REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 62 of 2004

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

-VERSUS-

MICHAEL JITOTO.....RESPONDENT

JUDGMENT

Before the Resident Magistrate, Migori, the respondent's case was that vehicle registration number KAA 416P was owned by the appellant (who was the 1st defendant) and was being driven by John Omenda Odhiambo(who was the 2nd defendant); that on or about 9/1/2003 he was a lawful passenger in the vehicle which was being driven along Migori-Awendo road and which, owing to negligent driving, lost control and hit a house as a result of which he was injured. He sued the defendants to be compensated in general and special damages. A defence was filed in which the appellant admitted to be the owner of the vehicle, and 2nd defendant to be the driver. The fact of accident and that the respondent was a passenger in the vehicle at the time were also admitted. It was denied that the vehicle was being driven negligently, or that the respondent was injured in the accident.

During evidence, the respondent testified that he was travelling to work in the lorry which was being driven at a high speed when it hit a house as a result of which he was injured. He stated he was injured on the head, right arm, chest and back. He was treated at Stella Medical Care. He reported the accident at Migori police station. He was given P3 form (exhibit 3) and police abstract. He was examined by Dr.P.M.Ajuoga (PW2) on 1/2/2003 who found he had suffered blunt head injury; cerebral concussion; bruises and lacerations on the back and chest; and contusion and bruises on the right elbow. The Doctor produced medical report (exhibit 4). He testified the respondent had suffered soft tissue injuries which had healed.

The defence called the driver (2 nd defendant) who testified that he was driving along a rough road when the brakes unexpectedly

failed. He was then doing 40 kilometers per hour. The lorry crossed the road, hit a pillar and stopped. When cross- examined, he said that it took the lorry to hit a house to be able to stop. He said this was the best option in the circumstances. He stated no passenger was injured. He testified that this was an old vehicle. He had driven the lorry for 8 years and that:

> "*The brakes have failed severally."*

He said he did his best to control the vehicle, but that he did not

> "*use the gears to try to stop the lorry."*

DW2 Daniel Okoth Ojuang is workshop supervisor for the appellant and repairs this vehicle. He stated the vehicle had been serviced and all fittings done. The vehicle, he said, was in good mechanical condition. He acknowledged that on 15/1/2002 the lorry had brake problem, but was fixed. DW3 Jairus Ogutu Otieno was the contractor who had recruited the cane cutters who were on the lorry. They were 61 on the lorry. He also travelled on the lorry. On the way, this driver tried to reduce speed and applied brakes but they failed. The accident occurred. He stated that he was injured as did 5 other passengers whose names he gave. They did not include the respondent. DW4 Anthony Njoroge Ngumba investigated the accident and said 8 people were injured.

The defence evidence given through DW3 and DW4 did not agree as to how many people were injured. The driver said no passenger was injured. Against that contradictory evidence, the respondent stated he was in the vehicle and got injured. Considering that the burden on the respondent was to prove the case on balance of probabilities, I find the trial court correctly accepted his evidence. The fact that there was medical evidence and that the defence had admitted the respondent was in the vehicle during the accident should fortify that finding.

The next issue that the respondent was to prove was that the accident was caused by the careless driving of the driver, in which case the appellant would be vicariously liable. Quite unfortunately, the trial court failed to deal with the question of liability. This is how the court dealt with the matter.

> "*He blames the defendants for the accident and seeks compensation against them.*
>
> *The defendants have denied the claim. However they do not deny that the plaintiff was involved in an accident. The issue is whether he sustained the alleged injuries.*
>
> *In prove of the injuries he has produced the P3 form, treatment notes and medical report.*
>
> *The defendants offered no evidence of rebutting the above. I find that the case on balance of probability and hold the defendants 100% liable jointly and severally."*

There was evidence regarding the cause of the accident given by either side. The court had to deal with that evidence to be able to decide whether the respondent had proved his case.

In my own consideration, the respondent stated the accident was due to speed on the part of the driver. The driver stated the brakes accidentally failed when he was doing 40 kilometers per hour. DW3 stated the driver was reducing speed when the brakes failed. The driver acknowledged the brakes have failed severally, and that this was an old lorry. It was carrying 61 cane cutters. On balance, given the age of the vehicle and the weight it was carrying, the version of the respondent that the vehicle was in high speed and that was the substantial cause of the accident is acceptable. I find the driver liable, and the appellant vicariously liable.

The appellant complained that the Kshs. 75,000/= general damages was manifestly and exorbitantly high and excessive in the circumstances.

The trial magistrate indicated he had considered the submissions made when he arrived at the quantum. The court ought to have considered that the injuries were extensive, but all soft tissue. It ought to have considered that the respondent had, according to the Doctor, recovered. There was no evidence of admission. The respondent went to Stella Medical Care following the accident and was treated. There was no necessity for another attendance, it would appear. The appellant had wanted him to be awarded Kshs. 20,000/= for the injuries, when the respondent was asking for Kshs. 100,000/=. Given the age of the authorities cited and the circumstances of the case, an award of Kshs. 50,000/= should have been appropriate. The award above is set aside as it was excessive. It is replaced with Kshs. 50,000/=. There was no appeal against special damages of kshs. 3,460/=. It will remain.

To that extent, therefore, the appeal is dismissed with costs.

Dated, signed and delivered this 23rd day of November, 2009.

A.O.MUCHELULE

JUDGE

23/11/2009

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Ochillo for appellant

Mr. Oggutu for Mr. Kerario for Respondent

COURT: Judgment in open court.

A.O.MUCHELULE

JUDGE

23/11/2009