



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET**

**CIVIL APPEAL 68 OF 2007**

**KIPYEGON ARAP RONO:.....APPELLANT**

**VERSUS**

**INTEX CONSTRUCTION CO. LTD:.....RESPONDENT**

*(An appeal from judgment of the Learned Chief Magistrate A.O. Muchelule in Eldoret CMCC.NO.881 of 2002 delivered on 23<sup>rd</sup> May 2007)*

**J U D G M E N T**

The Appellant was the unsuccessful plaintiff in Eldoret CM.CC.NO.881 of 2002. He was a passenger in motor vehicle Registration No. KXB 900 owned by one Martin Ngomati and driven by one Stephen. The Plaintiff with fellow workers of the Respondent were being transported to work when the motor vehicle above rolled twice on negotiating a bend. The trial court dismissed the Plaintiff's suit hence this appeal.

The grounds of Appeal are:

1. The Learned Magistrate erred in law and in fact in failing to find that the Appellant had proved his case on a balance of probability.
2. The Learned Magistrate erred in law and fact in failing to find that the respondent had breached the implied contractual duty of care it owed its employees as an employer regarding safety.
3. The Learned Magistrate erred in law and fact in failing to find that there was no leave granted in the suit to join a third party to the proceedings as required by Order 1 Rule 14 of the Civil Procedure Rules and that no third party directions were taken.
4. The Learned Magistrate erred in law and fact in finding that the defence of an independent contractor negated the respondent's liability to the Appellant when the same was not pleaded.
5. The Learned Magistrate erred in law and fact in failing to find that the respondent as an employer of the Appellant could not transfer whether by contract or otherwise its personal responsibility to its employees regarding safety to any third parties.
6. The Learned Magistrate erred in law and fact in relying on the contract produced by the respondent between itself and the transporter when the Appellant was not party thereto and contrary to tenet of privity of contract.
7. The Learned Magistrate erred in law and fact in failing to find that the Respondent was liable to the Appellant when in evidence an admission had been made.
8. The Learned Magistrate erred in law and fact in failing to assess the quantum of damages.
9. The trial magistrate erred in law and fact in failing to follow the provisions of Order XX Rule 4 of the Civil Procedure Rules.

At the hearing of the appeal all the grounds were consolidated and argued as one. Admitted facts were that the accident occurred on 15.01.2002; the Appellant was a passenger in motor vehicle KXB 900, Appellant was an employee of the respondent, and that both the

Appellant and the Respondent blamed the driver of motor vehicle no. KXB 900 for the accident following which the Appellant was injured. What was in contention was whether or not the Respondent was liable to compensate the Appellant for the injuries he sustained.

It was submitted that the Third Party Notice to Martin Ngomati failed to comply with rules and it was not served as required and no directions on the same were given. That it was never agreed anywhere between the Respondent herein and the third party owner of the offending motor vehicle to transfer the Respondent's responsibility over its employees to the owner of the motor vehicle registration number KXB 900. That the issue of the owner of the said motor vehicle being an independent contractor was neither pleaded nor proved in evidence hence it was wrong for the trial court to consider that fact and the Respondent should have been found 100% liable for the safety of its workers and as hirer of the motor vehicle as the driver of that motor vehicle was acting as an agent of the Respondent. That there was no privity of contract between the Appellant and the owner of the motor vehicle and the Appellant had no opportunity to enquire as to the ownership of the motor vehicle or the competence of the driver.

For the Respondent it was submitted that the third party proceedings were not improper and were in fact introduced into the proceedings by consent and so they now cannot be challenged. The third Party never entered appearance or filed a defence so there were no directions to be taken in that event. That the driver of the motor vehicle and who was blamed for the accident was the agent of the owner of the motor vehicle which owner was vicariously liable for the tortious acts of his driver.

I have considered the proceedings at trial, the grounds of appeal and rival submissions by both counsel here appearing. I wish to dispose of the issue of the Third Party first. It was conceded that Martin Ngamati the third party was introduced to the proceedings by consent of both parties. He did not enter appearance. There was no judgment entered in favour of the Plaintiff and so the issue of directions after judgment as contented by the Applicant is totally misplaced and does not arise.

Both the Plaintiff and the Defendant at trial blamed the driver of motor vehicle registration number KXB 900 for the accident that resulted in the injuries of the Plaintiff. The tort of negligence was therefore attributed to such driver. It was not disputed that he was the driver of the third party. His liability was therefore that of the Third Party by the operation of the doctrine of vicarious liability. However the Third Party never entered appearance and more importantly the suit was lost by the Plaintiff against the Defendant and so the Third Party could not be brought into play in those circumstances. It is my finding that to that extent the trial court properly applied the law. The Plaintiff blamed the driver of KXB 900 for the accident. The outcome of the case would have been totally different had he sued the right party. He did not.

At the hearing of the case DW1 gave evidence that the Third Party and who was the registered owner of the offending motor vehicle was paid 2000/= daily for the hire of the motor vehicle by the Defendant. The said Third Party provided the driver of the motor vehicle and further maintained the mechanical situation of the motor vehicle. That was the evidence led at trial. I find that the trial court based its finding that the Third Party was an independent contractor upon that evidence and the court was correctly in so proceeding. It was clear that on the facts of the case and the evidence led in court the trial could base its finding on the case and come to the conclusion it did. **see the case of ODD JOBS V MUBIA CA 49 OF 1969.**

Nothing has been shown in this appeal to empower me to disturb the judgment of the trial court. This appeal is dismissed with costs.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 16<sup>TH</sup> DAY OF JUNE 2010.**

**P.M.MWILU**  
**JUDGE**  
**IN THE PRESENCE OF**

**Obima** - Advocate for the Appellant

**Watima H/B Karira** - Advocate for Respondent

**Andrew Omwenga** - Court clerk

**P.M.MWILU**  
**JUDGE**