IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 302 OF 2010

BETWEEN

JOASH M. NYABICHA …..... APPELLANT

AND

KENYA TEA DEVELOPMENT AUTHORITY …....1ST RESPONDENT

KIPKEBE LIMITED …..... 2ND RESPONDENT

ATTORNEY GENERAL …..... 3RD RESPONDENT

(An Appeal from a judgment and decree of the High Court of Kenya

at Kisii (Makhandia J.) dated the 16th July, 2010

in

H.C.C .C. NO. 12 OF 2000)

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JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the High Court at Kisii (***Makhandia J***. as then was) dated 16th July, 2010. The genesis of this appeal is that on 10th February, 1998 ***Joash B.M. Nyabicha*** the appellant, at about 5.00 O'clock was riding motor-cycle registration No. KAD 798Z on his way home when, near ***Enchore Trading Centre,*** he was knocked down by lorry registration No. KAA 823 P. As a result of the accident, the appellant was seriously injured. He blamed the accident on the driver of Kenya Tea Development Authority, ***("the 1st respondent.")***

On 1st January, 1999 the appellant was arrested and charged before the Chief Magistrate's Court at Kisii with riding a defective motor-cycle in Traffic Case No. 188 of 1999 in respect of the same accident. He was however acquitted on 28th July, 1999.

By a plaint dated 10th February, 2000 the appellant sued the 1st respondent, Kipkebe Limited *("the 2nd respondent")* and the Attorney General *("the 3rd respondent")* jointly and severally seeking compensation for the injuries he sustained and for false arrest, unlawful confinement and malicious prosecution. As against the 3rd respondent he also claimed damages for breach of contract of

employment.

The 1st respondent entered appearance and filed its defence through ***M/s Behan & Okero, Advocates***. The 2nd respondent entered appearance and delivered its defence through ***M/s Timamy & Company Advocates.*** The 3rdnd respondent neither entered appearance nor filed his defence with the consequence that with the leave of the Court, interlocutory judgment was entered against him.

In the defences of the 1st and 2nd respondents, they both denied the appellant's allegations in the plaint as to the occurrence of the accident and their liability. In the alternative, the 1st respondent blamed the appellant for the accident and gave particulars it attributed to him. The 3rd respondent on their part, in the alternative, blamed 3rd parties for the accident.

When the pleadings were closed and before the suit was set down for hearing, the appellant withdrew his claim against the 3rd respondent. His claim against the 1st and 2nd respondent however remained. The appellant eventually testified in part before ***Wambilyanga J.*** *(as he then was)* and ***Bauni J.*** *(as he then was)*. However, proceedings before Bauni J. were, by consent, set aside. The appellant concluded his testimony before Makhandia J. (as he then was) who also heard the rest of the case and delivered the judgment appealed from.

The appellant testified that on the material day at about 5 p.m., he left his place of work at Kipkebe and headed for Mosobeti market to buy vegetables on his way home. He was riding motor cycle registration number KAD 798 Z which had been allocated to him by his employer, the 2nd respondent. He had ***Charles Momanyi Ogutu*** as a pillion passenger. At Enchoro Tea Buying Centre, he saw lights of an on-coming vehicle. He went off the road and stopped. The on-coming vehicle then left it's side of the road and knocked him down. The occupants of the vehicle stopped a short distance after hitting him and returned where he was. He could not stand up and those people took him to Kaplong Mission Hospital where he was admitted for one day. The next day he was transferred to Aga Khan Hospital – Kisumu where he stayed for 9 days. He had a fracture on his right leg which was operated on and was put in plaster of paris. When he went back to the same hospital for check-up, the leg had not healed and was advised to go back for a further check-up after two weeks. He did so and the plaster was removed. He had however not healed and he was taken to St. Leonard hospital in Kericho where he underwent another operation on the same leg and plaster of paris applied. This time round he was admitted for one month but his leg did not heal and he was referred to Aga Khan Hospital – Nairobi where another operation was done. He improved slightly but could not walk for long. Later ***Dr. Wour*** prepared a medical report of his injuries which report was produced at the trial. Also produced were several receipts for expenses incurred, a second medical report and a P3 form.

He reported back on duty but shortly afterwards he was served with a termination letter and was only paid salary for 3 months in lieu of notice.

On 1st January, 1999 he was arrested and charged with riding a defective motor cycle. The case was eventually terminated under ***section 202 of the Criminal Procedure Code.*** He testified that the vehicle which knocked him down was owned by the 1st respondent. He prayed for damages.

In cross examination, he testified, inter alia, that the motor vehicle which knocked him down was owned by the 1st respondent but admitted that the police abstract report he produced indicated that its owner was Nyasiongo Tea Factory.

The appellant called his pillion passenger, ***Charles Momanyi Ogutu*** (PW2). He testified that he was indeed given a lift by the appellant on his motor cycle on the material day when, at around 5 p.m., at Enchoro Tea Centre, he saw an on-coming vehicle which belonged to the 1st respondent. The vehicle was ***"zig zagging"*** on the road. He warned the appellant of the imminent danger and the appellant pulled off the road. PW 2 alighted and stood aside. The vehicle then hit the appellant who fell down. The vehicle stopped and its occupants went to check on the appellant and took him to Kaplong Mission Hospital. PW 2 was certain that the vehicle which knocked down the appellant belonged to the 1st respondent.

The respondents did not adduce any evidence at the trial before the High Court.

Upon considering the evidence and the submissions of counsel, the learned judge, of the High Court in a reserved judgment delivered on 16th July, 2010 dismissed the appellant's claim with costs. The learned judge then, as was expected of him, proceeded to assess damages he would have awarded the appellant if he had not dismissed his case. The learned judge made the following awards:-

1) General damages for pain and suffering and

loss of amenities - Kshs.1,000,000/=

2) General damages for malicious prosecution - Kshs.150,000/=

3) Special damages - Kshs.100/=

Total

Kshs.1,150,100/=

Being aggrieved by the decision of the High Court, the appellant filed the instant appeal and raised a total of 14 grounds in support of the appeal. When the appeal came up for hearing before us on 11th July, 2013, ***Mr. Okoth,*** learned counsel for the appellant abandoned the appeal against the 3rd appellant and urged his client's running down claim against the 1st respondent. It should be remembered that the appellant had at the High Court, withdrawn his claim against the 2nd respondent. This appeal is therefore solely against the 1st respondent. The grounds of appeal against findings of the High Court in favour of the 3rd respondent are therefore unmaintainable and were properly abandoned.

In our view therefore this appeal turns on the following complaints made by the appellant:-

(a) That the learned Judge of the High Court misdirected himself on several matters of law and fact and delved in trivial technicalities.

(b) That the learned Judge of the High Court erred in law in mis-interpreting the provisions of Order VI rule 9 of the Civil Procedure Rules.

(c) That the learned Judge of the High Court erred in law and fact in calling upon the appellant to prove a fact which was expressly admitted in the plaint i.e. the ownership of the accident motor vehicle and relied on his opinion that the admission of ownership could have been an error.

(d) That the learned Judge erred in law and fact in holding that the mere fact of arresting and charging the appellant was sufficient to imply that he was guilty of contributory negligence.

(e) That the learned Judge erred in law in holding that the 1st respondent was not liable for the tort of malicious prosecution.

(f) That the learned Judge erred in law in awarding only Kshs.150,000/= for damages for malicious prosecution.

Mr. Okoth, learned counsel for the appellant, at the hearing contended that given the introduction of the ***"Oxygen"*** principle, substantial justice should be the main concern of the courts rather than adherence to technicalities. In this regard he invoked the decision of this court in ***Hunter Trading Co. Ltd -Vs- Elf Oil (K) Ltd*** **[CAC APPL No. 6 of 2010 (UR 3 of 2010].**

Counsel further challenged the learned Judge's conclusion that because no reply had been filed, there was admission by the appellant of the respondent's averments in the defence. In his view, there was joinder of

issue on the defence and the appellant led evidence of negligence against the respondents whilst the respondent failed to challenge the same by rebuttal or any other evidence.

With regard to the ownership of the accident motor vehicle, counsel submitted that ownership was clearly admitted in the defence and no evidence was required to prove the same as the learned judge wrongly found.

Counsel further submitted that the respondents led no evidence on contributory negligence on the part of the appellant and his being charged with riding a defective motor cycle was no basis for finding against him in that regard.

In the premises he prayed that the appeal be allowed with costs.

Mr. Kouko, learned counsel for the 1st respondent, on the other hand argued that as the averments on negligence in the defence were not traversed, they were deemed to be admitted by the appellant and for that proposition relied upon this courts' decision in ***Mount Elgon Hardware -Vs- United Millers Ltd*** [**Kisumu C.A. No.19 of 1996 (UR)** and that of ***Lucy Njoki Chege -Vs- James Macharia Kungu T/A Marsh Transporters & Another*** **[Nakuru HCCC No.239 of 1998] UR.**

On the issue of the ownership of the accident motor vehicle, counsel acknowledged that indeed ownership was not challenged. Nonetheless he prayed for the dismissal of the appeal with costs.

Mr. Maroro, learned counsel who represented the Attorney General, prayed for costs, the appeal against the Attorney General having been withdrawn by the appellant.

We have set out above what, in our view are the main issues in contention and the rival submissions of counsel on the same. This being a first appeal, it is our duty to re-evaluate as well as re-examine the evidence adduced before the High Court and come to our own conclusion but bearing in mind the fact that we have not had the opportunity of seeing and hearing the witnesses testify and should give allowance for that. ***(See Selle -Vs- Associated Motor Boat Company*** [1968] ***E.A. 123, Williamson Diamonds Ltd. -Vs- Brown [1970] EA 1 and Arrow Car Limited -Vs- Bimomo & 2 Others [2004] KLR 101.)***

Both issues of liability and quantum have been raised and form the fulcrum of our determination. With regard to liability the ownership of the accident vehicle is pertinent. The appellant pleaded as follows, in paragraph 5 of the plaint

> ***"5. On or about the 10th day of February, 1998 at about 5.00 O'clock in the evening along Kipkebe – Mosobeti road the plaintiff was lawfully riding motor – cycle registration No. KAD 798Z owned by the defendant while from duty going home when on reaching near Enchore Trading Centre the driver of Isuzu Lorry Registration No KAA 823 P owned by the first defendant as employee/servant or agent of the first defendant so negligently drove, managed and or controlled the said lorry that he caused or permitted the same violently to collide with the said motor- cycle registration No. KAD 798Z which was stationary thus injuring severely the plaintiff."***

To those averments, the first respondent pleaded as follows in paragraph 4 of its defence:

> ***"4. Save that an accident occurred on 10th day of February, 1999 on the Kipkebe – Mosobeti road involving the 1st defendant's motor – vehicle registration number KAA 823 P the contents of paragraph 5 of the plaint are denied and the plaintiff is put to the strictest proof thereof. The 1st defendant denies in particular that the accident was caused by the negligent driving of its driver servant and or agent as particularised therein."***

The 1st respondent did not file any subsequent pleading amending paragraph 4 as originally pleaded. The said paragraph remained it's pleading regarding ownership of the accident motor vehicle until the suit was finalised before the High Court. The said paragraph plainly admitted that the 1st respondent's motor vehicle registration number KAA 823P was involved in an accident on the material date. It however denied that its driver servant, and/or agent was negligent as particularised. The 1st respondent could not run away from its pleading in paragraph 4 without amending the same. Given that admission, the finding by the learned judge of the High Court, that the appellant had to prove that the accident motor vehicle was owned by the 1st respondent was puzzling. The learned judge considered the 1st respondent's averment in paragraph 4 and the contents of a police abstract report which indicated that the subject motor vehicle was owned by an entity called Nyansiongo Tea Factory which had not been joined as a defendant and concluded as follows:-

> ***"It therefore matters not that the 1st defendant may have admitted ownership of the motor vehicle. It could be an error. It was upto the plaintiff to prove his case against the 1st defendant and in particular with regard to the ownership of the motor vehicle. However he only managed to prove that after all the motor vehicle belonged to a different entity other than the 1st defendant. The 1st defendant had no obligation to prove ownership of the motor vehicle or assist the plaintiff in his effort to build up his case."***

With all due respect to the learned Judge of the High Court, we find that he misdirected himself as to the standard of proof with regard to the ownership of the accident motor vehicle. The 1st respondent having admitted being the owner of the accident motor vehicle, could not change that averment without amending the pleading appropriately. It could not do so in cross examination or in submissions. It was bound by its pleading. As was stated by ***Lord Normond*** at pp 238 – 239 in ***Esso Petroleum Co. Ltd -Vs- South port Corporation (7) [1956] AC 218*** which was cited with approval in ***Puspa -vs- Fleet Transport Company [1960] EA 1025:***

> ***"The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them."***

In the case before us the 1st respondent unambiguously admitted ownership of the accident motor vehicle. That was its case with regard to the issue of ownership of the accident motor vehicle. The fact required no further proof by the appellant. With respect, we do not appreciate the learned judge's opinion that the pleading in paragraph 4 of the 1st respondent could have been an error. On the same line of argument, the entry in the Police abstract could also have been an error. The learned Judge could not amend the 1st respondent's averment in his judgment. He could not descend into the arena of battle strictly reserved for the parties to the dispute before him.

The record further shows that the appellant testified before the High Court and said in evidence in chief:-

> ***"On my way I was hit by KTDA's vehicle Registration No.KAA 823P. I was at Enchoro Tea Buying Centre."***

And in cross examination he answered counsel for the 1st respondent that the police abstract report showed the owner of the motor vehicle as Nyasiongo Tea Factory. That answer alone did not change the 1st respondent's pleading admitting ownership of the accident vehicle.

The record also shows that on 17th February, 2005 the following order was recorded by consent:

> ***"1. By consent the suit against the 3rd defendant Kipkebe Limited be and is hereby withdrawn with half costs. Medical report of Dr. H.P Owuor dated 6/9/99 and one by Dr. D.O. Raburu dated 1/10/2003 be and are hereby admitted without calling the makers. Mention on 14/3/2005 with a view of recording a consent on issue of liability."***

The appellant called as a witness Charles Momanyi Ogutu (PW2) who also testified that the accident vehicle belonged to the 1st respondent. In cross-examination, he reiterated his assertion that the vehicle

was indeed owned by the 1st respondent.

At the close of the appellant's case, the 1st respondent's counsel informed the court that he did not wish to call any witness. The 1st respondent therefore never called any evidence to rebut the appellant's evidence with respect to the ownership of the accident motor vehicle.

In our view therefore, on the evidence before the High Court, it cannot be said that the appellant did not demonstrate who the owner of the accident motor vehicle was. He did so on a balance of probabilities and in any event the 1st appellant unambiguously admitted ownership of the accident motor vehicle. With respect, the learned Judge of the High Court misdirected himself in holding otherwise and the appellant is obviously right in the complaints he has made to the effect that the learned Judge erred in law and in fact in calling upon the appellant to prove a fact which was expressly admitted in the pleadings and in relying on his opinion that the admission could have been an error.

We now turn to the complaint that the learned Judge erred in interpreting the provisions of ***Order VI rule 9 of the Civil Procedure Rules.*** The learned Judge indeed set out the provisions of ***sub-rule 9 (1)*** of the said rule in his judgment as follows:-

> ***"....Subject to sub-rule (4), any allegation of facts 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.."***

The record shows that the appellant did not file a reply after he was served with the 1st respondent's defence which alleged, among other things, that the appellant was wholly to blame for the accident due to his negligence. The learned Judge of the High Court therefore concluded that the appellant had admitted he was negligent in the manner he rode his motor cycle and was consequently the sole author of his misfortune.

A plain reading of ***Order VI rule 9 (1)*** shows that an allegation in a pleading may be traversed expressly by the opposing party or there may be a joinder of issue under ***rule 10*** of the same Order which joinder operates as a denial of the issue or issues. ***Rule 10 (1) and (2)*** reads as follows:-

> **"10 (1) If there is no reply to a defence there is a joinder of issue on that defence (2) Subject to sub-rule (3) -**
>
> **(a) there is at the close of pleadings a joinder of issue on the pleading last filed, and**
>
> **(b) a party may in his pleading expressly join issue on the immediately preceding pleading."**

In the case before us, the appellant did not file a reply to the defence which alleged he was negligent. In the clear language of ***Order VI rule 10 (1)*** there was therefore a joinder of issue on the same. The appellant needed not have expressly filed a subsequent pleading denying the negligence as the learned High Court Judge found. With all due respect to the learned Judge, we think he fell into error when he failed to consider ***rule 9 (1) of Order VI*** as a whole.

The case of ***Mount Elgon Hardware -Vs- United Millers Ltd [Kisumu CA No 19 of 1996] (UR)*** which was relied upon by counsel for the 1st respondent for the proposition that failure to traverse allegations of negligence in a defence amounted to admission of the negligence by the plaintiff, is clearly distinguishable from the case before us. There, the plaintiff, who was the appellant, did not plead any particulars of negligence in its plaint and the only particulars of negligence pleaded were by the defendant/respondent. That is not the position in our case where the appellant not only particularized the allegations of negligence but also led evidence on the same.

We therefore agree with the appellant that the learned judge of the High Court erred in law in interpreting

the provisions of ***Order VI rule 9 of the Civil Procedure Rules***. We can also not fail to observe the inconsistency in the learned Judge's findings on failure to expressly deny an allegation in a subsequent pleading. Whereas he took the view that the failure by the appellant to expressly deny the allegations of negligence in the defence amounted to admission of the same, he was liberal in his interpretation of the consequences of the 1st respondent's express admission of the ownership of the accident motor vehicle and held that the appellant should have called evidence to demonstrate the ownership of the accident motor vehicle.

Another complaint made by the appellant with regard to liability is that the learned judge of the High Court erred in law in holding that the mere fact of arresting and charging the appellant was sufficient to imply that he was guilty of contributory negligence. In his own words:-

> ***"Finally there was the issue of him having been charged with a traffic offence arising from the said accident though acquitted. Taking all the foregoing into account I am satisfied that the plaintiff has not proved on a balance of probabilities that the 1st defendant was liable to him for the accident."***

The record shows that the accident occurred on 10th February, 1998 and was reported to the police in the same year going by the police abstract form which was produced at the trial before the High Court. More than 1 ½ years later the police charged the appellant with driving a defective motor cycle. The appellant denied the charge and was subsequently acquitted. Would those proceedings per se impute liability on the appellant. The appellant was charged with riding a defective motor cycle. Besides the acquittal, there was no evidence that the defect in the motor cycle, even if there was one, was the cause of the accident. The appellant testified that when he saw the oncoming vehicle he pulled over to the side of the road. He had therefore stopped by the time he was hit by the accident motor vehicle. ***Charles Momanyi Ogutu*** (PW2) supported the appellant. In his own words:-

> ***"We were riding along and reaching Enchoro Tea Centre we saw a vehicle belonging to KTDA carrying tea leaves a head of us. It was zig zagging on the road. I warned the plaintiff and he pulled over. I alighted from the motor cycle and stood aside."***

So, the appellant was not in motion when the accident occurred. Again with all due respect to the learned Judge, we do not see how the charging of the appellant in the traffic case would, in the circumstances, suggest that the appellant was liable for the accident. We agree with the appellant that the learned Judge's conclusion based on the mere charging of the appellant with a traffic offence was unfounded and without basis.

As we have already stated, the appellant testified that on the material day when he was riding his motor cycle he saw the 1st respondent's motor vehicle. He stopped on the side of the road and was then hit by the said motor vehicle causing him to fall down. As already observed, he had a pillion passenger who had already alighted by the time the appellant was hit. The pillion passenger supported him. The appellant and his passenger clearly blamed the driver of the accident motor vehicle.

There was no other evidence on the issue of negligence as the 1st respondent opted not to adduce any evidence before the High Court. In our view, the appellant adduced ample evidence to show that the accident was caused by the driver of the 1st respondent's motor vehicle registration number KAA 823 P. The driver of the said motor vehicle was clearly wholly to blame for the negligence which resulted in the accident. The learned Judge, with all due respect to him, was in error in finding that the appellant was wholly to blame for the accident due to his negligence.

Having resolved the issues of ownership of the accident motor vehicle and that of liability with regard to the accident, we shall mention briefly the issue of the 1st respondent's liability for instigating the arrest, confinement and subsequent prosecution of the appellant. This aspect of the appellant's complaints was not urged by *Mr. Okoth,* learned counsel for the appellant, and rightly so in our view. We say so, because

when the appellant testified before the High Court, he merely narrated his arrest on 1st January, 1999 and being charged and subsequently ***"discharged"*** under ***section 202 of the Criminal Procedure Code.*** He blamed no one for the arrest, confinement or prosecution. In our view he wholly failed to demonstrate that his arrest lacked basis or that his confinement and subsequently prosecution was without reasonable and probable cause and or that the prosecution was malicious.

The appellant did not also demonstrate to any extent how he had been injured in his credit character and reputation and how he had suffered mental anguish as he had pleaded in his plaint. It is for those reasons that we think his counsel was right in not urging his appeal based on his having been arrested, confined and subsequently prosecuted.

We turn now to the learned Judge's assessment of damages. We observe that if the appellant had succeeded, the learned Judge would have awarded him Kshs.150,000/= as damages for malicious prosecution. Nothing however, turns on that award as we have found that the appellant failed to prove that claim. For pain, suffering and loss of amenities, the learned Judge of the High Court awarded the appellant a sum of Kshs.1,000,000/= as general damages. The appellant, in his appeal before us, expressly accepts that assessment as reasonable.

Taking into account all that we have said in the foregoing paragraphs, we allow the appeal, set aside the judgment and decree of the High Court made on 16th July, 2010 and substitute therefor a judgment holding the 1st respondent 100% liable in negligence.

In the result we enter judgment for the appellant against the 1st respondent as follows:-

(a) General damages for pain and suffering and loss

of amenities:- *Kshs.1,000,000/=*

(b) Special damages :- *Kshs.100/=*

Total ***Kshs.1,000,100/=***

The sum in paragraph (a) shall bear interest at Court rates from the date of the High Court Judgment until payment in full, and the sum in paragraph (b) shall bear interest from the date of filing suit until payment in full.

The appellant shall also have the costs of the suit in the High Court as well as the costs of this appeal to be paid by the 1st respondent.

Dated and Delivered at Kisumu this 24th day of October, 2013

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR