and **delivered** at Kisii this 17th June**,** 2010.

ASIKE-MAKHANDIA

JUDGE