

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 235 OF 2001

SASINI TEA & COFFEE LTD.....1ST APPELLANT

MR. KANYERI..... 2ND APPELLANT

VERSUS

DANIEL KARIUKI KISERESPONDENT

JUDGMENT

This is a decision against the Judgment of the SRM Thika in SRM CC Civil Suit 4065 of 2000 in which he found the Respondent liable for the Appellant's injuries and awarded a sum of Shs.250,000/= by way of general damages.

He found the driver of the truck liable in negligence as he was driving at a high speed. He rejected the defence that the Respondent rode the tractor without the consent of the driver. The Magistrate found that the Plaintiff was on duty at the time of the accident. In its Defence the Defendant pleaded that the accident was wholly or substantially caused by the Plaintiff's own negligence, as particularized in the Plaintiff.

Mr. Mburu for the Respondent submitted that failure to file a reply amounted to admission of liability. He relied on the case of Mount Elgon Hardware versus United Millers Ltd C.A 19 of 1996.

In that case the Court of Appeal held the Learned Judge was perfectly entitled to conclude that the Appellant had admitted the negligence alleged in the defence in term of O.VI. Rule 9(1) of the Civil Procedure Rule In Elijah Roimen V. Stephen Cawa H.C.A. 748 of 2002 I held that a Reply to Defence only necessary where it was intended to confess and avoid an allegation. Under O.6 rule 10 it is clear that there if no reply to a defence is filed there is a jointer of issue on that defence.

The Magistrate found that the Respondent was traveling in a the tractor and found that the Appellant's driver was speeding leading to the accident. The Plaintiff's evidence was that he was hit by a coffee tree, which threw him from the tractor. The Magistrate accepted this evidence. He also accepted that Respondent had the consent of the Appellant's driver to be on the Tractor. In this evidence Charles Njoroge an estate Manager said that Tractors were used occasionally to carry people. There was no evidence of any negligence on the part of the Respondents adduced by the Appellant and the Magistrate rejected the defence that the Respondent drove without the consent of the owner. The particulars of negligence by the Respondent not having been proved the Magistrate was correct in making no finding in that respect.

In the result I uphold the decision of the Magistrate and dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 21st day of November, 2003

P.J. RANSLEY

JUDGE