REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 1 OF 2012

DAUDI TONJE ….....APPELLANT

VERSUS

PETER WEKESA NAMUTALE ….....RESPONDENT

[Being an appeal from the judgement in Kitale Senior Resident Magistrate T.A. Odera delivered on 18/3/2011 in CMCC Case No. 425 /2007]

J U D G M E N T

The respondent sued the appellant herein seeking general and special damages out of an accident that occurred on 5/6/2007 while the respondent was assisting in fixing a hydraulic problem in the appellants tractor Registration No. KXF 218 Ford 6610. As a consequences of the said accident the respondent sustained the following injuries

(i) Traumatic amputation of the left middle finger (he lost two phalanges)

(ii) Traumatic amputation of the left ring finger (he lost two phalanges)

(iii) Severe loose of blood and severe pain incurred during and after injury.

The respondent after full trial was awarded the sum of Kshs 451,500 both general and special damages. The appellant being dissatisfied has filed this appeal citing several grounds which include;

1) The trial court holding the appellant 100% liable

2) The damages were excessive in the circumstances

3) That the respondent was working on behalf of the appellant.

Before decising on the above issues it would be worthwhile to run through the evidence as presented by the parties during trial.

PW1 Dr Samwel Aluda basically produced the medical-legal report which showed the extent of the injuries sustained by the respondent.

PW2 the respondent testified that he worked for the appellant as a driver. He said that on the material day they had just completed spraying when the appellant told him to help the mechanic lift the hydraulic of the tractor he was repairing. In the process of lifting the same, it felt and injured seriously the respondent as described above.

He testified that they were 6 of them who were lifting the said hydraulic system. He said that the appellant did not provide them with protection gears such as cloves. He insisted that it was the appellant who told him to carry out the work.

On cross-examination he said that it was one James Obiero who was the mechanic and it was him also who was supervising the whole work.

The Appellant then testified and told the court that he had not employed the respondent but he had been employed by MsLimo Enterprises Company which owned the farm. He produced the registration certificate to that effect. He said that he had contracted one James Obiero a mechanic to repair the tractor. He said that at 5 pm when he came back he saw the tractor at the parking area and he saw the respondent going to where the mechanic was. He also testified that a part from the respondent there were other workers too.

He thereafter heard him cry and he saw the injured fingers. He ordered that he be taken to hospital. He denied instructing the respondent to work on the tractor.

PW2 James Othwila Obiero was a mechanic who was carrying out the repairs on the tractor the same day. He said that he was being assisted by 2 other farm workers. He said that he lifted the tractor hydraulic system and he had the respondent scream and on checking he saw that he had been injured.

He denied that he called the respondent to assist in the exercise as he had other 2 workers assisting him.

On cross-examination he denied that the respondent was told by the appellant to assist in the repairs.

Analysis and Determination

There is no doubt that the respondent was injured. The question is whether as found by the trial court, the appellant was wholly responsible or liable. Evidence was led by the respondent that he was the driver to the appellant. Although the appellant testified that the respondent had been employed by M/s Limo Enterprises, no evidence was led to that effect. There was no formal agreement or contract between the respondent and the said Limo Enterprises now any iota of evidence. The tractor in question as per the documents from the motor vehicle registration department clearly indicated that the tractor was owned by the appellant in conjunction with another company. It is the same tractor which was admittedly driven by the respondent. I do therefore hold that it is the appellant who had employed the respondent and not Limo Enterprises.

Turning now to the thorny issue of liability the trial court found the appellant wholly negligent. It is now trite law that an appellate court shall interfere only with the trials courts findings after re -evaluating and re assessing the same. There is a caveat though as was held in ***Kenya Ports Authority Vs Kuston (Kenya) Ltd (2009) E.A. 212*** *w*here the Court of Appeal stated as follows;

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters by the parties evidence." (****underlining mine)*

Its clear therefore on the evidence on record and admitted so by the respondent that the tractor in which the repairs were being undertaken was a different one from that driven by the respondent. DW2 was carrying out the repairs. The respondent alleges that he was instructed by the appellant to assist DW2 in undertaking the said repairs. DW2 denied ever seeking such request from the respondent. Infact he testified that he was working with other 2 farm workers. He also said that the appellant was not around at that moment and he came later after the respondent had been injured. DW2 further stated that it was him who had been contracted to undertake the repairs.

Based on the evidence on record, its clear that it was not DW2 alone who was carrying out the mechanical repairs on the tractor. Infact the respondent said there were 6 others although DW2 said he had 2 assistance. If this was so why did the respondent after finishing his spraying work and parked his tractor go to where DW2 was carrying out the repairs? Is it probable that the appellant told him to assist DW2? DW2 stated that he would have heard the appellant instructing the respondent to assist him as he was close.

On the other hand there is no reason to suggest that DW2 needed assistance from the respondent.

In my view it is the respondent who out of his own volition and after parking his tractor and having finished his work for that day decided to check what DW2 was doing. Further even if he had been told to assist DW2, where does the appellant negligence fall? Granted, there were other people who were assisting DW2, but the appellant was not present holding the hydraulic system which was being repaired.

The holding of the machine was solely done by the respondent. As a prudent adult and for that matter a seasoned driver, I believe, ought to have foreseen the danger. The danger here was that the hydraulic system of the tractor was under repairs and the same was therefore not in good condition. The tractor driven by the respondent must also be having an hydraulic system. What happens when the same is faulty? The answer is obvious , namely that it needs to be repaired and that in the process it could injure someone if not properly handled.

Moreover, it was not the appellant who was in control physically. It was the mechanic DW2 and others who were in physical control. It defeats logic therefore to shift blame yet it was the respondent who mechanical controlled his own mental faculties and motions so as to ensure that he does not get injured.

In such an exercise, it is only an individual who has his own control of motions. Neither DW2 nor the appellant at worst can be blamed.

The duty of care ought to be reasonable and foreseeable in varying circumstances and situations.

In this case it was the respondent who had a personal duty of care to ensure that whatever he was holding was in such a state that it was safe.

My above finding are buttressed in the case of ***Kreative Roses Ltd Vs Olpha Kerubo Sumo (2014) eKLR HC at Nakuru Civil Appl No.151/2003 where Hellen Omondi J*** *while referring to* ***Halsbury Laws of England*** state as hereunder;

"The Court of Appeal quoting Halsbury Laws of England in the case of ***Mwanyale said T/A Jomvu Total Services station*** stated as follows:_

> ***"It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employee's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of relation of employer and employee to compensate him for an injury which he may sustain in the work upon which he is engaged. The employer is not liable to the employee for damages suffered outside the employees working condition nor is he an insurer of his employees "safety, exercise of due care and skill suffices"*** *(underlining mine)*

In this case the respondent ought to have exercised due care and skills. In any case he vengered into another person areas, namely DW2 . Had he parked his tractor and left for his own frolics I do not see how he would have been injured. The mechanic had other people who were assisting him in the process.

The sum total of any observations are that the respondent was the cause of his own misfortune. Even if he had cloves how would it have prevented the injuries. The cloves do not lift the object or the hydraulic system. It is the respondent applying his own skills. I do not think that holding the appellant liable in the circumstance was correct. The trial court erred.

However on the question of quantum, I do not find that the trial court s finding was excessive. The injuries sustained by the respondent were serious in nature and were I to allow the appeal I would have sustained the award on quantum.

In conclusion I do not find that the trial court was correct in finding the appellant negligent. On the contrary it is the respondent who was negligent. Perhaps it would have been different if DW2 would have come on board as a defendant if indeed he instructed the respondent to assist.

The appeal is therefore allowed. The lower court judgement is set aside. The appellant shall have the costs of this appeal and those of the lower court.

Order accordingly.

Delivered this 5th day of October 2016.

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H.K. CHEMITEI

JUDGE

In the presence of;

Barongo for the Applicant

Onalo for Chepkwony for the Respondent

Kirong – Court Assistant