REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 240 of 2002

JOHN KAMOCHE MUIRURI................................APPELLANT

VERSUS

HEZRON KIRANGA NJAGA...........................RESPONDENT

(An appeal from the Judgment and Decree of the Hon. Mrs. N. Matheka,

Senior Resident Magistrate in CMCC No.3561 of 1998

at Milimani Commercial Courts, Nairobi)

J U D G M E N T

1. This appeal arises from a suit which was filed at the Chief Magistrate's Court at Nairobi by John Kamoche Muiruri, hereinafter referred to as the appellant. He had sued Hezron Kiranga Njaga, hereinafter referred to as the respondent. The appellant claimed general and special damages arising from injuries suffered by him as a result of an accident involving the motor vehicle Registration No. KAA 445C, hereinafter referred to as the said vehicle. The appellant who was at the material time the driver of the said vehicle claimed that the accident was caused by the negligence of the respondent who was the owner of the said vehicle.

2. The respondent filed a defence in which he denied that an accident occurred, or that he was in any way to blame. Without prejudice to that denial, the respondent claimed that if the accident occurred, then the same was wholly or substantially contributed to by the negligence of the appellant, and relied on the doctrine of *res ipsa loquitor*. The respondent further contended that the accident was inevitable.

3. During the hearing of the appeal, the respondent though served did not attend Court. The hearing therefore proceeded *ex parte*. The appellant and one Dr. Patel testified in proof of the appellant's case. The appellant explained that he was employed by the respondent as a matatu driver. On the material day, he was driving the said vehicle along Nyahururu/Gilgil Road when the vehicle had a tyre burst, lost control and overturned. The appellant claimed that the respondent was responsible for the accident, as he had been informed that the tyres of the vehicle were worn out, but had assured the appellant that he fixed them. The appellant sustained injuries for which he was treated at Nyahururu, Nakuru and Kenyatta National Hospitals. He was later examined by Dr. Patel who prepared a medical report which was produced in evidence. The appellant also produced a police abstract report of the accident.

4. In her judgment, the trial Magistrate found that the respondent could not be held liable for the accident, as the appellant had a duty to himself and other passengers not to drive a defective motor

vehicle. The trial Magistrate further noted that if the appellant was driving at a reasonable speed, he would have been able to control the said vehicle, even after the tyre burst. She therefore dismissed the appellant's suit.

5. Being aggrieved by that judgment, the appellant has lodged this appeal raising six grounds as follows:

(i) The learned trial magistrate erred in law and in fact in concluding that the plaintiff had failed to establish liability in complete disregard for the plaintiff's unchallenged evidence on record and the pleadings of both parties.

(ii) The learned trial magistrate erred in law and in fact in failing to take into consideration and completely disregarded the fact that the plaintiff was claiming damages under negligence as well as the workmen compensation as an employee of the defendant.

(iii) The learned trial magistrate erred in law and in fact in dismissing the plaintiff's claim without considering the nature of the plaintiff's injuries and what award he would have been entitled to.

(iv) The learned trial magistrate erred in law and in fact in completely disregarding the submissions of the plaintiff and consequently arrived at a wrong decision in dismissing the plaintiff's suit in its entirety.

(v) The learned trial magistrate erred in law and in fact in delivering judgment in the absence of counsel for the plaintiff of the parties and on a date not given to the parties as a judgment date.

(vi) The learned trial magistrate erred in law and in fact in delivering judgment without considering and stating the case before the court the points for determination, analyzing the evidence adduced and the exhibits, the burden of proof and the concise reasons for her decision contrary to the provisions of the Civil Procedure and the **Evidence Acts.**

6. Mrs. Maira who appeared for the appellant, submitted that the appellant's claim was based on the contract of employment as well as negligence on the part of the respondent. She argued that the Court did not consider the pleadings, or the claim under the Workman Compensation Act. She maintained that the trial Magistrate failed to note that the appellant's evidence was unchallenged, and that there was no evidence in support of the defence of contributory negligence or inevitable accident which was pleaded.

7. Mrs. Maira contended that the respondent had a duty as the owner of the said vehicle to ensure that it was in good condition. She maintained that at the very least, the respondent ought to have been found contributorily negligent. Mrs. Maira pointed out that although there was sufficient evidence of injury, the trial Magistrate failed to address herself on the issue of quantum. She therefore urged the Court to set aside the judgment of the lower Court and award general damages in favour of the appellant.

8. Mr. Mogeni who appeared for the respondent submitted that the appellant had a duty to establish the basis of her claim upon which the respondent's liability could arise. He maintained that the trial Magistrate properly considered the issue of negligence. He submitted that there was no evidence adduced by the appellant to support the particulars of negligence which were pleaded. He therefore urged the Court to dismiss the appeal.

9. I have carefully reconsidered and evaluated the evidence which was adduced before the trial Magistrate. I have also considered the submissions made before me. Under section 107(1) of the Evidence Act, the burden is upon the person who desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, to prove the existence of those facts.

10. In his plaint filed on 18th May, 1998, the appellant pleaded the particulars of negligence against the respondent as follows:

(i) Failing to keep and maintain the said vehicle and its components in good and road worthy condition.

(ii) Providing the plaintiff with a vehicle which had defective components when he knew or ought to have known it was dangerous and unsafe so to do.

(iii) Failing to have any regard for the safety of the plaintiff and the passengers in the said vehicle.

(iv) Causing or allowing the said vehicle to be driven with defective tyres.

(v) Causing the said accident.

11. Notwithstanding the absence of the respondent at the hearing, the appellant was under a responsibility to prove his case on a balance of probability. In order for the appellant to succeed in his claim, the appellant had to establish at least one of the alleged particulars of negligence. In his evidence before the trial Magistrate, the appellant claimed that the tyres of the motor vehicle which he was driving were worn out. There was however no evidence produced to substantiate the appellant's allegation that the tyres were worn out, or that the accident was caused by a rear tyre burst. Assuming for the sake of argument that the tyres were worn out, the appellant being the driver of the said vehicle, it was his responsibility to ensure that the said vehicle was in a good and road worthy condition. By agreeing to drive a motor vehicle which to his knowledge had worn out tyres, the appellant was not only in breach of the law but also exposed himself and his passengers to foreseeable danger.

12. Moreover, the mere fact that an accident occurred involving the said vehicle, was not sufficient to establish that the accident was caused by a tyre burst. Other factors such as the speed at which the motor vehicle was being driven, the care and control exercised by the driver, were relevant factors which could have contributed to the accident. No evidence was adduced by the appellant who was the one fully in control of the vehicle, to rule out any negligence on his part in that regard. I find that the appellant's claim in negligence cannot succeed, because he has not established any negligence on the part of the respondent.

13. As regards the claim arising under the contract of employment, the relationship between an employer and employee is described in *Halsbury's Laws of England 4th Edition, Vol.16 par.562*, as follows:

"*It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for any injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety; the exercise of due care and skill suffices.*"

14. As aforestated the appellant did not demonstrate that the respondent failed to exercise reasonable care for the appellant's safety. To the contrary, the evidence shows that it is the appellant who failed to exercise reasonable care for his own safety. As a driver, the appellant was in full control of the subject vehicle and the condition of the vehicle. In the circumstances, the respondent was not in breach of any common law duty of care or breach of contract. I find that the trial Magistrate was right in finding the respondent not liable.

15. As regards the assessment of damages, the trial Magistrate was under a duty to assess the quantum of damages notwithstanding her finding on liability. The trial Magistrate therefore erred in failing to assess the quantum of damages. The medical report produced by Dr. Patel showed that the appellant suffered:

(a) Blunt injury to the back of the neck leading to dislocation of cervical vertebrae c5 and c6.

(b) Multiple lacerations on the scalp and forehead

(c) Bruises of both shoulders

(d) Deep lacerations on the right wrist

(e) Head injuries with loss of consciousness.

16. The appellant was admitted at Nyahururu hospital for 3 weeks, Rift Valley General Hospital, Nakuru for 3 days and Kenyatta National Hospital for 10 weeks. The residual effects of his injuries included many scars on the right parietal area, reduced power on the left arm, reduced abduction at the shoulder, and reduced power on the left leg. Although the appellant did not suffer any fracture, it is evident that he suffered an element of paralysis and had to endure a long period of immobility in hospital. A sum of Kshs.250,000/= would have been appropriate for the injuries suffered by the appellant.

17. The upshot of the above is that the appellant having failed to establish liability on the part of the respondent, his appeal fails. It is accordingly dismissed. Those shall be the orders of this Court.

Dated and delivered this 25th day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Maira for the appellant

Owang holding brief for Mongeri for the respondent

Eric court clerk