



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL APPEAL NO. 18 OF 2011**

**MOURICE MWANJA ..... APPELLANT**

**VERSUS**

**AGRICULTURAL DEVELOPMENT CORP ..... RESPONDENT**

***(An Appeal against the Judgment and Decree of Hon. Daniel Ochenja Principal Magistrate dated 9th March 2011 in Kitale Chief Magistrate's Court, civil Case no.527 of 2007***

**J U D G M E N T**

1. The appellant, Maurice Mwanja, was aggrieved by the dismissal of his case against the respondent, ***Agricultural Development Corporation***, in a judgment rendered by the Principal Magistrate at Kitale in ***Kitale PMCC.NO.527 of 2007***, which arose from a road traffic accident which occurred at Olkadongo ADC Farm Kitale on the 5th August 2007.
2. It was the appellant's contention that on the material date, the respondent's driver who was the first defendant drove the respondent's motor vehicle Reg.No.KAN.994U New Holland Tractor so negligently, recklessly and carelessly such that it caused an accident which occasioned him (appellant) bodily injuries,. He was at the time a lawful passenger in the vehicle. He therefore prayed for general and special damages against the respondent together with costs of the suit and interest.
3. The respondent filed a statement of defence denying the appellant's claim and contending that if the accident occurred, then it was inevitably occasioned by bad weather beyond the control of the vehicle's driver. The respondent therefore prayed for the dismissal of the appellant's suit.
4. At the hearing of the suit, the appellant led evidence to show the circumstances under which the accident occurred and contended that the blame lay with the driver of the vehicle. He called ***Dr. Samuel Aluda (PW2)***, to testify on the injuries suffered by himself and the resultant effects thereof.

The respondent did not lead any evidence in support of his case.

5. The Learned Trial Magistrate considered all the evidence presented before him and concluded that negligence on the part of the vehicle's driver was not established neither was the respondent's alleged ownership of the material vehicle. It was essentially for those reasons that the appellant's case was dismissed and hence, the present appeal based on the grounds contained in the memorandum of appeal dated 23rd March 2011. Written submissions were presented by both sides for and against the appeal.
6. The duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Having done so, it was apparent that the basic issue for determination was whether the accident was caused by the alleged negligence of the respondent's driver and if so, whether the appellant was entitled to damages from the respondent and to what extent.

7. Basically, the occurrence of the accident, the respondent's ownership of the material vehicle and the appellant's presence in the vehicle at the time of the accident were factors which were not substantially disputed or disproved by any evidence from the respondent. The particulars of the negligence attributed to the respondent's driver included driving the vehicle at an excessive speed.
8. The appellant's testimony indicated that the vehicle overturned due to over-speeding by its driver. That, the vehicle veered off the road and landed on a ditch before overturning once.

The appellant also indicated that it had rained on the material date and that the road was wet. He appreciated that the driver made efforts to avoid the accident but all in vain.

9. Contrary to the finding on negligence by the trial court, this court would find that there was sufficient and uncontroverted evidence from the plaintiff showing that the vehicle was at an excessive speed despite the wet condition of the road and it was for that reason that it veered off the road and overturned. Excessive speed along a wet road is a clear demonstration of recklessness and utter negligence on the part of a driver. The fact was herein proved on a balance of probabilities by the appellant against the respondent under whose authority the material vehicle was driven by its driver.
10. In any event, there was no explanation from the respondent's driver as to why the vehicle overturned and thus disprove the fact that over-speeding was the main cause of the accident. The trial court was therefore in error in finding that negligence was not established against the respondent's driver. The slippery and muddy state of the road could not by itself have caused the accident. The respondent's driver negligent manner of driving the vehicle on such a road was the actual cause of the accident meaning that the respondent was vicariously liable for the consequences of its driver's negligent actions and / or omissions and therefore liable to the appellant in loss and damages arising from the accident.
11. Indeed, where it is proved that a vehicle has caused damage by negligence, then in the absence of evidence to the contrary, presumption arises that it was driven by a person for whose, negligence the owner is responsible (*see Dritoo vs West Nile District Administration (1968) EA 428*)

As noted herein-above, ownership of the material vehicle was not substantially disputed. In fact, ownership was not at all disputed as no evidence was led by the respondent to show that the vehicle belonged to another person other than itself. The police abstract availed by the appellant was sufficient proof of ownership of the vehicle by the respondent (*see, Lake Flowers Ltd. Vs Cila Francklyn Civil Appeal No.210 of 2006 at Nakuru(C/A)*) and more so, in the absence of any other evidence to the contrary.

12. The non-joinder of the respondent's driver in this appeal was not fatal as liability against his employer (the respondent) depended largely on the pleadings and the evidence in support of the claim as led by the appellant. Such was indeed the reasoning of the Court of Appeal in the case of *Ndungu vs Coast Bus Corp. Ltd (2000) 2 E.A.462*, where it was further reasoned that vicarious liability of the employer is not pegged to the employees' liability but to his negligence.
13. Now that this court finds the respondent liable to the appellant for loss and damage incurred as a result of the accident, the next issue for consideration is the quantum of damages awardable to the appellant.

Although the learned trial magistrate dismissed the appellant's claim, he was nonetheless obliged to make finding, on the quantum of damages he would otherwise had awarded if the claim had succeeded before him.

14. In that regard, the learned trial magistrate considered the injuries suffered by the plaintiff / appellant in the light of comparable authorities cited by both appellant and respondent and assessed the general damages in the sum of Kshs.100,000/= for pain suffering and loss of

amenities.

That assessment was, in the opinion of this court, reasonable and adequate compensation in terms of general damages for pain, suffering and loss of amenities as the injuries suffered by the appellant as per the evidence of Dr. Aluda (PW2) were mainly minor injuries from which he was expected to fully recover without any significant disability.

15.The appellant also prayed for special damages in the sum of Ksh.2,200/= for the medical report and police abstract. The amount was established by production of the material documentary evidence (P.Ex.3 and 4).

The appellant is thus entitled to special damages in the claimed amount.

16.In sum, this appeal is allowed to the extent that the judgment of the trial court is hereby set aside and substituted with a judgement in favour of the appellant against the respondent for the total sum of Kshs.102,200/= together with costs and interest.

The appellant shall also have the costs of the appeal.

Ordered accordingly.

**J. R. KARANJA**

**JUDGE**

[ Delivered and Signed this 9th day of July 2015].