



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL SUIT NO. 170 OF 2007**

**DAVID KIPKURUI TENAI.....PLAINTIFF**

**VERSUS**

**NYAYO TEA ZONE DEVELOPMENT CORPORATION.....DEFENDANT**

**JUDGMENT**

This is a personal injury claim arising from a road accident which occurred along the Nakuru-Eldoret Road at an area known as Jogoo on the 21<sup>st</sup> September 2005.

The accident involved a motor vehicle Reg. No. KAL 667U Isuzu lorry belonging to the defendant, **NYAYO TEA ZONE DEVELOPMENT CORPORATION**, driven at the time by the plaintiff, **DAVID KIPKURUI TENAI**, while in the course of his employment with the said defendant.

It is averred in the amended plaint dated 9<sup>th</sup> July 2008 that the brakes of the said vehicle failed thereby causing it to ram into a motor vehicle Reg. No. KQX 323/ZB 1043 Mercedes Benz lorry with the result that the plaintiff was seriously injured.

It is further averred that the defendant, its servants/agents and/or servant owed the plaintiff a statutory duty of care and by reason of the said accident the defendant was guilty of negligence and/or was in breach of its statutory duty of care in that it exposed the plaintiff to the risk of injury or harm, failed to provide a safe system of work, allowed the plaintiff to carry out his duties in a dangerous and unsafe environment, failed to maintain its motor vehicle Reg. No. KAL 667U, Isuzu so as to be in good working condition, allowing a defective motor vehicle on the road and causing the said accident. The plaintiff contends that as a result of the accident he suffered injuries which have completely incapacitated him. He therefore prays for an award of general and special damages against the defendant including loss of future earnings for fourteen (14) years at the rate of Ksh. 15,188/- per month.

In the amended defence filed by the defendant on the 21<sup>st</sup> July 2008, the allegations of negligence and/or breach of statutory duty of care made against the defendant by the plaintiff are denied. Indeed, the defendant denies the occurrence of the accident and the alleged resultant effects and contends that, if any accident occurred, then the same was solely and/or substantially contributed to by the negligence of the plaintiff in that he drove the motor vehicle Reg. No. KAL 667U Isuzu without the presence of mind, he failed to have due regard and/or safety of other road users while driving the said vehicle, he deliberately caused the said motor vehicle to ram into motor vehicle Reg. No. KQX 323/ZB1043 Mercedes Benz thus

injuring himself, he failed and/or refused to make use of the vehicle's braking system on time thus causing it to ram into motor vehicle Reg. No. KQX 323/ZB 1043, he drove motor vehicle Reg. No. 667U at an excessive speed and generally caused the accident. The defendant further denies the claim by the plaintiff for loss of earnings and contends that the plaintiff was wholly compensated under the Workmen's Compensation Policy thereby rendering this suit incompetent.

Consequently, the defendant prays for the dismissal of the suit with costs.

From the pleadings and the evidence adduced in Court, the occurrence of the accident and the plaintiff's employment with the defendant are factors which are not substantially disputed. Indeed, the documents produced by the plaintiff i.e. P. Ex. 1 to P.Ex. 11 confirmed that the accident occurred as alleged and that the plaintiff suffered injuries as a result. The documents also confirm that the plaintiff was at the time employed as a driver by the defendant and that his employment was discontinued due to the catastrophic consequences of the accident on his health.

With that proof of the occurrence of the accident and the plaintiff's employment with the defendant, the basic issue for determination by this Court is whether the accident was caused by the negligence and/or breach of statutory duty of care on the part of the defendant and if so, whether the plaintiff would be entitled to damages, and to what extent.

On the issue of liability, it was incumbent upon the plaintiff to establish on a balance of probabilities the pleaded particulars of negligence and/or breach of statutory duty made against the defendant.

In his testimony, the plaintiff (PW 1) said that he was driving the material vehicle from Kapsabet to Nairobi and on reaching the Molo area he saw a stalled vehicle ahead of him. The vehicle was in the middle of the road. He reacted by applying the brakes of his vehicle but they failed. Consequently, his vehicle rammmed into the stalled vehicle. Immediately thereafter, he lost consciousness and later found himself at a hospital in Molo from where he was transferred and taken to the Moi Teaching & Referral Hospital in Eldoret for further treatment of the injuries sustained in the accident.

The plaintiff attributed the accident to brake failure and blamed the defendant for its failure to properly maintain the vehicle.

In cross-examination, the plaintiff confirmed that the accident occurred in a dark night when it was drizzling such that it was difficult for a person to clearly see what was ahead of him.

The plaintiff said that he saw the stalled vehicle in a sudden but due to brake failure he could not bring his vehicle into a stop. He confirmed that his journey from Kapsabet upto the scene of the accident was without any problem and that there was nothing wrong with the brakes upto that point. He said that if he had noticed any defect in the brakes, he would have ended his journey, stopped the vehicle and contacted the defendant, his employer. He contended that he would not have rammmed into the other vehicle if his vehicle's brakes were in good working condition. However, the plaintiff conceded that the wet condition of the road would have prevented effective application of the brakes and that he did not avail any inspection report showing that the vehicle's brakes were defective.

The plaintiff was with his turnboy at the time of the accident. The turnboy **JULIUS KETER (PW 2)** remembered that prior to the accident, he heard the driver (plaintiff) shouting "*brakes*" "*brakes*". It appeared to him (PW 2) that the vehicle's brakes had failed. The next thing that occurred is that the

vehicle went out of control and collided with another vehicle.

In cross-examination, the turnboy confirmed that visibility was poor at the time because there was a drizzle and it was a dark night. He also confirmed that the driver had not raised complaints regarding the vehicle's brakes before the accident occurred. He (PW 2) was uncertain as to whether or not the brakes were in working condition. He said that he saw the stationary vehicle when it was fifty (50) metres away.

In her testimony, the defendant's Zone Manager, **EVERLYN AMBERE (DW 1)**, confirmed that the plaintiff had been authorized to make the journey from Kapsabet to Nairobi. A work ticket (D.Ex.1) was produced to that effect. The work ticket was for the month of September 2005 and had no entries showing that the vehicle had any defects. This therefore invalidated the plaintiff's allegation that he was assigned a defective vehicle to make the ill fated journey.

In cross-examination, the Manager (DW 1) contended that any defect in the vehicle was to be noted and recorded in the work ticket by the driver.

From all the foregoing evidential facts and the arguments put forward in the written submissions filed by both parties, there can only be two possible explanations for the accident. Firstly, the driver of the vehicle (i.e. the plaintiff) might have been reckless and negligent in his manner of driving such that he failed to notice the stationary vehicle ahead of him and proceeded to ram into it from the rear. The existing circumstances and the wet condition of the road dictated that extra caution be taken. It would appear however, that the plaintiff drove carelessly and without any or proper consideration or lookout for other road users.

Secondly, it could also be that the plaintiff was neither reckless nor negligent and that his manner of driving was that expected of any reasonable and prudent driver. Therefore, it may as well have been that due to the wet condition of the road the vehicle's braking system efficacy was reduced due to a prior defect in the system such that it was impossible for the plaintiff to bring the vehicle into a halt no sooner had he noticed the stationary vehicle ahead of him.

Whereas the first possible explanation hereinabove renders the plaintiff solely responsible for the accident, the second explanation would render the defendant solely responsible for the accident for its failure to provide a safe system of work and its failure to properly maintain its vehicle such that it allowed a defective vehicle to be used on the road thereby endangering the safety of the plaintiff and other road users.

The burden to establish the defendant's culpability lay with the plaintiff. It was the plaintiff's duty to establish on a balance of probabilities that the accident was caused by a defect in the vehicle's braking system. Such proof would invariably establish the particulars of negligence and/or breach of statutory duty of care attributed to the defendant. The evidence of the plaintiff (PW 1) and the turnboy (PW 2) contained mere allegations that the vehicle rammed into another due to brakes failure. The plaintiff stated that had the brakes not failed, the accident would not have occurred. This implied that his manner of driving played no role in the causation of the accident.

However, the plaintiff failed to offer any evidence of the vehicle's alleged defect. He did not tender any inspection report to show any pre-accident defects in the vehicle. Consequently, his allegation that the defect in the vehicle's brakes caused the accident remained unproved.

As for the turnboy (PW 2), he was uncertain of the defectiveness or otherwise of the vehicle brakes. He only heard the driver shouting “brakes! brakes!” and opined that the brakes had failed. His evidence, like that of the plaintiff, did not prove that the vehicle was defective and hence, the accident. On the contrary, the evidence by the defendant’s Manager (DW 1) showed that, most likely than not, the vehicle was not defective from the time it left Kapsabet upto the time the accident occurred. It was thus implied by the defendant that, the accident was caused by the plaintiff’s negligent manner of driving the vehicle rather than by brake failure.

In the absence of proof that the vehicle was defective prior to the accident, this Court is disinclined to believe that the defendant played a role or contributed to the occurrence of the accident. In the circumstances, the defendant cannot be held liable for the consequences of the accident which befell the plaintiff.

The plaintiff would not therefore be entitled to any damages from the defendant. Unfortunately, he cannot benefit from an accident in which he was apparently the author. As it were, he was the author of his own misfortune.

A liability cannot be without fault (See, **MUTHUKU VS. KENYA CARGO SERVICES LIMITED [1991] KLR 464** and **KABOSWA TEA ESTATE VS. ALFRED JUMA BILAURI CIVIL APPEAL NO. 302 OF 2000 AT ELDORET (C/A)**).

There is no doubt herein, that the plaintiff brought this action against the defendant merely because he was injured while in the course of his employment with the defendant and also because, the injuries occasioned by the accident led to his being retired from the employment. This however, did not provide him with sufficient cause of action against the defendant based on the tort of negligence and/or breach of statutory duty of care. In such cases, regard should be given to the statement by the Court of Appeal in the cited case of **MWANYULE VS. SAID t/a JOMVU TOTAL SERVICE STATION [2004] 1 KLR 47**, thus,

***“..... With respect we do not agree with the learned Counsel for the appellant in his contention that the degree of care owed to the employee is absolute ..... Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 16, paragraph 562 discusses the law on the extent of employer’s duty and it states:-***

***“It is an implied term of the contract of employment at common law that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer’s duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee to compensate him for any injury, which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages suffered in the cause of his employment in consequence of the dangerous character of the work upon which he is engaged ..... The employer does not warrant the safety of the employee’s working conditions, nor is he an insurer of his employee’s safety; the exercise of due care and skill suffices .....”***

***In our view the above reflects the common law position and is the law applicable in Kenya. .... We think, what we have stated above is enough to show that the employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution.”***

This present cause of action was therefore ill-advised and was bound to fail “ab initio”.

In any event, the plaintiff was compensated under the now repealed Workmen Compensation Act (Cap 236 LOK).

If this court were to find the defendant liable to the plaintiff, it would have awarded the plaintiff proven special damages as well as general damages for pain and suffering.

The medical report by Dr. Sirma dated 14<sup>th</sup> September 2007 (P.Ex.7) showed that the plaintiff suffered a fracture of the neck of the right femur and comminuted and segmental fracture of proximal  $\frac{1}{3}$  right femur. The injuries were confirmed by Dr. V. V. Lodhia in his report dated 20<sup>th</sup> February 2008 (P.Ex.8).

Dr. Sirma opined that the injury rendered the plaintiff's right leg a permanent disability with a possibility of amputation if the infection thereon persisted without proper treatment.

Dr. Lodhia assessed permanent disability at 50% revisable in accordance with future healing or deterioration of the state of the leg.

Considering both medical reports in the light of the decisions cited herein in the submissions by both Counsels for the plaintiff and the defendant, an award of Ksh. 800,000/= would have been reasonable and adequate for pain, suffering and loss of amenities.

The plaintiff also claimed loss of future earnings. This was not awardable for the reason that the plaintiff was retired on medical grounds and thus entitled to the usual retirement benefits. This claim was an attempt to unjustly enrich himself.

In the end result, the entire claim by the plaintiff against the defendant was not proved. The suit is thus dismissed with costs to the defendant.

**J. R. KARANJA**  
**JUDGE**

**[Delivered and signed this 25<sup>th</sup> day of October 2011]**