



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO 57 OF 2006

TREADSETTERS TYRES LTDAPPELLANT

VERSUS

JOHN WEKESA WEPUKHULURESPONDENT

J U D G M E N T

This is an appeal from the decision of the Senior Resident Magistrate in Mombasa Senior Resident Magistrate's Court Civil Case No. 1280 of **2003 – JOHN WEKESA WEPUKHULU –VS- TREADSETTERS TYRES LIMITED** delivered on 17th March 2003.

The Honourable Magistrate awarded a sum of Kshs.500,000/- as general damage to the plaintiff, now the Respondent for loss and damages suffered as a result of injuries sustained in a motor accident on 20th May, 2001 at Kibarani Area in Mombasa. The court also awarded Kshs.4,600/- being special damages which it said had been pleaded and proved.

The plaintiff in the said suit filed on 2nd April 2003, pleaded in the plaint dated 26th February 2003 that:-

- *At all material times the plaintiff was employed by the Defendant as its driver of Motor Vehicle registration No. KAG 545 R, Isuzu Canter.*
- *On or about the 20th May 2001 the plaintiff was lawfully in the course of his employment with the Defendant when he was duly instructed by the Defendant, its agent, servant, and/or employee to transport tyres from Changamwe to the Mombasa City Executive (?) on the Defendant's motor vehicle Registration No. KAG 545R, Isuzu Canter, when upon reaching Kibarani area, the said motor vehicle's steering wheel broke causing the motor vehicle to suddenly veer off the road thereby colliding with an oncoming motor vehicle Registration No. KAL 456T Datsun Pick-up. In consequence, where the plaintiff sustained multiple injuries and has suffered loss and damage.*

The plaintiff contended that the said accident was solely caused due to the negligence on the part of the Defendant and thus held the Defendant liable in negligence. The Defendant set out the particulars of negligence in the plaint.

The Defendant averred that it was a term of the said employment contract between the plaintiff and/or it was the duty of the Defendant to take all reasonable precautions of the safety of the plaintiff not to expose him

to a risk, injury or damage which the Defendant knew or ought to have known to maintain adequate tackle and appliances in regard to the said motor vehicle to enable the plaintiff to carry out his aforesaid duties of driving in safety, to ensure that the place where the plaintiff carried out his duties was safe and to provide and maintain a proper and safe system of working.

The particulars of negligence set out in the plaint were:-

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- (a) Failure to properly maintain the said motor vehicle in good working condition.
- (b) Failure to replace the defective steering wheel in time to avoid accident.
- (c) Engaging the plaintiff upon the said work knowing the vehicles to be defective.
- (d) Failure to take reasonable precautions for the safety of the plaintiff while in the course of his employment.
- (e) Engaging the plaintiff upon the said work without due care, caution or attention to his safety.

- (f) Contravening the Traffic Code and rules.
- (g) Failed to warn the plaintiff of the damage inherent in the said work in regard to the said motor vehicle.”

The plaintiff pleaded that as a result of the accident he sustained serious injuries and has suffered loss and damages. The particulars of injuries as said to be :-

“PARTICULARS OF INJURIES”

The plaintiff sustained serious injuries and has suffered loss and damage.

The Particulars of Special damages were:-

- 1. Medical reportShs.2,000/-
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- 2. Police Abstract.....Shs. 100/-

Total Shs.2,100/-

On the basis of the foregoing the plaintiff claimed general damages, special damages and costs of the suit.

The Defendant denied the allegations in the plaint in respect of negligence and the injuries said to have been suffered. The Defendant pleaded that if ever the accident took place or occurred, then it was occasioned, caused and/or substantially contributed to by the carelessness; negligence and/or recklessness of the plaintiff. The Defendant set out the particulars of the alleged negligence of the Defendant who was himself the driver of the vehicle at the time of the accident.

The Plaintiff was aggrieved by the judgment in favour of the Defendant in respect of liability, injuries and award of damages.

Considering the fact that the plaintiff was the driver of the motor vehicle and in control of the same, the burden of proof was upon him to prove that steering wheel broke making him to lose control of the

vehicle that it collided with another. In this case, his entire case was based on the question that the Defendant as his employer and owner of the vehicle gave a defective vehicle to drive in the course of his duties as a driver. It is to be noted that in his own evidence he said that he had driven the same vehicle for 8 years and that it was not serviced. He testified that the steering wheel had a problem and had informed his employer. He said that the motor vehicle was inspected and found to be defective.

In cross-examination the plaintiff stated that he had not sensed any defect on the motor vehicle. He stated that the plaintiff had been charged but did not know of the outcome. He said that he had driven the motor vehicle for 4 years and not 8 years. He admitted that he had not reported any defect. In re-examination he reiterated about the loose steering.

P.W. 3 was a motor vehicle inspector. He confirmed that the vehicle was inspected after the accident took place and found to be defective. A certificate of Inspection No. 64847 was issued. However, when P3 produced a photocopy of the certificate, it was found not to be legible and was disallowed. PW 3 stated no charges were preferred against the owner of the vehicle.

The Defendant did not call any witness and had its doctor's medical report produced by consent.

Our law is long established and is certain on one issue that the person who alleges must prove the allegations. An allegation that the vehicle was defective to the extent that steering wheel broke is a very serious one. The burden of proof is on the maker. In this case the plaintiff was the driver of the vehicle. He had driven the vehicle for at least 4 years. There was no evidence in writing or otherwise that he had complained about a defective steering wheel.

P.W.3 the Police Motor Vehicle Inspector came with the Department's file but did not produce either the original copy of the Inspection report nor the legible one. The trial court correctly rejected the said report. It was not admitted. The plaintiff in the circumstances did not prove that the motor vehicle was defective and in particular that the steering wheel broke. Breaking of a steering wheel is a serious mechanical condition. The plaintiff is taken to be stating that it was not his own driving which caused the accident but the breaking of the steering wheel which was a matter beyond his control. Such a mechanical defect is capable of being determined by a simple motor vehicle inspection. The Inspection Department released their file and a witness but could not prove any defective whatsoever to court. Without the certificate of motor vehicle inspection; it cannot be conclusively proven that a motor vehicle involved in an accident had a pre-accident defect. The Respondent failed in his duty to prove that the motor vehicle Registration No. KAG 545 R had any pre-accident defect of the nature claimed and in particular that the Steering wheel had broken. He had the opportunity to prove this and the Motor Vehicle Inspection Department were called as witnesses by himself.

In view of this determination, I do not think that the court should waste any time on the question of motor vehicle ownership.

The plaintiff was the driver of the motor vehicle. He had full charge and control of the vehicle at the time the accident took place. He did not enjoin the owner or driver of the other vehicle involved in accident, motor vehicle registration No. 456 Datsun Pick-up. There are no allegations that the said vehicle caused the accident or was to blame wholly or partially.

In the absence of the inspection report and proof of the breaking of the steering wheel or in any other defect, the court is entitled to infer that the accident was related to the driving of the vehicle by the plaintiff himself.

I do hold that the nature and extent of the alleged defect herein "breaking of a steering wheel" was of such magnitude that required specific, cogent and scientific proof that indeed such a major defective existed or took place as to place blame on the Appellant as owner of the motor vehicle.

On question of proof, and burden thereof, it is stated in CHARLESWORTH & PERCY ON NEGLIGENCE, 9TH edition at P.387:-

“In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

With regard to the question of inspection, the trial Magistrate had to say as follows:-

“.....

On the issue of inspection, the evidence was corroborated by P.w.11 and P.W.111. Court has noted that the original inspection report was never produced in court but notwithstanding and in the absence of any evidence to the contrary, I am convinced that indeed the said inspection was carried out and motor vehicle to have been defective. Having had no prior knowledge of the state of the motor vehicle and the defendant having failed to take any appropriate action to remedy the same, I am convinced that the defendant was wholly to blame for the accident...”

With respect, this is a misconception of the law. The trial magistrate had shifted the burden of proof to the Defendant in a manner not permitted by the law. He also admitted evidence which never existed or availed to the court.

The allegation that the plaintiff reported the defect to the employer required to be supported in this case by evidence that consequently at the time of the accident, the steering wheel of the vehicle broke thereby caused the accident. The court stated that the original inspection report was not produced. So how could he hold that in effect the defect of the steering wheel must have existed? In fact, there was no copy of the report and no report was admitted.

The court rejected the illegible copy which was worthless in evidence. The inference here was unreasonable and the deduction by the court totally skewed. The inference and deduction herein could not have the validity of proof.

A reporting of a defect by itself is not knowledge of the existence of a defect. In this case, the breaking of the steering wheel had to be proven.

I do find that the trial magistrate erred in fact and law on the question of negligence. In this case, there was no material before the court, for the court to require the Respondent to rebut the allegations. The necessary evidentiary threshold to shift the burden of proof was not attained in this case. Land Wenileydale in the case of MORGAN –V- SIM (1857) 11, MOO P.C. 307 at P.312 was referred to in CHARLESWORTH & PERCY at P. 392:-

“The party seeking to recover compensation for damage must make out the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he loses the case in even

scales and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed.”

On a balance of probabilities I do find on analysis of the evidence on record that the cause of the injury was not due to the negligence or breach of Statutory duty of the Respondent. There was no proof of a broken steering wheel which could have led or caused the accident. There is no evidence of causation whatsoever.

The trial court ought not have found in favour of the plaintiff in respect of liability.

With regard to the general damages awarded for the injuries, the issue raised in the appeal is that the plaintiff in the suit did not plead or set out the particulars of injuries. The Appellant contends that the plaint was defective to this extent and it was entitled to raise the same as a point of law in its submissions. That there was no application for amendment.

The Respondent has not dealt with this question in his submission. The plaint speaks for itself. In paragraph 9, it is pleaded as follows:-

“9. As a result of the accident the plaintiff sustained serious injuries and has suffered loss and damages.

PARTICULARS OF INJURIES

The plaintiff sustained serious injuries and has suffered loss and damage ...”

There was no amendment of the plaint. As a result, the case was concluded without the particulars of the injuries being supplied. During the trial, parties produced respective medical reports and P3 Forms i.e. Medical Examination Report.

The trial court found that the plaintiff had suffered injuries namely, fractures of both feet and commuted fractures of the lower third of shafts of both femur. The plaintiff had to eventually resign as he could no longer drive.

When the issue was raised at the trial, the trial magistrate accepted that no particulars were given in respect of the injuries. He however held:

“The pleadings, are however clear that the plaintiff sustained serious injuries and has suffered loss and damage. If the defendant was serious and if the matter was meant to be raised to determine the case, then the same ought to have been so done during the hearing to allow time for the plaintiff to respond. This is a court of equity and he who comes before it must do equity.”

I have carefully considered the above. First however much, the courts are Courts of Equity, there are certain procedural law that cannot be overridden by principles of equity. Each party is bound by his pleadings. In cases of tortious claims based on negligence, injuries and special damages must be pleaded. They cannot be imagined or inferred. The court's road-map are the pleadings on record. If a party alleges he suffered an injury, he must particularize the same so that the Defendant can specifically respond to the claim. One must plead the nature and extent of injuries suffered. This is a mandatory requirement of the law. His omission cannot be cured by principle of equity or the principles envisaged in

Section 1A, 1B and 3A of the Civil Procedure Rules.

In **CHARLESWORTH & PERCY ON NEGLIGENCE** P.301, it is stated:

“... Once the existence of a duty of care has been established, which has been followed by a breach of that duty, the final element to be proved of these essential components of actionable negligence has that the consequential damage has been suffered.”

To bring an inquiry as to the consequential damage, then the claimant must plead the nature and extent of the injuries or damages suffered. It cannot be left in vacuum or for the court to pluck from the air. Claim of loss, and damage must be under-pinned on the pleading. So in the question of injuries, Damages resulting from one and the same cause of action must be assessed and recovered once and for all. As a result, the court must be informed of the particulars of the loss and damage.

Order VI of the Civil Procedure Rules Rule 3 provides:-

“3(1): subject to the provisions of the Rule and Rules 6,7 and 8 every pleading shall contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim and defence, but not the evidence by which those facts are to be proved and the statement shall be as brief as the nature of the case admits.”

I do hold that the particulars of injuries in a personal injury claim are material facts if not crucial. It is the core of the case and gives rise to the value of amount of the claim. It is a matter that must be in the claim as a matter of necessity.

Applying the Overriding Objectives of the Civil Procedure Act as envisaged in the Civil Procedure Act Cap 21 Sections 1A, 1B, and 3A, Act in this court attempted to find a way round the issue to ensure that there is a just and fair determination of the appeal and considering that the Appellant had been successful and was an employee of the Respondent.

I found that the issue of the alleged serious personal injuries were not of a technical nature. They have to be expressly and specifically pleaded. By the time the suit was filed on 2.04.03, all the facts relating to the injuries sustained on 20.05.01 a period of 2 years were all available to the plaintiff. It is the person for filing the suit.

The High Court of Australia in **DARE –V- PULHAM** (1982) 148, C.L.R. 658 at 664 described the functions of pleadings:-

“Pleadings and particulars have a number of functions; they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet, they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give a defendant an understanding of a plaintiff’s claim in aid of the defendant’s right to make a payment into court...”

Relief must be founded on the pleadings except in very exceptional cases where parties ignore the pleadings and proceed on issues mutually chosen at the trial.

As a result of the foregoing the suit would still have been unsustainable at the close of the trial on this basis with regard to the substantive claim.

The net result is that this appeal must succeed. I do hereby allow the appeal with costs to the Appellant.

Dated and delivered at Mombasa this 24th day of November 2010.

M. K. IBRAHIM

J U D G E

Coram:

Ibrahim, J
Court clerk – Kazungu
Mr. Wachira for the appellant
Mrs. Abuodha for the Respondent

Judgment delivered in their presence.

Ibrahim, J