



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO 61 OF 2011

SIGEI KIPKOECH REUBEN.....APPELLANT

VERSUS

MULITIPLE HAULIERS LIMITED.....RESPONDENT

[An appeal from the judgment and decree of in original Webuye SRMCC NO.104 of 2009 delivered on 2.06.2011 by Hon Obwewa RM]

JUDGMENT

The appellant Sigei Kipkoech Reuben was the plaintiff in magistrate court in Webuye SPMCC 104 of 2009 sued the Defendant/Respondent Multiple Hauliers E.A. Limited by plaint dated 31.10.2008, seeking general damages for pain and suffering from injuries sustained in a road traffic accident involving motor vehicle registration number KAM 142P/ZC 0513 Mercedes Benz.

The plaintiff claim is that he was employed by the Defendant in 2004 as a driver and on or about 26/6/2008 while the plaintiff was driving from Malaba to Mombasa when at Chimoi area, he had an accident when the brakes of the defendant motor vehicle registration number KAM 142P/ZC 0513 failed, that he was moving down the steep and applied brakes but the same became loose causing the motor vehicle to move at high speed and overturned and he was thrown out of the motor vehicle. As a result of the accident he sustained soft tissue injuries on his body and 4 teeth came off.

The Respondent/Defendant entered appearance and subsequently filed its statement of defence dated 15th April 2009 denying the Plaintiff's claim and setting out particulars of negligence on part of the plaintiff under paragraph 7 of statement of defence.

After full hearing in which the Plaintiff called two (2) witnesses and the Defendant one witness, the learned trial magistrate by judgement dated 2.6.2010 dismissed the plaintiff suit with costs.

Aggrieved by the decision of the trial court the appellant filed this appeal on the following grounds;

i. That the learned trial magistrate erred in law and fact when he failed to find that the duty to keep motor vehicle in question in good mechanical condition lies with the Respondent.

ii. That learned trial magistrate erred in law and fact in failing to find that the appellant had proved his case on balance of probability.

Briefly the evidence before the trial court was that PW1, the plaintiff testified that he was working for the defendant and that on 26.6.2008 he was driving from Malaba to Mombasa and while at Chimoi along Malaba – Eldoret road he was involved in an accident when the brakes of defendants motor vehicle failed while he was moving down the steep and he applied brakes but the same became loose causing the motor vehicle to move at a high speed and overturned and he was thereafter thrown out of the motor vehicle. He later found himself at Webuye District Hospital. He testified that he was injured on back head, chest and back and he later on reported the matter to Turbo Police Station and was issued with a P3 form. He also testified that he had reported severally to the Defendant that the Motor Vehicle had breaking system problem.

Pw2 Pc Geoffrey Mbevi testified that the accident occurred on 27/6/2008 along Eldoret-Webuye Road involving motor vehicle registration number KAM 142P/ZC 0513 Mercedes Benz. He testified that the recommendation by investigating officer was that the file be closed as the Motor Vehicle developed mechanical problem and that was the cause of the accident.

On defence hearing Dw1 Peter Agumba testified and admitted that the plaintiff was their employee as a driver and driving motor vehicle registration number KAM 142P/ZC 0513 was involved in an accident on 26/6/2008. He testified that the Motor vehicle was regularly served

and produced record of service.

By consent of the parties and court directions, this appeal was canvassed by way of written submissions. Mr. Omundi for the appellant submitted that the duty to keep the motor vehicle in good mechanical condition lies with owner and in this case the respondent relying on decision in *Ima Hauliers Limited Vs Mohammed Nyongesa Murende Civil Appeal No.129 of 2009*.

He submitted that the respondent did not tender any evidence to show that the braking system of the vehicle was regularly serviced. He submitted that the decision of trial court was wrong as the driver is under no obligation to report a defect but rather owner is under obligation to ensure that the vehicle is in good condition.

He submitted that the court failed to consider evidence of Pw2 who stated that investigation into accident reveal the motor vehicle developed a mechanical problem leading to the accident and prayed that the appeal be allowed.

Mr. Kimani for the respondent submitted that the motor vehicle was mechanically sound at the time of the accident and appellant witness Pw2 police officer confirmed the same and Pw2 also confirmed on cross examination that the breaking system was effective.

He submitted that Dw1 testified that the motor vehicle was regularly serviced and produced record of service. He submitted that Respondent was not in breach of duty of care as motor vehicle was regularly serviced relying on decision in *Statpack Industries Vs James Mbithi Munyao [2005] eKLR*. He submitted that the Respondent was not to be blamed at all for the accident and the appellant did not prove. His case on balance of probability and the finding should not be disturbed and the appeal herein should be dismissed.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of *Selle Vs Associated Motor Boat Company Ltd [1968] EA 123* where Sir Clement De le Stang stated that:

“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hamed Sarif Vs Ali Mohammed Solan [1955] 22 EACA 270).

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal is whether the Defendant/Respondent was liable for causing the accident.

To determine liability it is imperative we set out how the accident occurred, From evidence in record the plaintiff in his plaintiff/appellant narrated how the accident as follows;

“...that on 26.6.2008 he was driving from Malaba to Mombasa and while at Chimoi he was involved in an accident when the brakes of defendants motor vehicle failed while he was moving down the steep and he applied brakes but the same became loose causing the motor vehicle to move at a high speed and overturned and he was thereafter thrown out of the motor vehicle. He later found himself at Webuye District Hospital”.

The plaintiff in his evidence also submitted that he had made a report on defects of braking system of the motor vehicle to the Defendant prior to the accident however he did not produce any evidence made for the repair of the same.

The Defendant on other hand called one witness who stated the motor vehicle was well maintained and that the motor vehicle and he also produced certificate of examination and test of vehicle dated 26/6/2008 that indicated under remarks that no pre accident defects noted. From above evidence it is clear that no evidence was tendered by plaintiff to prove that he notified the defendant about the defective braking system of suit motor vehicle and but the defendant on the other hand produced evidence to show that the motor vehicle had sound mechanical system prior to the accident through certificate of examination and test of vehicle.

From the evidence on record the accident was self-involving as the appellant did not demonstrate before the trial court that the vehicle had defect with its braking system to amount to breach of duty of care and negligence on part of the respondent.

In *Simon Mumo Malonza Vs British American Tobacco(K) LTD[2008] eKLR* where the court held;

“ where during the trial, the appellant was the only witness who testified and explained how he crashed when riding a motor bicycle from Suba to Migori and blamed his employer as the accident was caused by a mechanical defect, the trial Magistrate dismissed the claim on the ground that no liability had been established, the appellate court in dismissing his appeal concluded that the evidence adduced tended to prove that the accident was probably caused by the appellant’s own negligence”.

In the instant case the appellant was driver of the suit motor vehicle and it was incumbent upon him to prove the allegations raised against the respondent which he failed.

Therefore, having re-evaluated the evidence on record and considering the submissions by both counsels, I have come to the conclusion that the appellant did not discharge the burden of proving on a balance of probability, that the respondent was negligent or liable for the said accident.

The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed with costs.

It is so decided.

Dated and Delivered at Bungoma this 5th day of February, 2020.

S.N. RIECHI

JUDGE