REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 147 OF 2002

(CORAM: F. GIKONYO J.)

UNITED OVERSEAS AGENCIES LTD……APPELLANT

VERSUS

SAMUEL MBOGO GITHENGU…….RESPONDENT

(Appeal from the Judgement of Mrs Owino Esq. (SRM) dated 14.3.2002 in Milimani CMCCC No. 392 of 2001)

JUDGMENT

1. The appellant herein was the Defendant in the trial Court whereas the Respondent was the Plaintiff. The Respondent sued the Appellant vide plaint dated 18TH January 2001 in which he sought special damages and General Damages for pain and suffering. The particulars of the claim were that on 24th March 2000 while he was in the cause of his employment at the Appellants Company as a driver he was hijacked by heavily armed thugs and forced to drive to 6th Parkland Road where he stopped and thrown out of the vehicle as a result of which he sustained the following injuries; Deep lacerations in the right forearm, lacerations in the occipital region. Bruises in the right leg.

2. The appellant filed its Defence on 23rd February 2001 denying the knowledge of the injury. The appellant averred that the plaintiff voluntarily placed himself in such a position as to have caused injury to himself in the alleged accident.

3. During the hearing the Respondent called two (2) witnesses whereas the Appellant called five (5) witnesses.

4. The trial court found that the respondent had proved its case on a balance of probabilities. In its determination it found that it was only **Pw2 and Dw2** who were the diver and owner respectively who could be aware of the motor vehicle accident on 23/3/2000. It was the trial Magistrate's view that the talk between Dw2 and the police influenced the release of the motor vehicle without inspection charges or any other action by the police hence the reason the vehicle was not booked.

5. The trial court found the evidence of **Dw1 Dw3 and Dw4 and DW5** to be full of hearsay since they were not present when the accident took place. And, that the attempt to prove the motor vehicle was new car and therefore had no defects had no logic. He considered the injuries suffered by the Respondent and awarded him Kshs 80,000/= as general damages and Kshs 1.500/= as special damages.

6. Aggrieved by the aforesaid decision the appellant filed this memorandum of appeal raising nine (9) grounds of appeal that may be summarised into the following three issues;

i. Whether the plaintiff proved negligence and breach of duty against the Appellant.

ii. Whether the Respondent was entitled to an award of damages or in the sum of Kshs. 81,500/=.

Submissions

7. On 8/12/2011 the court directed parties to canvass the appeal through written submissions. Both parties restated the testimonies in the trial court. The appellant submitted that there was no direct link between the appellant alleged act (providing a defective motor vehicle) and the injury ultimately occasioned on the Respondent. He also stated that the quantum of damages by the court was excessive and unjustified. It relied on the Scottish Case of **Pawsey V Scottish Union, Civil Cae No. 2366 Of 1989 David Ngotho Vrs Mugumomi Estate, Hccc 197 Of 1994 Danuel Wabori Mwangi Versus Binuface Kamau And Another, Hccc 5832 Of 1990 Nocholas Kobia Versus Overseas Trading Co, Hccc 3474 Off 1989 Muchendu Njuguna Macharia Vs Tom-O- Metla Ltd, Hccc 3784 Of 1985 Margaret Muthoni Mukindi**

Versus Josephat Waithaka Mwangi, Hccc 3974 Of 1998 Rahael Mwaniki Kiboi Versus Joseph Njogu Kinyua.

8. The Respondent submitted that the Trial Magistrate arrived at the correct determination on liability, production of evidence and quantum.

ANALYSIS AND DETERMINATION

9. I will now perform the duty of the first appellate court; to re-evaluate the evidence, apply the law on the facts of the case and make own determination of the issues at hand. See the case of **Selle v Associated Motor Boat Co. & others [1968] E.A. 123.**

10. The events as narrated by the witnesses are as strange as are incredible. At one point, the vehicle herein is said to have been involved in a minor accident on 23rd March 2000. At another time on 24th March 2000, the same vehicle is said to be at the centre of serious carjacking incident in which the eight (8) carjackers are shot dead by the police. Events herein seems quite dramatic. And for that it is important that I set out in *extenso* the events as narrated by the witnesses.

Evidence

11. Pw1 Cyprinaous Okoth testified that he examined the Respondent who provided a history of having been hijacked. That at the time of his examination the Respondent had pain in the right knee and headaches. He arrived at the conclusion that the Respondent suffered lacerations wounds on the right lower region, right forearm and bruises on the right lower leg. It was also his further testimony that the scars are permanent and the Respondent needed physiotherapy.

12. Pw2 the Respondent herein testified that on 24/3/2000 he was asked by his boss to go to Milimani Police station and get the motor vehicle KAL 171F. He stated that the vehicle was defective and the brakes were not good. He told the trial that at the police station, he tried to start the vehicle but it could not start. He had people push it for him. At Bunyala he stopped to give way. The motor vehicle however went off. He came out and fixed it. But when he was trying to start it, he was accosted and kidnapped by thugs at gun point. The thugs forced him to drive it.

13. He informed the court that when he was approaching Aga khan they approached a police vehicle. But, the thugs ordered him to overtake it. As he did so, the police noticed something was amiss. The motor vehicle then entered into a trench and they threw him out as a result of which he sustained the injuries pleaded.

14. It was his testimony that he later heard gunshots and the thugs were shot dead. Later, he was taken to the police station from where his wife came for and took him to Lunga Hospital. He stated that the motor vehicle was defective and the appellant forced him to drive it.

15. Dw1 P.c. Macdonald Olama presented the police records in connection with the events of 23/3/2010. He testified that from the police record which he produced, there was no accident reported on motor vehicle KAL 171F on 23rd March 2o00. He produced the **O.B. as Pexh 1**.

16. Dw2 Ramesh Dadia told the court that it was the plaintiff who informed him that the motor vehicle had been impounded by the police. They called the Nairobi Police Headquarters but there was no clear response. That on 24/03/2000 he was informed by the police that the motor vehicle had been hijacked and would give them progress of the matter. That on the same day he went to the police station and found that the plaintiff had been injured.

17. He further testified that the vehicle was 5-6 months old and in good condition at the time. That the motor vehicle had also been inspected. He told the court that after the accident they offered the plaintiff medical assistance but later he wrote a letter stating that he wished to stop working. They eventually paid him all his dues. He presented **the letter from the Respondent as Dexh 2, letter of dues paid as Dexh 3, Delivery note as Dexh 5.**

18. In cross-examination he testified that he received a report of a minor accident from the Respondent on 23/3/2000 but did not see the vehicle. It was also his testimony that he is the one who told the Respondent to pick the vehicle from the police station on 24th March 2000.

19. Dw3 Cpl Charless Kitee testified that on 24/3/200 he assisted in the towing of the motor vehicle to the police station. He also stated that the eight (8) hijackers had been gunned down and that he saw the Respondent had been injured. He produced **pExh 7**.

20. Dw4 Jonathan Kinuthia testified that he is an assessor from ARA and that he assessed the motor vehicle on 30/3/2000. He told the court that the condition of the motor vehicle was average. The vehicle was mechanically fine and the doors were also fine. It was his testimony that he used a camera and eye to conduct the assessment and that he did not drive the vehicle. In re-examination it was his testimony that they only replaced the sliding doors. He produced the assessment report as **Pexh 8.**

21. Dw5 James Nganga Kamau a private investigator testified that he was instructed by Tausi Insurance Co. to carry out investigations into the alleged accident on 23/3/2000. He found that there was no report on the O.B. nor was there an inspection report.

Proximate cause

22. From the evidence by the Respondent, the Appellant asked him to drive a defective motor vehicle from Milimani police station. Upon reaching Bunyala Road, he stopped to give way to other motorists but the vehicle stalled. He came out of the vehicle to fix it. He then went back into the vehicle and as he was struggling to ignite the engine, he was accosted and carjacked by thugs. He says that were it not for the defective motor vehicle he would not have been carjacked as a result of which he was injured. Arguments have then been made on: **Whether**

the defect of the motor vehicle was the proximate cause of the carjacking and the injuries that the Respondent sustained. While this remains the ultimate issue for determination, proper questions to ask and in a more potent order are;

1. Was the Respondent asked to get the motor vehicle herein from Milimani police station on 24th March 2000. Here, whether the subject motor vehicle was involved in a minor accident on 23rd March 2000 will come to bear.

2. Has the Respondent proved that the vehicle was defective? and

3. Was the defect the proximate cause of his injuries?

Instruction to drive vehicle from Milimani police station

23. The Respondent stated that on 24th March 2000 his boss, i.e. DW2 asked him to get the subject vehicle from Milimani Police station. He told him that it had been involved in an accident. He went to the police and passed a note he had to the in charge, police. He tried to start it but it could not. Eventually, people helped to push it and he started the journey to the work place. DW2 stated that on 23rd March 2000, the Respondent told him that the vehicle had been impounded by the police for inspection. He called the traffic headquarters, Nairobi but he was not receiving clear briefing. The police then told him that since it was late, they would brief him in the morning, that is, 24th March 2000. He admitted that he was aware that the Respondent had gone to collect the motor vehicle from the police station that morning, i.e. on 24th March 2000. He however stated that it is the Respondent who told him that he had been asked by the police to pick it that morning. Surprisingly DW2 also stated the following: -

> **''The plaintiff was told by me to collect the motor vehicle from Milimani Police Station on 24th/3/2000. The motor vehicle was taken to police on 23/3/2000 because of a minor accident''.**

24. DW2 was not truthful given his abrupt and unexplained sways in his evidence. It is apparent that the vehicle was in Milimani police. DW2's evidence show that the vehicle was at the police station on 23rd March 2000 and the Respondent went to collect it upon his instructions and or with the knowledge of DW2. For reasons only known to the Appellant and all its witnesses including the police, they attempted to deny the accident to and presence of the vehicle at the police station on 23rd March 2000. The Respondent told the court that he took a note to the in charge of Milimani police station and he was allowed to collect the vehicle. It seems DW2 was in effective communication with the police on this vehicle on 23rd March 2000.

Alleged minor accident

25. From the evidence available, the vehicle herein was at the station on 23rd March 2000. It has been alleged that it had been impounded by the police for inspection. The Respondent stated that the vehicle had an accident on 23rd March 2000. He said that a Mr. David drove the vehicle on 23rd March 2000 when it had the accident. DW2 also admitted the accident of 23rd March 2000. It seems DW1 and DW2 know why the accident was not booked in the OB. It is for this reason that DW2 sent the Respondent to pick it very early the following day before the roads got busy. The version given by the Respondent is credible and is backed by evidence that the vehicle was involved in an accident on 23rd March 2000. I believe him and not the Appellant. But was the damage the proximate cause of his injuries?

Proximate cause

26. Ultimately, I should answer whether the defects or damage alleged by the Respondent was the proximate cause of his injuries? "Proximate Cause," is also termed direct cause, procuring cause, producing cause or primary cause or effective or dominant cause. ***Blacks Law Dictionary***, 7th Edition defines proximate cause as: -

> **"A cause that is legally sufficient to result in liability. A cause that directly produces an event without which the event would not have occurred."**

27. In **Edward Mzamili Katana V Cmc Motors Group Ltd & Another [2006] Eklr** the court cited the case of **Obwogi – Vs – Aburi [1995 – 1998] EA 255** where the Court explained the term proximate cause as follows;

> **"To render the respondent liable in an action for negligence, it must be shown that the negligence found is the proximate cause of the damage. Where the proximate cause is the act of a third person against whom precautions would have been inoperative, the respondent is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it.''**

28. I have looked at the documents produced by both parties to this suit and attached to the record of appeal. At page 43 of the Record DW2 testimony to the occurrence of 24/03/2003 states as follows;

> "That morning our driver named Samuel Mbogo Githendu had collected the vehicle from the Traffic Headquarters where it had been laid over night the previous day regarding a minor accident where the vehicle had been slightly banged**"**

29. The testimony of **DW2** and the Investigation report provided the same averment that the Respondent was hijacked at Bunyala Road. The investigation report states that the Respondent was driving in a suspicious manner and when he was noticed by the police they drove to Uhuru Highway then Mwambao road where they were cornered and gunned down.

30. The testimony of the Respondent to the police at **page 86 of the record of appeal** does not mention that the motor vehicle had been laid over at the police station the previous night. His testimony also contradicts his statement. In his statement he did not make any allegation that he stopped at Bunyala or the vehicle was defective. He stated that he was slowing down at the round about when he was accosted by the kidnappers. His testimony also contradicts his report to the police. Whereas in his testimony he said that he tried to overtake the police vehicle and then hit a trench, in his statement he stated that he hit head-on the police vehicle and later dashed down and hit the ground.

31. A report from the Daily newspaper dated 25th March 2000 stated that the Respondent had informed the policed that the hijackers had waved upon him to stop. On 8th November 2001 the D.T.O Central Police Station wrote to the private investigator confirming that there was no accident reported on 23/03/2000.

32. The contradictions were deep and material. The trial court did not take these matters into consideration. Again although there was evidence that the vehicle mya have been damaged on 23rd March 2000, there was no concrete evidence that the defects consisted in defective brakes and the ignition which made the vehicle go off any time. I have stated the contradictions in his statements and oral testimony in court about how he was carjacked. He did not prove that the vehicle's defect made the vehicle stall, thus, exposing and making him a sitting duck for robbers. He did not link the alleged defectiveness to the carjacking to the injuries he sustained. The proximate cause was not established. This connexion is necessary for the employer to be liable.

33. I am aware of what Shah J. stated on the employer's duty of care at common law stated as follows;

> **"The employer in my view cannot be liable for criminal acts committed by trespassers (or thieves or robbers) which result in injuries to the employees. I would entirely agree with what Lord Herschell said in Smith vs Baker & Sons (1891) 325 360.**
>
> **"The maxim (volente non-fit injuria) (brackets are mine) is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as wrong"**
>
> **Whilst the facts in Morris vs Murray & Another (1991) 2C2 B6 were different the principal that emerges is that if one takes upon himself a task which is inherently dangerous he cannot complain of injury unless there is clear breach of duty or negligence on part of the other."**

34. The appellant herein had pleaded the maxim of *volenti non fit injura*. The Appellant did not show how this maxim applies to this case.

35. In sum, I find that the Trial Magistrate erred in holding the appellant liable. Therefore, the Appeal succeeds. The trial Court decision is hereby set aside. Given the circumstances of this case, I order each party to bear own costs of the appeal. It is so ordered.

Dated and signed at Meru this 20th day of November 2019

F. Gikonyo

Dated, signed and delivered in open court at Nairobi this 5th day of December 2019

L. NJUGUNA

JUDGE