

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Appeal 57 of 2007

NZOIA SUGAR COMPANY LIMITED APPELLANT

VS

DAVID NALYANYA RESPONDENT

JUDGMENT

By an amended plaint dated 17th August, 2006, the plaintiff sued the defendant Nzoia Sugar Company Ltd who is the present appellant claiming “**general damages under common law negligence**”, special damages and costs of the suit plus interest thereon at court rates. After hearing the matter, the learned trial magistrate found the defendant 100% liable and proceed to award the plaintiff Ksh.100,000/= as general damages. He found special damages not proved and did not award anything under that head. Being dissatisfied with the said judgment, the defendant appealed to this court both on the issue of liability and also on the issue of quantum of damages. The defendant through Wetangula and Co. Advocates is relying on 10 grounds of appeal which Mr. Makokha, counsel for the defendant handled together. He urged the court to find that negligence on the part of the defendant was not proved and that the appeal should be allowed and the suit before the trial court be dismissed.

This being a 1st appellate court, it is incumbent upon me to re-evaluate the evidence adduced before the trial court re-analyse the same and come to my own independent decision as to whether the defendant was liable for the said accident. In doing so however, I should not lose sight to the fact that unlike the learned trial magistrate, I did not have the advantage of seeing and hearing the witnesses testify. I will now consider that evidence before I come to the grounds of appeal and submissions by counsel. By and large, the facts surrounding this case are not disputed. The plaintiff/respondent told the trial court that he was an employee of the defendant company where he was working as a cane cutter. He and the other workers used to be ferried to and from work in a lorry Reg. No.KTP 690 which was owned by one Mohammed Saleh who was previously a defendant in the suit but was removed when the plaint was amended. As they were being driven home abode the said lorry on the date in question, the lorry first overturned. The accident was reported at Webuye Police Station. The plaintiff/respondent said that he sustained injuries on the “**back left leg, my ribs, and lost sexual power.**”

I would not know what the letter means or how the same can be quantified. He said that he was treated at Bungoma Hospital for 5 days and was also treated in Kisumu. No clinical notes were nonetheless availed to the trial court. He produced as exhibits 2 medical reports – one by Dr. C.O. Okuoga and another by Dr. George Simiyu Webala who testified as PW2. PW2 produced the medical report which he said he completed on 10.2.2007. He told the court that he saw the treatment notes which had been given to the plaintiff before but these were not produced in court as exhibits. According to PW2’s report, the plaintiff/respondent had sustained soft tissue injuries on the left side of his face and head, he had chest pains, severe backache and a cut on the left ankle joint. He also had difficulties in breathing. He had nonetheless not sustained any fractures or other injuries of a permanent nature.

The defendant called one witness who described himself as the “**field cane harvesting supervisor**”. His evidence was that the lorry in question belonged to one Mohamed Saleh who he described as a transporter contractor. He testified that the defendant company was not engaged in the management of he said lorry or driving it. He said that the same was not faulty but if it was, then it was the contractor’s responsibility to maintain it. He therefore urged the court to dismiss the suit. On cross-examination, he admitted that the defendant company used to offer transport to the cane cutters – but both the driver and the motor vehicle used to belong to the contractor. He nonetheless conceded that the lorry was on duty when the accident occurred. The occurrence of the accident is not therefore disputed. The thrust of the grounds of appeal is first and foremost that the lorry in question did not belong to the defendant, that it belonged to an independent contractor and that the defendant should not therefore be held vicariously liable for the accident for the accident. Secondly, that the particulars of negligence were not proved against the defendant; and thirdly, that the medical report was of no probative value and lastly that even if liability was established, that the damages awarded were excessive. These are the issues both counsel herein expounded in their oral submissions in court. I will start on the issue of liability. I will start with the issue as to whether an independent contractor can be deemed to be an agent of the defendant. According to the appellant’s counsel he was. On this point, I was furnished the authority of

“SELLE AND ANOTHER –V- ASSOCIATED MOTOR BOAT COMPANY LIMITED & OTHERS CIVIL APP. NO. 31 OF 1967.

In this case, the Court of Appeal for East Africa held:-

“Where a person delegates a task or duty to another, not a servant, to do something for his benefit, or for the joint benefit of himself and the other, whether that other person be called agent or independent contractor, the employer will be liable for negligence of that other in performance of the task, duty or act;”

In my considered view, although counsel for the appellant tried to distinguish this case from this appeal, I am convinced that this appeal falls on all fours with the sell case (ibid). I say so because the evidence before the trial court shows that the defendant had the duty and responsibility to transport its workers home. It was for them therefore to either use their own transport or contract another person to do so. This was to the defendant’s benefit because it enabled its workers to get to and from work on time and this must definitely have impacted on their performance. It was not the workers who decided which transport they should use to and from work. It was for the defendant to

provide them with transport. If they gave that responsibility to somebody else then that somebody else becomes their agent. If the defendant had not contracted the owner of the lorry in question, then liability could not attach to them but since they contracted the transporter to carry out a duty they were themselves supposed to perform, then they cannot escape liability. In those circumstances therefore, that argument must fail.

That notwithstanding however, this court will need to go further and make a finding on whether the plaintiff proved the particulars of negligence on the part of the defendant as pleaded in paragraph 5 of the plaint. From the evidence on record, I do not see any evidence adduced on the manner in which the lorry in question was being driven. The issue of excessive speed, failing to keep any proper look out for other motor vehicles etc. was not even advanced in the plaintiff's evidence. Indeed, the plaintiff's evidence is only to the effect that the accident occurred. He said that the motor vehicle was not speeding and that it just veered off the road and overturned. This was a self involving accident. I have noted that counsel for the plaintiff in his submission stated that according to Pexh.3 – the workman compensation form, it was the steering rod of the lorry that broke. With due respect to counsel, I have studiously scrutinized that document and I have not seen any such thing. Even assuming that it was there, the same would not be deemed as a reliable source of the cause of the accident. Only a qualified motor vehicle examiner's report on the mechanical condition of the lorry in question could have established the mechanical defects on the said lorry prior to the accident. Not even the police abstract form supports counsel's claim as to the cause of the accident.

I am aware of the principle that where negligence is pleaded, the acts of negligence must be proved and that there should be no liability without fault. Nonetheless, I note that in this case the doctrine of "*Res Ipsa Loquitur*" is pleaded in the plaint. My finding is that the same would be applicable here. I say so because the accident did happen; the lorry was not being driven recklessly; there was no other motorvehicle or other object whatsoever that got into the driver's way. There is no evidence of bad weather etc. The only presumption one can make is that the driver was the sole cause of the accident. Accidents don't just happen on their own in absence of any of the above situations and in absence of any evidence of mechanical defects on the motor vehicle. The driver must therefore be held responsible for the same. My finding therefore is that the learned trial magistrate did arrive at the right decision on liability. I nonetheless note that he failed to consider the issue of contributory negligence on the part of the plaintiff. I note that the defendant had pleaded several particulars of negligence on the part of the plaintiff. There was no joinder of issues from the defendant and so under OVI r.9(1) those particulars are deemed to have been admitted. Further to this it is also noted that according to the plaintiff, there were about 80 people aboard the lorry. That by any standard is a large number and clearly in excess of what the lorry could comfortably carry. The plaintiff agreed to be ferried aboard an overloaded lorry. He cannot therefore escape partial liability in this case. Accordingly, my finding is that the plaintiff was 50% liable for the accident. On the issue of damages, my finding is that the medical report was properly admitted in evidence it having been produced by its author. He too said that he had examined the plaintiff and had also seen the initial treatment chits. I also find that the amount awarded was not so manifestly excessive as to call for my interference. I will not therefore disturb the same. Accordingly this appeal only succeeds in part to the effect that liability is hereby apportioned to 50:50 for the plaintiff as against the defendant. The plaintiff/respondent therefore gets an award of Ksh.50,000/= as general damages plus 50% of the costs both in the subordinate court and in this appeal. Adjustment be done accordingly.

W. KARANJA

JUDGE

12/3/2008

DELIVERED today in open court in presence of Mr. Makokha for the appellant and Mr. Sichangi for respondent.