



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Case 118 of 2004**

**JOHN WAINAINA KAGWE ..... PLAINTIFF**  
**VERSUS**  
**HUSSEIN DAIRY LIMITED ..... DEFENDANT**

\*\*\*\*\*

**JUDGEMENT**

The Plaintiff **JOHN WAINAINA KAGWE** filed this plaint dated 27<sup>th</sup> April 2004 against the Defendant **HUSSEIN DAIRY LIMITED**, seeking the following prayers

***“(a) General Damages***

***(b) Special damages***

***(c) Future medical expenses***

***(d) Damages for lost business***

***(e) Costs of and incidental to this suit***

***(f) Interest on (b), (c) (d) and (e) above from***

***the date of filing of this suit until payment***

***in full***

***(g) Any other relief which this honourable***

***court may deem just and expedient”***

The suit arises out of an accident which took place on 29<sup>th</sup> October 2002 along the Mombasa-Malindi Highway near Whitesands Hotel at Bamburi. The Plaintiff in his oral testimony before the court stated that on the material date after 11.00 p.m. he was driving his motor vehicle Registration No. KAG 571S along the Mombasa Malindi Highway when he came across a lorry Registration No. KAE 894L/ZB 7387 in the road. The Plaintiff in his plaint claims that this lorry which was being driven by one **ABDALLA SALIM KIBIRITI** a servant and/or employee of the Defendant was left parked carelessly on the road thereby obstructing other road-users. The Plaintiff upon noticing the stationery vehicle attempted to overtake it but met with an oncoming vehicle. He then applied his emergency brakes but to no avail and rammmed into the rear of the stationery vehicle. The Plaintiff lost consciousness upon impact and awoke three (3) days later to find himself admitted at Pandya Hospital in Mombasa having sustained severe and life threatening injuries. The

Plaintiff who was represented by **Ms. Njoroge** Advocate called five (5) witnesses at the hearing of the suit. The Plaintiff's case was that the accident was caused solely by the negligence of the Defendant's driver and as such the Defendants are vicariously liable for any and all damages sustained by the Plaintiff.

The Defendants who on their part were represented by **Mr. Shekeli** Advocate, denied any and all allegations of negligence on their part and denied all claims of liability by way of their written Statement of Defence dated 8<sup>th</sup> June 2004. The Defendants called one (1) witness in support of their defence.

There do exist certain undisputed facts of this case. The ownership of the vehicles in question and the fact of the accident are not in any dispute. In their defence dated 8<sup>th</sup> June 2004 at paragraph 3 the Defendants clearly state

***“3) With reference to the Plaintiff's averments in paragraphs 4, 5, 6, 7, 8 and 9 of the plaint the defendant admits (my emphasis) that there was an accident involving the plaintiff's Toyota Saloon Car Reg. Nos. KAG 571S and the defendant's semi-trailer Reg. No. KAE 894L/ZB7387 on or about the date, time and along the road at the place mentioned therein ...”***

This is a clear concession by the Defendants that they were the owners of the lorry in question and also that their vehicle was involved in an accident with the Plaintiff's car on the material date. In the same paragraph 3 of the defence the Defendants proceed to refer to

***“One Abdalla Salim Kibiriti”***

as

***“the defendant's agent, driver and/or servant”***

Making it clear that the driver of the said lorry was indeed the Defendant's employee.

Last but not least **PW5 PC. John Wachira**, did produce before the court as an exhibit a police file No. 235/2002 which was an enquiry into a serious road-traffic accident along Mombasa-Malindi road near Whitesands. **PW5** confirms that the police did receive a report about the accident carried out an inquiry and finally charged the driver of the lorry Abdalla Salim Kibiriti with the offence of obstruction. **PW4 Michael Chaka** an Executive Officer attached to the Registry at Mombasa Law Courts produced the court file **Traffic Case No. 8517 of 2002**, confirming this prosecution and its outcome which was the conviction of the accused driver. Based on the foregoing I do find as a fact that indeed an accident occurred on 29<sup>th</sup> October 2002 along the Mombasa-Malindi road, involving the Plaintiff's vehicle Registration No. KAG 571S and the Defendant's lorry Registration No. KAE 894L/ZB7387.

The key element in a case such as this is that of liability. In order to prove liability the Plaintiff must satisfy the court on a balance of probability that the accident was caused by the negligence of the Defendant's driver.

The Plaintiff claimed that in leaving the lorry parked and stationary on the road, unattended and for an unreasonable length of time, the Defendant acted negligently and breached their duty of care to other road users leading to this accident.

The Plaintiff in his evidence told the court that the Defendant's vehicle had been left stationary in the middle of the road at night. The fact that this vehicle was stationary on the road is not in any doubt. However the question is whether

this vehicle was left in such a position that it would be a danger as well as an obstruction to other road users. In the police file produced by **PW5** is a sketch map drawn at the scene. It shows clearly that this lorry was not parked in the middle of the road as alleged by the Plaintiff but was actually partially off the road to the left. The sketch map clearly shows that part of the body of this vehicle was off the road. Mr. Shekeli did cross-examine **PW5** at length with respect to the measurements taken at the scene. From this cross-examination and from my observation of the sketch map as well as the measurements indicated thereon it becomes clear that the width of the road was 6.5 feet. The trailer as it was parked measured 1.6 metres into the road. It still left 1.65 metres on the left side of the road clear and unoccupied. The width of the Plaintiff's vehicle was 1.4 metres. As such even taking into account the 1.6 metres of the road taken up by the stationary lorry the Plaintiff's vehicle still had enough space i.e. 1.65 metres (as against his vehicle's width of 1.4 metres) to by pass the lorry on the left side of the road. The Plaintiff told the court that he tried to overtake the lorry but upon noticing an oncoming vehicle he applied brakes. Strangely enough no brake or skid marks were noted at the scene and no such marks are indicated on the sketch map. The absence of the skid marks negates the Plaintiff's claim that he attempted to avoid hitting the lorry by applying emergency brakes. From the sketch map, it would seem that the Plaintiff drove smack bang into the lorry which I have already established was parked partly off the road.

Why did the Plaintiff fail to see and either bypass this lorry or stop in time to avoid a collision? The accident occurred near the Whitesands Hotel. Both the Plaintiff and **PW5** admit that this is a very straight stretch of the road and due to the several hotels nearby it is a well lit area. Further under cross-examination by Mr. Shekeli both the Plaintiff and **PW5** concede that the lorry did have chevrons and not just two but four chevrons at the rear. **PW5** a police officer confirms that the purpose of such chevrons is to illuminate the rear of the vehicle to provide ample warning of its presence on the road. A lorry is a very large vehicle. Add to this the straight, well lit road, and the chevrons at its rear, this trailer ought to have been very visible to any driver on that road. **PW5** under cross-examination by Mr. Shekeli for the Defendant even admitted that the trailer driver had placed branches on the road to serve as a warning of its presence. It is clear that the driver did all he possibly could to warn other road users of the presence of this broken down trailer on the road. Indeed the evidence is that the trailer had been on that spot, a busy road for several hours and no other motorist had rammed into it.

In his evidence the Plaintiff claims that the accident occurred "**past 11.00 p.m.**". However in the plaint he is more truthful and admits that the accident actually occurred at 5.00 A.M. **PW5** also states that police received the report about the accident at 5.00 A.M. Under cross examination by Mr. Shekeli the Plaintiff admits that from 9.00 P.M. to 5.00 A.M. he was at Kigotho's Bar and Restaurant where he had a few drinks. This is contrary to his initial statement to the police in which the Plaintiff claimed that he was driving home having dropped a friend at Bombolulu. He kept out any mention of his sojourn at Kigotho's Bar. It is clear that the Plaintiff was desperately trying to conceal the fact that he had been drinking for several hours prior to the accident. For a man to have been in a bar drinking from 9.00 P.M. to 5.00 A.M. and then get behind a wheel to drive home is in my view reckless in the extreme. There can be no doubt that the Plaintiff was to a great degree inebriated, such as would affect his judgement on the road. This may explain the Plaintiff's statement that he first believed the trailer was moving only to realize when he came up closer that it was actually stationary. There can be no doubt that due to poor reflexes the Plaintiff in his state was not able to see the trailer on the road within enough time to avoid a collision. Can this be blamed on the driver of the trailer? I think not.. As I have stated earlier the facts show that this trailer was clearly visible on the road and any reasonable or prudent driver would have been able to see and avoid hitting it.

The Plaintiff told the court that he was driving at a speed of 50 KPH at the time of the accident. Taking into account that his vehicle was totally written off and taking into account the very serious injuries which the Plaintiff sustained I find this to have been hardly likely. The damage to his vehicle indicates that the Plaintiff must have been driving at an excessive speed which contributed to his failure to see and avoid this trailer. In the case of **VYAS**

**INDUSTRIES –VS- DIOCESE OF NYERI Civil Appeal No. 23 of 1976**, the court held the Plaintiff's driver 75% to blame for running into an unlit lorry which was stationary on the road. That case is distinguishable from this present one in that in this case the trailer was in a well lit area, had chevrons and was partly off the road and clearly visible to oncoming vehicles. The general rule is that any driver coming up from behind is required to exercise due care and is required to keep a safe distance from the vehicle ahead. The Plaintiff by driving at an excessive speed in an inebriated state clearly failed to adhere to this rule leading to his ramming into the trailer from behind. I find the present case and circumstances to be on all fours with the case of **DORINE MKANJALA & ANOTHER –VS- UNITED TOURING COMPANY & 3 OTHERS Civil Suit No. 624 and 625 of 1983** in which a driver rammed into a stationary vehicle from behind. Hon. C.C. Wambilianga (as he then was) held as follows

*“A prudent driver should travel at such a speed and at such a distance that he is able to pull up without colliding with a vehicle ahead of him. His primary duty is to keep a reasonable look-out for destructions or conditions which may impair efficacious operation of the vehicle ...”*

The learned Judge (as he then was) went on to state that

*“It is pertinent to remember that the 2<sup>nd</sup> defendant had already consumed alcoholic drinks which could have inebriated him to some degree and thereby diminished (somewhat) his capacity to be on the look-out for obstacles or to make good decisions in an emergency situation”*

This was exactly the situation in the present case. The Plaintiff had been in a bar taking alcoholic drinks from 9.00 P.M. to 5.00 A.M. a period of six (6) good hours. There can be no doubt that he was inebriated to such a degree that would diminish his capacity to act in event of any emergency situation like avoiding an obstacle on the road. Lastly the Hon. Judge states that

*“Drivers have to contend with problems of blinding lights and obstructing vehicles, or such other adverse conditions, they drive sensibly, steadily and they also have a duty to keep a reasonable look-out and be attentive. They also have to anticipate unreasonable or dangerous behaviour on the part of other drivers ...”*

In this case the driver who rammed into the stationary vehicle was held 100% liable for the accident. There are other cases to buttress this position. In **HAMISI GUNGA BAYA –VS- SALT MANUFACTURERS LTD & 2 OTHERS HCCC NO. 651 of 1993** the Defendant's vehicle rammed into a stationary unlit vehicle at night. Hon. Wambilianga J. held of the driver

*“he must not have had a proper look-out for obstacles as required of a prudent driver; otherwise he should not have failed to notice the lorry given that it was on a very straight stretch of the road, he should have not driven the vehicle unless he felt physically and mentally fit to do so”*

The driver was found 100% liable for the accident.

All the above cited cases are similar in all material and relevant respect to this case before me. I find no reason to

deviate from the findings therein. The Plaintiff of his own volition got into his vehicle and drove off after nearly six hours of imbibing alcoholic drinks. He has no one to blame for the consequences of this short-sighted action other than himself. The cause of the accident was not the presence of the trailer on the road but rather the negligence of the Plaintiff in driving recklessly and disregarding its presence on the road. I am satisfied that the Defendants took all measures including moving the trailer off the road, having reflective chevrons on their vehicle and placing branches on the road to warn on-coming drivers of its presence on the well-lit and straight road. I find no liability to attach to the Defendant. On the contrary I find the Plaintiff 100% to blame for the occurrence of this accident. In the absence of liability no damages can flow. I note that the Plaintiff did suffer serious injury – indeed it is a miracle that he survived the accident but sadly he is the author of his own misfortune. He is not entitled to any damages. This claim fails entirely and I do hereby dismiss this suit with costs to the Defendant.

**Dated and Delivered at Mombasa this 4<sup>th</sup> day of June 2010.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:-

Ms. Njoroge for Plaintiff

Mr. Shekeli for Defendant

**M. ODERO**

**JUDGE**

**4/6/2010**