



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 181 OF 2009

CHINA WUYI & CO. LIMITED APPELLANT

VERSUS

SAMSON K. METTO RESPONDENT

(Being an appeal from the Judgment and Decree of the Senior Resident Magistrate

**(J. M. Njoroge) in Kapsabet Principal Magistrate's Civil Case No. 81 of 2007 delivered by on
13th October, 2009)**

JUDGMENT

The appeal emanates from a decision in the Principal Magistrate's Court at Kapsabet Civil Case No. 81 of 2007. The Respondent herein, Samson Kipkoskei Metto who was the Plaintiff was the driver of motor vehicle registration number KAS 350T and was at all times employed by the Appellant. His case was that the said motor vehicle developed low pressure in the pressure gauge and the brakes failed causing him to land in a ditch and sustain injuries to his chest and ribs. He blamed the Appellant for failing to accord him a safe working environment by failing to maintain the vehicle.

The trial court apportioned liability at 85:15% in favour of the Respondent. The court blamed the Respondent for knowingly driving a defective motor vehicle. The Appellant had to shoulder the highest responsibility for not maintaining the motor vehicle. An award of Ksh. 250,000/= in general damages was made. The Respondent took Ksh. 212,500/= after subtraction of 15% contributory negligence. Special damages were awarded at Ksh. 31,100/=.

The Appellant was dissatisfied with the Judgment and preferred this appeal both against liability and quantum. It has listed six grounds of appeal as follows:-

“1. That the learned Senior Principal Magistrate erred in law and in fact by holding that the Plaintiff had proved his case on a balance of probability on the facts when the pleadings and documents produced before him referred to two different set of circumstances.

2. That the Learned Senior Principal Magistrate erred in law and in fact by applying his own theory in assessing the primary facts which made him fall into error of speculation and inserted his finding which was not supported by evidence as a necessary inference from the primary facts pleaded and proved before him.

3. That the learned Senior Principal Magistrate erred in law and in fact in holding that the Plaintiff had established a duty of care upon the defendant which it had violated and

proceeded to hold it liable and apportioned liability on ex-gratia basis which was contrary to law and breach of principles established over a long period of time.

4. That the learned Senior Principal Magistrate erred in law and in fact by awarding damages that are inordinately excessive in the circumstances of this case.

5. That the learned Senior Principal Magistrate erred in law and in fact by basing the assessment of damages on the wrong principle when he disregarded precedent on awards in similar situations.

6. The award is demonstratively wrong compared to awards for similar injuries.

In crystalizing the above grounds, I will determine the appeal under the following heads;

1. **Liability** – Whether the Respondent proved the existence of the duty of care between himself and the Appellant, and whether the case was proved on a balance of probabilities.

2. **Quantum** – Whether the damages awarded were excessive in the circumstances and whether the trial court applied the wrong principles of the law in awarding the same.

This is the first appellate court whose duty is to re-evaluate the evidence on record and come up with its own findings – See case of **SELLE -VS- ASSOCIATED BOAT LIMITED (1968) E.A., 123.**

LIABILITY

The Respondent who testified as **PW1** called four witnesses. He stated that he was employed by the Appellant as its driver on 27th July, 2004. On 2nd February, 2005 he was driving motor vehicle registration No. KAS 350T at Kaptumo along Kipsigak – Serem road. He noted that the pressure on the pressure gauge was low. He alerted the foreman who told him the brakes were mechanically fit. As he drove off the gate, the brakes failed and the vehicle moved for a distance of about four (4) kilometres uncontrollably. He then lost control, veered off the road and landed in a ditch. He was hit by the steering wheel on the chest. He lost consciousness. He was taken to Nandi Hills District Hospital where he was admitted for two days. He stated that the accident was caused by the brake failure for which he blamed the Appellant. He identified the following documents;

- A discharge summary
- Treatment notes from Nandi Hills District Hospital
- A P3 form
- A police abstract form
- Dr. Omuyoma's medical report
- Payment receipt of Sh. 3,000/= for the Medical Report

In Cross-examination, PW1 stated that he did not have the motor vehicle inspection report and did not also know whether an inspection of the motor vehicle was done. He stated that he was injured while on duty and that he could not do heavy work due to the injuries.

PW2, Julius Amuroche Litabilia testified that he worked at Nandi District Hospital as a record and information officer. He stated that the Plaintiff was admitted to the hospital on 2nd February, 2005 after being involved in a road traffic accident and sustaining soft tissue injuries. He was discharged on 3rd February, 2005. He produced the following documents as exhibits;

- Discharge Summary – P. Exhibit 1
- OP (outpatient) Card – P. Exhibit 2
- P3 form filled by the hospital – P. Exhibit 3
- Inpatient record D. No. 524 – P. Exhibit 4
- OP Record No. O.2821 – P. Exhibit 5

In cross-examination, he stated that the Plaintiff suffered soft tissue injuries and fracture of the ribs.

PW3, Police Constable Nelson Mukhwana of Nandi Hills Police Station testified that the Plaintiff (PW1) was involved in an accident on 2nd February, 2005. The accident was reported to the Police Station. PW1 was injured. He produced the police abstract form as P. Exhibit 6.

In cross-examination, PW3 stated that since PW1 was the driver of the motor vehicle, he was to blame for the accident.

PW4, Doctor Obed Omuyoma examined PW1 on 14th February, 2007 and compiled his medical report which he produced as P. Exhibit 7. According to him, PW1 sustained soft tissue injuries to the chest, hands and face.

In cross-examination, he stated that the injuries had then healed and that PW1 had not suffered any permanent incapacity.

The defence called only one witness, Zabbana Eram the Appellant's Assistant Personnel Manager who testified as **DW1**. He confirmed that on 2nd February, 2006 their motor vehicle was involved in an accident. He stated that the Respondent was their driver but that at the time of the accident, the motor vehicle was being driven by the Respondent's friend without the authority of the Appellant.

In cross-examination, DW1 stated that he could neither recall the date of the accident nor the motor vehicle's registration number. He stated that they found the Respondent in the motor vehicle after the accident and took him to hospital.

From the foregoing, the following issues are not in dispute. Firstly, that the Respondent was at all material time an employee of the Appellant as a driver. Secondly, that an accident occurred involving the Appellant's motor vehicle. Thirdly, that at the time of the accident, it is the Respondent who was driving the motor vehicle. Although DW1 stated that the vehicle was being driven by a friend of the Respondent, that assertion was without prove. It was also dislodged by PW3 who confirmed that the vehicle was being driven by the Respondent.

With those facts in minds, the Appellant was at all times required to provide the Respondent with a safe working environment. Respectively in this case, the motor vehicle ought to have been in a good mechanical condition.

According to the Respondent, he had informed the foreman that the brakes were defective but he was nonetheless ordered to drive the vehicle. But this contention was far from being proved. Although it may have been difficult to secure the attendance of the alleged foreman, it was possible for the Respondent to demonstrate that he requested him to come and testify. Such indication would be done, say, by way of a letter written to the Appellant in this respect.

In the same way, the Appellant would also have requested that the motor vehicle be inspected so as to ascertain that in deed, the brakes were defective. Although the Appellant may not have

sanctioned such an inspection, had the Respondent in writing requested for it, it would have persuaded the court to believe his story that the brakes were defective, but was not given the necessary support by the Appellant to demonstrate that.

Without any of the above having been shown, it remained remotely possible for the court to find that the Appellant bore any contributory negligence. The Respondent failed to meet the threshold of the maxim in law that **“he who alleges must prove”**. As I have noted, he failed to demonstrate that the vehicle's brakes were defective and that he had reported that defect to his seniors. And as was submitted by the Appellant, the trial court erred in arriving at a finding that the Respondent had demonstrated that he had reported to the Appellant that the brakes were defective and accordingly apportioned heavy blame upon the Appellant.

There is no dispute that the Respondent got injured in the accident. But he was unable to show that these injuries were attributed by the negligence of the Appellant – See the case of **STATPACK INDUSTRIES -VS- JAMES MBITHI MUNYAO NAIROBI HC. CIVIL APPEAL NO. 152 OF 2003 (unreported)**, the then Visram, J. stated as follows;

“Coming now to the important issue of 'causation', it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury 'per se' is not sufficient to hold someone liable.”

The cardinal principle of law that, **‘he who alleges must prove’** is also well captured in Sections 107 to 109 of the Evidence Act which read as follows:-

“107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. *The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

109. *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.”*

Having regard to the above, it is my finding that the Respondent did not prove any of the particulars of negligence he alluded to in paragraph 5 of the Plaint. He could not therefore successfully allude that the Respondent was liable for his injuries.

The Appellant submitted that the Respondent did not deny the particulars of negligence attributed to him by the Appellant. That this ought to have led to the inference that he (Respondent) had admitted those particulars of negligence, for which reason the trial court ought not to have held the Appellant liable.

I understand the Appellant to mean that the Respondent's failure to file a Reply to Defence was itself an admission of any particulars of negligence that were attributed to him in the defence.

The current Order 2 Rule 11 which provides for admissions and denials of pleadings is the import of the old Civil Procedure Rules Order VI Rule 9 (1). The latter read as follows:-

“Subject to sub-rule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.”

The particulars of negligence attributed to the Respondent which were; driving the vehicle in an excessive speed, driving without due care and attention, failing to slow down, brake, swerve or avoid accident, failing to abide by the Highway Code and Traffic Rules and causing the accident needed to be traversed by him. He failed to this. This failure ultimately draws the inference that he had admitted those allegations – See the case of **MOUNT ELGON HARDWARE -VS- UNITED MILLERS LIMITED CIVIL APPEAL NO. 19 OF 1996** – Court of Appeal sitting in Kisumu, in which the court said:-

“Furthermore, the Respondent denied any form of negligence on its part and in turn, alleged negligence against the Appellant. The Respondent pleaded the particulars of such negligence. The Appellant wholly failed to traverse by any further pleadings the particulars of negligence alleged in the Respondent's defence. In those circumstances, the learned Judge was perfectly entitled to conclude that the Appellant had admitted the negligence alleged in the defence in terms of Order VI Rule 1 of the Civil Procedure Rules.”

The trial court then ought to have found that the Respondent had not proved any breach of the duty of care by the Appellant towards the Respondent. Any negligence in the manner the vehicle was driven ought to have been attributed to the Respondent himself.

The Appellant did also submit that the trial court did not take into account the contradiction with respect to the date the accident occurred. It was submitted that the Respondent stated that the accident occurred on 2nd February, 2005 while the evidence adduced was contrary.

In response, the Respondent submitted that there was a correction on the original court record at paragraph 4 which correction was countersigned. Unfortunately it was not reflected in the compiled record of appeal.

Paragraph 4 of the Plaintiff in the original court does show the date of the accident as 2nd February, 2005. The year was originally typed as 2006 but was corrected by pen to reflect 2005. That correction is countersigned but has no date.

In the compiled record of appeal, the date is indicated as 2nd February, 2006. All the Plaintiff's witnesses testified that the accident occurred on 2nd February, 2005. It is only the defence witness who stated that the accident was on 2nd February, 2006. In the cross-examination, the Plaintiff did not make an attempt to correct this anomalously so as to align the defence evidence with that of the Plaintiff's case to the effect that the accident occurred on 2nd February, 2005. Nevertheless, the Plaintiff's case outweighed that of the defence that the accident occurred on 2nd February, 2005. It appears the defence adduced this evidence so as to controvert the Plaintiff's case in this respect, but did not bear any fruit.

On the whole, it is my finding that the Respondent did not prove his case on a balance of probabilities. The trial court misdirected itself in arriving at a finding that the Appellant was to blame at 85%. No liability ought to have been attributed to the Appellant. I need not, in the circumstances, address myself on the issue of quantum.

In the result, I allow the appeal, and set aside the entire Judgment of the Magistrate's Court. Costs of the appeal are awarded to the Appellant.

It is so ordered.

DATED and DELIVERED at ELDORET this 1st day of October, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Chepkwony holding brief for Kimani for the Appellant

Mr. Okara holding brief for Onkoba for the Respondent