



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.150 OF 2001**

**SOKORO SAWMILLS LIMITED..... APPELLANT**

**VERSUS**

**CALEB ONJOTE LIKALANI..... RESPONDENT**

**JUDGMENT**

1. The Respondent instituted a suit in the lower court (**Nakuru CMCC NO.1809 of 1996**) seeking general and special damages for injuries he allegedly suffered during the course of his employment with the appellant.
2. It was the respondent's case that on 2nd February, 1996 he was lawfully doing his authorized work with the appellant namely, loading goods onto motor vehicle registration No.KAD 341W which was hired by the Defendant, when the motor vehicle suddenly moved backwards, hit a wall and caused the frame to hit him the head. He also suffered a fractured arm. Following the accident, he was referred to Molo District Hospital where he underwent treatment for more than three (3) months. Later on, he saw Dr. Wellington K. Kiamba who examined him and prepared a medical report for him (PEX 2). For preparation of the medical report he paid Kshs. 2000/=.
3. Absolving himself from blame for causing the injury, the respondent denied having been careless or having departed from instructions while doing his work.
4. Contending that the defendant and/or his agent was to blame for how the motor vehicle was parked or keyed, he stated that either the motor vehicle's brakes were defective or it was moved by a person inside it.
5. On cross-examination, the respondent stated that the motor vehicle was contracted by the Appellant and that Karol, who was an employee of the owner of the Lorry, was driving the motor vehicle.
6. D.W.1, Charles Thande, informed the court that the motor vehicle had been received in the defendant's premises (yard) for them (defendant's work) to load block boards. It was his evidence that the driver had no one to show him how to reverse. For this reason, the respondent went to show him how to reverse. It was then, when the driver reversed into a post and onto the respondent's hand.
7. Explaining that the lorry was not company property and that the driver was not an employee of the appellant, he blamed the respondent and the driver of the lorry for causing the accident.
8. Cross examined by counsel for the respondent, Mr. Gekong'a, D.W.1 admitted that the accident

occurred when they were doing the appellant's work; and that the motor vehicle was hired to do work for the appellant.

9. D.W.2, David Mwangi, explained that after the accident occurred they carried investigations and established that the Lorry owner was to blame for allowing the motor vehicle to be driven by a person without a driving licence.

10. Explaining that the appellants' employees only assisted in loading the lorry, he stated that the appellant had no control over the sub-contracted Lorry and the accident.

11. Upon considering the evidence presented before him the trial magistrate found the appellant to have been 100% liable for causing the accident complained of and the resultant injuries. Consequently, he ordered the appellant to pay the respondent general damages amounting to Kshs. 295,000/= and special damages of Kshs. 2000/=. He also awarded costs of the suit to the respondent.

12. Aggrieved by the judgment of the lower court the appellant brought this appeal challenging the decision of the lower court on the following grounds:-

- a. That the learned trial magistrate erred in law by holding the appellant liable for the negligence of the driver of a third party over whom the appellant had no control;
- b. That the learned trial magistrate erred in law by failing to find that the accident was caused or substantially contributed to by the negligence of the respondent;
- c. That the trial magistrate erred in finding that the Appellant had not provided a safe working place or system of work;
- d. That the trial magistrate rejected the defence evidence without any reasonable basis; and
- e. That the general damages awarded were excessive.

13. This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence presented before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses. See **Selle & Another** vs. **Associated Motor Co. Ltd & Others** (1968) E.A. 123.

14. It is common ground that the respondent was an employee of the appellant when the accident complained about occurred. The only question that fell for consideration before the court below and which is the crux of this appeal is whether the appellant is liable for the occurrence of the accident.

15. According to the evidence of both the prosecution and defence witnesses, the accident hereto occurred inside the appellant's premises, when the driver of a Lorry hired to transport block boards for a customer was reversing.

16. According to D.W.1, the respondent was showing the driver how to reverse when the accident occurred. That is the testimony of an eyewitness, which should be contrasted with that of the respondent to the effect that they were loading goods when the Lorry suddenly moved backwards and hit the wall causing a frame to hit him on the hand; and that as a result of the impact, his arm got fractured three times.

17. That being the only evidence, regarding how the accident happened, I find for a fact that the motor vehicle was not stationary at the time the accident occurred. The question to ask is whether the movement of the motor vehicle which led to the occurrence of the accident was caused by an action or omission on the part of the appellant and/or his agent, so as to hold the appellant responsible for the accident.

18. Through the submissions filed on behalf of the respondent, it is submitted that the respondent could not reasonably have been expected to keep proper look out when he honestly believed that the motor vehicle was parked. Contending that D.W.1's evidence does not conform to the appellant's statement of defence, it is submitted that his evidence should totally be disregarded or regarded very cautiously.

19. In reply, it is submitted that the evidence on record is to the effect that the motor vehicle did not belong to the appellant; and that there is no evidence that the appellant was in control. Further that there is no agency alleged or proved.

20. Regarding the allegation that the motor vehicle was hired to transport the appellant's goods, it is submitted that the evidence on record does not establish that fact; and that even if it had been hired the appellant would still not be liable as the owner of the vehicle was an independent contractor. In this regard several decisions are cited to buttress the appellant's contention.

21. In this appeal, although no contract of hire was produced to prove the allegation that the motor vehicle was hired by the appellant, upon evaluating the totality of the evidence adduced before the trial court, I find as a fact that the motor vehicle was hired by the appellant to transport the appellant's goods. I say this because the evidence of D.W.1 corroborated that of the respondent in that respect. On that issue the D.W.2 stated as follows-

**“It is true the lorry was hired to do work for Sokoro saw mills. That we don't deny.”**

22. Given that admission, and there being no dispute that the motor vehicle belonged to a third party, the question that arises is, whether the appellant, as the beneficial owner of the motor vehicle, owed the respondent a duty of care?

23. It is submitted that because the appellant is not the owner of the motor vehicle, he did not owe the respondent a duty of care on how the motor vehicle was parked or driven in his premises. The reason given for that argument is that the appellant did not have control of the motor vehicle.

24. In my view, the only way the court could have properly appreciated the nature of arrangement that existed between the appellant and the owner of the motor vehicle is if the contract of hire was produced in court, unfortunately that did not happen. Be that as it may, the trial magistrate had to grapple with the issues framed for its determination, one being whether the appellant was in control of the Lorry. In my view, although the appellant and/or his agent was not the one physically controlling the motor vehicle, I take judicial notice of the fact that the appellant through its officers could direct the driver on when to enter and exit its premises. I also take judicial notice that, in a bid to ensure the security of its workers the appellant could direct the driver on where and when to drive the motor vehicle on its premises.

25. Having said so, and noting that the respondent's claim was based both on the tort of negligence and breach of the contract of employment. It is necessary to find out whether the appellant was in breach of its contractual obligations to the respondent. In so doing, I rely on **Mwanyale V. Said t/a Jomvu Total Service Station (2004) 1 KLR 47** where the Court of Appeal held:-

**“It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of relation of employer and employee to compensate him for any injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employees' safety; the exercise of due care and skill suffices.”** (Emphasis supplied)

26. Did the appellant exercise due care? The respondent blamed the appellant for failing to provide him with a safe and proper system of work; and in particular:-

- a. Starting the engine of the said motor vehicle without warning him;
- b. Exposing him to injury or damage which it knew or ought to have known of;
- c. Driving the said motor vehicle without due care and attention;
- d. Failing to swerve and/or stop so as to avoid injuring the plaintiff; and
- e. Permitting unqualified person to control the said motor vehicle.

27. There being no dispute as to who was in control of the motor vehicle herein, I find grounds (a), (c), (d) and (e) to be incapable of forming any cause of action against the appellant. I say so because, the Defendant and/or his authorized driver servant and/or agent was not the one in control of the motor vehicle at the material time. However, I hold the view that underground (b) the appellant had a non-delegable duty to provide the respondent with a safe working environment. See **Wilson & Clyde Coal Company Ltd v. English (1937) 3 ALL ER 628** where Lord Wright observed:-

**“I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company and whether or not the employer takes any share in the conduct of the operations”.**

28. The employer’s duty explained in **Wilson & Clyde Coal Company Ltd v. English (supra)** was provision of competent staff, adequate material and a proper system and effective supervision.

29. On the same breadth in **Mason v. Satelcom Limited (2008) EWCA civ 494**, it was held:-

**“Those who are actively engaged in or organize activities which place others at physical risk are similarly under an obligation to conduct themselves carefully. That is the rationale of activities as diverse as driving a car on one hand, or allowing a dangerous display to take place upon your land.”**

30. Upon reading and considering the above authorities, and many more, on the non-delegable duty of care, of an employer I find and hold that the appellant was not in breach of its contractual duty of providing the respondent with a safe system of work. There is no evidence that the driver who was behind the wheel was not qualified. Directing a motor vehicle on its reverse motion in my view does not require any supervision and the issue of exposure to unnecessary risk was not under these circumstances of such dangerous character as to visit blame on the appellant.

31. For the foregoing reasons, I find and hold that the appellant was not liable for the injuries and loss sustained by the respondent in the course of his employment with it. I find the respondent to have contributed to the occurrence of the accident by failing to exercise proper look out and take care of his own welfare. In any event it is not clear why the respondent opted not to sue the owner of the motor vehicle and its driver. I therefore set aside the trial magistrate’s finding on liability against the appellant. The appeal is merited and is allowed with costs to the appellant.

**Delivered and dated this 16<sup>th</sup> day of May, 2014 at Nakuru.**

**H.A. OMONDI**

**JUDGE**