REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 93 OF 1996

JOHN BILL KAMAU ……..1ST APPELLANT

EASTERN RIFT SAW MILLS LTD ……...2ND APPELLANT

VERSUS

STEPHEN MWAURA MBUGUA …….RESPONDENT

JUDGMENT

This is an appeal from the Judgment of the lower court by which the Respondent was awarded general damages of Kshs. 120,000/= and special damages of Kshs. 1,000/=. The matters leading to the appeal are as follows:

The Respondent who was an employee of the 2nd Appellant was working with his colleagues when he was hit by a tree stump which was being pulled by a tractor which was being driven by the 1st Appellant. The Respondent claimed in his Plaint that the 2nd Defendant was the registered owner of the offending tractor.

The Appellants were aggrieved by the decision of the lower court and have appealed to this court seeking to have the same set aside or for a review or revision of the award of damages by the said court. The appeal is based on 12 grounds which in my view are frivolous.

From the record of the lower court, it is obvious that the 2nd Appellant was the owner of the offending tractor. It was the employer of the Respondent and the 1st Appellant and had sent them to work at the stated location. The 1st Appellant who occasioned the loss leading to the claim in the lower court stated on cross examination that he was a supervisor and a driver of the Respondent. He also said that he drove the 2nd Defendant's tractors with its consent. It is therefore obvious that by virtue of his employment he had actual or ostensible authority to drive the 2nd Appellant's tractors. Being such an employee, the 2nd Appellant is vicariously liable for his negligent acts.

As was pointed out in **Mwona Ndoo t/a Ngomeni Bus Service v. Kakuzi Ltd.** (1982-88) 1KAR 523, it is the responsibility of an employer to prove that his servant was acting outside his authority to absolve the employer from being liable for the negligent acts of the employee committed by the employee in the course of his employment. Here, the 1st Appellant was an employee of the 2nd Appellant. The 1st Appellant admitted that he drove – atleast sometimes, the 2nd Appellant's tractors with the 2nd Appellant's consent. That is, in my view, sufficient to constitute the 2nd Appellant vicariously liable for the negligent driving of the 1st Appellant.

I did not appear to understand Mr. Mahida's argument on foreseability. Here was the 2nd Appellant's supervisor who knew that he was not licenced to drive tractors but went ahead to do so. He acted recklessly by all standards and that is sufficient to constitute negligence. Whether he saw the stump or not is neither here nor there. There can also not be a question for contribution in this case. The Respondent did not do anything to lead to his injury and only the Appellants are liable for his injuries.

As to damages, I was not shown that the Learned Trial Magistrate applied wrong principles in reaching the decision that she did. I have looked at the nature of injuries sustained by the Respondent and the authorities supplied to the lower court and I am satisfied that the decision of the lower court on that question was fair and proper in the circumstances of this case.

I, therefore, dismiss this appeal with costs. The Respondent will also have the costs of the lower court.

Dated and Delivered at Nakuru this 7th day of May, 2003.

ALNASHIR VISRAM

JUDGE