



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Civil Appeal 25 of 2004**

**SOUTH NYANZA SUGAR CO. LTD. .... APPELLANT**

**AND**

**JOSEPHAT AGUMBA EMONDA ..... RESPONDENT**

**(Being an appeal from the judgment and decree of MR. Kariuki Mwaniki, Esq., Resident**

**Magistrate, Migori on the 17<sup>th</sup> December 2003 in Migori SRMCC No.113 of 2003)**

**JUDGMENT**

1. The respondent herein, Josephat Agumba Emonda was the plaintiff in Migori RMCC No.113 of 2003. He filed suit against the appellant seeking to be paid both general and special damages on account of injuries he alleged to have sustained in a road traffic accident which occurred on or about 9<sup>th</sup> January 2003 involving the respondent and the appellant's m/v Reg. No. KAA 416 P. He averred that on the said date he was travelling as a lawful passenger in the above mentioned motor vehicle along the Migori-Awendo Road when the said vehicle was so negligently and recklessly driven by the 2<sup>nd</sup> defendant in the lower court that it lost control and hit a house thereby severely injuring the plaintiff.
2. The respondent averred that the appellant's driver, servant, and/or agent was negligent by driving at an excessive speed in the circumstances, failing to apply brakes, slow down, stop or in any manner avoid the said accident, failing to effectively control the said motor vehicle, driving an overloaded and defective motor vehicle. As a result of the accident, the respondent averred he suffered the following injuries:-
  - **Blunt head injury**
  - **Cerebral concussion**
  - **Blunt injury to the chest**
  - **Bruises on the right hand**
  - **Soft tissue injuries**
3. The respondent blamed the appellant for the injuries he sustained and sought to be awarded damages. He also prayed for costs of the suit and interest.
4. The appellant filed a defence. While admitting that an accident did occur on the 9<sup>th</sup> January 2003,

involving the appellant's m/v Reg. No. KAA 416P, which m/v was being driven by the 2<sup>nd</sup> defendant in the case before the lower court, the appellant denied all the respondent's allegations in the plaint and in particular, the appellant denied that:-

- *the respondent was severely injured in the said m/v at the time of the said accident.*
- *the said vehicle was negligently and recklessly driven at the time of the accident.*

5. In the alternative, the appellant averred that even if it is admitted that the respondent was lawfully travelling in the said m/v at the time of the accident, it is denied that the respondent suffered any and or any of the alleged injuries or at all. The appellant denied all the particulars of negligence and averred that the accident occurred due to brake failure which did not connote negligence on the part of its driver. The appellant also averred that the accident occurred as a result of circumstances which were well beyond the control of its driver, the 2<sup>nd</sup> defendant in the lower court and that the said driver did all he could in the circumstances to avoid the said accident. The appellant asked the trial court to dismiss the respondent's suit with costs.

6. The case proceeded to hearing in the lower court. The respondent testified and told the court that on the material day, he was travelling to work with other cane cutters in the appellant's lorry Reg. No. KAA 416P. When they got to a place called Kakrao, they were involved in an accident when the lorry left the road and hit a building. The respondent also testified that just prior to the accident, the lorry was being driven very fast. He got injured in the head, chest and left hand. He was treated at Stella Medicare Maternity and Nursing Home and discharged. He later recorded his statement at Migori Police Station and was issued with a P3 form and a police abstract. Dr. Ajuoga later examined the respondent and prepared a report. He paid Kshs.3000/= to Dr. Ajuoga for the report. The treatment notes from Stella Medicare Maternity and Nursing Home, the P3 form, the police abstract and the medical report by Dr. Ajuoga were all produced in evidence as **P. Exhibits 1-4.**

7. Dr. Ajuoga who testified as PW2 stated that he examined the respondent on 3<sup>rd</sup> February 2003 in connection with the injuries the respondent had suffered during the road accident on 9<sup>th</sup> January 2003. According to Dr. Ajuoga's examination and report, the respondent suffered the injuries as stated in the plaint. Dr. Ajuoga told the court during the hearing of the case on 25<sup>th</sup> July 2003 that the respondent still complained of chest pain at the time of examination on 3<sup>rd</sup> February 2003. He classified the respondent's injuries as soft tissue injuries which had healed.

8. The appellant adopted the evidence given in civil case No.86 of 2003. The evidence in the said case was that on the material day, the appellant's driver was driving the lorry at about 40 kmph. As he was approaching the junction at Kakrao, he applied brakes but the brakes failed and that is when the vehicle hit a house. The driver contended that the cause of the accident was brake failure. DW2 for the appellant was Daniel Okoth Ojwang who said that the lorry had undergone routine service on 13<sup>th</sup> January 2003 and that it was therefore in sound mechanical condition when it left the yard for work on the material day. DW3, Jairus Oguta Otieno, who was a passenger in the ill fated lorry testified that there were 61 passengers on board the lorry, including himself and the respondent. DW3 stated that the respondent was not among those who were injured in the accident, and that in fact on the 10<sup>th</sup> January 2003, the respondent went to work as per **D. Exhibit 3.** In the document, the name of the respondent appears as Number 71 against entries for 10<sup>th</sup> January 2003 and it is given as Josphat Agumba. In his evidence, the respondent stated that he did not go to work on 10<sup>th</sup> January 2003 because of the injuries he had sustained on 9<sup>th</sup> January 2003.

9. The court also notes **D. Exhibit 2** which is a report compiled on the accident in question. The report, dated 14<sup>th</sup> January 2003 has names of persons injured in the accident and the nature of the injuries sustained by each. The name of the respondent is not among those names. The appellant wanted the respondent's case dismissed with costs.

10. After analyzing the evidence that was placed before it, the trial court entered judgment for the respondent as follows:-

- **Liability** ..... 100%
- **General damages** ..... Kshs.70,000/=
- **Special damages** ..... Kshs.3,000/=

plus costs of the suit.

11. The appellant was aggrieved by the whole of the said judgment and filed this appeal on the following seven (7) grounds:-

1. *The Learned Trial Magistrate erred in both law and infact in holding that the respondent had proved negligence against the Appellant.*
2. *The Learned Trial Magistrate erred in both law and infact in holding that the respondent suffered injuries pursuant to the accident on 9<sup>th</sup> January 2003.*
3. *The Learned Trial Magistrate erred in both law and infact in awarding the respondent the sum of Kshs.70,000/= as General damages which amount was manifestly and exorbitantly high and excessive in the circumstances.*
4. *The Learned Trial Magistrate erred in both law and infact in failing to hold that even though there was an accident on 9<sup>th</sup> January 2003 involving appellant's motor vehicle, and cane cutters among them the Respondent, non of the cane cutters, including the respondent suffered any injuries which warrants compensation.*
5. *The Learned Trial Magistrate erred in both law and infact in disregarding in his judgment all the evidence given at the trial by the appellant's witnesses and the submissions urged at the trial on behalf of the appellant.*
6. *The Learned Trial Magistrate erred in both law and infact in failing to dismiss the respondent's suit as manifesting no cause of action against the appellant.*
7. *The Learned Trial Magistrate erred in both law and infact in failing to hold that the treatment chits, P3 form and the Medical report and the evidence of PWII Dr. P.M. Ajuoga led at the trial on behalf of the respondent were all made up purely for purposes of seeking compensation and had no actual and truthful evidential value and in failing to disbelieve and dismiss the same in his judgment.*

12. The appellant prays that the appeal be allowed and that the respondent's suit in the lower court be dismissed with costs.

13. By consent of parties herein, this appeal proceeded by way of written submissions. The parties filed their respective submissions together with supporting authorities. I have carefully read these submissions, the pleadings, the proceedings and the judgment of the lower court. In their submissions, the appellant appeared to have abandoned grounds 1, 6 and 7 of the Memorandum of Appeal and relied only on grounds 2, 3, 4 and 5 thereof.

14. This is a first appeal. As a first appellate court, the duty of this court is now well established. In **Peters –vs- Sunday Post Limited [1958] EA 424**, the Court of Appeal for Eastern Africa, sitting at Nairobi observed as follows at p. 429:-

**“It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An**

**appellate court has, indeed, jurisdiction to review the evidence, in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”**

15. In his further remarks on the duty of an appellate court, Sir Kenneth O'Connor, of the Court in **Peter's case** (above) took as a guide to the exercise of the appellate court's jurisdiction an extract from the opinion of their Lordships in the in the House of Lords in **Watt –vs- Thomas [1947] A.C 484**, where Viscount Simon L.C said at P.485:-

**“---an appellate court has of course jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight.”**

16. In the instant case, it is not in dispute that the accident occurred as alleged by the respondent. It is also not in dispute that the respondent was one of the 61 passengers who were in the lorry at the time of the accident. The only point of contention is whether the respondent was injured as a result of the said accident. According to the appellant, the respondent was not among those who were injured. According to the appellant also, and contrary to what the respondent stated in court, the respondent was one of those cane cutters who were on duty on 10<sup>th</sup> January 2003 despite the fact that he had been in the lorry on the day of the accident. According to Dr. Ajuoga, PW2, the respondent was injured in the accident as per the treatment notes from Medicare Centre where the respondent went for first line treatment after the accident.

17. Although both the respondent and Dr. Ajuoga stated in their evidence in chief that the respondent was given treatment notes from Medicare Centre, the respondent testified on cross examination that he was not given any treatment notes. In his report dated 3<sup>rd</sup> February 2003, Dr. Ajuoga stated concerning treatment given to the respondent at Medicare Centre:-

**“He was treated at Medicare where according to the notes available the following was done:-**

**- Dressing – analgesics – antibiotics – anti-tetanus.”**

18. What this court finds strange is that though Dr. Ajuoga testified that he based his report upon examining the appellant on the notes from Medicare, there were no such notes. In my view therefore, either one or both witnesses lied to the court. I also find that according to **D. Exhibit 2** dated 4<sup>th</sup> January 2003, the name of the respondent was not among the injured cane cutters. **P. Exhibit 3** also shows that the respondent was on duty on 10<sup>th</sup> January 2003. In the circumstances, it is not clear that the respondent was ever injured in the accident.

19. On the basis of the above, I am of the view that if the trial court had critically analyzed the evidence that was before him with much care, it would have found that the respondent had not proved his case against the appellant on a balance of probability in that he did not prove that he was injured in the accident.

20. On the issue of liability on the part of the appellant, if the respondent had proved that he was injured in the accident, I would have found the appellant liable in negligence. Though the defence witnesses alleged that the lorry was in good condition, there was evidence to show that the lorry was in bad condition prior to the accident and that is why, if the allegation of brake failure was true, the brakes failed. The appellant was therefore to blame for the accident for negligently allowing an un-road worthy

motor vehicle to be on the road and to endanger the lives of so many people, among them the respondent.

21. The upshot of what I have said above is that this appeal has merit. I accordingly allow the same. The judgment of the lower court is set aside and in lieu thereof I make an order dismissing the respondent's suit in the lower court. I make no orders as to costs.

22. Lastly, the delay in delivering this ruling/judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9<sup>th</sup> July 2012.

23. It is so ordered.

**Dated and delivered in open court at Kisii this 7<sup>th</sup> day of September, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Nyamurongi for Odhiambo (present) for Appellant

M/s Kerario Marwa (absent) for Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**