REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 70 of 2008

SOUTH NYANZA SUGAR COMPANY …….. APPELLANT

AND

LILIAN ANNA ANYANGO ……..…….. RESPONDENT

(Being an appeal from the judgment and decree of Hon. Ezra Awino, Principal Magistrate, Migori dated and delivered on the 6th day of May 2008 in Migori PMCC NO.34 of 2006)

JUDGMENT

1. The respondent herein, Lilian Anna Anyango was the plaintiff in the lower court. She filed suit against the appellant seeking both general and special damages on account of injuries she alleged to have sustained on or about 5th October 2003 in an accident involving herself and the 1st appellant's motor vehicle registration number KAA 940 P a Ford Tractor which was being driven by the 2nd appellant herein as the 1st appellant's authorized driver. The respondent averred that on the material day, she was lawfully walking off the verge of a path along Dede-Awendo Road when the 1st appellant's above stated motor vehicle was so negligently and/or carelessly driven by the 2nd appellant herein that it lost control, veered off the path and violently knocked down the respondent thereby occasioning her severe bodily injury.

2. The respondent blamed the appellants for the accident and averred that the 2nd appellant was negligent by:-

(i) *Driving at an excessive speed in the circumstances;*

(ii) *Driving without the presence of mind;*

(iii)*Driving a defective motor vehicle;*

(iv) *Failing to take effective control of motor vehicle registration*

(v) *number KAA 940 P;*

(vi) *Permitting motor vehicle registration KAA 940 P to lose control and knock down the plaintiff;*

(vii) *Failing to exercise the prudence and skill of a qualified driver;*

(viii) *Driving under the influence of alcohol and or drugs;*

(ix) *Driving off the limits of the path;*

(x) *Failing to give sufficient warning or any at all while approaching the plaintiff.*

3. As a result of the injury suffered by the respondent, namely dislocation of the right foot, the respondent sought to be compensated in both general and special damages.

4. The appellants entered appearance and also filed their statement of defence on 9th March 2006. In the defence, the appellants denied that the accident took place and also more particularly denied that the respondent was violently knocked down by the appellants' motor vehicle nor that she suffered severe bodily injuries as a result of the negligence and/or careless driving of the tractor Reg. No. KAA 940 P after it lost control. The appellants also denied the particulars of negligence set out in paragraph 5 of the plaint and put the respondent to strict proof of the same. The appellants denied that the respondent was injured as stated in the plaint or at all and also denied that the respondent suffered either special or general damages. In the alternative and absolutely without prejudice to the appellants' general defence, the appellants averred that if the respondent was injured at all in the traffic accident as alleged, which was denied, then the injuries were caused by and or substantially contributed to by the respondent's own negligence or contributory negligence. The appellants averred that the respondent was negligent by aimlessly walking or attempting to cross the path of an oncoming tractor when it was not safe to do so; failing to heed the tractor's approach warning and by failing to give way to the tractor so it could safely pass. The appellants therefore prayed that the respondent's suit be dismissed with costs.

5. The respondent filed reply to defence and denied all particulars of negligence attributed to her by the appellants. She prayed that the prayers of the plaint be allowed with costs.

6. The suit proceeded to hearing before the lower court. After carefully analyzing all the evidence that was placed before him, the trial court found the appellants 90% liable to the respondent in respect of the injury sustained by her. The trial court awarded Kshs.100,000/= as general damages and Kshs.3000/= as special damages subject to 10% contribution. The respondent was also awarded costs and interest from date of judgment.

7. The appellants were aggrieved by the whole of the said judgment and have come to this court on appeal to challenge the whole judgment. The Memorandum of Appeal dated 5th June 2008 and filed in court on the same day sets out the following 5 grounds:-

1. *The Learned Trial Magistrate erred in both law and infact when he held that the Respondent had proved negligence against the Appellant in the circumstances.*

2. *The Learned Trial Magistrate erred in law when he held the Appellant to be 90% liable for the alleged accident in the circumstances of the case without first making a primary finding on negligence against the Appellant.*

3. *The Learned Trial Magistrate erred in both law and in fact when he failed to notice the apparent contradictions between the pleadings of and the evidence led by the Respondent at the trial and in failing to dismiss the suit.*

4. *The Learned Trial Magistrate erred in both law and infact when he awarded Kshs.100,000/= as General Damages for pain and suffering which amount is manifestly high, exaggerated and punitive in the circumstances and constituted an erroneous estimate.*

5. *The Learned Trial Magistrate erred in both law and infact when he*

failed to consider the Appellant's submissions urged at the trial.

8. The appellants' prayer is that this appeal be allowed with costs and that the respondent's suit in the lower court be dismissed with costs.

9. When this appeal came up for directions before me on 20th March 2012, the parties agreed to prosecute the appeal by way of written submissions. The submissions, together with relevant authorities were eventually filed. I have read both sets of submission and the authorities cited. I have also carefully read the pleadings, the proceedings and the judgment of the trial court as is expected of me on a first appeal. The duty of a first appellate court has been stated and restated by the courts in well known decisions such as **Peters –vs- Sunday Post[1958] EA 424**; **Selle & another –vs- Associated Motor Boat Co. Ltd. & others 1968] EA 123** and**Williamsons Diamonds Ltd. –vs- Brown [1970] EA 1**. In the **Selle case**, Sir Clement De Lestang V-P, while delivering judgment of the court said the following concerning the duty of a first appellate court:-

"I shall deal with the cross-appeal first as in my view it can be disposed of quite shortly. I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

10. In the **Peters Case**, the court stated that whereas an appellate court has the duty of rehearing a case on first appeal, it was to be borne in mind that such jurisdiction has to be exercised with caution and that **"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 had an advantage of seeing and hearing the witnesses."** It was also held in the same case that where there was no evidence to support the findings made by the trial court, then the appellate court should not hesitate to interfere with such findings, but where there is no evidence of misdirection by the trial court, the appellate court should be slow to interfere. That where the case appears to the appellate court to be a border line case, then the decision of the trial judge who had the opportunity to see and hear the witnesses should not be interfered with.

11. In the present appeal the appellant has raised two issues for determination. The first one is on apportionment of liability and the second one is on quantum of general damages awarded.

12. From the record, the respondent testified that on 5th October 2003, she was weeding in her shamba when the appellant's tractor knocked her from behind. She was taken to hospital by the appellant's people. She was first taken to Sony Hospital and later to Migori District Hospital. She was later examined by Dr. Ajuoga who filled a P3 form issued to her by Awendo police station. Dr. Indigiza, PW3 examined the respondent some $1^1/_2$ months after the accident and prepared a medico-legal report which was produced as **P. Exhibit 4**. According to Dr. Indigiza, the respondent suffered a severe dislocation of the right foot which resulted in pain that would disappear with time. Disability was assessed at 4%. He also testified on cross examination that chances of full recovery from the accident were 50:50. Other witnesses called by the respondent were Number 53525 Police Constable Kubumba who produced as **P. Exhibit 6** the police abstract filled by his colleague PC Aduda. The abstract concerned the accident in which the respondent was injured. Number 45378 Police Constable Mofat Khwahu also testified as PW4 and produced the OB NO.23/5/10/03 as **P. Exhibit 7**.

13. The appellants did not adduce any evidence nor did they file any written submissions. In the

judgment, the trial court noted that the appellants did not adduce any evidence. It thus appears to me that the facts of the case as given by the respondent remained uncontroverted. On the first issue therefore, I find that the apportionment of liability was based on the evidence that was adduced before the trial court. The appellants had contended in their defence that the respondent contributed to the accident by aimlessly walking and/or attempting to cross the path of an oncoming tractor when it was not safe to do so; that she also contributed to the accident by failing to heed the tractor's approach warning and by failing to give way to the tractor. What the appellants averred in their defence were mere allegations. These allegations were denied by the respondent in her reply to defence. It was incumbent upon the appellants to adduce evidence to support those allegations of contributory negligence which would have meant the court finding the respondent responsible for the accident to a greater extent than the 10% attributed to her by the trial court. In the absence of such evidence, Although the respondent averred in the plaint that the accident occurred when she was walking off the verge of the path along Dede-Awendo road, in her evidence in chief, she stated she was weeding her shamba. Since the appellants offered no evidence to the contrary, the court accepts that the respondent was hit by the appellant's tractor.

14. Having accepted that the respondent was hit by the appellant's tractor while she was in her shamba, I also find that motor vehicles do not just veer off the road. The inference I have drawn from the evidence on record is that the driver and/or servant of motor vehicle Reg. No. KAA 940P was negligent in the manner he drove and/or managed the said motor vehicle resulting in the vehicle veering off the path and colliding with the respondent and knocking her down as she went about her business of weeding.

15. In the case of **Daniel Onchari Oira & another –vs- Esther Nyabiage Onkware**being Kisii HCCA NO. 3 of 2009 (Musinga J. on 17th June, 2010), the court held that where a plaintiff alleges negligence on the part of a defendant who does not controvert the allegations in evidence and the plaintiff proves the allegations on balance of probabilities, then the defendant will be found wholly liable. In the instant case, the trial court exercised its discretion by apportioning 10% liability to the respondent. I see no reason for interfering with that discretion or with the finding on liability as a whole.

16. As concerns the award of Kshs.100,000/= in general damages for pain, suffering and loss of amenities it was submitted on behalf of the respondent that the said sum was neither punitive nor excessive in the circumstances. Reliance was placed on the case of **Ndiku Mue –vs-Machakos Ranching Company Ltd. – Machakos HCCC NO.304 of 1994**. I have considered this authority against the authorities cited by counsel on behalf of the appellants and especially the case of **Loise Nyambeki Oyugi –vs- Omar Haji Hassan – Nairobi HCCC No.4150 of 1991**, in which the court awarded Kshs.20,000/= for the following injuries:-

- *Traumatic osteothesis of the elbow.*
- *Multiple bruises of right elbow.*
- *Stiffness and pain of left elbow.*
- *Trauma shock*

17. Reliance by the appellants was also placed on the Court of Appeal decision in **Cecilia W. Mwangi & another –vs- Ruth Mwangi – Court Appeal Civil Appeal in Nyeri, Civil Appeal No.251 of 1996**and on the case of **West (H) & Son Ltd. –vs- Shepherd [1964] AC 326** where Lord Morris of Borthy – Gest stated the following at P. 345:-

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to serve some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation."

18. The above principle was reiterated by Lord Denning M.R in the case of**Lim P. Choo –vs- Chamden**

& Ishington Area Authority [1979] 1 All ER 329 where his Lordship put the case thus:-

"In considering damages in personal injury claims, it is often said.

"The defendant are wrongdoers, so make them pay in full. They do not deserve any consideration." That is a tedious way of putting the case. The accident like this one may have been due to a pardonable error much as may befall any of us. I stress this so as to remove the misapprehension, so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation fair both to her and to the Defendants. The Defendants are not wrongdoers. They are simply the people who foot the Bill. They are as the Lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay."

19. Having considered all the circumstances of this case, and the law as stated above, and considering the extent of the injuries suffered by the Respondent, I am persuaded that this is a proper case for this court to interfere with the award. In my considered view, the award made by the trial court was excessive in the circumstances. See **Butt –vs- Khan – Court of Appeal at Nairobi, Civil Appeal NO.40 of 1977**.

20. Consequently, and for the reasons above given, I dismiss this appeal but reduce the general damages to Kshs.50,000/=. The appellants shall bear the costs of this appeal.

21. It is so ordered.

Dated and delivered at Kisii this 1st day of November, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Odhiambo Kanyangi (present) for the Appellants

Mr. C.A.Okenye for Abisai for the Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.