



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. 151 OF 2017

ISSA TRANSPORTERS LIMITEDAPPELLANT

VERSUS

CHENGO PANGA TSAMA.....RESPONDENT

(Being an Appeal from the Judgment and decree of the Chief Magistrate's Court at Mombasa by Hon. Eric Mutunga SRM made on 24th July 2017 at Mombasa CMMCC NO. 346 OF 2012)

JUDGMENT

1. This is an appeal arising out of a judgment of the Senior Resident Magistrate, Honourable ERIC MUTUNGA delivered on 24th July, 2017 in Mombasa vide CMCC No 340 of 2012, whereby the judgment was found in favour of the plaintiff (the respondent herein)

2. The cause of action in this matter arose on 10th May, 2009 or thereabout whereby the respondent, was on an express or implied term of contract of employment by the Appellant in the above motor vehicle registration number KAY 054 Q/ZC, 3968, SCANIA SEMI TRAILER as a turn boy. That the said motor vehicle, while being driven along the Eldolet- Nakuru road a Margaret Kenyatta farm area, was so negligently and carelessly driven by the Appellant's driver who was the duly authorized driver that he lost control and the said motor vehicle crashed and over turned, a consequence of which the Respondent sustained severe injuries for which he hold the appellant vicariously liable for.

3. The respondent, vide an amended plaint filed on 20th November,2012 and claimed for general and special damages, averring that the defendant was vicariously liable, in breach of care and or negligence in the manner in which he managed, drove or controlled the said vehicle

- (a) The defendant's driver drove to the motor vehicle without care and attention;
- (b) Failing to take any precautions or any adequate precautions for the safety of the plaintiff while he was engaged upon his duties;
- (c) Exposing the plaintiff to the risk of damage or injury of which they knew or ought to have known;
- (d) Failing to maintain a proper and safe work system;
- (e) Failing to provide any or any sufficient supervision;
- (f) Using a system of work that was inherently dangerous;

- (g) Failing to provide or maintain adequate or sustainable plant tackle and appliances to enable the plaintiff carry out the work safely;
- (h) Failing to take any measures to prevent the plaintiff being involved in an accident due to careless driving while he was in the cause of his duties;
- (i) Failing to provide and maintain a safe and proper system of work or to instruct their workmen including the plaintiff to follow the system;
- (j) Failing to provide any or any adequate safety apparels;
- (k) Allowing the driver to negligently and carelessly drive the motor vehicle.

4. The 1st appellant filed a statement of defence on 15th April, 2012 in which they denied all the averments by the respondents in their amended plaint except for the respondent's address and who he is. They claimed that if at all the accident, which is denied, happened, then the same was as a result of negligence on the part of the respondent;

- (a) Attempting to disembark from the said motor vehicle when it was not safe to do so;
- (b) Failure to mind his safety while aboard on the motor vehicle;
- (c) Failure to observe traffic rules;
- (d) Failing to adhere to the safety regulations while on board of the motor vehicle;
- (d) Boarding the motor vehicle without consent/authority of the defendant.

The 2nd appellant did not enter appearance nor file a defence. A request for judgment was made and an interlocutory judgment entered on 22nd January 2013. The matter proceeded for hearing and in his judgment delivered on 24th July, 2017 the trial magistrate found that the respondent (plaintiff) had proved his case on the set standards in the civil matters and proceeded to award him;

- (a) liability apportioned at 100% against the appellant
- (b) General damages Ksh 350,000.00
- (c) Special damages Ksh 2000/=
- (d) Costs and interest of the suit at court's rates

5. The appellant's found the said award excessive in relation to the nature of injuries that the Respondent suffered. And being aggrieved by the same he filed an appeal in which he cited for (4) grounds in their amended memorandum of appeal as follows;

- (a) The learned magistrate erred in law and in fact by holding the Defendant as being 100% vicariously liable for the accident;
- (b) The learned magistrate erred in law and in fact in failing to hold that the case had not been established against the 1st Defendant not being the owner of the accident vehicle and had nothing to do with the plaintiff's employment contract;
- (c) The learned magistrate erred in law and in fact by awarding Ksh 350,000 as general damages;
- (d) The learned magistrate erred in law and in fact in failing to consider all the evidence and

submissions on record;

6. After filing a record of appeal and the appeal being admitted on 21st March, 2018, the same was set down for hearing on 22nd November, 2018 counsel for both parties, having been directed to file and serve their respective submissions, appeared before court for highlighting of the same.

APPELLANTS SUBMISSIONS

7. In arguing the appeal, the appellant's counsel has submitted that grounds 1 and 2 of the Amended memorandum of appeal is on whether the appellant is vicariously liable on acts and omission of the appellant. Mr Mogaka submitted that in the Record of Appeal. The particulars of the breach of duty of case and/or negligence of the Defendant's record in the Amended plaint and that the judgment as at page 33 of the Record of appeal is sought for against the Defendant and it is not indicated whether it is the 1st or 2nd defendant to the suit and as per the amended plaint.

8. Also, the appellant's counsel, submitted that according to the evidence that was adduced by the Respondent (plaintiff's then) Issa Transporters was blamed and a copy of ownership records for motor vehicle number KAY 054Q AND FOR Trailer ZC 3968, was produced, clearly indicating that the registered owner for both vehicles was JAMA HOHAMED with the 2nd Defendant being the driver at the time of the accident. That ISSA TRANSPORTERS only came on record after filing their defence upon knowledge of the interlocutory judgment.

9. Further, the appellant's counsel submitted that the learned magistrate in the entire judgment misapprehended that there was only one party, the 1st Defendant, and the issue of ownership of the vehicle. The trial magistrate never addressed the issue of whether or not the 2nd Defendant was servant or agent of the 1st Defendant. As a result, the plaintiff failed to establish the doctrine of vicarious liability against the 1st Defendant/Appellant.

10. The Appellant's counsel submitted that the trial magistrate disregarded their authority on quantum when the Respondent, according to the doctor's report suffered injuries which only caused 50% permanent partial disability.

RESPONDENT'S SUBMISSIONS

11. The Respondent's counsel on the other side submitted that in sitting on an appeal in a matter that it did not have the privilege of seeing the witnesses' demeanor or hearing their evidence, the court has to be slow in interfering with the judgment of the trial court unless it is shown that there was misapprehension of the law and or facts.

12. According to the respondents counsel, the trial magistrate, in arriving at his decision, was guided by the evidence and facts on record which were largely uncontroverted as the appellant did not testify. He pointed out the all the issues raised by the appellant's counsel in his submissions were never raised in the defence and or memorandum of appeal. As such, he is limited just like themselves to their pleadings.

13. On the issue of vicarious liability, the respondent's counsel submitted that the respondent in his amended plaint, pleaded vicarious liability on the part of the Appellant (Defendant) and the plural is only used with regard to the particulars of breach of duty of care and particulars of negligence. He submitted that the police abstract produced as exhibit P2 clearly indicated that the Appellant, Issa Transporters Ltd as the owner of the motor vehicle and had the vicarious liability over the tort for the said vehicle's driver at the time of the accident.

14. He also submitted that there was uncontroverted evidence that the Respondent was in the course of his employment working as a turn boy and was advancing the appellant's interest and or transport work, so that the appellant, having withheld its evidence from court left the trial magistrate with no choice but to find for the respondent. They can therefore not challenge the Respondent's evidence on

appeal where the Respondent has no chance to question the new evidence.

15. On the issue of the award being inordinately high, it is the submission by the Respondent's counsel that the trial magistrate took into consideration a number of factors including inflation in arriving at the award which is moderate and should not be interfered with.

16. It is trite law that for a first appeal, the appellate court has to reconsider the evidence that is on record before the trial court, re-evaluate it and draw its own conclusion. But, it has bear in mind unlike that the trial court, it neither saw nor heard the witnesses to be able to assess the demeanor and should therefore make due allowances in that respect.

Like in many other cases, this principle was reiterated in the case of *MWANA SOKONI VRS KENYA BUS SERVICES LTD* where the court adduced that'

“An appellate court will normally not interfere with the trial court's findings of fact unless it is based on no evidence, or on a misapprehension of evidence, or if the trial court is shown demonstrably to have acted on wrong principles in reaching that finding.”

17. The Respondents adduced evidence of two witnesses, being the plaintiff (Respondents) and Pw2, Dr. AJONI ADEDE. The Respondent's evidence was that he was involved in a road traffic accident on 10.5.2005 when the motor vehicle registration No. KAY 024 R Scania lorry Trailer No ZC 3968 he was travelling in lost control and overturned between Nakuru and Eldoret road. He was treated at Nakuru Provincial Hospital. The Respondent produced the treatment notes, and P2 respectively. He stated that he was injured on the left hand and head, with the head sustaining a cut wound. He said that the vehicle is owned by Issa Transporters but registered owner is Mohamed Juma, who he thought was a co-owner then. He also said that the luggage belonged to Issa Transporters Ltd. He also produced a report by Dr. Ndegwa and receipt or it for Ksh 1,500/= as Exhibits P3 and P4 and copy of records and its receipt of Ksh 2,400/= as Exhibits P5 and P6. He further produced a demand letter the advocate wrote to Issa Transporters dated 17.12.2011 as Exhibit P7 and identified the report for Dr. Adede.

18. Pw2, Dr. Adede testified that he examined Chengo Panga, the Respondent on 25.8.2014 who had presented to him alleging to have been involved in a road traffic accident on 10.5.2015. He found the Respondents had suffered a fracture of the left radius fore arm bone and a deep cut on the fore head, for which he had been treated at Nakuru where he was X-rayed, plastered and stitched. Pw2 noted that this was after 5 years and 3 months and the left forearm was deformed and left wrist stiff. He also noted scars on his forehead. He then read through the medical notes and X-ray report and prepared a report which he produced as Exhibit P8 and the receipt he issued for payment of Ksh 200/= as Exhibit P9. He further produced the receipt for Ksh 300/= as fees for court attendance as Exhibit P910. He concluded by saying that according to Dr. Ndegwa's report, the plaintiff was found to have suffered 5% permanent disability.

19. The 1st defendant (appellant) despite filing a defence and list of documents to include written statements of the driver, never called any witnesses to testify in support of their case in court. They instead chose to file written submissions.

The trial magistrate in his judgment delivered on 24th July, 2017 entered judgment in favour of the Respondent and awarded him;

- (a) General damages of Ksh 350,000/=;
- (b) Special damages of Ksh 2000/=;
- (c) Costs and interest of the suit at court's rates.

20. In considering the appeal, I have examined the amended memorandum grounds of appeal in line with the pleading, proceedings and judgment of the trial magistrate in the lower court, the entire

record of appeal, parties submissions, together with the cited authorities and the law relied upon in support of their different stand points. I find that three issues stand out for determination by this court:

(a) Whether the 1st defendant is a proper party to these proceedings and whether vicarious liability was established

(b) Whether the evidence that was tendered supported the pleadings;

(c) Whether the trial Senior Resident Magistrate reached an erroneous finding for the Respondent in the award he arrived at for him.

21. On the first issue of whether the 1st Defendant is a proper party to these proceedings, and vicarious liability has been established, I am guided by the fact that before the close of proceedings, the 1st Defendant intended to call the driver of the alleged motor vehicle on the material day of the accident, but this was not done. Instead the Defendants chose to make final submissions and not tender evidence in court. It will be noted that both the Appellant and Respondent produced copies of records in their list of documents indicating that 2nd Defendant as the owner of motor vehicle registration No. KAY 055Q ZC 3968. I do not find this to be a coincidence.

22. Also, the police abstract produced as Exhibit P2 indicates the owner of the said motor vehicle to be the 1st Defendant. Of worth noting is that while the appellants (defendant) filed a defence to the plaint on 13th April, 2012, they did not file an amended defence when the respondent filed an amended plaint on 20.11.2012 in which the 2nd defendant was joined as a party to address the issues they are now raising in submissions with regard to who is the registered and or beneficial owner of the suit motor vehicle and who is the driver.

23. Furthermore, the appellants did not challenge or call any evidence to controvert the Respondent's evidence.

In the case of **MARY NJERI MURIGI VRS PETER MACHARIA & ANOTHER (2016) e KLR**, Aburili, J, held as follows ;

“ In addition, pleadings, answer in cross examination and or submissions do not amount to evidence or defence. It therefore follows that however well- choreographed the submissions are and however serious the cross examination was and however fervent and vehement the statement of defence is, are not evidence”.

24. I therefore find and hold that the appellants are the proper parties to have been sued in the pleadings herein. As a result thereof , grounds 1, 2 and 4 of the amended memorandum of appeal fail and issues numbers (1) and (2) as framed herein confirmed in the positive.

25. The third issue is whether the trial magistrate arrived at an erroneous finding for the Respondent in granting the said award. Before the lower court, the appellants counsel submitted that a quantum of Ksh 200,000/= be awarded as general damages plus costs and interest. He relied on the case of **CHRISTINE WANGURU VERSUS STEPHEN NGIGI KABAI (NAIROBI HCCC NO. 4833 OF 1990)**. It will be noted that the case was decided in 1990.

26. The Respondent herein is said to have sustained a fracture of the colles on the left wrist and deep cut wound on the left side of the forehead. In the authority cited, the respondent had similar injuries sustained for electrocution.

27. On the issue of apportionment of liability, there is no evidence which was tendered by the appellant to contradict the occurrence of the accident and to indicate to what extent the Respondent was to blame for the accident .The appellant never called any witness to show that the negligence or a part of it was occasioned by the Respondent.

28. Also, the appellant did not dispute that the Respondent sustained the injuries he claimed he sustained and or the findings in the medical evidence and by the doctor, Pw2. As for the quantum of damages I find that the trial magistrate in considering the proposals by either side, took into consideration the nature of the injuries the Respondent sustained, the severity vis a vis the ones sustained by the plaintiff in the cited cases and the rate of inflation at the time I have also taken the same issues into consideration and hold that the learned trial magistrate was correct in his finding on quantum of damages and I have no reason to disturb the award as the same is not inordinately excessive.

29. I find and hold the appellant and 2nd defendant jointly and severally liable at 100%. The final analysis that commends itself is that the appeal is dismissed with costs and make the following orders;

(a) Uphold the finding on the apportionment of liability that the Appellant and 2nd Defendant are jointly and severally liable at 100% to the plaintiff /Respondent;

(b) Judgment on general damages and special damages is confirmed and interest shall accrue to the date of final payment;

(c) Costs of the suit in the lower court and the appeal to the Respondent.

Delivered, dated and signed this 18th day of June, 2019.

LADY JUSTICE D. O. CHEPKWONY

18.6.2019

Before Hon. D. O. Chepkwony

C/clerk – Beja

M/s Azei counsel holding brief for Mr Jengo for appellant

No appearance for Respondent

Court – Judgment delivered in open court

The parties to be supplied with copies of judgment upon paying of requisite court fee.