



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO.132 OF 2011

CHEMELIL SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

JOSEPH NYAMOLO ONGERE.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Tamu SRMCC No. 148 of 2009

delivered of Hon. C. A. Kutwa (SRM) on 16.8.09)

JUDGMENT

1. JOSEPH NYAMOLO ONGERE (*hereinafter referred to as respondent*) sued **CHEMELIL SUGAR COMPANY LIMITED** (*hereinafter referred to as appellant*) and another in the lower court, claiming damages for injuries he suffered on 21.12.07 when appellant's tractor registration number KAD 386M (*hereinafter referred to as the Tractor*) in which he was travelling was driven negligently by the respondent's driver that it collided with Motor vehicle KAS 815 U as a result of which respondent was injured.

2. The defendant/appellant and another filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.

3. In a judgment delivered on **16th August, 2011**, the learned trial Magistrate found respondent and another jointly and severally liable at 100% and awarded respondent general damages in the sum of Kshs. 270,000/-.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal filed on 14th September, 2011 which set out 10 grounds of appeal which I have summarized into 3 grounds to wit:

- 1. The learned trial magistrate erred in law and fact in holding appellant liable at 100%**
- 2. The learned trial magistrate erred in law and fact in awarding excessive damages**
- 3. The learned trial magistrate erred in law and fact in failing to hold that plaintiff had not proved ownership of the tractor**

SUBMISSIONS BY THE PARTIES

5. On 7th March, 2018, this court directed that the appeal be canvassed by way of written submission which the parties dutifully filed.

Appellant's submissions

6. Appellant holds the view that its driver was delivering water to the respondent which was outside his scope of duty; that respondent was an authorized passenger who exposed himself to danger by sitting on the tractor's mudguard and that it was the driver of Motor vehicle KAS 815 U that was negligent. Appellant urged the court to apportion liability at 100% against the respondent. Appellant placed reliance the following authorities: -

- 1. Kiema Mutuku –Vs- Kenya Cargo Handling Services Ltd (1991) 2 KAR 258** where the Court of Appeal held that our law has not reached the age of liability without fault

2. *Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another [2014]* on vicarious liability

3. *Israel Mulandi Kisengi V The Standard Limited & 2 Others [2012] eKLR* on contributory liability

Respondent's submissions

7. Respondent holds the view that appellant had not rebutted evidence that respondent was injured in the cause of his employment. To this end, he relied on a decision of the Supreme Court of India *Saurashtra Salt Manufacturing vs Bai Valu Raja and Ors. AIR 1958 SC 881, (1958) ILLJ 249 SC.*

Analysis and Determination

8. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See *Mbogo v Shah & Another (1968) EA 93; Selle & Another v Associated Motor Boat Co. Ltd. & Others 91968) EA, 123* and *Mwanasokoni v Kenya Bus Services Ltd [1985] eKLR*). It then behooves this court to summarize the evidence that was tendered before the trial court.

The evidence

9. It is not disputed that respondent was travelling on appellant's tractor which was being driven by DW1 when it collided with Motor vehicle KAS 815 U as a result of which plaintiff/respondent was injured. DW1 confirmed that he had authority of appellant's manager to deliver water to Zedikas and that respondent was authorized to accompany him to show him where the water was to be delivered. DW1 denied that the tractor's lights had failed as stated by the respondent but conceded that he was trying to overtake another vehicle when he collided with an oncoming vehicle.

10. From the foregoing, it is evident that appellant's driver was overtaking when it was not safe to do so as a result of which the tractor collided with an oncoming motor vehicle. The issue in question is whether appellant is liable for the actions of its driver.

negligence was set out in this Court's decision in *Joseph Cosmas Khayigila –vs- Gigi & Co. Ltd & Another, Civil Appeal No. 119 of 1986* as follows: -

“In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.”

12. In *P. A Okelo & Another t/a Kaburu Okello & Partners –vs- Stella Karimi Kobi & 2 Others- Civil Appeal No. 183 of 2003*, Waki, J.A expressed himself as follows regarding the assignment of vicarious liability:

“In assigning vicarious liability, the learned Judge appreciated, correctly, that it arises when the tortious act is done in the scope or during the course of his employment.”

13. As clearly stated herein above, the tractor driver was in the course of his employment with the appellant when the accident occurred and thus the appellant was vicariously liable.

14. On whether respondent was negligent for riding while sitting on the mudguard, I have considered the definition of contributory negligence in *Charlesworth and Percy on Negligence* which at page 194 states: -

“The expression contributory negligence.... applies wholly to the conduct of the Plaintiff. It means that there has been some act or omission on the Plaintiffs part which has materially contributed the damage....”

15. After considering the totality of the evidence, I find that plaintiff exposed himself to danger of being injured by sitting on the tractor's mudguard. The tractor driver was driving a lethal machine and appellant will therefore bear the greatest liability. In the result; I apportion liability at 20:80% in favor the respondent as against the appellant.

16. This principle of law on whether a court on appeal can disturb the quantum of damages was well settled in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1985) 1KAR 727* . At page 730 Kneller J.A. said: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

17. I have considered the record of appeal and the submission by both parties and there is no evidence that in assessing the damages, the trial court took into account an irrelevant factor, or left out of account a relevant one, or that the amount awarded is so inordinately high to be considered an erroneous estimate of the damages.

DISPOSITION

18. Consequently, the appeal succeeds only on liability. The trial court's order on liability is set aside and substituted with a ratio of **20:80%** in favor the respondent as against the appellant. The amount of general damages assessed by the trial court remains undisturbed. Each party shall bear its own costs of this appeal.

DATED, DELIVERED AND SIGNED THIS 19th DAY OF July 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - N/A

Respondent -N/A