**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KAKAMEGA**

**Civil Appeal 8 of 2008**

**THE CHAIRMAN BOARD OF GOVERNORS BUTERE GIRLS HIGH SCHOOL.....APPELLANT**

**VERSUS**

**JAMES AKENGA MAHERO.....RESPONDENT**

**JUDGMENT**

The appeal is premised on the following grounds:-

1. That the learned trial magistrate erred in law and in fact in holding that the respondent was 60% negligent contrary to the evidence on record.

2. That the learned trial magistrate erred in law and in fact in failing to find that the respondent did not prove his case on a balance of probabilities.

3. That the learned trial magistrate erred in law and in fact in failing to find that the respondent was wholly to blame for the accident that took place on 3rd May, 2008.

4. That the learned trial magistrate erred in law and in fact in finding the appellant liable contrary to the evidence on record.

Mr. Anziya Advocate appeared for the appellant and Mr. Namatsi Advocate appeared for the Respondent. The counsels put in their written submissions.

In the lower court, the Respondent's case against the appellant sought general damages for injuries sustained when the blade of the lawn mower he was using to cut grass broke and cut his leg. He blamed the accident to the negligence, breach of statutory during and contract of the Appellant

The particulars of negligence, breach of statutory duty and contract were set by the Respondent as follows:-

"1. Failure to ensure the plaintiff's safety.

2. Exposing the plaintiff to danger it knew or ought to have known.

3. Failure to provide the plaintiff with protective gadgets e.g. gumboots.

4. Failure to warn the plaintiff of the existing risk in the said work.

5. Failure to provide any other safer system of performing the said work.

6. Failure to maintain the lawn mower.

7. Failure to keep the lawn mower in a good state of repair."

The Respondent also relied on the doctrine of ***RES IPSA LOQUITOR***.

In their statement of defence dated 30.5.06, the Appellants denied liability for the accident and blamed the Respondent for being the sole author of his misfortune and/or having contributed substantially to the injury.

The Appellant in the statement of defence dated 30.5.06 listed the following particulars of contributory negligence:-

"a) Failure to manage and/or use the machine in his custody according to instructions.

b) Exposed himself to danger by mishandling the lawn mower.

c) Causing the machine to break by knocking it on obstacles.

d) Failing to clear the ground of stones or other obstacles before embarking on the job of clearing grass.

e) Failing to ensure that the machine was in good condition as required.

f) Failing to adhere to working rules and condition.

g) Disobeying standing orders relating to his duties."

In his judgment, the trial magistrate apportioned liability at 40% against the Respondent and 60% against the Appellant. The Respondent was awarded Kshs. 50,000/= general damages and Kshs.3,500/= special damages plus costs and interest.

Mr. Anziya for the Appellant submitted that the Respondent was in charge and in total control of the lawn mower and had a duty to exercise care while pushing the same. That there was no evidence that the lawn mower was not serviced or that the lawn mower had any defects or that the Respondent was forced to push the lawn mower on the material date. The court was referred to the following authority:-

***ABDALLA BAYA BWANYULE VS SWALA HADIN SAID T/A JOMVU TOTAL SERVICE STATION – CA NAIROBI 211/2002.***

Mr. Namatsi for the Respondent submitted that the machine is supposed to be serviced as per the service manual. That it is during the service that latent defects are discovered and repaired. That the service of the machine is not dependant on the report by the user to the school.

In his evidence, the Respondent, PW1, JAMES AKENGA MAHERO, testified on the issue of liability. He stated that he was pushing the lawn mower but it was not moving and a blade broke from the machine and cut his right leg. The Respondent also testified that he had worked for the Appellant as a grounds man and had used the lawn mower for nine years. He denied any negligence stating that the appellants ought to have serviced the machine. The Respondent also stated that he knew his work and carried out the same without supervision and reported any defects on the machine but had not detected any defects on that day but also added that he was not a technician. It is not in dispute that the plaintiff was supplied with gumboots and gloves but that the same could not prevent the injury.

On the other hand, **DW1, NATHAN BURUKU MUTALII**, the school bursar testified on behalf of the Appellant that the Respondent used the machine alone and that it is the Respondent who informed the office if the machine required to be serviced. That the Respondent did not report any defects on the machine on that particular day. The bursar admitted during cross-examination that the Respondent is a grounds man and not a technician. He admitted that there are things concerning the machine that a grounds man cannot detect. Although the bursar stated in his evidence that the machine was serviced, he did not have the service records or manual for the machine. The bursar described the environment where the Respondent was working as "Okay".

From the bursar's evidence, it comes out clearly that the lawn mower was serviced when the Respondent made a report of any defects. No service records were produced. The bursar is not a technician and could not expound in the court what went wrong with the machine. The evidence of the Respondent is that he used to report any defects that he detected but also added that he was only a grounds man and not a mechanic.

I agree with the submissions by Mr. Namatsi that there are latent defects that can only be discovered and repaired during the servicing of the machine.

The case of **ABDALLA BAYA BWANYULE** (supra) cited by the Appellant's counsel is therefore distinguishable from the instant case. Relying on reports by the Respondent who is a groundsman and not a technician to have the machine serviced instead of having the machine serviced on a regular basis was a failure by the Appellant to exercise due care and skill.

The Respondent had also used the machine for nine years and was therefore aware of the lack of regular servicing of the machine.

Based on the evidence on record, I find that the trial magistrate properly apportioned liability to both parties. The trial magistrate did not err in fact or law as stated in the grounds of appeal.

The appeal has no merit and is dismissed with costs.

***Delivered, dated and signed at Kakamega this 12th day of June, 2012***

**B.THURANIRA JADEN**
**J U D G E**