



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL APPEAL NO 21 OF 2017**

**(Being an appeal from the judgment and decree of Hon Wandera (CM) delivered on 24/5/2017 in Kitale CMCC No.81 of 2012 between Godfrey Opuba Mulaa vs. Highland Carrier's Ltd)**

**HIGHLAND CARRIERS LTD .....APPELLANT**

**VERSES**

**GODFREY OPUBA MULAA.....RESPONDENT**

**BETWEEN**

**GODFREY OPUBA MULAA.....PLAINTIFF**

**VERSES**

**HIGHLAND CARRIERS LTD.....DEFENDANT**

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

1. The Respondent was working at Servant hood and Light Development Foundation on 30<sup>th</sup> November, 2011. As he was finalising his duties on that day, the Appellants servant and or agent drove suddenly Motor Vehicle Registration number KBC 416G Lorry in a reverse gear without any warning to the Respondent. It pinned the Respondent on the wall causing him to suffer serious bodily injuries. The said injuries were on his pelvic and loss of penile erection.
2. He filed the suit for damages and he attributed negligence to the Appellant. The Appellant filed its defence in which it blamed the Respondent for the accident.
3. The matter proceeded to full trial and judgment was entered in favour of the Respondent and the trial court attributed 100% liability against the Appellant. Provoked by the said decision, the Appellant has filed this appeal citing several grounds.
4. The substance of the grounds of appeal centres on the fact that the trial court err in attributing full liability to the appellant without taking into consideration the prevailing circumstances; that negligence was not proved against the appellant and that the court relied on wrong principles when awarding the damages.
5. This court when this matter came up for hearing ordered the same to proceed by way of written submissions which the parties have complied. Before looking at them, it shall be appropriate to summarise the evidence as presented during trial by the parties.
6. The Respondent stated that he was a casual labourer loading gas cylinders on the Lorry Reg. No. KBG 416G at Servant hood and light foundation on 30<sup>th</sup> November 2011.While at the back of the lorry, the same was suddenly reversed and it hit the Respondent who lost consciousness and found himself at the hospital having sustained serious injuries. He was treated at Kitale District hospital and later at Moi Teaching and Referral hospital.
7. The Respondent in his evidence produced all the relevant treatment documents as well medical reports.
8. **PW2 KENNEDY MAGIGE** from Kitale Police Station produced the police abstract which showed the extent of the police investigation. He said that the accident was caused not by the driver of the lorry but a turn boy who was still at large. He produced the police abstract.
9. **PW3 LINUS LIGARE** from Kitale County Referral hospital produced the P3 form on behalf of his colleague Zachary Bunyasi who had since died.

10. **PW4 DR. SAMUEL CHEGE NJENGA** who had examined the Respondent produced the medical legal report showing the extent of the injuries and the prognosis.

11. After the Respondent closed his case, the Appellant did not call any witness, but it produced the medical legal report prepared by Dr. Z. GAYA. The same was produced by consent and it also showed the injuries suffered by the Respondent and the extent of the treatment.

### **ANALYSIS AND DETERMINATION**

12. Having read the parties' submissions and the related attached authorities the duty of this court is to re-evaluate the evidence and reach an independent conclusion. (See **SELLE VS. ASSOCIATED MOTOR BOAT & CO LTD & OTHERS (1968) E A .123**)

13. The fact that the accident occurred was not disputed. The scene and the cause of the accident was equally not in dispute. It is not further disputed that the Respondent worked as a casual employee of the Appellant on that day. At the same note it is not disputed that the Respondent as a result of the injuries underwent treatment at Kitale County hospital as well as the Moi Teaching and Referral hospital.

14. The Appellant on the crucial question of who caused the accident has blamed the turn boy as was found by the police. It nevertheless goes on to state that there was no evidence that the said turn boy was an employee of the Appellant. It further submitted that the turn boy one SLVESTER MNANIA was not authorised to drive the lorry as there was an authorised driver.

15. Whereas this position may be true, there was no evidence from the Appellant that the turn boy was not its employee. It was the findings by the police that he was the one who caused the accident by moving the vehicle illegally. The vehicle was within the Appellants premises and the turn boy was also present. That being the position, and in the absence of any evidence by the Appellant, I find that it is too late in the day to argue that it was not liable for the accident.

16. The reasoning of the trial court on this ground cannot be faulted. It was incumbent upon the Appellant to adduce evidence to rebut the allegations by the Respondent. Nothing stopped the Appellant from issuing 3<sup>rd</sup> party proceedings against the turn boy who was its employee and who without any authority managed carelessly the vehicle despite knowing his limited driving knowledge.

17. In **PRITOO VS. WEST NILE DISTRICT ADMINISTRATION 1968 EA 428**, it was held that,

***“ where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person whose negligence the owner is responsible.”***

18. In this case, the vehicle that caused the accident belonged to the Appellant. The turn boy was in control of the said vehicle within the premises of the Appellant. It has not been proved that he was not the Appellant's servant. Consequently this court just like the above cited authority irresistibly concludes that he was the Appellant's servant and or agent.

19. On the question of liability, I find nothing to depart from the findings of the learned magistrate. The Respondent was within his working environment and the lorry was parked securely. There was nothing to indicate that the same would be in motion as the driver was not at his cabin. There was nothing that could have warned him to be careful as it appears that they had concluded the day's business. In the premises, I find that the Respondent was not to be blamed. Again in the absence of any oral evidence by the Appellant this court will go by the position taken by the Respondent.

20. I have seen the argument concerning the issue of damages. The nature of the injuries suffered by the Respondent are serious. Taking into consideration the authorities cited by the parties, the award in my view was modest. The Respondent invited this court to raise the award to kshs. 2,500,000. This court shall decline to do so for the simple reason that there is no cross appeal.

21. This court has stated as much do show that this appeal is unmeritorious and the same is hereby dismissed with costs to the Respondent.

**Dated, signed and delivered in open court at Kitale this 5<sup>th</sup> day of November, 2019.**

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**H. K. CHEMITEI**

**JUDGE**

**5/11/19**

**In the presence of:-**

**Arunga holding brief for Atudo for respondent**

**Khisa holding brief for Onyinkwa for Appellant**

**Court Assistant – Kirong**

**Judgment read in open court.**