



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CIVIL APPEAL NO 11 OF 2018

GEORGE MUCHAI RIMUI.....APPELLANT

VERSUS

HERITAGE INVESTMENT LIMITED.....RESPONDENT

(Appeal from the judgment and decree of Hon .F. Kyambia, SPM

dated 7th September 2018 in Mombasa SPMCC No 1485 of 2013)

JUDGMENT

1. The case in the trial court from which this appeal proceeds arises from a road traffic accident on 24th February 2013, involving the Appellant, who at the material time worked for the Respondent as a Driver.
2. The facts of the case as recorded by the lower court are that the Appellant was assigned motor vehicle registration number KBL 544U ZD 4991. On 17th February 2013, he was instructed by the Respondent to transport loose rims to Uganda.
3. The Appellant told the lower court that he was arrested at Mai Mahiu for overloading, an issue that was said to have been resolved by the Respondent, allowing the Appellant to proceed with the journey.
4. The Appellant further told the trial court that in the course of the journey, the loose cargo started shifting from side to side causing the trailer pin to malfunction and the brakes to fail. As the Appellant was trying to avoid hitting a vehicle ahead of him, his motor vehicle veered off the tarmac and an accident occurred along the Malaba-Bungoma Road.
5. According to the record, the Appellant suffered a crush amputation (mangled) right lower limb, resulting to the loss of one leg. Permanent incapacity was assessed at 50%.
6. In the judgment appealed from, the Appellant's suit was dismissed with costs, on the ground that he had failed to prove liability against the Respondent.
7. In his Memorandum of Appeal dated 4th October 2018, the Appellant raises the following grounds of appeal:
 - a) The learned trial Magistrate erred in law and fact by failing to hold the Respondent liable for the accident that occurred on 24th February 2013, involving the Appellant and the Respondent's motor vehicle registration number KBL 544U/ZD4991, despite the overwhelming evidence on record that the Respondent was to blame for the accident and thus dismissed the Appellant's suit, a conclusion that was untenable, unfair and manifestly unjust;
 - b) The learned trial Magistrate erred in law and fact by disregarding the Appellant's overwhelming evidence that the Respondent was to blame for the accident by failing to fasten or adequately fasten the goods in a sealed container, thereby arriving at a finding on liability that was unfair and manifestly unjust and contrary to the weight of evidence;
 - c) The learned Magistrate erred in law and fact when he failed to apply the appropriate standard of proof required in the case;
 - d) The learned Magistrate erred in law and fact by failing to judiciously analyse the Appellant's evidence and submissions on record thereby arriving at a finding on liability that was unfair, untenable and manifestly unjust;

- e) The trial Magistrate further fell into error by awarding general damages that were inordinately so low that amounted to an entirely erroneous estimate;
- f) The trial Magistrate in assessing loss of earning capacity fell into error by adopting a ratio approach; adopting a manifestly low multiplier and multiplicand and thereby arriving at an award that is untenable in law and fact;
- g) The Appellant was never served with the Respondent's submissions until 11th September 2018, after delivery of the judgment which prejudiced the Appellant's right to respond to the Respondent's submissions.

8. This being a first appeal, the duty of the Court is as set out in *Abok Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Company Advocates [2013] eKLR* where the Court of Appeal stated the following:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by parties in the evidence.”

9. From the evidence on record, it is not in doubt that the Claimant was injured in the course of duty on 24th February 2013, while working for the Respondent as a Heavy Commercial Driver. The point of contention is who was to blame for the accident.

10. In his Complaint filed at the lower court on 2nd August 2013, the Appellant states that in the course of his journey to Uganda, the cargo being loose rims, started shifting from side to side as result of which the trailer pin malfunctioned and the brakes failed.

11. The Appellant further states that he had to steer the motor vehicle to the right to avoid knocking motor vehicles ahead of him and his motor vehicle, which he claims was overloaded, toppled off the tarmac upon which the Appellant suffered serious injuries.

12. The Appellant accuses the Respondent of negligence and breach of contract by:

- a) Permitting the Appellant to work in dangerous conditions;
- b) Failing to take adequate precautions for the safety of the Appellant;
- c) Exposing the Appellant to risk of damage or injury which the Respondent knew or ought to have known;
- d) Permitting the Appellant to work in circumstances which were inherently dangerous;
- e) Failing to fasten and/or secure the cargo resulting into instability of the motor vehicle;
- f) Overloading the motor vehicle;
- g) Failing to provide a safe work system;
- h) Failing to ensure that the brakes were in good condition;
- i) Failing to ensure that the trailer lock pin was in good condition and not defective;
- j) Failing to ensure that the trailer lock pin was properly fastened;
- k) Failing to ensure that the motor vehicle had undergone service;
- l) Failing to ensure that the motor vehicle had undergone proper maintenance.

13. In its Defence, the Respondent states that the accident was caused solely by the negligence of the Appellant. The Respondent cites the following particulars of negligence on the part of the Appellant:

- a) Failing to adhere to the Highway Code and other traffic regulations;
- b) Driving at an excessive speed without due regard to the nature of the road;
- c) Driving without due regard to the safety of other road users;
- d) Driving without due regard to other traffic on the road;
- e) Failing to exercise due care and skill in managing motor vehicle registration number KBL 544U/ZD 4991;

- f) Failing to brake, stop, steer or in any other way manage motor vehicle registration number KBL 544U/ZD 4991 to avoid the accident;
- g) Driving without care and attention thereby causing the accident;
- h) Causing motor vehicle registration number KBL 544U/ZD 4991 to overturn.

14. In a nutshell, the Appellant blames the Respondent for allowing him to use a defective motor vehicle and the Respondent accuses the Appellant of careless driving.

15. In his judgment delivered on 7th September 2018, the learned trial Magistrate states:

“On how the accident occurred, the only evidence is that of the Plaintiff. The Plaintiff told the court that the accident occurred when the loose cargo he was carrying started swaying causing the pin connecting the cabin for the trailer to thrust and broke (sic) when he applied the brakes. He stated that the aforesaid happened because the vehicle had been modified with an additional axle. The evidence as how the accident occurred is not controverted by the Defendant. The Defendant’s position is that the vehicle was in good condition.

This brings me to the next issue if actually the Defendant was negligent and or in breach of duty of care. On this issue counsel for the Defendant submitted that the burden was on the Plaintiff to prove that the Defendant was to blame.”

16. The learned Magistrate further states:

“I have considered the aforesaid submissions and I agree with the Defendant Counsel that the burden was upon the Plaintiff to prove the particulars of negligence and/or breach of duty of care.

Did the Plaintiff discharge that burden? The Plaintiff’s to prove negligence (sic) and for breach of duty on the part of the Defendant gave evidence that the brakes failed because they were defective and that the Defendant had modified the vehicle and loaded the same with loose cargo causing the same to sway. Apart from the evidence that the vehicle was modified by adding an extra axle, the Plaintiff did not prove that the vehicle was defective. The issue of defect raised by the Plaintiff is of technical nature as submitted by the Defendant Counsel and can only be proved by availing technical evidence that the vehicle was defective. The Plaintiff did not discharge that burden. On the other hand the Defendant availed inspection report which certified that the vehicle had no preaccident defect.”

17. In the submissions filed on behalf of the Respondent in this Court on 27th February 2020, reference was made to the decision in *Statpack Industries v James Mbithi Munyao (HC Civil Appeal No 152 of 2003)* where **Visram J** (as the then was) rendered himself in the following terms:

“Coming now to the important issue of ‘causation’, it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone’s negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone’s negligence. An injury ‘per se’ is not sufficient to hold someone liable.”

18. This is the law as I understand it. I must therefore agree with the learned trial Magistrate that the Appellant bore the burden of proving that the accident in which he was injured was caused by the Respondent’s negligence. This too is the essence of Sections 107, 108 and 109 of the Evidence Act.

19. In the submissions filed in this Court on behalf of the Appellant on 10th February 2020, the notion of progressive breach of duty by the Respondent was introduced. In this regard, the Appellant submits that the defect in the breaks and the axle was not the only malaise with the motor vehicle. The Appellant adds to the list of breaches; overloading, failing to fasten and/or secure the loose cargo and modifying the vehicle by adding an extra axle.

20. The Appellant concludes that this successive breach of duty caused the twist locks holding the container to snap, the pin joining the trailer to the cabin to break and the breaks to fail as the vehicle was going downhill, as a result of which the vehicle toppled over as the Appellant could not control it.

21. My perusal of the evidence adduced before the trial court did not reveal any record of the foregoing narration. The only logical inference to draw therefore is that these are not matters that were canvassed at the trial. This Court would therefore be overreaching its mandate were it to entertain them at this appellate stage.

22. Moreover, it seems to me that the conclusion drawn by the Appellant in his submissions could only have been arrived at upon interrogation of technical evidence on the mechanical state of the motor vehicle at the time of the accident. The Appellant did not call any such evidence and because the inspection report on the motor vehicle did not reveal any pre-accident defects, the finding is that the Appellant failed to discharge his burden of proof in this regard.

23. Furthermore, the Appellant himself testified before the trial court that he left Mombasa on 17th February 2013. The accident of 24th February 2013 which occurred at Malaba, close to the final destination, happened a week later. Assuming that the motor vehicle indeed had

the cabal of malaise narrated by the Appellant the question to ask is how the motor vehicle was able to traverse all the way from Mombasa to Malaba in such a sorry condition.

24. Additionally, the Court must also ask why the Appellant, who described himself as a professional driver agreed to take such a faculty motor vehicle on the road. I ask this question because in his Plaintiff, the Appellant accused the Respondent of permitting him to work in dangerous conditions.

25. Overall, I agree with the learned trial Magistrate that the Appellant failed to link the accident of 24th February 2013 to the Respondent's negligence. The appeal therefore fails on the question of liability.

26. Although the Appellant's case failed at the point of liability, the learned trial Magistrate, went further as he was required to do, to assess quantum all be it on a hypothetical basis.

27. On general damages, the trial court returned a figure of Kshs. 1,500,000 for general damages, Kshs. 99,058 for special damages and Kshs. 70,000 for future medical expenses.

28. The power of an appellate court to interfere with an award by a trial court is limited to cases where in assessing damages, the trial court has applied a wrong principle of law or where the award is so inordinately low or high as to be wholly erroneous (see *Henry Hidayya Ilanga v Mangena Manayka (1967) 1 EA 705*)

29. This Court did not find any proof of the learned trial Magistrate having fallen into any of the aforesaid pitfalls. I therefore find no reason to interfere with his award.

30. In the end result, I find this appeal to be without merit and therefore dismiss it.

31. In view of the previous employment relationship between the parties and because the Appellant is evidently incapacitated, I direct that each party will bear their own costs.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF MAY 2020

LINNET NDOLO JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this judgment has been delivered during the court recess.

LINNET NDOLO

JUDGE

Appearance:

Mr. Njoroge Mwangi for the Appellant

Mr. Njengo for the Respondent