



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

**AT KISUMU**

**Civil Appeal 31 of 2005**

EVANS WAFULA.....APPELLANT

**-VERSUS-**

ANVI EMPORIUM LTD.....RESPONDENT

**Coram:**

**Mwera, Judge,**

**Omondi for Ouma for appellant/plaintiff**

**Ms. Oron for the respondent,**

**Raymond CC.**

**JUDGMENT**

This appeal arises from the decision of the lower court at Kisumu where the appellant/plaintiff sued the employer, respondent/defendant claiming damages on account of injuries suffered on 15.9.2003 in an accident. The appellant pleaded that as an employee (driver) of the respondent, while he was driving the latter's motor vehicle reg. no. KAH 354 N, he was injured and therefore entitled to compensation on account of negligence. This was denied. After trial the learned trial magistrate dismissed the claim on the basis that the appellant had not proved liability against his employer for requiring him to drive a defective motor vehicle. The appeal had five grounds. Mr. Omondi abandoned ground 3 and argued the rest together. Ms. Oron opposed the appeal.

The plaintiff stated that it was a duty of the respondent to take all reasonable precautions to ensure that its employee, the appellant operated in an environment of safety while on duty. It did not do so and when the appellant was driving the motor vehicle referred to above:

**“--- the said motor vehicle lost control due to mechanical defects and veered off the road thus occasioning to the plaintiff severe bodily injuries.”** (para 5, plaintiff).

It was averred that the respondent failed to provide/ensure that its motor vehicle reg. no. KAH 354 H ran on suitably serviced accessories; it did not provide safety belts; and it did not explain to the appellant

inherent dangers in driving its motor vehicle which was defective. There were alternative pleadings to the above which in essence repeated the particulars of negligence already laid out above. The injuries included a blunt one on the head with concussion; lacerations on the lower lip; loosened teeth, lacerations with scars on the right hand and left knee. The appellant sought damages, costs and interest.

In its defence the respondent denied that it was the registered owner of motor vehicle no. KAH 354 N or that the appellant was its employee. So it owed no duty of care to him regarding safety while on duty. He was not engaged in its duties on 15/9/2003 and no accident occurred occasioning the appellant the alleged injuries. Every aspect of negligence at common law or statute was denied and that, if anything, the appellant was duly entitled to compensation under the Workman's Compensation Act. In the alternative it was pleaded that the appellant was wholly or substantially responsible for the accident by his own negligence of driving at an excessive speed, not taking care of his own safety, failing to brake to avoid the accident or failing to put on safety belts or checking the mechanical condition of the motor vehicle before driving it etc. It was added that the accident occurred in circumstances beyond the respondent's control.

The appellant told the learned trial magistrate that before he set on duty to deliver some goods using motor vehicle reg. no. KAH 354 H he had complained about its brake system to one Virod Pal, his boss. The problem was discovered in May 2003 and he suggested replacement of brake disc and pads. Only the pads were replaced. The disc was worn out by 15.9.2003. On this day he also complained about the brakes adding that the motor vehicle had been overhauled (overloaded?). But Virod instructed him to deliver the goods or leave employment. While going down hill on KAKAMEGA – MUMIAS RD a cyclist suddenly emerged from the left side of the road. The appellant tried to swerve to avoid a collision. He also tried to brake but they failed. The motor vehicle overturned and he was injured on the head, left knee, right leg, chest and on the mouth. He was admitted in Jalaram Hospital in Kisumu for treatment (Exh P1). He was moved to Nyanza Provincial Hospital for more treatment (Exh P2). The accident was reported to the police (Exh P4) and a P3 form was completed (Exh P3). He still experienced chest pains. A certain Dr. Okontu (?) examined and made a report on the appellant's health (Exh P5).

In cross – examination the learned trial magistrate heard that the appellant had no employment card with the respondent. He was not a mechanic but he had basic knowledge in that area. He had to drive this motor vehicle otherwise he would lose his job. The brake pad was replaced but not the brake disc. The appellant had no inspection report to show that defect. He carried 2 tones of goods and not the motor vehicle's capacity of 1.5 tones. He was driving 70 KPH down hill when the accident took place with cyclist getting into the road. He was in a high speed at 70 KPH. Most of the injuries were healed, except those on the legs and chest.

Eric Lumwaji, a shop attendant with the respondent was with the appellant delivering goods on 15.9.2003. As they drove along Kakamega – Mumias Rd, a cyclist who was ahead of their motor vehicle, looked behind and by that he rode into the road. It was raining. In trying to avoid him the appellant drove onto the other side of the road and the motor vehicle overturned. Both its occupants were injured. The appellant had not complained of the brake problems to this witness. He did not know whether such complaint was put to their boss. But they had not had any problem with the motor vehicle on their trip which had led them through Nandi then Kakamega. When the appellant tried to brake the motor vehicle's speed reduced but it did not stop. The motor vehicle had no mechanical problem.

On the court's own review of the evidence before the learned trial magistrate, the main basis of alleging negligence on the part of the respondent was that it did not service or maintain a proper brake system of motor vehicle KAH 354 N, which he then directed the appellant to drive on the material day. During the trip out, when a situation arose where it was necessary to apply brakes, the appellant tried them to avoid hitting a cyclist but they failed. The motor vehicle went on the other side of the road and fell, injuring the appellant with DW1. It was claimed that this brake defect had been detected long before. It had only been partly attended to, but not fully.

This major claim required mechanical evidence to show the state of the brake system before the accident. There was no such report and thus the mere claim that the brakes were defective before the accident,

appeared baseless. The appellant claimed; he should have proved. Perhaps he told one Virod Pal, his boss about it, and not Lumwaji (DW1). But that is neither here nor there. It was incumbent on the appellant to prove that he was driving a defective motor vehicle before the accident occurred. There was no evidence of a defective brake system before the accident and accordingly the learned trial magistrate properly concluded that the appellant had not proved his claim on the basis of this allegation.

The suit failed and similarly this appeal fails with costs.

Judgment delivered on 29.6.2009.

**J. W. MWERA**

**JUDGE**

*JWM/hao*