



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL 171 OF 2001

ERASTUS GITONGA PLAINTIFF

VERSUS

KENYA NUT CO. LTD DEFENDANT

J U D G M E N T

1. Erastus Gitonga, the Plaintiff filed this suit on 18.9.2001 and in it he was seeking “special and general damages for pain and suffering, loss of amenities and costs of future medical attention” as well as costs for injuries that he sustained as result of an accident on 2.10.1998 along the Meru-Chuka road.

2. The fact that the accident occurred and involved the Plaintiff who was at the material time and place riding motor-cycle Registration Number KAH 711 T is not denied in the Defendant’s Statement of Defence dated 5.2.2002. The fact that the motor-cycle belonged to the Defendant is also not in issue. What is in issue is the exact cause of the accident. In the Plaintiff at paragraph 5, the Plaintiff alleges that the Defendant failed to “**provide [him] with a safe and roadworthy motor bike**” and acted negligently thereby. The particulars of negligence as set out are that the Defendant so acted by;

“(i) **Failing to warn the Plaintiff adequately of the danger.**

(ii) **Providing the Plaintiff with a defective and an un road worthy motor bike.**

(iii) **Failing to adequately service and repair motor bike KAH 711T before allowing the Plaintiff to use it.**

(iv) **Failing to ensure that the said motor bike was in good working condition and fit to be used on the road”.**

3. The Defendant on the other hand at paragraph 5 of the Statement of Defence aforesaid avers that on the contrary the accident was caused by the sole negligence of the Plaintiff and the particulars at paragraph 5 of the Defence are;

“(i) **Riding at an excessive, reckless and dangerous speed in the circumstances.**

(ii) **Failing to adhere to the Highway Code and Regulations.**

(iii) **Failing to have regard to other road users**

(iv) **Failing to so ride motor cycle KAH 711T so as to avoid hitting motor vehicle KUJ 469.**

(v) **Otherwise riding without due care and attention.**

4. When he testified before court, the Plaintiff said that the motor cycle that he was riding belonged to his employer and that on the material day, he rode it towards Meru South although he knew that it was faulty. He did so because the Defendant's branch manager at Meru, one P.K. Njagi, had insisted on sending him to work on the faulty motor-cycle, and so he did. As he was riding it at Mwichiune, he tried to apply brakes as he approached a motor-vehicle turning onto a side road but the brakes failed and he crashed into the vehicle and sustained the following injuries:-

- (a) fracture of the femur
- (b) fracture of the left hip joint
- (c) fracture of the left wrist
- (d) cut on the right ring finger.

5. The Plaintiff added that he was treated at Nkubu and then Chogoria Hospital and after his discharge, returned to work but his services were terminated by the Defendant after he filed this suit.

6. As for expenses incurred, the Plaintiff produced

- (a) a receipt for Ksh.2000/- (P.Exh.8) which he paid one Dr. Warui for a medical report.

7. The Plaintiff denied that he was riding the motor-cycle at high speed and in cross-examination he stated that in the motor-cycle's "**vehicle history card**" it was indicated that the subject motor cycle had "**no pre-accident defects noted.**"

8. The Plaintiff called Dr. Stephen Warui who had examined him on 20.6.2002 and who produced P.Exh.7 (medical report) and P.Exh.8, (the receipt for payment made to him) and significantly, apart from pain on the left leg during the cold season or when carrying heavy objects, the Plaintiff was found to have arthritis of the left leg and which required use of drugs from time to time.

9. The Defendant's witness was one Fabian Kaunga Imunya, its Branch Manager at Meru. His evidence emanated from the records of the Defendant as he had no personal knowledge of the events leading to this suit. He produced inter-alia, a Certificate of Inspection and Test of Vehicle (D.Exh.2) showing that although the subject motor-cycle was involved in an accident as alleged, when it was inspected on 7.10.1998, it did not have a faulty braking system and that the front and rear brakes were effective. Further that the motor-cycle had no prior accident defects. He denied any negligence on the part of the Defendant as alleged, or at all.

10. I have read the Submissions by both advocates and I have taken them on board but i should start by saying that the only issue to determine from the outset is whether the Defendant as is alleged in paragraph 5 of the Plaint acted negligently. The proof of negligence on its part if at all lies squarely with the Plaintiff. The Plaintiff pleaded that the motor cycle he was riding was not "**safe**" "**roadworthy,**" "**defective,**" not in good working condition and unfit to be used on the road. In a bid to prove these matters, the Plaintiff has said that the motor-cycle had faulty brakes and that he informed one P.K. Njagi aforesaid about it but the latter "**insisted**" that the Plaintiff should ride the same. For my part this evidence would have received more serious attention but not in the face of D.Exh.2. That document produced by the Defendant completely whitewashed the Plaintiff's evidence as to the condition of the motor-cycle. The same was inspected on 7.10.1998 at 1.00 p.m. within Meru Police Station and the braking system was found to be effective and yet other damaged parts were clearly pointed out e.g. the clutch handle, steering, mirror, headlamp, parking lights, front-wheel rim and spokes. In the end, the document notes that the motor-cycle had "**no pre-accident defects noted.**" Spirited attempts by the

Plaintiff's counsel to discredit this document in my view did not succeed and I take it that the Plaintiff's evidence that the brakes failed was an afterthought, not specifically pleaded and in the face of D.Exh.2 cannot stand as proof of negligence on the part of the Defendant.

11. I should say this to reinforce the above point; the Plaintiff averred that the motor-cycle was not repaired prior to the accident. D.Exh.1 is the vehicle history card for the motor cycle and I note that on 12.9.1998, some 2-3 weeks before the accident, the motor-cycle was repaired and the items so repaired are listed as "**F sprocket chain, side mirror, flasher unit.**"

12. Its history of repairs goes way back to 22.2.1997 with thirteen (13) other repair dates in between. I cannot in the face of such evidence hold as the Plaintiff says that the Defendant was negligent in any way. It is stated in Winfield vs Jolowicz on Tort, 16th ed. 2002 and quoting Erle CJ in Scott vs London and St. Katherine Dock Co. 1865 3 Ha C 596 that:

"There must be reasonable evidence of negligence...." if negligence should attach to a Defendant.

13. In this case, there is no reasonable evidence that the Defendant was negligent and the Plaintiff's bare statements cannot by themselves be said to be proof of such negligence. On the other hand, the Defendant has powerfully shown that it was not negligent hence my firm holding above.

14. Without proof of negligence and since the injuries sustained by the Plaintiff are not denied, I see no reason why I should go on to other issues raised in the suit. However, suppose I am wrong and had found for the Plaintiff and the only issue left would have been quantum? In that case and based on the injuries sustained by the Plaintiff which are set out above, then I would have awarded Ksh.500,000/- based on the authorities cited by counsel for the Plaintiff i.e.

(a) Atieno Abundo vs Michael Akello HCCC 558/1988 – Ksh.400,000/- for a fractured femur and cuts. (Mbogholi J.)

(b) Elias Murang'a Ngari vs B.A.T. (K) Ltd HCCC 1689/1992 where Mbogholi J. awarded Ksh.300,000/- in 1993 for fractures to the carpal bone and cuts to the head.

15. I would have enhanced the learned Judge's awards for reasons of inflation and changed circumstances of life.

16. However, because I do not think that the Plaintiff has proved his case on a balance of probabilities, I would instead order as I hereby do that the suit herein be dismissed with costs to the Defendant.

17. Orders accordingly.

Dated, signed and delivered in open court at Meru this 28th . Day of June 2007.

ISAAC LENAOLA

JUDGE

In the presence

Mrs Kaume Advocate for the plaintiff

Mr. Mwenda Advocate for the Defendant

ISAAC LENAOLA

JUDGE