



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CIVIL APPEAL NO.129 OF 2009**

*Appeal arising from BGM SPM CC No.552 of 2004*

**IMA HAULIERS LIMITED.....APPELLANT**

**VRS**

**MOHAMMED NYONGESA MURENDE.....RESPONDENT**

**JUDGMENT**

The Appellant Ima Hauliers Limited appeals against the judgment of Bungoma Senior Principal Magistrate in CM CC No.552 of 2004. In that case the court entered judgment for the Respondent on full liability against the Appellant and awarded general damages of Ksh.250,000/= and special damages of Ksh.18,500/=. The Respondent was a driver of the Appellant's tractor registration number KUV 745 Cameco loading sugarcane when he was injured and sustained injuries. The claim was based on negligence blamed on the Appellant for failing to maintain the tractor in a good mechanical condition. In the memorandum of appeal the Appellant faults the learned magistrate for finding the Appellant 100% liable when the evidence did not support that finding. It is the contention of the Appellant that the damages awarded were excessive. This appeal was vehemently opposed on grounds that the Respondent proved his case on the balance of probabilities and that the damages were commensurate with the injuries sustained.

The Respondent testified that he was an employee of the Appellant as a tractor driver. The tractor was used for transporting sugarcane. In the course of his duties on 28/09/2003, the tractor's gears failed causing the tractor to overturn and lay on the respondent. As a result of the impact, the Respondent sustained injuries. He blamed the Appellant for failing to maintain the tractor in a serviceable condition.

The Defendant's witness DW1 said that all the company drivers report to him in case of a defective vehicle and he ensures repairs done. The Respondent had not reported to DW1 that his vehicle was defective. He added that if the vehicle is defective, the driver is not supposed to drive it. He denied liability on the part of the Appellant.

This appeal was heard in way of submissions, both parties filed their written submissions which have been considered.

The Appellant argues that the burden of proof had not been discharged and that the principle of *volenti non fit injuria* was not addressed by the court. The driver had no business to drive a defective motor vehicle and he ought to have been found negligent in whole or in part. He was a professional and experienced driver who ought to have acted to avoid the accident.

The Respondent in his testimony:

***“I blame the company for the accident. It is them who were responsible for maintenance of the vehicle. I had told them it was defective.”***

In cross examination the Respondent said:

***“I had reported the problem earlier and it had been rectified and this was the third time.”***

The cause of the accident was a failed gear causing the vehicle to overturn according to the Respondent. The motor vehicle inspection report done on 30/09/2003, one day after the accident showed that the vehicle had several defects affecting the electrical system reported a defect, it was repaired. In this case, it appears that inadequate repairs had been done twice on the same problem which did not fully rectify it, thus causing a third time breakdown. The argument of the appellant is that the driver ought not to have driven the vehicle at all if it was defective. And that if he did so, he ought to be held liable for contributory negligence.

The magistrate relied on the Plaintiff’s evidence which he believed that the defect had been reported but not yet rectified. The Defendant witness did not specifically deny that he had received earlier reports of the defect. Rather he denied that on the material day, no defect had been reported to him.

The duty to keep a vehicle in a good mechanical condition lies with the owner of the vehicle. The driver cannot be held liable for not reporting a defect. In the case before me there is evidence that the defect was reported before hand. The owner of the vehicle has a duty to put in place measures to check and rectify defects of vehicles and especially those used on heavy duty and commercial transport like transporting sugarcane. These are day to day assignments which call for highly serviced vehicles. The owner cannot use the failure by driver to report a defect as a defence. The owner owes a duty of care under common law to the driver and any other person in the vehicle to ensure their safety as they work. Failure to service the vehicle exposed the Respondent to risk. The issue of contributory negligence does not arise in the instant case.

I find that the magistrate was correct in finding the appellant fully liable. On quantum, the Respondent was admitted in hospital for nine days having sustained the following injuries:

- a) **Fracture of right leg;**
- b) **Swelling on the head;**
- c) **Chest contusion.**

The Appellant had proposed general damages of Ksh.20,000/= in their submissions in the lower court. Before me is a slightly higher proposal of Ksh.50,000/=. The change of mind was not explained. The authority of **WANJIRU VS HUSSEIN MOHAMMED YUSUF & ANO. HCCC NO.1629 OF 1991 NAIROBI** is not relevant since the Plaintiff thereon suffered no fracture, yet she was awarded Ksh.50,000/= in 1993 for a deep cut wound on the forehead. The proposal of the Appellant was inordinately low and not consistent with the injuries sustained.

In the case relied on by the Respondent of **JOSEPH GATHUNGU VRS EDWARD JALANI NAIROBI HCCC NO.4140 OF 1988**, the Plaintiff was awarded Ksh.280,000/= for a fracture of the right ankle joint plus soft tissue injuries in 1994. Considering that the instant case was decided in 2006, I find the damages awarded of Ksh.250,000/= reasonable. This court can only interfere with quantum when it is excessive and inordinately high which is not the case here.

I find no merit in this appeal and dismiss it accordingly. The Appellant to pay the costs of the lower court and for this appeal.

**F. N. MUCHE**

**JUDGE**

**Judgment delivered this 6<sup>th</sup> day of June, 2011 in the presence of Mr. Situma for Morara for the Appellant.**

**F. N. MUCHEMI**

**JUDGE**