



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 55 of 1997**

**A.O. BAYUSUF & SONS .....PLAINTIFFS**

**VERSUS**

**BULLEYS TANNARIES LTD. ....DEFENDANTS**

**J U D G M E N T**

The Original plaint was amended on 14/11/1997.

The cause of action is in negligence arising out of a motor accident which occurred on 11/2/1996 along Mombasa/Nairobi Road between the Plaintiff's motor vehicle KAE 652X and defendant's motor vehicle KSP 470/Trailer ZA 6801. Plaintiff alleged negligence on the part of the Defendant's driver agent or servant the particulars of which are set out in the plaint.

The particulars of material loss was specifically stated in the plaint and the prayers were on material loss only not personal injuries.

The evidence on how the accident happened was given by PW 2 the driver. That night he slept at Maungu. Later at Mtitio Andei in the morning there were the two vehicles one of them got its container falling onto his lorry. It was coming from Nairobi. It was KSP 47/ZA6801 both vehicles were completely destroyed. Plaintiff's vehicle was carrying goods. The goods were transferred to another vehicle of the plaintiff's company.

A breakdown was used to tow the vehicle to police and to Mombasa. The driver of the other vehicle was charged. The container fell over the lorry after leaving the body of its vehicle. The container rolled over the plaintiff's cabin and fell on the driver's left side. The driver of the other vehicles stopped until the police arrived.

According to police records exhibited the driver of KSP 470 was driving from Nairobi, he collided with other vehicle a Mercedes and also with plaintiff's vehicle. After accident vehicles were taken to Police station,

The driver of KSP 470 Francis Munguti was charged with traffic offence of careless driving and

convicted on his own plea of guilt and sentenced to a fine of Shs.5,000/-.

On the issue of negligence there was evidence of PW 2 the plaintiff's driver. He said clearly that his vehicle was traveling towards Nairobi from Mombasa and that the vehicle KSP 470/Trailer ZA 6801 coming from Nairobi towards Mombasa got its container falling onto the cabin of his lorry on the left side. The police officer from Voi produced the police file in respect of investigation on this accident. There is sketch map of the accident. It is easy to see that the driver of the defendant's vehicle failed to keep his side and collided with another vehicle a Mercedes and the container from the defendant's vehicle. It was apparent to the eye that there was an accident.

On the part of the Defendant it is admitted that there was an accident on or about the date, time and place mentioned between vehicles KAE 652X and KSP470/ZA 6801. The defendant also alleges contributory negligence on the part of the plaintiff's driver and has set out particulars of such negligence under paragraph 4 of the defence. I have perused the court file and the record does not show any denial by plaintiff of the defence allegations on record at all. Agreed issues signed by both parties the issue of ownership of the vehicle KAE 652X is not raised. Indeed the parties proceed on the assumption that there is no dispute as to ownership of "plaintiff's motor vehicle registration No. KAE 652X and this issue was not covered at the trial. Issue No. 3 is framed thus: "was the said accident caused or substantially contributed to by the negligence of the plaintiff's servant and/or agent in driving, managing or controlling motor vehicle registration No. KAE 652X as alleged in the defence".

On this issue there was no evidence put forward for the allegations of negligence made against the plaintiff. No evidence was called, at the trial and the issue was not pursued by defendant in cross-examination of plaintiff's evidence. The Principle that he who alleges must prove is relevant here. There was no evidence in court to enable the court to see that the plaintiff's driver was in anyway negligent so as to be found guilty of contributing negligence. Again the parties proceeded as if the issue of contributory negligence was denied by the Plaintiff.

The admission in Traffic court that the defendants was guilty of careless driving covers all particulars of negligence pleaded namely driving too fast, failing to keep any or any proper look out or to have any or any sufficient regard for other road users, failing to stop, to slow down or so to manage the vehicle so as to avoid the accident, failing to give adequate warning of his approach, failing to see the plaintiff's motor vehicle in sufficient time or at all, failing to exercise sufficient prudent and skill in the circumstances.

Upon considering the evidence on record which was not shaken in cross-examination, I find no contributory negligence on the part of the Plaintiff's driver. I find that the Plaintiff has proved its case on balance of probability and I find the defendant 100% liable for the accident.

On the issue of material loss claimed the basic principle is that only loss pleaded and proved can be awarded. There is evidence that the lorry was carrying fertilizer to Nairobi and it became necessary to obtain another vehicle to transport the goods. This the plaintiff did by taking one of his other vehicles to do the job.

There was also towing charges of the vehicle, repair charges, loss of user for 195 days, dispatch of low loader and forklift,

Personnel – 2 guards, hired loaders to off load the goods.

3 mechanics foreman to oversee the operation.

The plaintiff also claims cost of obtaining police abstract and assessor's fees. PW 1, Laxmishankar A Pandya, loss adjuster surveyor and accident assessor examined motor vehicle KAE 652 X made a report dated 9/8/1996. Accident occurred in February same year. He found the cost of repairs, everything inclusive to be Shs.1,591,766. He testified that the vehicle was repaired at the workshops of the plaintiff. Repair works took 6 months although he had estimated repair time to be between 8-10 weeks.

Cross-examined on his assessments he said he did not list where the spare parts were purchased or whether or not they were genuine. He said the practice was not to use used parts. As the plaintiff used parts from garage it was not certain that the same were new or used. The report does not show the cost of each spare part used. He confirmed that repairs could have been done in a shorter period. Pre-accident value is assessed as approximate Shs. 6 million.

The parts damaged are described in the report exhibit 1 but as stated above no costs of repairs and spare parts is exhibited. Therefore although the report shows labour cost at Shs.256849/45 and paint and misc. at Shs.65,000/- and spares Shs.1269912/-. The court does not know how these figures were arrived at or whether the payments were made at all.

On the cost of repairs the plaintiff tendered the evidence of Faiz Abdalla, Claims Manager in the company. He testified that the repairs were carried out at plaintiff's workshops and the spare parts were from their workshops. He testified that the cost of repairs amounted to Shs.1,591,766.70. This is the figure that is stated in the assessors report. He also testified that the company buys large quantities of spares which are stored in the workshops. However on cross-examination he said they were claiming non user for 195 days because there was delay caused while looking for spares. He was not able to explain which spares were missing.

Furthermore he testified that the forklift of the plaintiff and the workers were also in the employment of the plaintiff. Loader was also from their workshop. The workers were paid allowances. He had a petty cash voucher for 20,000/- paid to the foreman. Nevertheless he claimed 60,000/- for forklift and assessors fees, towing charges Shs.30,100/- to Mtito Andei and to Mombasa and the claim of 2 watchman, hire of alternative transport for fertilizer and claim for 3 mechanics at 3500/-, loss of user for 195 days Shs.1,406.50 per day and Shs.20,000/- aforesaid paid to supervisor.

Further evidence on the issue of spareparts and their cost was given by PW 5, Salim his job was to transfer spares from store to workshop. He was shown some documents in a bundle and marked (MFI 6) (Exhibit 6) and Job cards.

On being cross-examined this witness said, "I cannot tell what the assessors said. I was in the store" On being shown some documents he admitted that some requisition forms carried different figures from the amount of invoice. Some of the documents did not relate the vehicle KAE 652 X. He admitted there are errors in some of requisitions. He said "we purchased for replacement after accident" (of KAE 652X). Also he said they used to purchase spares from spare parts shops. Sometimes the spares used are obtained from other vehicles. The invoices are produced as exhibit 6.

PW 4 was recalled to produce exhibit 5. He further certified that VAT was paid. Exhibit 5 is a bundle of documents showing the volume of work on which to base the claim for loss of user.

In an effort to prove the cost of repairs to the vehicle the plaintiff produced several documents marked exhibit 6 for example.

Invoice No. 1664 dated 11.5.96 for several items priced at Shs.27410/- is

Accompanied by a local purchase order of the same date and the two documents are accompanied by a copy of requisition from workshop for 2 items dated 20/6/96 priced at Shs.1790. This shows that only part of the invoice may have related to repair costs. However, the list of repairs to be done was not made until after 9/8/1996. This is the time the repairs were identified. Counsel for defendant submitted that these documents did not support the repairs which were subsequently identified by the Assessor. The repairs were done before assessment and it cannot be said that the documents supported any repairs necessitated by the accident.

On the issue loss of use the claim is for 195 days. PW 4 stated that the repairs took 9 months and they did not hire alternative transport. There was delay in dismantling the vehicle. Exhibit 5 shows the earnings of the vehicle of the month of December 1995 and January 1996 and on this basis he calculated

an average and came to mitigate loss monthly sum of 253095/-. . The plaintiff was doing the job itself and should have done everything to ensure the work was done in shortest time to mitigate loss. There is no proof why there was such delay in executing the repairs. I find the period proposed by the assessor to be the maximum allowed in this case. The period should have been 10 weeks on average the loss of user should be calculated at the rate of 253.095 p.m. for 2<sup>1</sup>/<sub>2</sub> months less the VAT yielding = 253095.00

	<u>37965.25</u>
	215129.75
plus	<u>215129.75</u>
	430259.50
plus	<u>107564.85</u>

The other claim is for towing charges. There is exhibit 4 showing towing charges from the scene of accident to MTITO ANDEI POLICE POST.

The other claim made is that of low loader of Shs.200,000/- and fork lift Shs.60,000/- no documents are exhibited to prove these claims. Both items were said t have come from the Plaintiff's workshops. There was no evidence why they were need and they cannot be said to have been proved.

On the issue of personnel Shs.15,500/- is proved by the production of petty cash voucher exhibit 4. The police Abstract was produced by police witness. The court finds that the special damage proved:

Police Abstract	100.00
Assessors Fees	3000.00
Loss of User	537824.35
Towing charges	30000.00
Personnel expenses	<u>15500.00</u>
	<u>583724.35</u>

Judgment is entered for the Plaintiff against the defendant in the sum of Kshs.583,724/35 plus interest at court rates from the date of filing suit and costs of this suit.

Dated at Mombasa this 27<sup>th</sup> day of September 2005.

J. KHAMINWA

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