



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL APPLICATION NO 113 of 2005**

*(Being an appeal from the Judgment/Decree of Hon. A.B.M. MONGARE – Resident Magistrate, Nakuru delivered on 9<sup>th</sup> June, 2005 in Nakuru CMCC No.2348 of 2003)*

**VALLEY BAKERY LIMITED ..... APPELLANT**

**VERSUS**

**PATRICK WAFULA MUDOGO ..... RESPONDENT**

**JUDGMENT**

This appeal arises from the judgment of Senior Resident Magistrate, Nakuru, in CMCC No.2348 of 2003 where the respondent sued the appellant for a claim of general and special damages.

In his statement of claim, the respondent gave the particulars of negligence which he attributed to the appellant such as failure to take adequate precaution for safety of the respondent. Exposing the respondent to risks and failing to maintain safe and proper system of work, among others. The respondent also pleaded the doctrine of **res-ipsa loquitor** amongst other particulars.

At the hearing of the suit, the respondent testified that on 13<sup>th</sup> March, 2003 while in the course of his lawful employment with the appellant, the appellant negligently failed to maintain the motor vehicle **Reg. No.KAL 306** which had a defective window. In the course of driving this motor vehicle, the window glass shattered and the respondent sustained some cuts on the hand for which he was treated at Provincial General Hospital Nakuru.

The respondent was later examined by **Dr. Omuyoma and Dr. Karania**. The former gave evidence in court and produced a medical report prepared in this respect for the injuries sustained by the respondent for which he classified as harm. This witness was paid kshs.2, 500/= for the examination and preparation of the said report

The report by **Dr. Karania** was probably produced by consent and he classified the injuries suffered by the respondent as a temporary disability for which the respondent was given five days off duty. On the part of the defendant, liability was denied in total and in the alternative, the appellant pleaded that the respondent was injured due to his own negligence and his own failure to observe due care and attention in the course of his duties amongst other particulars of negligence.

The appellant also relied on the evidence of one **Joseph Ongare Apondi,[DW1]** their Transport Manager who testified that on the material day the respondent was driving motor vehicle **Reg. No.KAL 466K and not KAL 306Q**. He produced duty registers to show that the respondent was not assigned motor vehicle **KAL 306Q** nor was the respondent injured on the material day as the register of persons

injured while on duty did not indicate the respondent's name. The trial court however made a finding that the said registers were not prepared by this particular witness.

After the conclusion of the case the trial court evaluated the evidence and in its judgment found that the appellant was liable for the injuries suffered by the respondent. Liability was apportioned at **70%** to be borne by the appellant and **30%** to be borne by the respondent and the respondent was awarded a total sum of kshs.64, 750/= with costs and interest.

The appellant being dissatisfied with the said judgment appealed and relied on the following grounds of appeal to wit:

**1. THAT the learned magistrate fundamentally erred in**

**Law and in fact in finding that the respondent herein Patrick Wafula Mudogo was on the alleged date injured and at the alleged site especially against the back ground of the fact that the appellant denied the occurrence of the accident and adduced evidence excluding the alleged accident at its premise.**

**2. THAT the learned magistrate erred in law and in fact in**

**Finding that the respondent had proved his case against the appellants to the required standards without justifying such finding by factual findings or applying the relevant law in negligence and especially no negligence was factually established by the respondent.**

**3. THAT in any even the learned trial magistrate erred in**

**Fact in holding that the respondent had proved negligence against the appellant at 70:30 when the evidence adduced was contrary to such findings.**

**4. THAT the learned trial magistrate erred and in fact to**

**Evaluate the evidence adduced in court thus arriving at findings not consistent with evidence adduced.**

**5. THAT the learned trial magistrate erred in law and in**

**Fact by not giving reasons for holding the Appellant liable to the extent decree and in failing to otherwise conform to order XX of the Civil Procedure Rules.**

In further arguments, Counsel for the appellant submitted that, the judgment of the trial court failed to comply with the provisions of **Order 20 rule 4 of the Civil Procedure Rules**. The judgment does not contain the points for determination and the reasons thereto. He further submitted that the pleadings by the respondent did not disclose the occurrence of the accident and thus the respondent's evidence was not supported by the pleadings. Counsel further argued that since the respondent admitted in his evidence that he did not need protective clothing, the claim for negligence cannot be sustainable because there was no reasonable foresee ability of the damage or injury that the respondent claimed to have suffered. Counsel relied on the by **Text by Peter Cane 4<sup>th</sup> Edition Accidents, Compensation and the Law**. In that text, the Learned Authors have expressed the following opinion;

**Foresee ability** means:

***“Other events may be such remote possibilities that nobody would adjust his conduct because of them – for instance, that an earthquake may occur in this country.”***

He also relied on the decision of the case of **David Goth Mugunga vs. Mugomoini Estate HCCC Nai. No.2366 of 1989** in which the court held that a defendant cannot be liable for acts of robbers even if the

employee had no defence. He urged this court to find that the appellant had no fault and was not liable for criminal acts.

This appeal was opposed by counsel for the respondent who supported the decision by the trial court. The respondent gave evidence of how he was given a motor vehicle with a defective window and in the course of driving the glass shattered and injured his hand. The respondent was in the course of his duty and the evidence by the appellant was properly rejected by the trial court as lacking in credibility. There was evidence to show from the muster roll that the respondent was on duty and besides, there were glaring contradictions in the defence evidence as well as in the statement of defence and therefore the appellant was merely abrogating and reprobating. It is clear that the respondent was not claiming damages due to criminal acts and there is nowhere even in the defence the allegation of criminal acts is pleaded.

This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent decision, while bearing in mind that it never saw the witnesses testify and make due allowance for that. The principles to be followed by the first appellate court have been set out in several decisions and one such leading authority is the case of **Peter vs. Sundy (1958) E.A. page 429:**

**“It is a strong thing for an appellate court to defer from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”**

The principle issue for determination in this appeal is whether the respondent proved his case to the required standard. The contention that the judgment of the trial court does not comply with the provisions of Order 20 rule 4 is not of a major significance as this court is mandated to re-write the judgment.

On the issue of liability, the trial court found that both parties were liable and apportioned liability at **70:30**. The issue for determination therefore is whether there was evidence to support this finding. From the respondent’s pleadings, he blamed the appellant for providing unsafe system of work. During the hearing the respondent testified that the unsafe system of work was a defective motor vehicle whose defects he had reported to the supervisor. The respondent was able to prove that he was an employee of the appellant at the material time, and the muster roll produced by the appellant in their defence showed that the respondent was on duty on the material day. The only variance is the contention by the appellant’s witness who said that the respondent was driving a different motor vehicle. The trial court that heard the witnesses believed the evidence by the respondent.

This being an appellate court, it is undesirable to interfere with the trial court’s discretion in assessing general damages unless it can be proved that the said trial court proceeded on the wrong principles of the law or that it awarded damages that are inordinately high or inordinately low as to amount to an entirely wrong estimate for the amount awarded. ***(See the case of Kitori Vs Coastal Bottlers ltd [1985] KLR 56 and Hassan vs. Nathan Mwangi Kamau Transporters.)***

I have considered all the submissions and proceedings before the trial court, and having analyzed the entire evidence, I find that this appeal lacks merit. The respondent was able to prove that the injury that he sustained occurred while in the course of employment and the appellant was negligent for failing to repair the motor vehicle. With respect I disagree with the submissions by counsel for the appellant that the accident was caused by acts of criminals.

This is not borne out of the evidence by the respondent or even the defence. During cross examination the respondent denied that he was a victim of robbery. It is only indicated in the medical report by **Dr. Karani** who did not testify on his findings which I would consider hearsay evidence. The appellant in their defence did not adduce this line of evidence.

I am satisfied that the trial court arrived at the correct decision. Motor vehicle windows do not just shatter, if they are in good serviceable condition and they cannot be compared with an earthquake or any other unforeseeable incident. The respondent testified that he had reported the defects on the window to the supervisor and the trial court made a finding of contributory negligence, and rightly so, for reasons that the respondent too should have acted reasonably and by agreeing to drive a defective motor vehicle, he had to share the liability. On the other hand the appellant should not also have allowed the motor vehicle to be used without attending to the defect and since they have a higher duty of care as employers I find the assessment of contribution of liability of 70% reasonable.

On the issue of special damages the same was proved by **Dr. Omuyoma** who examined the respondent and prepared the medical report and charged kshs.2, 500/= which was the claim for special damages.

In this regard, therefore, I find no merit in this appeal. The decision by the trial court is hereby upheld and the appeal is dismissed with costs to the respondent.

Judgment read and signed on 25th day of May, 2007.

**M. KOOME**

**JUDGE**