REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, SHAH & PALL, JJ.A.)
CIVIL APPEAL NO. 192 OF 1997

MURGIAN TRANSPORT (K) LIMITED..... APPELLANT

AND

JOHN KATOGA MULOZI..... RESPONDENT

ALIAS RASHID MWAKATOGA

(Appeal from the Judgment of the High Court at Machakos given on 16th March, 1995 by the Honourable Mr. Justice J.L.O. Osiemo

in

H.C.C.C. NO. 112 OF 1989)

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JUDGMENT OF THE COURT

John Katoga Mulozi alias Rashid Mwakatoga (the respondent) was employed by Murgian Transport (Kenya) Limited (the appellant) as a driver. On 7th August, 1987 he was driving the appellant's Fiat lorry KMC 623 along Kericho-Kisii road when the brakes failed and the vehicle overturned and in the process the respondent sustained personal injuries. He sued the appellant in the superior court at Machakos to recover damages for his injuries alleging that the accident was caused by negligence on the part of the appellant. The particulars of negligence alleged by the respondent in the plaint were that the appellant failed to put the vehicle in good and roadworthy condition; failed to detect mechanical faults before releasing the vehicle to the respondent; and the respondent also sought to rely on the doctrine of "res ipsa loquitur".

The appellant filed a defence in which it denied the respondent's claim in its totality and averred that the accident was caused solely or substantially contributed to by the respondent's own negligence and set out the proforma particulars of negligence common in such cases.

At the trial before Osiemo J, the respondent gave evidence. He said that on 7th August, 1987, he was driving from Nairobi to Luanda along Kericho-Kisii road.He was going downhill when the brakes failed, he lost control and the vehicle overturned. He was injured in the accident and he was taken to Kericho Hospital and later transferred to Kenyatta National Hospital in Nairobi. According to him he was unconscious for a very long time and could not recall when he was discharged from hospital. He was seen by two doctors whose reports were admitted in evidence and to which we shall revert later in this judgment.

When cross-examined by Mr. Billing, learned counsel for the appellant, the respondent said inter alia:-

> ***"Before a motor vehicle leaves for a far country, the motor vehicle must be serviced. Yes the company has a procedure that the motor vehicle after service must go to a road test. But on that day I did not go to the road test with the said motor vehicle with a company mechanic. I observed and found out that the motor vehicle was in good condition.***
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> ***The said motor vehicle was serviced before I left with it for Luanda. I left Nairobi and went up to Nakuru where I stopped and checked and found that it was in good condition. But when I reached Kericho it started the brake problems. When I started noticing brake problem I had passed Nakuru. The brakes were not working. I stopped and checked. I am not a mechanic. The pressure was less. Yes I noticed the brakes were not working. Yes I decided to proceed after I had noticed that the brakes were defective. ... I agree I was driving a defective motor vehicle after I had realised the brakes had failed."***

The appellant called its Workshop Supervisor who testified that the vehicle had been serviced and tested before the respondent departed for Luanda. He produced documentary evidence in support of this averment.

Dr. Charles Omanga saw the respondent on 15th May, 1991 and in his report he said the respondent had sustained injuries to his head and both arms. The injury to the head is vague but he appears to have sustained cuts on both arms.His examination revealed that the cuts had healed leaving scars and had partial loss of memory. In his conclusion Dr. Omanga ventured the opinion that the injuries sustained by the respondent had rendered him unable to perform his daily activities, whatever that means.

The respondent was seen by Mr. Bodo, a Consultant Orthopaedic Surgeon on 1st July, 1991. Although the respondent complained of pain in the right arm on doing heavy work and generalised body weakness, on examination Mr. Bodo found that he was mentally clear with no cranial or skeletal nerve deficit. Although he had scars, his right wrist and finger movement were normal. The function of the left arm was also found to be normal. Mr. Bodo's opinion was that the respondent had achieved full recovery.

On this evidence, the Judge held the appellant liable and awarded the respondent general damages in the hefty sum of Shs.800,000/- and a further sum of Shs. 600/- in respect of special damages. The Judge rejected the evidence of servicing purely on the ground that the vehicle had not been taken on a road test by a qualified mechanic and because of that he arrived at the conclusion that the appellant was negligent in failing to detect that the brakes were faulty. According to the Judge, since the respondent was not a mechanic, he could not detect any defect on the brakes.

The appellant has appealed against the decision of the Judge in relation to both liability and quantum. The sum total of the appellant's complaint is that the respondent did not prove, on a balance of probabilities, that the accident was caused by negligence on the part of the appellant and also that the sum awarded by way of damages is excessive and bears no relation at all to the injuries the respondent was proved to have suffered.

In order for his claim to succeed, the respondent had to prove that the accident and his injuries were caused by some negligent act on the part of the appellant. The respondent admitted that the brakes started failing just after he had passed Nakuru. Having realised that the brakes were faulty he decided nevertheless to continue with the journey. This is clear evidence of a person who having discovered a potential danger voluntarily volunteered to suffer injury [volenti non fit injuria]. On this evidence, if anyone was guilty of negligence, then it was the respondent. He appeared to have been deliberately courting injury and he was quite clearly the author of his own misfortune. The vehicle had been properly serviced and this was confirmed both by the respondent and the witness called on behalf of the appellant. In these circumstances it is impossible to see on what plausible ground the Judge could have concluded, as he did, that the appellant was negligent. That finding is erroneous on the evidence on record and cannot

be justified on any view other than other the learned Judge totally misapprehended the evidence. The appeal against liability accordingly succeeds.

In view of the conclusion we have come to as regards liability it is not necessary for us to deal in any depth with the issue of quantum of damages except to say that the evidence of Dr. Omanga was improperly admitted as it was hearsay. Anyhow, according to the evidence of Mr. Bodo the respondent had recovered fully from any injuries he might have sustained. We are firmly of the opinion that the sum awarded to the respondent as damages was not only excessive but also outrageous.

In the result we allow this appeal, set aside the judgment and decree of Osiemo J. and substitute therefor an order dismissing the respondent's suit against the appellant, with costs. The appellant will also have the costs of this appeal.

Dated and delivered at Nairobi this 5th day of June, 1998.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR