



**Ima Hauliers Limited v Samuel (Employment and Labour Relations Appeal
2 of 2023) [2023] KEELRC 1618 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1618 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL 2 OF 2023**

**JW KELI, J
JUNE 29, 2023**

BETWEEN

IMA HAULIERS LIMITED APPELLANT

AND

WELINGA WASWA SAMUEL RESPONDENT

*(Appeal from Judgment and Decree of Honorable S.O Mogute (PM) delivered on the
5th April, 2017 Bungoma Chief Magistrate's Court Civil Suit No. 314 of 2016)*

JUDGMENT

1. The Appellant being dissatisfied by Judgement of Hon SO Mogute (PM) Bungoma Civil Suit No 314 of 2016 delivered on April 5, 2017 filed Memorandum of Appeal dated April 18, 2017 with record of appeal received at the Bungoma High Court on the March 19, 2021 and transferred to this Court by Order of Justice DK Kemei dated February 24, 2023 being appeal against the decision of the learned Magistrate seeking for the appeal to be allowed with costs and that the judgment of the trial magistrate be set aside with costs.
2. The appeal was premised on the following grounds:-
 - a. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability superficially and consequently coming to a wrong conclusion on the same.
 - b. The Learned Trial Magistrate failed to consider or sufficiently consider the demand for a contributory negligence based on the evidence adduced and the written submissions presented and filed by the appellant in their entirety.



- c. The Learned Trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.
- d. The Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the appellant while the onus of proof lay with the respondent.
- e. The analysis of the evidence as per the judgment is extremely wanting in material respects.
- f. The Learned Trial Magistrate misapprehended the evidence on record to a material degree resulting in his arriving at a wrong conclusion.
- g. The Learned Trial Magistrate failed to apply judiciously and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

Background to appeal

3. On the February 28, 2019, the Respondent (Claimant in the trial court) filed a plaint dated June 10, 2016 against the Appellant seeking the following orders:-
 - a. General damages, past present and future medical and nursing expenses
 - b. Special damages of Kshs 3,500/-
 - c. Costs
 - d. Interests
 - e. any other relief.
4. The claimant in addition filed his verifying affidavit sworn on June 10, 2016, plaintiff's list of witnesses, witness statement by the plaintiff, plaintiff's list of documents and the bundle of documents all filed on the June 29, 2016. (at Pages 4-24 was the plaintiff's pleadings and documents). The claimant filed reply to defence on the August 10, 2016(page 44).
5. The Respondent entered appearance vide lawfirm of LG Menezes & Company advocates on the July 14, 2016, filed statement of defence dated July 15, 2016, defence witness statement of Peter Nyota dated August 17, 2016, defendant's list of documents dated August 17, 2016 together with the bundle of documents(pages 25-69 was the defence pleadings and documents).
6. On the March 8, 2017 the trial court heard the claimant's case with the claimant testifying on oath as only witness of fact and being cross -examined by counsel for the appellant Mr Ondego. The claimant produced his documents. On even date the defence case was heard with one witness of fact Peter Nyota who testified on oath and produced the defence exhibits and was cross -examined by counsel for the Claimant.
7. The parties filed submissions after close of defence case (pages 70-107).
8. The trial court delivered its decision on the April 5, 2017 as follows:-

‘ In the end I enter judgment for the plaintiff against the defendant as hereunder:

 - a. General damages Kshs 100,000/-
 - b. Special damages Kshs 1,000/-

Total Kshs 101,000/-



- c. The plaintiff is awarded the costs of the suit and interest at court rates.”

Hearing

9. The appeal was initially filed in Bungoma High court and the court directed that the appeal be canvassed by way of written submissions. The High Court transferred the appeal to be determined by this court vide judgment of Justice DK Kemei dated February 24, 2023. The Appellant’s written submission’s drawn by LG Menezes & Company Advocates were dated September 17, 2022 and received in court on the October 11, 2022. The Respondent’s written submissions drawn by Omundi Bw’onjiri Advocates were dated October 27, 2022 and received in court on the October 31, 2022.

Determination

10. The appellant challenged the judgment on both the liability and quantum. The appellant submitted on the role of the court sitting on appeal by reliance on the decision in *Gitobu Imanyara & 2 others v Attorney General* (2016)e KLR where it was held:-‘an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are, that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.’” And in *Abok James Adera t/a J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* (2013)e KLR where the Court of Appeal stated the duty of first appellate court to be:- ‘this being a first appeal we are reminded of our primary role as a first appellate court namely to re-evaluated , re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial court are to stand or not give reasons either way.’” Similar holding was in *Selle & Another v Associated Motor Boat Co Ltd & others* (1968)EA 123. The court upholds the foregoing decisions to guide it in determination of the instant appeal.

Issues for determination

11. The Appellant and the Respondent are agreeable on the issues for determination in the appeal as stated in their respective written submissions to be whether the appeal is merited.
12. The court for the purposes of determination of the appeal opines the issues to be addressed in the appeal are :-
 - a. Whether the learned trial magistrate erred in law and fact in finding on liability.
 - b. Whether the award on quantum damages was justified

Whether the learned trial magistrate erred in law and fact in finding on liability.

13. The appellant with respect to liability raised the following grounds of appeal:- The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability superficially and consequently coming to a wrong conclusion on the same; The Learned Trial Magistrate failed to consider or sufficiently consider the demand for a contributory negligence based on the evidence adduced and the written submissions presented and filed by the appellant in their entirety; The Learned Trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant; and The Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the appellant while the onus of proof lay with the respondent.



14. The respondent's case was that he was driving MV registration No. KTCA 326 D attached to a trailer No ZCA 2297 when the said tractor lost control when its brakes failed. That he sustained injuries and was treated at St. Mary Hospital.
15. Section 107 and 107 for burden of proof as follows:- '107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'
16. The appellant submits that the respondent had to prove that the appellant herein was negligent or was responsible for the accident. The respondent testified that the accident motor vehicle was in poor condition and that he had always reported to the supervisor and the said complaints were never dealt with leading to the accident when the brakes failed. The appellant submitted that the respondent never provided evidence of having reported any mechanical issue of the tractor and the said supervisor was not called as witness.
17. The appellant submits that DW1 indicated the tractor was serviced on the August 28, 2015 when the break lining and steel plate were repaired as shown in the stock issues statement produced from August 1, 2015 to October 30, 2015 as DEXBI. That service of the accident motor vehicle was undertaken on September 7, 2015. That DEXB2 was the tractor trip cards which showed the accident Motor Vehicle operated from September 2, 2015 to September 12, 2015 without any mechanical issues. The appellant submits that the respondent was thus negligent in driving the accident Motor Vehicle and should be fully blamed for causing the accident due to his own negligence.

The Respondent's submissions on liability

18. The respondent reiterated his case at the lower court to the effect that he was driver employee of the appellant driving Motor Vehicle KTCA 326D-ZC2297, that he was a qualified driver with driving license (P-Exhibit 2 being his driving licence and P-exhibit 3 payslip for month of September 2015) and further relied on copies of search records produced at trial to prove that the accident Motor Vehicle was owned by the appellant (p- Exhibits 4&5 were the search records). The respondent reiterated his position that he reported four mechanical problems of accident motor vehicle to one Asman the supervisor without action, that on the September 7, 2015 while he was driving the accident motor vehicle along Bungoma Mumias road the brakes failed and the accident motor vehicle fell on the side of the road as a result of which he sustained injuries. The respondent blamed the appellant for failure to repair and service the accident motor vehicle.
19. The respondent further submits that the appellant produced an inventory of purchases which showed the items purchased and the amount used but did not prove the accident motor vehicle was serviced or repaired and as admitted at cross examination DW who was a clerk in charge of keeping records could not tell whether the accident motor vehicle was serviced or repaired. That the employer had duty of care to ensure safety of the respondent and was 100% liable. The respondent relied on High Court case in *Ima Hauliers v Mohammed Nyongesa Murende* (2011)e KLR where Justice Muchemi held:- 'The duty to keep a vehicle in a good mechanical condition lies with the owner of the vehicle. The driver cannot be held liable for not reporting a defect. In the case before me there is evidence that the defect was reported before hand. The owner of the vehicle has a duty to put in place measures to check and rectify defects of vehicles and especially those used on heavy duty and commercial transport like transporting sugarcane. These are day to day assignments which call for highly serviced vehicles. The owner cannot use the failure by driver to report a defect as a defence. The owner owes a duty of care



under common law to the driver and any other person in the vehicle to ensure their safety as they work. Failure to service the vehicle exposed the Respondent to risk. The issue of contributory negligence does not arise in the instant case..” and in Court of appeal decision in *Nandwa v Kenya Nazi Ltd*[1988] eKLR where it held:- ‘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.’”

Decision on liability

20. The court finds that it was proved that there was employee employer relationship between the parties, that the accident motor vehicle belonged to the appellant and that an accident occurred and the respondent was injured as the medical report on the injuries was not contested on appeal. The appellant submits it evidence was treated superficially and their demand for contributory negligence based on evidence produced. The court proceeds to re-evaluate the defence evidence before the trial court to find out if it was not given the necessary attention by the court. DW was Peter Nyota a record clerk of the Appellant and produced DEXB1 being stock issues, DEXB2 trip cards to effect that the claimant was negligent and caused the accident (page 114). During cross-examination DW told the court he was not the supervisor but records clerk, that if the plaintiff told the supervisor what was wrong with the accident motor vehicle he may not know, that DEXB1 shows the goods purchased and amount paid in cash for items purchased, that the accident motor vehicle carried out 2 trips on September 7, 2015, the 1st trip the Respondent signed in and out and the 2nd trip he did not. DW further stated that the driver was negligent for the accident and the trailer can still have problems even if serviced. The court examined the judgment and found the trial court captured the foregoing in pages 119 to 121.
21. The trial court relied on the decision of the High court in *Ima Hauliers v Mohammed Nyongesa Murende* where Justice Muchemi held:- ‘The duty to keep a vehicle in a good mechanical condition lies with the owner of the vehicle. The driver cannot be held liable for not reporting a defect. In the case before me there is evidence that the defect was reported before hand. The owner of the vehicle has a duty to put in place measures to check and rectify defects of vehicles and especially those used on heavy duty and commercial transport like transporting sugarcane. These are day to day assignments which call for highly serviced vehicles. The owner cannot use the failure by driver to report a defect as a defence. The owner owes a duty of care under common law to the driver and any other person in the vehicle to ensure their safety as they work. Failure to service the vehicle exposed the Respondent to risk. The issue of contributory negligence does not arise in the instant case..” The court finds the decision was relevant for the reasons that DEXHB1 was prove of purchase of stocks but not evidence of repair and service of the accident motor vehicle, the mechanical issues were reported to one Asman the supervisor who the appellant did not deny was its employee. DW had no evidence whether accident motor vehicle had been serviced or any evidence to controvert mechanical defects. The court find that the respondent discharged his burden on balance of probabilities on liability consistent with the provisions of section 109 of the *Evidence Act* to wit:- ‘109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.’” The court upholds to apply in this appeal the decision by High Court relied on by the trial court of *Ima Hauliers v Mohammed Nyongesa Murende* where Justice Muchemi held inter alia,- ‘The duty to keep a vehicle in a good mechanical condition lies with the owner of the vehicle. The driver cannot be held liable for not reporting a defect.The owner owes a duty of care under common law to the driver and any other person in the vehicle to



ensure their safety as they work. Failure to service the vehicle exposed the Respondent to risk. The issue of contributory negligence does not arise in the instant case.”.

22. The court holds that the employer is required to take all reasonable precaution to ensure the safety of the employee, to provide an appropriate and safe system of work which does not expose the employee to unreasonable risk under the Occupational Safety and Health Act and specifically as stated under section 6 to wit:- ‘6. Duties of occupiers

- (1) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.
- (2) Without prejudice to the generality of an occupier’s duty under subsection (1), the duty of the occupier includes—
 - (a) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;
 - (b) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
 - (c) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;
 - (d) the maintenance of any workplace under the occupier’s control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;
 - (e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;
 - (f) informing all persons employed of—
 - (i) any risks from new technologies; and
 - (ii) imminent danger; and (g) ensuring that every person employed participates in the application and review of safety and health measures.”

23. The Court further upholds the decision by Onyanja J to apply in the instant appeal in Boniface Muthama Kavita vs Canton Manufactures (2015) e KLR where it was held:- “The relationship between the appellant and the respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employer to provide appropriate and safe system of work which does not expose the employee to unreasonable risk.”.

24. The court did not find evidence of contributory negligence. In the upshot the court upholds the award of liability at 100% by the trial court against the appellant.



Whether the award on quantum damages was justified

25. The appellant submits that the appellant sustained mild soft injuries, compensation should be fair and reasonable and should not be excessive. That according to paragraph 7 of the plaint the respondent sustained soft tissue injuries to the head and chest. That Kshs 50,000/- was sufficient compensation as held in *Gilbert Odhiambo Owuor v Nzoia Sugar Company Limited*(2012)e KLR as the injuries were quite similar as those sustained by the respondent

Respondent's submissions

26. The respondent submits that the award by the trial court of Kshs 100,000/- was not inordinately too high for injuries of the head and chest pains. That the respondent testified he had not fully recovered, that the injuries were classified as soft tissue injuries and assessed at Kshs 100,000/- and prayed for the court to uphold the award relying on the decision in High Court *Odinga Jacktone Ouma v Moureen Odera*(2016)e KLR where the court sitting on appeal awarded Kshs 180,000/- for almost similar injuries. The respondent cited other awards by the High Court ranging from Kshs 160000 to 200000 for soft tissue injuries.

Decision on quantum

27. What were the injuries? The respondent sustained soft tissue injuries on the head and chest cage. The current situation at trial was that he still had chest cage pains and he would have chest pains whenever he has a bounty of malaria(medial report at page 56). The trial court awarded general damages for pain and suffering at Kshs 100,000/- and the appellant submitted the figure was excessive.
28. The principles guiding the court on appeal against quantum award were cited in *Joseph Henry Rubui v Attorney General* (2004)e KLR to wit:- ‘The Court of Appeal outlined the principles on which an appellate Court would interfere with the award of damages of the trial Court as follows; ‘the test as to whether an appellate Court may interfere with an award of damages was stated by Law, JA in *Butt v Khan* (1977) IKAR as follows: “An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
29. The court looked into the authority relied on by the appellant in *Gilbert Odhiambo Owour v Nzoia Sugar Company limited*(2012)e KLR where the injuries were swollen and tender left foot and ankle. The court noted the injuries were healing. The court finds that the instant injuries were more severe. The court did not find any reason to disturb the award of Kshs 100,000/- for pain and suffering considering the respondent had not healed. The award of damages of Kshs 100,000/- for pain and suffering by the trial court is upheld as the same was not inordinately too high and was justified.

Conclusion and disposition

30. In conclusion the judgment of the lower court is upheld in its entirety. The appeal dated April 18, 2017 is held to be without merit and is hereby dismissed in its entirety with costs to the respondent.
31. Stay of 30 days.
32. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS
29TH JUNE 2023**



JEMIMAH KELI

JUDGE

In the presence of :-

Court Assistant: Lucy Macheso

For Appellant:- Otieno Njoga

For Respondent: Absent

