



REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. 9 OF 2014

BETWEEN

ROBINSON OMARI ARERI APPELLANT

AND

SONY SUGAR COMPANY LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. M. Nyagah, PM at the Senior Principal's Magistrates Court in Migori in Civil Case No. 38 of 2013 dated 16th September 2014)

JUDGMENT

1. The appellant's case in the subordinate court was that on 14th August 2012, along the Awendo-Migori road at Lwala, the respondent's driver drove a tractor registration number KAY 247 V and Trailer ZA 6261 negligently causing it to lose control and hit his motor vehicle registration number KAW 288, a Toyota Carib, causing it extensive damage. The appellant also sustained body injuries. As a result he filed suit claiming general damages for injuries sustained and special damages amounting to Kshs. 223,700/- on account of damage to his vehicle.

2. After hearing the matter, the learned magistrate apportioned liability equally between the appellant and respondent and awarded the Kshs. 200,000/- as general damages and Kshs. 247,000/-. The appellant, being dissatisfied with the finding on liability, appealed on the following grounds set out in the memorandum of appeal dated 10th October 2014;

- 1. That the learned trial magistrate erred in law and fact in holding the appellant (plaintiff) 50% liable for the accident contrary to the evidence tendered by the witnesses.*
- 2. That the learned trial magistrate erred in law and in fact in failing to hold the respondent 100% liable for the accident.*
- 3. That the learned trial magistrate erred in law and fact in failing to consider the appellant's evidence and submissions in his judgment.*
- 4. That the learned trial magistrate decision on liability albeit, a discretionary one, was plainly wrong.*

3. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co.*** [1968] EA 123). In ***Kiruga v Kiruga & Another*** [1988] KLR 348, the Court

of Appeal observed that;

An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.

4. In order to proceed with this task it is necessary to set out the evidence before the trial court. Only two witnesses testified on the issue of liability on behalf of the appellant. The respondent did not call any witnesses.

5. The appellant (PW 1) testified that on 14th August 2012 at about 7.30 pm, he was driving from Awendo when he saw the respondent's tractor pulling a trailer. He stated that the first one had lights but the one being towed did not have any lights. He did not see the trailer as it joined the road. In cross-examination he stated that the tractor was emerging from his left and turned right and that he had his full lights on but did not see the trailer. PW 2, a police officer, produced the abstract and could not tell how the accident occurred.

6. The learned magistrate concluded that;

In my view, I don't understand how he [the appellant] could have failed to see the trailer which was being towed yet he had his full lights on. I will not speculate on the reasons that he failed to see the tractor. However he did testify that the tractor did not have its light on or any reflective (sic), which is a requirement of the Traffic Act, this evidence was not rebutted since the defence did not call any witnesses. Its my finding therefore that liability could be apportioned equally.

7. Counsel for the appellant reiterated the grounds of appeal and urged that his testimony was unrebutted and the learned magistrate had no option but to find against the respondent. The respondent supported the decision of the court and submitted that the learned magistrate's findings were justified by the evidence.

8. I have evaluated the evidence and I find that that on the unrebutted evidence, it is difficult to see how the appellant was driving with full lights on and was unable to see the trailer after he saw the tractor. On the one hand the trailer did not have reflectors and could not be seen by an oncoming vehicle. On the other hand the appellant may have been driving too fast to slow down, break or swerve to avoid hitting the trailer after he had seen the tractor turning onto the road. The court is entitled to draw necessary inferences from the primary facts. As a result I do not find any fault in the conclusions reached by the magistrate in apportioning liability equally.

9. The appeal is dismissed with costs to the respondent.

DATED and DELIVERED at MIGORI this 14th day of May 2015.

D.S. MAJANJA

JUDGE

Ms Maroko instructed by Ben K. Gichana & Company Advocates for the appellant.

Ms Ngoge instructed by O. M. Otieno & Company Advocates for the respondent.