



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 73 OF 2016

KOFINAF COMPANY LIMITED.....APPELLANT

VERSUS

STEPHEN KANG'ETHE NGANDU.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon L.M. Wachira (Mrs), Senior Principal Magistrate (SPM) at the Chief Magistrate's Court at Milimani in Civil Case No 2277 of 2012 delivered 29th January 2016)

JUDGMENT

INTRODUCTION

1. In her Judgment of 29th January 2016, the Learned Trial Magistrate, L.M. Wachira (Mrs), Senior Principal Magistrate (SPM) entered judgment in favour of the Respondent in the sum of Kshs 562,000/= made up as follows:-

General damages	Kshs 700,000/=
Special damages	<u>Kshs 2,500/=</u>
Total	Kshs 702,500/=
Less the 20% contribution	<u>Kshs 140,500/=</u>
Award	<u>Kshs 562,000/=</u>

costs of the suit and interest at court rates.

2. Being dissatisfied with the said judgment, on 25th February 2016, the Appellant filed its Memorandum of Appeal dated 8th February 2016. It relied on five (5) Grounds of Appeal. The Appellant's Written Submissions were dated 4th April 2018 and filed on 5th April 2018. Those of the Respondents were dated 9th May 2018 and filed on 22nd May 2018.

3. When the matter came before the court on 19th June 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

4. The Appellant's case was that at the material time, the Respondent was driving its tractor, he was not a licensed driver and that he had no authority to drive the said tractor. In other words, its contention was that the Respondent was on a frolic of his own when he was injured and he could not therefore attribute any negligence to it.

5. It pointed out that Section 30 (1) of the Traffic Act Cap 403 (Laws of Kenya) was clear that “**no person shall drive a motor vehicle of any class on a road unless he is the holder of a valid driving license or provisional license endorsed in respect of that class**”. It was emphatic that it was criminal for the Respondent to have driven the subject tractor without being a holder of a license.

6. It submitted that the law was clear that no one would benefit on an action that arose out of a breach of statute. In this regard, it placed

reliance on the cases of **Purple Rose Trading Co Ltd vs Bhanoo Shashikant Jai [2014] eKLR** and **Bedan Moses Kinyengu Mbae vs Robinson Njagi Gachogu [2007] eKLR**.

7. It added that the Learned Trial Magistrate misdirected herself by finding that a person by the name of Abraham Kahara ought to have been called as a witness in the case yet he was never mentioned in the Respondent's Witness Statements. It was its contention that the Learned Trial Magistrate was bound by the pleadings and that if she had found that the Respondent was a spanner boy, it was not clear how it could be held liable for acts which he had committed outside the scope as his duties.

8. It was its averment that the Respondent did not prove its case on a balance of probability and therefore urged this court to allow its Appeal.

THE RESPONDENT'S CASE

9. The Respondent's case was that the Learned Trial Magistrate only dealt with the issues that were placed before her and that at no point during the evidence did the Appellant contend that he did not have a driving license at the material time or that he was on a frolic of his own on the ground that he had no authority to drive the subject tractor.

10. He relied on the cases of **Esso Petroleum Co Ltd vs Southport Corporation [1956] AC 218** and **IEBC & Another vs Stephen Mutinda Mule & 30 Others [2014] eKLR** to buttress his argument that parties are bound by their pleadings and that an opposing party can only direct his evidence to the issue that has been disclosed in the pleadings.

11. He further stated that there was no legal requirement for drivers of vehicles on roads other than public roads to have driving licenses. He placed reliance on the definition of "**Road**" in the Traffic Act as being "**any public road... to which the public has access...**"

12. He also added that such legal matters could not be raised during submissions and that the Learned Trial Magistrate did not have sufficient evidence to pronounce herself regarding the nature, structure and category of the roads in the Appellant's estate. It was his argument that because it had not been proven that driving licenses were required when driving in coffee estate roads, then the Appellant's case must fail. He therefore urged this court to dismiss its Appeal.

LEGAL ANALYSIS

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

14. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

15. Having looked at the parties' submissions, it appeared to this court that the only issue that had been placed before it was whether or not the Appellant was liable in negligence for the injuries that the Respondent sustained when the adjuster/setter of the Appellant's tractor Registration No KAK 503A (hereinafter referred to as "the tractor") cut while he was driving the same.

16. This court carefully looked at the evidence that was adduced in the Trial Court and noted that it was not in dispute that the Respondent had been employed by the Appellant as a spanner boy at the material time. He admitted that he did not have a driving license but stated that he had authority from the Appellant to drive its tractors.

17. He testified that on the material day 16th September 2010 at about 5.00 pm, he was instructed by the Supervisor to ferry fuel to the irrigation pump. On his way, he was called by the Transport Manager who asked him to carry a chain to pull a tractor that had fallen. However, he lost control of the tractor after its pin got cut. At the time, he was moving on a rough and corroded road. As a result of the accident, he sustained fracture of the hip.

18. During his cross- examination, he stated that he was not trained to drive tractors but that he learnt to do so on the job. He stated that Abraham Kahara would authorise him to drive the tractors if there were no other drivers present.

19. Michael Nyanginya Odhiambo (DW 1) was employed by the Appellant as a tractor driver. He stated that he was the one driving the subject tractor on the material date and that he took the key with him.

20. On his part, Peter Kahara (DW 2) worked as a Security Officer in the Appellant's estate. He confirmed having seen the Respondent drive the subject tractor on the material day.

21. In her Judgment, the Learned Trial Magistrate found and held that the Respondent was a spanner boy in the Appellant's estate and that because he was a casual, he did not have the duty of ensuring parts were in a serviceable condition and could not therefore be held liable on that aspect. She therefore apportioned liability at 80%-20% in favour of the Respondent.

22. It was the view of this court that finding by the Learned Trial Magistrate that the Respondent was employed as a spanner boy in the

Appellant's estate did not answer the question of how he came to drive the subject tractor on the material date and time. Indeed, this court found that the Learned Trial Magistrate in fact misdirected herself when she stated that the Respondent's evidence that it was one Abraham Kahara who allowed him to drive the subject tractor remained uncontroverted.

23. A careful perusal of the Respondent's evidence-in-chief was that he was instructed to drive the subject tractor by his Supervisor. The issue of Abraham Kahara came up when he was being Cross examined. He testified that:-

“Abraham Kahara called me and gave me authority to drive if there was no other driver. It was oral not written”.

24. As it was the Respondent who stated that he had authority of Abraham Kahara to drive tractors if other drivers were not there, the onus was on him to have called him as his witness to support his case. He was also under an obligation to have called his Supervisor to corroborate his evidence that he was driving the subject tractor in the course of his employment.

25. Appreciably, the Respondent would have obviously had difficulties in calling the said witnesses because they were in the Appellant's employ. Unfortunately, those are the rules of legal practice. It is trite law that he who asserts a fact must prove the same. This is specifically provided in Section 109 of the Evidence Act Cap 80 Laws of Kenya that stipulates as follows:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

26. Accordingly, having considered the evidence that was adduced in the Trial Court, the Written Submissions and the case law that the parties relied upon, this court came to the firm conclusion that the Respondent did not prove, on a balance of probability, that he sustained injuries in the course of his employment.

27. There was no obligation on the part of the Appellant to adduce evidence to show that he had been authorised to drive tractors by one Abraham Kahara. It was his case. The onus was on him to present to court a cogent and tight case.

28. This court found and held that in the absence of any proof to the contrary, the Respondent sustained the aforesaid injuries while he was on a frolic of his own for which the Appellant could not have been found liable.

29. Although the issue of the license was peripheral, this court found it worthwhile to render its opinion regarding the Respondent's submissions that it was not necessary for one to have a driving license if driving on an estate road.

30. It was the considered opinion of this court that this was an incorrect interpretation. Section 2 of the Traffic Act defines “road” as:-

“Road” means any public road within the meaning of the Public Roads and Roads of Access Act (Cap. 399), and includes any other road or way, wharf, car park, footpath or bridle-path on which vehicles are capable of travelling and to which the public has access”.

31. The Respondent did not demonstrate that the road he was driving on could not be accessed by the public. Indeed, persons, who included his colleagues, were for all purposes and intent third parties and were classified as “public” within the meaning of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya.

32. Notably, in Section 2 of the Insurance (Motor Vehicle Third Party Risks) Act, “road” is defined as:-

“Road” means any public road within the meaning of the Public Roads and Roads of Access Act (Cap. 399), and includes any other road or wharf to which motor vehicles are capable of being driven”.

33. It would be foolhardy to allow anyone who is not licensed under the Traffic Act to drive on a road he purports not to be accessed by members of public and to enjoy the benefits of insurance in the event such person was to cause an accident in which third parties would suffer injuries. There is no doubt that no insurance company would compensate an insured if his driver was not licensed as envisaged in the Traffic Act.

34. As the main issue in contention was whether or not the Respondent was on a frolic of his own, which this court found to have been, this court did not find it necessary to analyse the issue of the driving license further.

DISPOSITION

35. For the foregoing reason the upshot of this court's decision was that the Appellant's Appeal that was lodged on 25th February 2016 was merited and the same is hereby allowed.

36. The effect of this decision is that the Judgment of the Learned Trial Magistrate, L.M. Wachira (Mrs) SPM delivered on 29th January 2016 in the sum of Kshs 562,000/= plus costs and interest in favour of the Respondent against the Appellant is hereby set aside and/or vacated. In its place, the judgment of this court is that the Respondent's suit that was dated 17th January 2012 and filed on 3rd May 2012 was not merited and is hereby dismissed with costs to the Appellant herein.

37. The Respondent will bear the Appellant's costs of this Appeal.

38. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of October 2018

J. KAMAU

JUDGE