



**No. 150**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 44 OF 2004**

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

**-VERSUS-**

**ZEBEDAYO MKUZI**

**KIHUGWA.....RESPONDENT**

**JUDGMENT**

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

**at Migori dated 14<sup>th</sup> January, 2004 in Migori SRMCC No. 78 of 2003)**

The respondent, **Zebedayo Mkuzi Kihugwa** obtained judgment against the appellant, **South Nyanza Sugar Co. Ltd** on account of injuries which he claimed to have sustained following a road traffic accident involving motor vehicle registration number KAA 416P, a lorry then owned by the appellant and in which he was being ferried to his work place on 9<sup>th</sup> January, 2003 at Kakrao area along the Migori-Kisii road. He was successful in his endeavours and was awarded general and special damages of Kshs. 70,000/=, and 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 following 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. 70,000/= 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 respondent's 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 may be briefly stated. The appellant on 9<sup>th</sup> January, 2009 instructed its driver one, **John Omenda Odhiambo** to ferry several cane cutters to their place of work for the day. 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 - Awendo road in which several cane cutters allegedly sustained injuries. According to the respondent he attributed the accident to the negligence of the appellant, its driver, servant and or agent aforesaid.

In response the driver of the lorry testified that the lorry's brakes had failed as he attempted to stop at a T-junction and that it only came to a stop after he rammed it into a building which was across the road and that several people had sustained injuries. DW2 **Daniel Okoth Ojwang** testified on behalf of the appellant that the lorry was road worthy and had been serviced regularly. When it left the yard on the fateful day, it was in sound mechanical condition. DW3 who had been engaged by the appellant to identify the cane cutters whom he had hired for the day had also boarded the lorry, and too sustained injuries as a result of the accident. He later took the five cane cutters who had sustained injuries to the appellant's medical centre for treatment. 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 or contention. Indeed the driver DW1, DW3 and DW4 conceded that much. That fact too is conceded to by the appellant in its defence. It was also common ground that the respondent was a passenger in the subject motor vehicle. However it is the contention of the appellant that much as the respondent was involved in the accident nonetheless he was not hurt nor did he sustain any injuries.

The issue therefore 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 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 facility on the very day unless he had been injured in the accident. It is also not suggested that the said health facility does not exist. 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 must have been satisfied as to the respondent having been involved in the accident and injuries sustained. He must have carried investigation and established the respondent's involvement in the accident. He was also issued with a police abstract which shows and

confirms that the respondent 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. The decree of injury sustained is indicated therein as harm. This is a public document whose authenticity 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. He who alleges must prove. The appellant did not tender evidence to show that the respondent was not involved in the accident. The mere fact that he was treated elsewhere and not in the dispensary is no prove that the respondent's claim was fraudulent.

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 ***"...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 authored the reports 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 contrary to the evidence of DW2. 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 is negligence. Finally, the manner in which the accident occurred is suggestive of over speeding. If indeed the driver was doing a speed of 40KM as he wanted the court to believe, then he could have crossed the road and crushed into a building and extensively damaging the veranda. According to the investigation report aforesaid, the vehicle actually sped across the road and rammed into 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**