



evidence on record that the Comeco was in good mechanical condition and what can be faulted is the manner in which it was operated. If it was operated in the correct way and with due care and attention, the 1<sup>st</sup> Respondent would not have been injured. DW2 owned up that he released the machine to offload before the driver of the tractor finished untying the chain. The reason he gave was that he was given a signal by a man whom he does not know and who is not an employee of the 2<sup>nd</sup> Respondent. DW2 also confirmed that the signal is supposed to be given by the driver of the tractor. In this case, the driver was the 1<sup>st</sup> Respondent and DW2 confirmed that he (1<sup>st</sup> Respondent) had not given any such signal. The blame therefore entirely lies on the 2<sup>nd</sup> Respondent who is vicariously liable for the acts of its employee. The magistrate's finding on apportionment of liability to the Appellant was not supported by any evidence. No particulars of negligence attributed to the Appellant were proved by the 1<sup>st</sup> Respondent. I am satisfied that the apportionment was based on wrong principles. I hereby substitute it with 10% against the Plaintiff and 90% against the 2<sup>nd</sup> Respondent. The Appellant is hereby discharged from liability. The appeal therefore succeeds.

On quantum, the doctor's report confirmed that the Plaintiff suffered only soft tissue injuries on the head, chest, back, shoulder and right hip joint. There was no evidence of dislocation of the right hip.

The damages awarded are not in my opinion manifestly excessive and I do not wish to disturb the magistrate's award. Each party to meet its own costs of the appeal.

**F. N. MUCHEMI**  
**JUDGE**

Judgment dated and delivered on the 12<sup>th</sup> day of October 2010 in the presence of Mr. Wattanga for the 2<sup>nd</sup> Respondent.

**F. N. MUCHEMI**  
**JUDGE**