



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

**Civil Appeal 7 of 1997**

**SAMUEL MWANGI WAITHAKA ..... PLAINTIFF**

**VERSUS**

**MUGOYA CONSTRUCTION & ENG CO. LTD.....DEFENDANT**

**JUDGMENT**

The appellant, Samuel Mwangi Waithaka, filed suit against the Respondent, Mugoya Construction and Engineering Company Ltd seeking to be paid damages on account of injuries he claimed to have sustained on the 24th of June 1990 while he was in the employment of the respondent. The appellant pleaded that he was injured when the motor vehicle registration number KAA 875J Isuzu Tipper (*hereinafter referred to as the said motor vehicle*) that he was driving, was involved in an accident when its brakes failed and resulting in the said motor vehicle losing control and overturning. The appellant blamed the respondent for the said accident. He pleaded that the respondent had failed to provide him with a safe working equipment and further failed to properly maintain the said motor vehicle and thereby resulting in the said accident which the appellant sustained serious injuries. The respondent filed a defence. It denied that it had failed to maintain the said motor vehicle to the required standard. It further denied that it had allowed the appellant to drive the said motor vehicle whilst it was aware that the same was faulty. The respondent blamed the appellant for causing the accident that resulted in the injuries that he claims he sustained. The trial Magistrate who heard the case agreed with the respondent. The appellant's suit was dismissed with costs. Being aggrieved by the said dismissal of his case, the appellant appealed to this court.

The appellant raised five grounds of appeal in support of his appeal against the decision of the trial Magistrate. The appellant was aggrieved that the trial magistrate had dismissed his case after holding that the appellant had not proved his case on a balance of probabilities. The appellant faulted the trial Magistrate for holding that the appellant had not established that the respondent was negligent and therefore dismissed his case. The appellant was aggrieved that the trial Magistrate had considered extraneous matters in reaching the said decision dismissing his case. The appellant faulted the trial Magistrate for relying on the Motor Inspection Report to the exclusion of other evidence and thus arrived at the wrong decision dismissing his case. Finally, the appellant was aggrieved that his case had been dismissed against the weight of evidence which had been adduced on record and which was in favour of the appellant. At the hearing of the appeal, I heard the submissions by Mr Gatimu, learned Counsel for the appellant and Mrs Oduor, learned Counsel for the respondent. Before addressing the issues raised in the said submissions, I will briefly set out the facts of this case. The appellant was employed as a driver by the respondent. He was employed to drive motor vehicle registration number KAA 875J, Isuzu Tipper. His work involved transporting sand from a place called Mutaita to Gilgil. At the time of the accident, the appellant had been employed for a period of about six months by the respondent.

Evidence was adduced by the respondent that the said motor vehicle was about six months old at the time of the accident. According to the appellant, about a week before the said accident occurred, he had informed the Site manager that the brakes of the said motor vehicle were not in a good working condition. According to him, the brakes of the said motor vehicle would sometimes fail without any explanation.

When he made this report to the Site Manager, he claims the said Site Manager told him to drive the said motor vehicle slowly as they awaited the arrival of a mechanic who would repair the said fault. The appellant testified that a week later, the said faulty brakes had not been repaired. On the 24th of June 1990, as he was driving the said motor vehicle along Nakuru-Gilgil road the brakes of the said motor vehicle failed. It was his testimony that the brakes failed when he was about to overtake a tanker. To

avoid ramming into the rear of the tanker, the appellant took evasive action and drove the said motor vehicle off the road as a result of which he lost control of the said motor vehicle and as a consequence of which the said motor vehicle overturned. He testified that he sustained serious injuries when the said accident occurred. The accident was reported to the police who inspected the said motor vehicle and wrote a report on its pre-accident condition.

This version of events as narrated by the appellant were denied by the respondent. The respondent called two witnesses, DW1 Mika Okogo Ayomo, a clerk at the Site office and DW2 Amos Chira who testified that the appellant had made no such report concerning a fault on the braking system of the said motor vehicle. DW2 testified that the said motor vehicle was regularly serviced and inspected for any mechanical fault at least once a week. He further testified that in case a report was made about any fault in a motor vehicle, the repairs were done immediately.

The respondent's witnesses further testified that after the accident had occurred, the appellant wrote a statement on the circumstances that the said accident occurred. In the said statement the appellant did not mention that the brakes of the motor vehicle were faulty. The said statement, written in the Kikuyu language and translated into English were produced in evidence as defence exhibit No. 2(a) & (b). The respondent testified that the said motor vehicle was inspected after the accident by the police who established that the brakes of the said motor vehicle were in a good working condition at the time of the accident. The respondent's testimony was to the effect that the said Motor Vehicle Inspection Report eliminated brake failure as the cause of the said accident. The Motor Vehicle Inspection Report was produced as defence exhibit No.3. The thrust of the respondent's evidence was that the mechanical condition of the said motor vehicle could not have caused the accident. It was their evidence that other reasons including the condition of the road and the manner in which the appellant drove the said motor vehicle could have caused the accident.

This being a first appeal, this court is aware of its mandate that requires it to reconsider and re-evaluate a fresh the evidence adduced before the trial Magistrate's court and reach its own independent decision based on the said evidence adduced. In reaching its determination, the appellate court should always put in mind the fact that it neither saw or heard the witnesses as they testified and therefore it is not expected to make any finding as regard the demeanour of the witnesses. In this appeal, the issue for determination is whether the appellant established on a balance of probabilities that the respondent was negligent or failed in its duty of care to him and therefore ought to compensate him for the injuries he alleges to have sustained in the accident.

I have carefully re-evaluated the evidence on record and considered the submissions made by the Counsel for the appellant and Counsel for the respondent on this appeal. To succeed in his case, the appellant had to prove that the respondent failed to maintain the said motor vehicle and therefore exposed the appellant to risk of injury. Being a driver of the said motor vehicle, the appellant could not attribute the said accident to the respondent. It was established that the said accident was occasioned either by the road condition or human error on his part. It was the appellant's case that he had reported the faulty brakes to the respondent's Site Manager about a week prior to the accident occurred. This evidence of the appellant was disputed by the respondent. The respondent's witnesses testified that no such report was made by the appellant. It was the respondent's evidence that if such a report was made then it could have been acted upon immediately.

After the accident had occurred, the said motor vehicle was inspected by the police. The police established that the brakes of the said motor vehicle were in a good working condition prior to the said accident. The said report was produced as defence exhibit No. 3. The appellant wrote a statement after the accident explaining the circumstances which the said accident occurred. The said statements were produced in evidence as defence exhibit *No. 2 (a) & (b)*. I have read the said statement. The appellant attributed the cause of the said accident to the slipperiness of the road and the fact that he was unable to overtake a tanker which was ahead of him and which he had seen just when he had steered the said motor vehicle towards a bend on the road. The appellant stated that when he tried to stop the said motor vehicle to avoid ramming it into the tanker, the said motor vehicle skidded, lost control and subsequently overturned. From the said statement, it is clear that the appellant was driving the said motor vehicle at an

excessive speed in the circumstances and was therefore unable to control the motor vehicle when he realised that he could not safely overtake the slower motor vehicle. The appellant did not mention in his statement that the brakes were faulty.

Having re-evaluated the said evidence adduced, it is clear that the appellant was the author of the said accident involving the said motor vehicle. The condition of the said motor vehicle had nothing to do with it. The brakes of the said motor vehicle were in a good working condition. This fact was established by the police when they inspected the said motor vehicle after the accident. There is no proof that the appellant made the report regarding the faulty brakes to the respondent. For all intents and purposes, the issue of the faulty brakes was raised by the appellant when he testified before court. The issue was raised as an afterthought. The appellant did not plead that the brakes of the said motor vehicle were faulty.

In the circumstances of this case, and after exhaustively re-evaluating the evidence on record, I do hold that the appellant has failed to establish that the respondent issued him with a faulty motor vehicle to drive. On carefully analysis of the evidence, it is clear that it was the appellant's failure of judgment when he was overtaking another motor vehicle that caused the said accident. He cannot blame anybody but himself for the injuries that he sustained. His appeal therefore lacks merit.

It is dismissed with costs.

**DATED at NAKURU this 3rd day of August 2005.**

**L. KIMARU**

**JUDGE**