



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

Civil Appeal 100 'A' of 2007

WALTER ONYANGOAPPELLANT

VERSUS

FOAM MATTRESS LIMITEDRESPONDENT

CORAM

J. W. MWERA J.

NYAWIRI FOR KOWINOH FOR APPELLANT

AJIGO FOR RESPONDENT

COURT CLERK DIANGA- INTERPRETER/ENGLISH/SWAHILI/LUO

J U D G E M E N T

This appeal arises from the judgment in the lower court at Winam, where the learned trial magistrate dismissed the appellant/plaintiff's claim for compensation.

Mr. Nyawiri submitted that the appellant was injured while on duty driving the respondent's motor vehicle whose brakes failed. In order to avoid ramming into the motor vehicle ahead of him, he swerved and the respondent's motor vehicle rolled injuring the plaintiff. Arguing all the grounds of appeal together the court heard that the learned trial magistrate was in error when he relied on a motor vehicle Inspection Report which was produced by consent and which stated that the subject motor vehicle had no pre-accident defects. That such a report could not be relied on because it could not truthfully contain the mechanical state of the motor vehicle since it was compiled after the accident. And that the appellant had established liability against the respondent in that its motor vehicle's braking system failed. It had no seat belts to be worn and the respondent called no evidence in rebuttal.

Mr. Ajigo's position was that the learned trial magistrate properly relied on the inspection report of the motor vehicle and the appellant did not prove that the motor vehicle's braking system was not well-maintained all the time.

The plaint before the lower court claimed that it was an implied term or duty of his employment with the respondent as a driver that the latter would take all reasonable precautions for the appellant's safety while on duty to avoid exposing him to risk of damage or injury, known or which it ought to have been

known and to provide and maintain adequate and suitable plant, appliances etc to ensure that the appellant worked in a safe environment. But the respondent failed to so provide or maintain and as per paragraph 5 (plaint):

“.....on 21st May 2004 while the plaintiff was in the course of his employment (ferrying) the defendants’ goods.....the brakes of motor vehicle registration No.KAG 164L MITSUBISHI FUSO failed wherein the plaintiff sustained serious injuries

“(underlining supplied.)”

The particulars of the respondents’ failure/negligence included exposing the appellant to a known risk or one that ought to have been known; providing poor working conditions, overloading the said motor vehicle; failing to pay attention to the appellant’s welfare and not providing protective gear – gumboots; failing to warn the appellant of the existing risk on the job.

A defence filed denied all alleged against the respondent adding that the accident in question occurred due to the negligence of the appellant who was in sole command/control of the offending motor vehicle at time of the accident. That the appellant caused the accident with intention of defrauding the respondent. Then the particulars of negligence wholly or substantially attributed to the appellant were set out: driving motor vehicle KAG 164L at an excessive speed and without due care and attention, driving on the wrong side of the road and overtaking when it was not safe to do so; failing to wear a seat belt.

The lower court pleading reproduced in the record of appeal does not show that there was a reply to the defence and so it can be taken that it was wholly admitted. The hearing got under way.

The appellant (PW1) said that on 21st March 2004, while on duty driving the respondents’ lorry registration No.KAG 164L, he got near a place called Keitui; he saw a lorry ahead of him. He braked but the brakes failed; he drove off the road to avoid hitting the lorry ahead and so his own motor vehicle rolled. He was injured. The appellant produced a police abstract and his treatment documents together with medical reports by Dr. Okombo and Dr. Raburu.

In cross-examination the appellant claimed that the brakes had failed as he drove downhill. A motor vehicle Inspection Report of 22nd March 2004 was noted, marked and later produced, as it shall be seen, by consent as a defence exhibit (Exh.D2) and:

“The motor vehicle had no seat belt.”

That closed the trial after several adjournments, with the following documents being produced by consent:

Police abstract – Exh.P1

Treatment Notes – Exh. P2

Dr. Raburu’s Medical Report – Exh.D1

M/V Inspection Report – Exh.D2

The parties submitted and the learned trial magistrate crafted the judgment under review. The appellants’ side urged the learned trial magistrate of find that the respondent bore 100% liability while the respondents’ side held a view to the contrary.

On quantum of damages the appellant’s side put forth shs.200,000/= as reasonable while the respondent could only think of shs.15,000/= in general damages.

As noted above the suit was dismissed by the learned trial magistrate on account of failure to prove negligence against the respondent.

In this court's view the evidence before the lower court did not prove negligence at all. The appellant set it out clearly in his plaint that the accident occurred because the motor vehicle brakes failed. They failed while he was going downhill. From the pleadings and evidence that particular of negligence was to be proved. It was not. The motor vehicle inspection report produced by consent clearly said:

“No pre-accident defects noted.”

Of the brakes it said:

“Brake fluid leaked on impact.”

So all in all the braking system was sound before the accident. Thus it was false of the appellant to claim and his counsel to submit that the inspection report having been prepared after the accident could not well and truly state of the defective braking system before the accident. The appellant did not present a different mechanical report to prop up his claim. It could not be sustained and the learned trial magistrate was right in his decision, to dismiss the suit.

It was also untenable for the appellant, who did not in a reply to the defence, to deny that the motor vehicle had a seat belt. No reply was filed and adding that there was no seat belt during cross-examination did not hold much water.

All in all the suit was on proper evidence and analysis dismissed in the lower court.

This appeal is also dismissed with costs.

Judgment delivered on 22nd June 2009.

J. W. MWERA

J U D G E

JWM/mk.