



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Appeal 609 of 2006

ELIZAPHAN NDITO KARERI.....APPELLANT

VERSUS

CHARLES MAINA KIMANI..... RESPONDENT

(Being an appeal from the judgment and order of the learned Magistrate G.K. Mwaura, Principal Magistrate in Murang'a PMCC No.681 of 2001 made on 11th August, 2006).

J U D G M E N T

1. This appeal arises from a suit which was filed in the Magistrate's Court at Murang'a by Elizaphan Ndito Kareri, hereinafter referred to as the appellant. He had sued Charles Maina Kimani, hereinafter referred to as the respondent, for special and general damages. The appellant's claim arose from personal injuries suffered by him, as a result of an accident involving the respondent's motor vehicle registration No. KQP 654. The appellant contended that the accident was caused by the negligence of the respondent.
2. The respondent filed a defence in which he denied the appellant's claim. In particular the respondent denied the particulars of negligence attributed to him and claimed that if there was an accident, then the same was an inevitable accident caused by *vis major*.
3. During the hearing of the suit, three witnesses testified in support of the appellant's claim. These were: Cpl Peter Munene, a police officer attached to Naru Moro Police Station; Dr. George Waiganjo, a doctor attached to Murang'a District Hospital; and the appellant.

4. Briefly their evidence was as follows. On the 14th February, 2001, the appellant was working for the respondent as a turn-boy. He was in the rear of the respondent's Mercedes lorry registration No. KQP 654, hereinafter referred to as the lorry. The lorry traveled from Murang'a to Othaya and then proceeded to Nyeri where they loaded murrum. As the lorry was being driven back towards Othaya, it was travelling at a very fast speed, when it hit a pothole lost control, and then overturned.
5. The appellant was injured on the left side of the neck, left shoulder, back and knees. He was taken to Othaya Hospital where he was treated and discharged. The appellant sought further treatment at Murang'a District Hospital. He reported the accident at Murang'a Police Station and was issued with a P3 form. The appellant blamed the lorry driver for the accident maintaining that he was driving very fast. The appellant was later examined by Dr. George Waiganjo, who prepared a medical report. Dr. Waiganjo noted that the appellant had scars on the left upper arm, shoulder, back, third and fourth toe of the left leg.
6. Cpl Peter Munene, who was at the material time attached to Othaya Police Station received and booked the report of the accident. He later visited the scene but the vehicle had already been removed from the scene. He noted that the road had many potholes, and that there was a sharp bend from the scene on the way to Othaya.
7. Two witnesses testified in support of the defence. These were: Joseph Magana Ngungu (Joseph) and the respondent. Briefly their evidence was as follows. On the material day, the respondent who operates the aforementioned lorry, drove the said lorry to a jua kali garage where they had lights repaired. He was in the company of Joseph who was a turn boy. When they left the garage, the appellant boarded the lorry. They proceeded to town where the respondent sent Joseph for a jerk. When Joseph brought the jerk, the respondent told him to tell the appellant to leave. The appellant wanted to work for the respondent as a turn boy for that day, but the respondent had already assigned Joseph to be the turn-boy.
8. The respondent drove the lorry towards Nyeri to collect murrum to take to Kiruti Tea factory. On arrival at Nyeri, he loaded the murrum. It was while in Nyeri that the respondent noted that the appellant was in the lorry. The respondent told the appellant to leave but the appellant insisted that he had no fare and the respondent therefore allowed him to ride on the lorry, back to Murang'a.
9. While the respondent was driving back, the lorry suddenly swerved and overturned. The respondent explained that the steering grew light and the lorry overturned on the left side. At that time the appellant was riding on the carrier of the lorry, whilst the respondent and his conductor were in the cabin. When the lorry overturned, the appellant was thrown out of the vehicle. The respondent maintained that he was not speeding but was driving very slowly as the road had a lot of potholes. He maintained that the accident happened because the steering locked and therefore he could not control the vehicle.
10. The respondent maintained that the appellant was not injured but Joseph suffered some injuries. They went to a dispensary and the appellant was given some pain killers. The respondent explained that the lorry was later inspected at a jua kali garage by one Joel Mbaya on 14th February, 2001. Efforts by the respondent to produce the report prepared by Joel Mbaya were successfully resisted by the appellant.
11. Joseph explained that at the material time he had worked for the respondent as a turn boy for about 2 years. Joseph explained that on the material day, the appellant had sought to work as a turn boy of the lorry in Murang'a town, but was rejected by the respondent. When the lorry arrived in Nyeri, Joseph was surprised to see the appellant inside. Apparently the appellant travelled at the rear of the lorry without the knowledge of the respondent or Joseph both of whom were in the cabin of the lorry. When the lorry was travelling from Nyeri the appellant sat on the carrier. As the lorry was traveling, it reached a corner, lost control and overturned. Joseph explained that the lorry was not traveling at a high speed as the road had many potholes. After the accident, Joseph noted that the appellant had a bruise on the left leg and was also injured on the left armpit. Joseph explained that at the time of the accident, the driver was avoiding a pothole, when the front wheel of the lorry got into a deep gully and the lorry overturned. Joseph further explained that the gully was not visible due to the bushes.

12. Written submissions were filed on behalf of each party. For the appellant, it was submitted that the respondent's allegation regarding the steering malfunction was not supported by any expert evidence. It was maintained that the accident was not caused by an act of God, but was caused by something that the driver did, or failed to do. The Court's attention was drawn to the respondent's witness who explained that the respondent swerved to the left to avoid a pothole but lost control when the vehicle got into a gully and overturned. The Court was urged to find the respondent liable. The Court was urged to award the appellant a sum of Kshs.150,000/= as general damages.

13. For the respondent it was submitted that the appellant had failed to prove that the accident was caused by negligence of the respondent. It was submitted that except for the allegation of driving at a high speed, the appellant did not address any of the particulars of negligence alleged against the respondent. It was maintained that the appellant failed to prove the speed at which the lorry was traveling. It was argued that the evidence of Joseph completely eliminated any notion that the lorry was travelling at a high speed.

14. It was pointed out that negligent in maintaining the lorry, was not one of the particulars of negligence alleged against the respondent. It was not therefore open to the appellant to bring that up as an issue. The Court was urged to note that the appellant stole a ride in the respondent's lorry, and the respondent only humanely agreed to give him a lift back to Murang'a. The Court was therefore urged to dismiss the appellant's suit.

15. On the issue of quantum, it was submitted that the appellant suffered only minor soft tissue injuries. It was pointed out to the Court that the doctor who prepared the medical report examined the appellant one year after the accident. The possibility of some of the scars being unrelated to the accident, could not be ruled out. The Court was urged to find that a sum of Kshs.35,000/= would be adequate compensation to the appellant.

16. In his judgment, the trial Magistrate found that the respondent was negligent, as he was driving too fast when negotiating the potholes. The trial Magistrate however noted that Dr. Waiganjo only noted scars during his examination, and that in preparing the medical report, he relied on a P3 form and treatment cards presented to him by the appellant. The trial Magistrate found the documents relied upon by Dr. Waiganjo to be hearsay evidence, as the makers were not called to testify. The trial Magistrate noted that the doctor's observation included injuries which were unrelated to the accident. He therefore ruled that the medical evidence was insufficient to prove that the appellant sustained injuries due to respondent's negligence. Accordingly, he dismissed the appellant's suit.

17. Being aggrieved by that judgment, the appellant has lodged this appeal raising 5 grounds as follows:

(i) The learned Principal Magistrate erred in both facts and law in his finding that there was no evidence of injuries sustained by the appellant in the accident subject of the lower Court proceedings.

(ii) The learned Principal Magistrate misdirected himself on a point of fact in his finding that the defendant had denied the plaintiff's averment of injuries, whereas the defendant had admitted the injuries in the statement of defence at paragraph 5 with the additional remarks that the said injuries appeared minor and that they were not caused by the defendant's wrongdoing.

(iii) The learned Principal Magistrate failed to address himself to the evidence of the second witness for the defence Joseph Magana Ng'ang'a, who testified that the appellant was injured on the toe and had other bruises even on the left back. The failure caused the Magistrate to assume that the doctor's evidence was not corroborated in any way.

(iv) The learned Principal Magistrate erred in fact and in law in disregarding the parties' submissions on the appellant's injuries. The Court did not appreciate the fact that the respondent through his advocate not only admitted that the plaintiff sustained injuries but proceeded to propose an award of Kshs.35,000/=. In the light of the said oversight the Court failed to appreciate that the lowest award would have been Kshs.35,000/= which the respondent was ready to shoulder in case the Court did not agree with him on liability.

(v) The learned Principal Magistrate's judgment was against the weight of the evidence adduced on quantum and caused injustice to the appellant.

18. Mr. Mbuthia who argued the appeal on behalf of the appellant, submitted that the trial Magistrate had sufficient grounds, upon which he could have awarded damages. He referred the Court to the evidence of the appellant in the lower Court, and the evidence of Dr. Waiganjo. Mr. Mbuthia also referred the Court to the evidence of the respondent, wherein the respondent stated that the appellant went for treatment after the accident, and the evidence of Joseph, who stated that the appellant was injured. Mr. Mbuthia pointed out that the respondent in paragraph 5 of his defence did not deny the fact of the injury, but only denied the extent of the injury. Mr. Mbuthia urged the Court to allow the appeal and make an award for general damages, in favour of the appellant, or in the alternative to refer the matter to the lower Court for assessment of damages.

19. Mr. Gichuki who appeared for the respondent maintained that there was a general denial of the appellant's claim in the defence. He noted that the respondent challenged the extent and causation of the appellant's injury, and it was therefore for the appellant to prove his injuries and connect them to the accident. It was argued that the medical evidence which comprised the evidence of Dr. Waiganjo, the P3 form and the medical report were not adequate, as neither the P3 form nor the treatment notes were produced in evidence. It was submitted that the respondent disputed the fact that the appellant was injured, and therefore there was no admission regarding the appellant having suffered injuries. The Court was therefore urged to dismiss his appeal.

20. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial Magistrate. I have also considered the submissions made before the trial Court and before me. I do note that there is no cross appeal, and therefore there is no reason for me to interfere with the finding of the trial Magistrate that the accident subject of the appellant's suit was caused by the negligence of the respondent. The issue that arises in this appeal is whether the appellant was injured in that accident and if so what was the extent of the appellant's injuries.

21. It was not disputed that the appellant was travelling inside the respondent's lorry when it overturned. Although an attempt was made to show that the appellant initially boarded the lorry without the respondent's knowledge or consent, it was conceded that the respondent discovered the appellant's presence in Nyeri and allowed the appellant to travel back to Murang'a in the lorry. Thus at the time of the accident, the respondent was fully aware of the appellant's presence in the lorry. Although the respondent stated that the appellant was not injured, his evidence was contradicted by Joseph who stated that the appellant was injured on the leg and on the armpit; and that both of them were taken to hospital at Othaya. The evidence of Joseph is in fact consistent with the respondent's evidence that Joseph and appellant were taken to the dispensary and given treatment. Thus it was evident that the appellant suffered some injuries as a result of the accident subject of the appellant's suit.

22. The next issue was the extent of the appellant's injuries. In this regard the appellant relied on his own evidence and the evidence of Dr. Waiganjo. Dr. Waiganjo gave evidence which was based on his own observations and also the treatment notes and the P3 form which were presented to him by the

appellant. Although the treatment notes and the P3 forms were not produced in evidence, Dr. Waiganjo was before the Court as an expert witness and the Court had no reason to reject his evidence simply because it was partly based on documents not produced. Indeed Dr. Waiganjo's evidence was consistent with the appellant's evidence and also the evidence of Joseph that the appellant suffered some minor soft tissue injuries. In the circumstances, the trial Magistrate was wrong in dismissing the appellant's claim.

23. I find that the appellant suffered minor soft tissue injuries for which, given the authorities cited, a sum of Kshs.40,000/= would have been adequate as general damages for pain and suffering. For the above reasons, I allow this appeal, set aside the judgment of the lower Court dismissing the appellant's suit, and substitute thereof a judgment in favour of the appellant as against the respondent. I award the appellant general damages of Kshs.40,000/= and special damages of Kshs.1,100/=. I further award the appellant costs in the lower Court and cost of the appeal.

Those shall be the orders of this Court.

Dated and delivered at Nairobi this 3rd day of November 2009.

H.M. OKWENGU

JUDGE

In the presence of:

Ombati holding brief for Mbutia for the appellant

Ms. Kamande holding brief for Gichuki for the respondent

Eric, court clerk