



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.62 OF 2002

(From original civil suit No.112 of 2001 from original civil suit No.112 of 2001 of the

SRM's court at Oyugis.)

SOUTH NYANZA SUGAR CO. LTD. APPELLANT

VERSUS

JOHANES OTIENO ALOIS RESPONDENTS

MICHAEL OYOT ONYANGO

JUDGMENT:

This appeal was consolidated with appeals No.60,61,63,64,65,66,67 and 68 of 2002 and the cause of action arose from the same accident and the main issue was that of liability.

The appeals are against the decision of the Senior Resident Magistrate Oyugis in civil case No.112 of 2001 which was used as a test case for the others.

There were 3 main grounds of appeal. The first is that the learned magistrate erred in finding that the defendant was the owner of M/V Reg. No.KAA 416P. The other ground was that the magistrate erred in finding the appellant was liable and in apportioning liability at the rate of 80% against the appellant and 20% against the 3rd party.

The evidence in the lower court was that all the Respondents were passengers in the appellant's M/V KAA 416P a lorry. They were from a funeral. At a place called mikai they found a G.K. Land rover parked on the left side of the road.

The appellant's vehicle's driver was at a very high speed and he started to overtake the land rover. At that time there was an oncoming lorry Reg. No.KAH 542D. The appellant's vehicle's driver lost control and hit the oncoming. The vehicle veered off the road and overturned the Respondents and other passengers were injured and take to hospital for treatment. The driver of the appellant's vehicle one STANLEY NYABUTO MOSE gave evidence (DW1). He told the court that the oncoming lorry was overtaking another vehicle and it came to his side thus causing the accident.

The appellant applied and was allowed to serve 3rd party notice to Michael Ayot Onyango the owner of M/V KAH 542D. He entered appearance but did not file a defence. Mr. Siganga for the plaintiff submitted

that the magistrate erred to find that the appellant was the owner of M/V KAA 416P. That fact was clearly denied in the defence and the Respondent did not call any evidence to show the appellant was the owner. There was no official search certificate from the Registrar of motor vehicles. Further it was submitted that the magistrate erred in finding the appellant's driver was to blame. Only PW1 who gave evidence and said the lorry was at high speed and left its lane. This was denied by DW1 the driver.

Mr. Siganga submitted that since the court directed the 3rd party to file a defence within 14 days after directions and he failed to do so judgment should have been entered against him and the appellant should be indemnified by the 3rd party. Lastly the court did not take into account the 20% contribution by the 3rd party when giving quantum of damages. Issue was taken with the assertion in judgment by the magistrate that he did not have the appellant's submissions when writing judgment on liability but got it later and only considered it on the issue of quantum. The appeals were opposed by Mr. Nyatundo who submitted that the respondents proved the appellant owned the vehicle in question and that the learned magistrate properly analyzed the evidence on liability.

I have keenly considered the appeals and submissions. The first issue is that of ownership of M/V KAA 416P. Indeed in para 4 of the defence the appellant denied owing the ownership of the vehicle. It was therefore upon the Respondents to prove that ownership. In the case of THURANIRA KARAUARI –VS- AGNES NCHECHE C.A. Civil appeal No.192 of 1996 the Court of Appeal held that information in police abstract are not enough evidence to prove ownership and a certificate of search should be produced. In this case it was not produced. However I think that case is distinguishable. In that case there was no evidence by the defence. In this case DW1 gave evidence. In his very detailed testimony he candidly stated the M/V KAA 416 P belonged to the appellant and he was its authorized driver.

This though the appellant had denied the ownership of the vehicle in his written defence he seemed to have abandoned such line of defence and through his witness admitted ownership of the vehicle. It seems the learned magistrate did not address this issue adequately but even though there is ample evidence that the appellant owned the vehicle. In fact the vehicle had ferried its workers to a funeral of one of its managers. DW1 stated he was their employee. The other issue is that of liability. PW1 had testified that the driver of M/V KAA 416 P was to blame. He was driving at excessive speed and lost control as he was overtaking a land rover parked on the left side of the road. DW1 admitted this fact in his evidence. He said he found the land rover parked on the left side. He said his vehicle was hit by the oncoming vehicle as he tried to overtake the land rover.

The learned magistrate was right to conclude that he must have moved from his lane to the other side and he hit the oncoming lorry. The magistrate analyzed the evidence at length and I am satisfied that he came to a proper and sound conclusion. Indeed the 3rd party did not file a defence or offer any evidence during the hearing. Apparently the appellant did not apply for judgment to be entered against him. However even if he did possibly interlocutory judgment may have been entered. The appellant was still to prove during the hearing that indeed the 3rd party was solely to blame. Evidence was adduced before the magistrate. He analyzed the evidence and concluded that the driver of M/V KAA 416 P was 80% to blame and the driver of M/V KAH 542D 20% to blame. Having made that finding the magistrate could not order the 3rd party to indemnify the appellant on his 80% contribution. He left each party to bear his own cross, which was proper from the findings.

The court considered submissions on quantum and made an award in each file. There were medical reports produced. I am unable to say the award were excessive in the circumstances. I will therefore decline to intervene. However as pointed out it seems that the magistrate after assessing damages he only calculated the 80% contribution by the appellants. He entered judgment only against the appellants. This was wrong. He should have entered judgment against the appellant and the 3rd party in the

proportions that he had found them liable. I therefore direct that the appellants will bear 80% of the awarded damages and the 3rd party 20%.

The upshot of the above is that the appeals are dismissed save the direction or sharing of the damages.

The Respondents will have the costs of the appeals.

KABURU BAUNI

JUDGE

26/5/04

Signed, dated and delivered on 26/5/04. Mr. Nyatundo for Respondents and Mr. Minda for Mr. Siganga for appellant.

KABURU BAUNI

JUDGE

Mr. Minda: I have instructions to apply for 30 days stay of execution.

KABURU BAUNI

JUDGE

COURT: There be 30 days stay of execution.

KABURU BAUNI

JUDGE



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