REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 12 of 2007

KASSIM FARAH WARSAME t/a SALAT TRANSPORTERS…1ST APPELLANT

HUSSEIN ISSA ABAB..……....2ND APPELLANT

VERSUS

JOHN MBUGUA OTSYULA…….……. RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Milimani, Nairobi delivered by Hon. C.W. Meoli, on 15th December, 2006 in Nairobi RMCC No. 2209 of 2003)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by John Mbugua Otsyula, hereinafter referred to as the respondent. He had sued Kassim Farah Warsame t/a AA Salat Transporters and Hussein Issa Abab, hereinafter referred to as the 1st and 2nd appellants. The respondent claimed that he was injured in a road traffic accident involving the 1st appellant's Mercedes trailer registration No. KUM 382-Z9784, (hereinafter referred to as the trailer), and motor vehicle KAG 149W which the respondent was lawfully driving. The respondent contended that the accident was caused by the negligence of the 2nd appellant. The respondent therefore claimed special and general damages from the appellants.

2. The appellants filed a joint defence in which they denied the respondent' allegation of negligence. The appellants claimed that the respondent was a habitual drunk and careless in his driving. The appellants contended that the respondent was driving while intoxicated and could not control motor vehicle KAG 149W to avoid the accident. The appellants therefore maintained that the accident was caused by the negligence of the respondent and urged the Court to dismiss the respondent's suit.

3. During the trial four witnesses testified on behalf of the respondent. These were Prof. Ndegwa Gakuo, who is a consultant in orthopedic, Sgt. Stephen Ndeti, a police officer attached to Industrial Area Police Station, Ahmed Abdulrahman Mohammed (Mohammed) who was a passenger in motor vehicle KAG 149W at the time of accident, and the respondent.

4. Briefly their evidence was as follows. On 27th of October, 2002, the respondent was driving motor vehicle KAG 149W along Mombasa Road towards the airport. He had three passengers who were his two children and Mohammed who is his neighbor. When they reached the Firestone junction, the appellant's trailer, which was coming from Mombasa direction turned towards Enterprise Road without giving way to other vehicles which were on the highway. The respondent had no time to stop or avoid the trailer and the two vehicles therefore collided. The respondent was injured, he lost consciousness and was taken to St. James Hospital where he later gained consciousness.

5. As a result of the accident, the respondent suffered the following injuries:

· closed chest injury with fractured multiple ribs left side of the chest;

· fracture right acetabulum hip joint with posterior dislocation of the right hip joint;

· extensive deep bruising over the right and left elbow and the face;

· lower back pains due to closed soft tissue injures to lumbar spine;

· whiplash injury to the neck;

· cut on the tongue with deep cut wounds;

· broken upper canine tooth.

6. The respondent was transferred to Nairobi Hospital, where he remained until 4th November, 2002 when he was discharged. Thereafter the respondent remained on crutches for about 6 months. Prof. Ndegwa Gakuo, an orthopedic consultant who later examined the respondent assessed his permanent disability at 35%. Prof. Gakuo also observed that the respondent will require future surgery at a cost of Kshs.350,000/=. Sgt. Stephen Ndeti produced a police file concerning the accident. The police investigation resulted in the trailer driver being charged and convicted on his own plea for dangerous driving.

7. The appellant called Dr. R.P. Shah who testified that he examined the respondent on the 14th June, 2004 and also examined the discharge summary from Nairobi Hospital and X-ray reports. At the time of examination, Dr. Shah found that the appellant's two teeth were slightly chipped off. He did not notice any other abnormalities. Dr. Shah noted that the rib fractures had healed well as well as the hip injury. The respondent's hip joint was normal and osteoarthritis had not developed. Dr. Shah formed the opinion that the appellant's permanent disability was 15%.

8. Both counsel filed written submissions each urging the trial Court to find in favour of his client. Counsel for the respondent urged the Court to award damages of Kshs.1.7 million for pain, suffering and loss of amenities; Kshs.350,000/= as damages for future surgery; and Kshs.500,000/= as damages for diminished earning or loss of earning capacity. Finally the Court was urged to award special damages of Kshs.156,459/=.

9. For the appellant it was submitted that the respondent not having filed any reply, to the appellant's defence which alleged negligence on the part of the respondent, the respondent must be deemed under Order 6 rule 9(1) of the Civil Procedure Rules to have admitted the particulars of negligence alleged against him. It was therefore submitted that the Court must apportion some elements of negligence on the part of the respondent. The Court was urged to apportion liability at 50%. It was submitted that even the evidence which was adduced by the respondent confirmed that the accident was caused by the negligence of the respondent in that he was driving at an excessive speed, and was not keeping a proper look out, causing him to ram into the trailer from the rear. Further it was submitted that vicarious liability was neither pleaded nor was there evidence adduced, upon which the 1st appellant could be held vicariously liable for the negligence of the 2nd appellant. Relying on ***Provincial Reinsurance Company East Africa Ltd. vs. Mordecai Mwanga Nandwa Civil Appeal No. 179 of 1975,*** the Court was urged to dismiss the suit against the 1st appellant.

10. On the issue of damages, a sum of Kshs.200,000/- was proposed as adequate for general damages. The Court was urged to reject the claim for special damages as the same was not proved. The claim for future medical expenses should also be similarly rejected as the same was not pleaded. The Court was urged to disregard the claim for diminished earning or earning capacity as it should have been a claim under special damages.

11. In her judgment, the trial Magistrate found the respondent's evidence unchallenged, and therefore found the appellants fully liable for the accident. The trial Magistrate accepted Dr. Gakuo's report on the appellant's injuries. She awarded the respondent general damages of Kshs. 900,000/= for pain, suffering and loss of amenities, and special damages of Kshs.104734/=. The trial Magistrate rejected the respondent's claim for diminished earning capacity and the claim for future medical expenses.

12. Being aggrieved by that judgment the appellants have lodged this appeal raising four grounds as follows:

(i) That the Honourable Magistrate erred in law and in fact in finding that the appellants herein were fully (100%) liable for the accident that resulted into the suit whereas the respondent who was driving on the rear of the 1st appellant's trailer substantially or equally contributed to the accident.

(ii) That the Honourable Magistrate erred in law and in fact by being biased against the appellants herein and thereby ignoring the appellants' written submissions dated 5th October, 2006 in reaching her decision hence the judgment of 15th December, 2006.

(iii) That the Honourable Magistrate erred in law and in fact by awarding the respondent the sum of Kshs.104,734.00 in special damages yet the same were not proved as strictly pleaded in the respondent's plaint as envisaged in law.

(iv) That the Honourable Magistrate erred in law and in fact by awarding to the respondent general damages in the sum of Kshs.900,000.00 that was inordinately and unreasonably high in comparison with the specific injuries suffered by the respondent contrary to the known principles of law with regard to quantum for general damages.

13. Both counsel filed written submissions, and urged the Court to determine the appeal based on those submissions. For the appellant it was submitted that the respondent was the one who caused the accident, as he was driving at a very high speed, without keeping a proper watch. The fact that he was not able to stop or avoid ramming into the rear of the trailer, confirmed that position. It was further submitted that the trial Magistrate was wrong in finding the appellants fully liable for the accident, as vicarious liability was not pleaded nor proved. On the issue of quantum, it was submitted that the sum of Kshs.900,000/= awarded as general damages was inordinately high, and that the trial Magistrate was wrong in rejecting the sum of Kshs.200,000/= which was proposed by the appellants' counsel.

14. For the respondent, the Court was urged to note that the appellants did not call any witnesses, and therefore the evidence adduced by the respondent on how the accident happened remained unchallenged. The Court was also asked to note that the 2nd appellant was charged and convicted on his own plea of guilty. It was maintained that although the appellant alleged negligence against the respondent, there was no proof adduced in support of the same.

15. With regard to quantum, it was submitted that the trial Magistrate considered the evidence of both doctors before assessing the quantum. It was maintained that the trial Magistrate properly exercised her discretion, and that the award of Kshs.900,000/= was justified. The respondent's counsel further urged the Court to reject the submission that there was no reply to the defence, a reply to the defence having been filed on 15th May, 2003. It was maintained that special damages were specifically pleaded and proved.

16. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial Magistrate. I have also given due consideration to the submissions made before the trial Magistrate, the submissions made before me and the authorities cited. I do note from the original record of the lower Court that there is a reply to defence which was duly filed on 15th May, 2003. In that reply, the respondent completely denied all the allegations of negligence which were attributed to him in the defence. The appellants' submissions that the allegations of negligence must be deemed to have been admitted have therefore no foundation and are accordingly, rejected.

17. Secondly, it is evident that the appellant did not call any evidence to explain how the accident happened or substantiate its allegations of negligence on the part of the respondent. The respondent, who had the burden of proving his case, discharged that burden through the evidence of the respondent and Mohammed, which evidence was consistent with the evidence contained in the police records produced by Sgt. Stephen Ndeti. The respondent's evidence that the accident was caused by the negligence of the 2nd appellant was further supported by the police records which showed that the 2nd appellant was convicted of the offence of dangerous driving contrary to section 7 (1) of the Traffic Act, on his own plea of guilty. This fact was pleaded by the respondent in the plaint and was never denied by the appellants.

18. It is clear that the 2nd respondent turned onto the road without ensuring that it was safe to do so and thereby cut on to the path of the respondent's motor vehicle causing the respondent to ram into the trailer. I find that the finding of the trial Magistrate that the accident was caused by the negligence of the 2nd appellant was fully supported by the evidence which was before her.

19. As regards the issue of vicarious liability, although the same was not specifically pleaded, the respondent pleaded that the vehicle belonged to the 1st appellant and was being driven by the 2nd appellant at the time of the accident. These facts were never denied nor contradicted nor did the 1st appellant raise any issue with regard to the authority of the 2nd appellant to drive the trailer. In the circumstances I find that there was an assumption that the 2nd appellant was driving the 1st appellant's trailer with the 1st appellant's authority and for the benefit of the 1st appellant. Accordingly, I find the 1st appellant fully liable for the 2nd appellant's negligence.

20. On the issue of damages, the appellants suffered serious injuries which necessitated his admission into hospital and his remaining on crutches for about 6 months. His permanent disability was assessed at between 35% and 15%, taking the totality of the evidence of the two doctors who testified. In awarding the sum of Kshs.900,000/= as general damages, the trial Magistrate properly addressed her mind to the injuries and the evidence of the two doctors. The trial Magistrate properly exercised her discretion and it cannot be said that the award was too excessive as to justify the intervention of this Court.

21. With regard to special damages of Kshs.104,734/=, the trial Magistrate used the evidence which was before her. The invoice from Nairobi hospital indicated that the amounts were paid and the trial Magistrate was right in taking the payment into account. I find that the sum of Kshs.104,734/= was specifically proved.

22. The upshot of the above is that I find no merit in this appeal and do therefore dismiss it with costs.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Onyango for the appellant

Wambugu for the respondent

Eric, court clerk