



**No.147**  
**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 65 OF 2004**

**SOUTH NYANZA SUGAR CO.....APPELLANT**

**-VERSUS-**

**FRANCIS CHACHA MWITA.....RESPONDENT**

**JUDGMENT**

**(An appeal arising from the Judgment and Decree of A.M.Kariuki ESQ-Senior Resident Magistrate's court**

**at Migori dated 16<sup>th</sup> January, 2004 in Migori SRMCC No. 75 of 2003)**

The respondent, **Francis Chacha Mwita** obtained judgment against the appellant, **South Nyanza Sugar Co. Ltd** on account of injuries which he claimed to have sustained when a motor vehicle registration number KAA 416P, a lorry then owned by the appellant and in which he was being ferried to his work place in Masaini was involved in a road traffic accident on 9<sup>th</sup> January, 2003 at Kakrao area along the Migori -Kisii road. He was successful in his endeavour and was awarded general and special damages of Kshs. 75,000/=, and of Kshs. 3000/= respectively as well as costs of the suit.

Aggrieved by the judgment and decree of the learned magistrate aforesaid, the appellant preferred this appeal through **Messrs Okong'o & Co. Advocates**. The appellant faulted the learned magistrate's judgment and decree on the grounds 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 to the respondent the sum of Kshs. 75,000/= as general damages which amount was manifestly and exorbitantly high and excessive in the circumstances.***

***4. The learned trial magistrate erred in 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 respondents suit as 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 facts of the case as gathered from the pleadings and testimonies of various witnesses called by the parties may be briefly stated: the appellant on 9<sup>th</sup> January, 2009 instructed its driver **John Omenda Odhiambo** to ferry several cane cutters to their place of work for the day in Masaini. The respondent was among them. However the vehicle never reached its destination as it was involved in a road traffic accident at Kakrao along Migori - Kisii road junction in which several cane cutters and occupants of a house allegedly sustained injuries. According to the respondent he attributed the accident to the negligence of the appellant, its driver, servant and or agent in the manner which drove, managed and controlled the lorry. According to the respondent the lorry was being driven at a high speed and ended up hitting a house.

In response, the driver of the lorry testified that he was driving the lorry at 40KPH. At Kakrao junction the brakes of the lorry failed. The lorry crossed the road, hit a pillar and stopped. He came out and checked. His passengers were not injured. The brake failure was accidental. He denied that he was driving at a high speed. Under cross-examination, he conceded that following the accident he had been charged with the offence of driving a defective vehicle. The case was still pending determination. He conceded as well that the lorry was old and that he had not used gears to try and stop it.

On his part, **Okoth Ojuang**, a workshop supervisor with the appellant testified that the lorry had been serviced on 26<sup>th</sup> November, 2002. The next service was however due after 5,000km. Thus at the time the vehicle was road worthy and in good condition.

**Jairus Ogutu Otieno** had been contracted by the appellant to hire cane cutters. On this occasion he had hired 61 cane cutters. However the respondent was not among them. As they proceeded to where they were going to cut the cane, the lorry crossed the road and hit the verandah of the house and stopped. Only five people were injured whom he took to Sony hospital. He denied the presence of the respondent in the vehicle and therefore the accident. Finally, the appellant called **Anthony Njoroge Ngumba** an investigator as a witness. In his report he revealed that out of 61 cane cutters in the lorry, only 6 were injured and the respondent was not among them. The other two casualties had been inside the house which was hit by the lorry.

The fact that the appellant's lorry was involved in an accident after the brakes failed is therefore not in dispute. Indeed the driver DW1, DW3 and DW4 conceded that much. That fact too is conceded to by the appellant in its defence. Much as **Jairus Ogutu Otieno** and **Anthony Njoroge Ngumba** denied the presence of the respondent in the lorry and therefore the accident, that position is contradicted by the averments in paragraph 6 of the defence. In that paragraph, the appellant categorically admits the presence of the respondent in the lorry. A party is normally bound by his pleadings. The appellant's witnesses are relying on documents generated by themselves to purport, to deny the presence of the respondent in the lorry. Between their evidence and the pleadings, I choose to go with the averment in paragraph 6 of the defence. I therefore rule and hold that the respondent was a passenger in the subject lorry on the fateful day just as the learned magistrate did.

The issues therefore which were left for determination before the trial court and indeed in this appeal is whether the respondent was injured in the accident and also whether there was negligence on the part of the appellant, its driver, servant or agent.

When the appeal came up for directions, parties agreed to canvass the same by way of written submissions. Subsequently however, only the appellant filed the same. I have carefully read and considered them alongside cited authorities.

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 of 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, controverted

nor rebutted. 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 in his defence that the respondent was in the lorry at the time of the accident. He must therefore have been injured in the accident. There is no suggestion that such medical facility does not exist. I do not buy the evidence of the contractor that the respondent could not have been involved in the accident since his name was not in his records. As I have already stated the said records were generated by the said contractor. Their authenticity is therefore in doubt. The possibility of them having been generated purposely to cover the appellant's back cannot be ruled out. 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 following investigations as to the respondent having been involved in the accident and was injured. He was also issued with a police abstract 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 degree of injuries that each one of them sustained. The name of the respondent features therein. The degree of injury sustained is indicated therein as harm. This is an official public documents whose contents cannot be impugned by oral evidence. Just like the learned magistrate therefore, I am also satisfied that the respondent was involved in this accident and as a consequence he was injured. His injuries are genuine and not fraudulent as claimed by the appellant.

The appellant from its defence seem to suggest that there was no negligence on the part of its driver that may have contributed to the accident. That the accident was caused by brake failure which did not connote negligence. Thus 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 thus ***"...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 appellant's own security manager who compiled the report was not even convinced that the accident was caused as a result of brake failure. Even if we were to accept that indeed that was the cause of the accident, the possibility that the brake failed due to the negligence of the appellant cannot be eliminated. It may not have serviced the brakes as and when required. Indeed the workshop supervisor conceded under cross examination that the service of the brakes is not indicated in the job card. Further the driver admitted that he did not use the gears to try to stop the lorry. The appellant cannot thus escape liability either way. It is also instructive that following the accident the driver of the lorry was charged with driving a defective motor vehicle. That perse connotes negligence! The circumstances of the accident are such that the driver of the lorry must have been driving at a higher speed than the admitted 40KPH. If he was not driving at such a speed and was approaching a junction, the lorry would not have sped across the road and violently rammed in to a building.

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 30<sup>th</sup> July, 2010.

**ASIKE-MAKHANDIA**

**JUDGE**