IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Platt, Gachuhi JJA & Masime Ag JA)

CIVIL APPEAL NO 91 OF 1987

Between

NANDWA.....PLAINTIFF

AND

KENYA KAZI LTD.....RESPONDENT

(Appeal from the High Court at Mombasa, Bosire J)

JUDGMENT

March 10, 1988, **Gachuhi JA** delivered the following Judgment..

The plaintiff filed a suit against his employer claiming that the employer was negligent in failing to mechanically maintain the vehicle before allowing the plaintiff to drive it on his normal duties. By the agreement of the parties, the learned judge was required to determine the liability, the quantum having been agreed. After the trial, the learned judge dismissed the plaintiff's claim, hence this appeal.

At the material time, the plaintiff was employed as a driver. He took the vehicle in the evening. While on the way to where he was going, a vehicle overtook them. He had another employee in the front passengers seat.

The plaintiff told his companion that motor vehicle's steering was not good. Ten minutes or so later, the driver was preparing to overtake the same vehicle which had overtaken them. He swerved to the right but the steering became loose and the brakes failed. The vehicle landed in the ditch on the right even before reaching the vehicle ahead of him. The plaintiff was taken to hospital leaving the vehicle in the ditch. He was hospitalized for a month.

The plaintiff gave evidence that the accident occurred few minutes after realising the steering was not proper. He was driving in the moderate speed of 40-50 Kph. There was no motor vehicle coming from the opposite direction when he was preparing to overtake and when the accident occurred. While in hospital, he was informed by his workmates that the employer tried to repair the vehicle before taking it for inspection by the police but it was all in vain. This is a hearsay statement, but the learned judge relied on it as it appears, later.

The defence had two witnesses, the companion in the vehicle and an administrator. The driver's companion admitted that before the accident the plaintiff complained that the steering was bad. This was about ten minutes before the accident. He also admitted that at the time of the accident, the speed was

moderate. The vehicle ahead did not stop after the accident. Though he left the vehicle at the scene of the accident, he found it at their premises in the morning. As far as he was aware, the vehicle was never taken for inspection by the police.

There is evidence on record, that vehicles are inspected in the morning or at any other time when need arose. There is also evidence that the vehicle was being driven in the morning by unknown driver before the plaintiff took it in the evening of that day. If there was anything wrong before the plaintiff took it over, it was only the other driver who could have reported. That driver never gave evidence but amazingly the defendant does not know who that driver was.

The administrator gave evidence that the accident was not reported to the police and the vehicle was not inspected. The vehicle was grounded seven months later for lack of spares.

The learned trial judge placed a heavy burden on the plaintiff to prove negligence. Some of the information were in the hands of the defendant and the plaintiff could not get them. The learned judge relied on the inspection which the plaintiff had stated as having been informed by his co-workers. As I said before, this was a hearsay evidence. The administrator Geoffrey Mbuni Rua (DW 2) said that the accident was not reported to the police and the vehicle was not inspected. If there was no inspection, I wonder how the plaintiff could have invented one. The defendant was requested to produce the vehicle maintenance book but instead they produced movement book. It is true that drivers were expected to report any defects, but in this case the plaintiff noticed the defects ten minutes or so before the accident. What could he have done in the circumstances? Was he expected to stop the car and go to the workshop to report? The prudent driver would, if the journey was long to break and take the vehicle back to the garage. If the journey is short, he would be expected to complete it and then take the vehicle to the garage. In this case, the plaintiff did what a normal person could have done, by letting his companion know of the state of the vehicle and then drove it at a moderate speed. The defence witnesses in a way corroborated the plaintiff's evidence to the extent that no negligence attached to the plaintiff in any way.

Mr. Oyatsi relied on the findings of the trial judge. Those finding were already displaced by the evidence of the defence witnesses. These witnesses having supported the plaintiff, the negligence has to be found in the defendant for allowing the driver to drive a defective motor vehicle on the public road. In *Hutchins v Maunder* (1920) 37 TLR 27 it was held:

> 'A motor vehicle which has its steering gear, by reason of wear, in such imperfect condition that the driver is liable to loose control of the steering, is a thing which on a highway is necessarily dangerous to persons using the highway, and to cause it to be driven on a highway amounts to negligence even in the absence of knowledge of the defect.'

Mr. Oyatsi complained that the plaintiff did not plead *res ipsa loquitur'*. Evidence is not to be pleaded. As was held in *Barkway v South Wales Transport Co Ltd* [1950] 1 All ER 392 at 393 B:

> "The application of the doctrine of *res ipsa loquitur*, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was by itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the respondents to give an adequate explanation, if the facts were sufficiently known the question reached to be one where the facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be inferred."

In any case the owner of the motor vehicle will be found negligent where the defective vehicle is found on the road. The defendant will have to displace the allegations and all the facts proved. In *Henderson v Henry E Jenkins & Sons* [1970] AC 282 at 301 Lord Pearson at letter D stated:

> "In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied

> on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift.
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> But if in the course of the trial there is proved a set of facts which raises a *prima facie* inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the *prima facie* inference. In this situation there is said to be an evidential of proof resting on the defendants..."

and at 30 letter H Lord Pearson made a finding that:

> "From these facts it seems to me clear, as a *prima facie* inference, that the accident must have been due to default of the defendants in respect of inspection or maintenance or both. Unless they had a satisfactory answer, sufficient to displace the inference, they should have been held liable."

Though there are contradictions in the evidence of the plaintiff, there is no contradiction of what happened on the material day. The plaintiff did not have the control of the vehicle for the whole day. He took it for the evening shift. The previous driver who had the car since morning is unknown and as such did not give evidence. The evidence of the plaintiff has been corroborated by the two defence witness. The defendant has not displaced the proved facts and so the defendant should be held responsible in negligence.

Mr. Oyatsi had in his defence and in submission that the appellant was negligent in overtaking the other vehicle. I cannot see any negligence in overtaking another vehicle. It cannot be said that there should be no overtaking so long as it is safe to do so. In the present case there were no vehicles from the opposite direction. What sort of negligence could there be in overtaking? There is no evidence to support contributory negligence either. I would allow this appeal and set aside the judgment of the High Court in dismissing the plaintiff's claim. I would substitute therefore judgment for the plaintiff that the defendant is entirely held negligent for allowing defective motor vehicle to be used on the road that ended in an accident whereby the plaintiff was injured. I would award to the appellant the costs in this appeal and the costs in the High Court. The taxed costs to have interest from the date of taxation to the day of payment in full.

We have been informed that damages have been agreed. This will carry interest from the date of judgment to the date of payment in full at court rates.

Platt JA. I agree with the conclusion reached by Gachuhi JA.

The salient facts are that on the day in question, 4 April 1985, the plaintiff (who now appeals to this Court) was involved in a motor vehicle accident; when he was driving his employer's vehicle in the course of his employment. The accident occurred at 5 pm. Whether or not the plaintiff had driven that vehicle before, a matter which was disputed, the vital question concerned the condition of the vehicle on the afternoon of 4 April 1985, when the plaintiff drove it. It had been used that morning on duty by some other driver. It is not known who that was, and consequently it is not known in what condition the vehicle was, when the plaintiff started to drive it. It was the plaintiff's case that when he started to drive the vehicle, he found the gears assembled in a strange way, and the steering and brakes defective. About ten minutes before the accident he remarked to his companions that there was trouble with the steering. Elias Oluoch (DW 1) described the plaintiff as driving at a moderate speed, having complained that the steering was not good. That was corroborative evidence that the plaintiff found the steering faulty. The case pleaded was that the defendant employer had failed to maintain the said motor vehicle in good working condition, order or condition. The plaintiff also claimed that the defendant permitted the plaintiff to drive a defective motor vehicle. As 'permitting' involves an element of knowledge, that may not have been made out. The defendant had 'used' the vehicle certainly. If the defendant had failed to maintain the said motor vehicle, in that sense the defendant had failed to take precautions for the safety of the plaintiff and had exposed him to risk.

On the evidence a *prima facie* case of mechanical failure had been set up, because that is what the plaintiff said was the situation before the accident occurred. He was in hospital after the accident. He was not in a position to get the vehicle examined. Indeed there was no examination. He relied on his experience at the accident, and that was the best evidence he could provide.

It was not evidence of the strongest nature as the learned judge pointed out. But it was supported by a defence witness, as to what the plaintiff said. Another defence witness denied there had been any mechanical failure. But there had been no examination of the vehicle before or after the accident. This witness said that every vehicle was examined every morning, and no report had been received of any defects. That was all very well, but the plaintiff had not driven the vehicle that morning. The other driver had not apparently reported any problem. Whether that driver was at fault will never be known because he was not called as a witness.

Indeed it may be that the defendant was let down by that other driver. The result was that the plaintiff made out a case of mechanical failure which was not met by the defence. It was the duty of the defendant company to keep its vehicle in good mechanical repair under the Road Traffic Act. It was also under a duty of care to the plaintiff to provide a safe system of working and not to expose him to risk. The defendant may have had a system of inspection of vehicles, but it did not cover the eventuality in this case. Consequently the defendant was liable to the plaintiff. The latter was not driving in any sense negligently. The manoeuvre he undertook of overtaking a vehicle without on-coming traffic was a normal procedure. It is difficult to tell whether the plaintiff should have abandoned the vehicle. It appears that the plaintiff thought that he could manage it. But then he found he could not. It seems that the plaintiff acted reasonably. This case is governed as Gachuhi JA has pointed out by *Hutchins v Maunder* (1920) 37 TLR 72, and *Henderson v Henry E Jenkins & Sons* [1970] AC 282.

A final word about the doctrine of *res ipsa loquitur*. It was not applicable to this case. The plaintiff contended that the vehicle was not in good mechanical repair. There was direct evidence as to the cause of the accident. Consequently, there was no circumstance which could not be fully explained, yet the facts proved spoke for themselves as a *prima facie* matter of negligence. Had the defendant sued the plaintiff, the defendant could have operated the doctrine, because the vehicle should not have entered the ditch.

I agree with the orders proposed by Gachuhi JA and as Masime Ag JA also agrees, it is so ordered.

Masime Ag JA. The appellant in this appeal was employed as a driver by the respondent a security company. On 4 April 1985 at about 5.15 pm the appellant reported for his work of delivering guard dogs to various places where the respondent had guard duties. The appellant drove the respondent's Colt motor vehicle registration number KQU 170 from Mombasa Island to the North Coast somewhere in the Bamburi area. The appellant who was accompanied by another employee (DW 1 Elias Oluoch) of the respondent noticed that the steering wheel of the vehicle was defective and so told his colleague (DW 1). About ten metres farther along Kiembeni road, while the appellant drove the vehicle at the moderate speed of 40-50 kph and when the circumstances and condition of the road reasonably permitted it, the appellant was in the process of overtaking another vehicle when the steering jammed. He lost control, the brakes failed and the vehicle went into a ditch. As a result the appellant was trapped in the vehicle and broke his arm.

By his plaint filed in court on 3 February 1986 the appellant alleged that this accident was caused by the negligence of the respondent in that it failed to take all reasonable precautions to ensure that the appellant had safe conditions of work by permitting him to drive a defective motor vehicle.

The particulars of negligence contained in the plaint were denied by the written statement of defence and the suit went onto trial on the issue of liability as the learned counsel agreed on quantum of damages.

The appellant alone gave evidence in support of his case while two witnesses testified for the respondent. The appellant's evidence was that he reported for work at 5.00 pm and took over a vehicle that had earlier been used by another driver. He found the gears were interfered with; a few minutes before the accident

he complained about the steering to DW 1; police came to the scene and a passing motorist took him to hospital. The motor vehicle was not thereafter brought to a serviceable condition and six months later in October 1985 was put out of use altogether.

On the evidence before the court the learned trial judge dismissed the appellant's case with costs. The learned judge found that the appellant was responsible for the accident as he had failed to report the defects on the vehicle to the respondent and since the plaintiff was not obliged to drive the car if he knew it to be defective. In this last finding the judge relied on ss 55 and 58 of the Traffic Act. The court also found against the appellant because of his failure to produce evidence of the defects by a police inspection report. It is against these findings and the decision that this appeal is brought.

With the greatest respect the learned judge misdirected himself on the evidence before him and hence made erroneous findings. The appellant's pleadings and evidence established negligence and it was hence upon the defendant to displace that negligence. There was no basis for the finding that the appellant knew of the defects as he only took charge of the vehicle at 5.00 pm after it had previously been driven by another driver, who was not called as a witness. See the authorities set out in the judgment of my Lord Gachuhi JA.

In the result I agree with my Lords (Platt and Gachuhi) that this appeal should be allowed and that the order of the learned trial judge dismissing the appellant's plaint with costs should be set aside and substituted with an order giving judgment to the appellant as prayed in the plaint with an order for costs both in this Court and in the Court below.

Dated and delivered at Mombasa this 10th day of March , 1988

H. G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

J.R.O MASIME

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AG.JUDGE OF APPEAL