



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
CORAM: GICHERU, LAKHA & OWUOR, J.J.A.
CIVIL APPEAL NO. 204 OF 1999
BETWEEN**

**GERISHON SETH AGONYA APPELLANT
AND
DAVID A. MAJANI
EMMANUEL ESHIVANDA RESPONDENTS**

**(Appeal from the judgment and decree of the High Court of
Kenya at Kakamega (Tanui J) dated 26th May, 1999
in
KAK. H.C.C.A. NO. 30 OF 1998)**

JUDGMENT OF THE COURT:

In allowing the respondents' first appeal, the learned superior court judge held that the appellant herein had not proved the second respondent's negligence on a balance of probabilities as he ought to have done nor had he proved, again, on a balance of probabilities the injuries he claimed to have suffered in the accident involving the first respondent's lorry registration No. KAU 097. The fact of the said accident appears in the Accident Registrar of Kilingili Police Station as OB number 15 dated 4th February, 1993, as per the Abstract **From Police On A Road Accident** dated 22nd March, 1993 and exhibited in the court of first instance and marked **Exhibit NO. 1**.

In his first plaint in the Principal Magistrate's Court at Kakamega, the appellant had inter alia alleged that the aforementioned accident was wholly caused by the negligence and/or carelessness of the first respondent and/or both the first and second respondents. And in regard to the first respondent the principal particulars of his negligence comprised of:

- (a) Failing to maintain his lorry registration NO. KAU 097 in sound mechanical and serviceable condition; and
- (b) Permitting the second respondent who was his driver/agent or servant to drive the said lorry.

To these particulars of negligence, the first respondent's defence was merely to put the appellant to strict proof in respect thereof. The injuries sustained by the appellant consequent to the accident referred to above were particularised in his plaint as follows:

- (a) Traumatic injuries on the chest;
- (b) Traumatic injuries on the left leg with a cut wound; and
- (c) Bruises on both legs, hands and face.

The first and second respondents' joint statement of defence in the court of first instance in regard to the aforesaid particulars of injuries was that the same were false and that at the hearing of the appellant's suit in the aforementioned court, they were to refer the appellant to their independent doctor to ascertain the said particulars of injuries. This was never to be.

The appellant together with others had been hired by the first respondent as casual workers to ferry sand in the first respondent's lorry registration NO. KAU 097. By 4th February, 1993, the appellant had worked as such casual worker for three days. On this day, he and other casual workers were on top of the lorry above mentioned which was being driven by the second respondent whose destination was the site for collecting and loading sand. As the lorry was being driven downhill about 800 metres toward a river, its brakes failed, and, according to the second respondent, he tried what he could to avoid plunging the lorry into the river and in the process he drove the lorry about 50 metres to the river with its rear side landing on the embankment trapping the appellant under it.

Subsequently, the appellant was removed from the entrapment having sustained the injuries particularised in his plaint as are set out above but in his evidence before the trial court he said that he was injured on the waist and had a fractured left leg below the knee. He had initially been treated for these injuries on the same day of the accident at Kilingili Health Centre and then at Mbale Hospital and at Kakamega Provincial General Hospital where an X-ray of his left leg showed a fracture of the upper 1/3 of the tibia bone. A plaster of paris was applied for a period of six weeks and was removed on 28th April, 1993. According to his medical report which was tendered in evidence before the trial court, as at 16th June, 1993 the prognosis and assessment in relation to this injury was that the appellant was developing posttraumatic oostoarthritis of the left knee joint and was to be on anti-inflammatory drugs for a long time and possibly for the rest of his life. His left knee could not come back to full function as before the accident and according to Dr B.L. Mwenesi who medically examined him on the aforesaid date, he had suffered a disability of a permanent nature in the average of 25%.

The only evidence for the respondents before the trial court was that of the second respondent which as is intimidated above was to the effect that the first respondent's lorry registration NO. KAU 097 landed on the road embankment pursuant to its brake failure. According to him, the appellant jumped from the lorry after it landed on the said embankment and thereby received scratch injuries from sticks onto which he landed. Nonetheless, if this were so, nothing could have been easier than including this fact in paragraph 6 of the respondents' joint defence in the court of first instance which was couched in the following terms:

"6. That on a without prejudice basis the Defendants shall plead contribution at the hearing hereof that the Plaintiff having requested for a lift and having known that the accident motor -vehicle was to a large extent to blame for the injuries sustained which are hereby denied."

In her judgment dated and delivered on 30th July, 1997, the learned trial magistrate, Mrs. W.A. Juma, held that the story that the appellant jumped out of the accident motorvehicle was untrue and that the medical report in respect of the injuries he sustained in the said accident was not contested. Granted that according to the Police Abstract Form referred to earlier in this judgment the police were aware of the accident in question, the learned trial magistrate proceeded to hold that on the material before her, the appellant had on a balance of probabilities proved his case and awarded him general damages in the sum of K.Shs.180,000/= together with costs and interest. This award was set aside by the superior court as indicated at the beginning of this judgment. In this second appeal, the appellant's principal complaint is that in disbelieving his evidence before the trial court in preference to that of the second respondent herein, the first appellate judge was in error in view of the material available before him which includes uncontested documentary evidence.

It is noteworthy that whereas in his judgment dated and delivered on 26th May, 1999, the learned first appellate judge absolved the second respondent herein of any negligence in relation to the material motor-vehicle accident, he made no reference to the first respondent's negligence as pleaded by the appellant in his plaint in the court of first instance. The evidence of the second respondent in that court clearly supported the appellant's averment that the first respondent was negligent in failing to maintain his lorry registration NO. KAU 097 in sound mechanical and serviceable condition and in permitting the second

respondent to drive the same in the state in which it was. Indeed, from the evidence of the second respondent, it was this condition of the said lorry that led to the accident in which the appellant sustained injuries the subject-matter of his suit in the Kakamega Principal Magistrate's Court. Hence, whereas the second respondent may not have been guilty of negligence in relation to the material accident, the first respondent was certainly to blame for it. And as the first appellate court did not absolve him of it, we would allow the appellant's appeal to the extent that the order of the superior court setting aside the orders of the trial court with costs to the respondents herein both in that court and in the court of first instance is varied so as to apply to second respondent only but as regards the first appellant, those orders still stand. The appellant shall have the costs of this appeal as against the first respondent. It is so ordered.

Dated and delivered at Kisumu this 23rd day of March, 2001.

J. E. GICHERU

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR