



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET**

**Civil Appeal 44 of 1998**

**RAI PLYWOODS (K) LTD ..... PLAINTIFF**

**-VERSUS-**

**SILVANUS SECHECHU ..... DEFENDANT**

**JUDGMENT**

This appeal is against both liability and quantum. The plaintiff's /Respondent's case is, that he was engaged as a machine operator by the defendant/Respondent and on 16.09.1996 at 4.00 a.m. while working as such two logs fell from the crane he was operating and fell on him thereby injuring him. He blamed the accident on the brakes of the machine he was operating which brakes he stated failed. He sustained a fracture to the femur, tenderness on the right thigh, there was limited movement to the right knee and developed traumatic arthritis which could improve with physiotherapy and the right femur healed with some deformity.

The case for the defendant/respondent was that there were no defective brakes and indeed the same machine that the appellant was operating continued to work soon after the accident until the following morning. That the trial court was wrong in attributing liability to the appellant on the matter of defective brakes when that was not pleaded and in any case no brakes failed. That in any event the award of general damages of Kshs.350,000/= for the injuries sustained was inordinately high and a sum of Kshs.150,000/= would have sufficed and liability should have been apportioned at the rate of 50/50 between the parties.

Before me it was submitted for the appellant that the trial court made an error in fixing liability on an issue neither pleaded nor proved as it was not pleaded that brakes failed and the plaintiff did not adduce evidence that brakes failed and that even if he had adduced such evidence it would have been of no consequence as the issue was not pleaded. That the appellant was himself negligent as the operator of the machine and he also took no evasive action to avoid the injury to himself. It was submitted that the award was way out of proportion to the injuries sustained

For the Respondent it was submitted that the issue of the failing brakes was pleaded in the particulars of negligence in the pleadings contain in a summary form the matters complained of and not evidence. It was submitted further that the appellant's evidence at trial was not shaken at cross examination and that no evidence was brought to prove that the machine was indeed in a good working condition and no evasive action could be taken in the case by the Respondent to avoid injury to himself as there was insufficient space.

At the trial Respondent gave evidence that he was on the night shift that started work at midnight on the material date. He had done four (4) trips of logs by 4.00 a.m. when he pressed the lowering button of the machine and the logs came down at a high speed and hit him, thereby injuring him. He did not deny the assertion by the defence that he did not wait for his co-worker whose duty it was to align the

logs and tie them on the crane before moving them to avoid them falling off as they did. The defence evidence to that effect was not even cross-examined. That fact was neither denied nor admitted by the plaintiff. The inference to be drawn is that it is true that the plaintiff did not wait for his co-worker to tie the logs together for if it was otherwise the plaintiff would have denied it outrightly. He did not.

The only evidence led on the brakes being defective was that by the plaintiff. The evidence by the defence supervisor (DW.1) that he worked on the machine after the accident was not dislodged. It appears to my mind that what led to the accident was a combination of two issues, the logs not being aligned and tied together and some malfunction of the machine that brought the logs down at a higher speed than the normal one. The supervisor did not explain why he worked with the machine, if he did, after the accident as that was really not his work, his was to supervise the workers. It would appear that there was some sudden malfunction of the machine. In these circumstances I would have apportioned liability at the ratio of 80/20 in favour of the plaintiff/respondent. For his not waiting for the logs to be tied together he should in my considered view take 20% liability. There was no mishap on the prior four (4) trips when the plaintiff admitted that someone tied the logs together on the crane, and the crane then did not also come down at high speed. It was not shown why the logs would of themselves tumble down if they were tied as required.

As to the point taken that the issue of defective brakes was not pleaded I find that that was taken sufficient care of in paragraph 5 of the plaint in the particulars of negligence of failing to provide the plaintiff with steady tools with which to work. In his own admission the plaintiff was a machine operator and his only tools of work were the machines he operated. That fact coupled with the evidence led at trial by the plaintiff that it was the brakes that failed, empowered the trial court to make a finding on the same. That was the situation in the case of **ODD JOBS –VERSUS- MISBIA CIVIL APPEAL 49 OF 1969.**

On quantum and for the injuries sustained and considering that the fractured femur headed with a deformity I would not interfere with the award of damages of Kshs.350,000/=. I do not find that there was a misdirection by the magistrate on assessing damages, she did not take into account irrelevant factors and did not fail to take into account relevant factors. She did not misunderstand or misapply the correct law and she appreciated the adduced evidence.

In the result this appeal succeeds to the extent that the appellant's liability is reduced by 20%. General damages of Kshs.350,000/= will remain intact. Costs to the respondent.

Orders accordingly

**DATED SIGNED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF JULY, 2010.**

**P.M. MWILU.**

**JUDGE.**

In the presence of

**Gicheru holding brief for Kiarie** Advocate for Appellant

**Mutei** Advocate for Respondent

**Paul Ekitela** Court Clerk.

**P.M. MWILU.**

**JUDGE.**

