



- 1) Civil Suit
- 2) Material loss claim
- 3) Motor vehicle accident between lorry/trailer and land rover
- 4) Damages to trailer and lorry
- 5) Liability:
 - a) Plaintiff's driver of lorry/trailer claims cause of accident tyre burst (an act of God?)
 - b) Tried and convicted in the subordinate courts Ksh.20,000/- fine in default 5 years imprisonment
(No appeal preferred)
 - c) Case law of Chemwolo & Another v Kubende
 - i) Principle that even where there is a criminal conviction, that the conviction [of the driver] is not conclusive evidence that he is guilty of carelessness. "The finding did not preclude the appellants from suing as the civil case could find that the respondent was also guilty of carelessness"
Held: Liability : - Nil
Plaintiff failed to show defendant was negligent or contributed to such negligence
Suit dismissed.
- 6) Possible Award
 - a) Special Damages
 - i) Repair charges Ksh.3,932,408/-
 - ii) Assessment fee Ksh .4,100/-
 - iii) Re-inspection Ksh .1,700/-
 - iv) Police abstract Ksh.100 Nil _____
Ksh.3,938,208/-
- 7) Case law
Chemwolo & Another v Kubende
1986 KLR 492
Platt, Gachuhi & Apaloo JJA
- 8) Advocate
A.O. Wandago advocate for the plaintiff
Waigi L. Kamau advocate for the defendant

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 600 OF 2002**

UNGA GROUP LIMITEDPLAINTIFF

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

The plaintiff, a limited liability company is the registered owner of motor vehicle Reg No. KAM 268X ZB 8632 Nissan Truck and trailer. The defendants the Attorney General is sued on behalf of a government motor vehicle Registration G.K. P976/KAC 4434 which vehicle was involved in a motor vehicle accident.

Briefly, on the morning of the 7th April 2001 at 8.30 a.m. the plaintiff agent was driving the Nissan Truck/trailer along the Nakuru –Eldoret road.

On the on coming lane there were three land rovers possibly bearing civilian Registration numbers but owned by the government of Kenya that was transporting GSU police officers to a function within the locality that involved the President.

The plaintiffs agent/driver claimed there was a tyre burst to the left of his vehicle. As an experience driver he did not break as this would have caused the vehicle to summersault. He used the gears to slow down the vehicle by shifting the gears. He then used the hand break. As he was doing this the first land rover swerved out of the way. The second land rover collided into his vehicle. In fact the witnesses in the land rover claim that the vehicle had come into their lane.

The driver of the Nissan truck said that the accident was inevitable. He was nonetheless charged with dangerous driving and was found guilty by the lower court in the traffic case. A fine of Ksh.20,000/- in default 5 years imprisonment was imposed.

It was that as a result of the said accident injuries were sustained by the passengers in the land rover including four fatal injuries.

The Registered owner of the vehicle, the plaintiff herein sued the Attorney General in damages. They claimed that the Attorney General was party to blame for negligence in causing the accident.

I) JURISDICTION

In his submission, the state counsel raised the issue of this courts jurisdiction in this matter? Namely, that the department sued was not the correct one. This to my mind should have been raised before the start of the trial as a preliminary objection to this courts jurisdiction. It should not be as a submission at the end unless there is good cause to show that it should be so raised at the end of the trial. The issue of jurisdiction that is raised within a trial is when a plaintiff has been given leave to file a suit “out of time” and has infact done so (ex parte) the defence is to raise the issue of jurisdiction within the trial.

No evidence infact was raised or mentioned on the issue of jurisdiction save “by way of passing” on this matter.

Further in the defence the defendant “admitted the jurisdiction” of this court “and is thus estopped from so not admitting” (see para 5 of the defence).

II) LIABILIT Y

The parties had by consent agreed to put in evidence the proceeding of the lower court. This means that there would have been no need of recalling all the witnesses a second time to this trial. I accordingly relied on the said proceeding under section 34 of the Evidence Act. Cap 80 of the Laws of Kenya. The driver was tried and found guilty after being convicted for the said traffic offence. Is he entitled to sue?

The advocate for the plaintiff relied on the case law of:-

Chewolo v Another v Kubende

Platt, Gachuhi & Apaloo JJ of Appeal.

Whereby the judges laid down the principles that:-

“Wherever there is a criminal conviction (of the driver) it not conclusive evidence that the [driver] is guilty of carelessness. “The finding did not preclude the appellants from suing, as the civil case could find the respondent was also guilty of carelessness.”

For instances where upon have a motor cycle who has an accident collision with a vehicle, the driver of the vehicle may be in the wrong and committed for a traffic offence but the motor cyclist contribute to the liability in a civil suit due to his carelessness if, for instance, he has not worn a helmet. The liability would therefore be approved.

I am asked in this case to see if there is any liability that could be approved to the defendants. According to the evidence, the Land rovers vehicle with its passengers of GSU personnel of about 15 or so were travelling in a conveyor at a speed of between 70 KPH to 80 KPH. They said that the Nissan truck swerved from side to side and came to third lane. It is then that the accident was inevitable and occurred involving the second land rover.

The plaintiff claim the accident was “an act of God” That as such the defendants should be blamed. This is an awkward position as normally the plaintiff would have been the defendants to perhaps imply this defence.

I nonetheless see whether there was indeed a tyre burst. The personnel who were on the ground from the police saw no skid marks. They also said the tyre burst came after the accident occurred.

I would believe that there could have been a tyre burst. The driver was still fill and as such was able to control the vehicle well. His misfortunate is that the traffic at that of the moving was bearing. The truck may have been speeding because of the impact that it sustained.

I find that in this situation the on coming vehicle were not negligent. As reasonable drivers they kept to their lane only to find the truck coming to them. I would not find that there was any contributory negligence on the part of the defendants servant. I would find that this was an act of God. I accordingly dismiss this suit with costs to the defendant.

I am nonetheless required by law to state what my award would be in the event that the plaintiff would have been successful in this matter.

III POSSIBLE AWARD

The claim herein is that of repairs to the said Nissan truck/trailer I am most impressed with report of Instep Loss Assessors.

They examined the vehicle after the accident and noted down all the damages, the costs of repairs by itemizing each item that required to be replaced.

Thereafter on already having the estimated costs by the dealers of repairs, they photographed the completed vehicle then the old spare parts that was replaced. This is a most commendable job and evidence given in this case.

The total costs of repairs (final) amounted to Ksh.3,932,408/- which I would have awarded.

The assessors fee of Ksh.4,100/- and re-inspection of Ksh.1,700/- is very reasonable and not exaggerated. Proof of payment was produced of a receipt bearing a revenue stamp. I would have awarded

this sum.

A police abstract fee of Ksh.100/- was produced. I would NOT have award this sum.

This would have come to a gross total of Ksh.3,938,208/- which I would have awarded.

The suit nonetheless stands dismissed with costs to the defendants.

In summary

- a) Material loss claim
- b) Motor vehicle collision between Nissan truck/trailer and landrover
- c) Liability – Nil
- d) Possible Quantum
 - a) repairs Ksh.3,932,408/-
 - b) Assessment for Ksh. 4,100/-
 - c) Re inspector fee Ksh. 1,700/-
 - d) Police abstract fee Nil_____

Ksh.3,938,208/-

Suit dismissed with costs to the defendant.

Dated this 23rd day of November 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Eboso & Wandago & Co. Advocates for the plaintiff

Waigi L. Kamau State Counsel for the defendant