



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CIVIL APPEAL NO 8 OF 2017**

**A.A TRANSPORTERS LIMITED.....APPELLANT**

**VS**

**MUUNGU MULONZYA.....RESPONDENT**

*(Appeal from the Judgment and Decree of Hon. S.K. Gacheru, PM delivered on 30<sup>th</sup> August 2013 in Mombasa CMCC No 1318 of 2010)*

**JUDGMENT**

1. This appeal was originally filed in the High Court in Mombasa as Civil Appeal No 128 of 2013. It was transferred to this Court by an order made by **Otieno J** on 27<sup>th</sup> March 2017.
2. The brief facts of the case as presented in the lower court are that on 11<sup>th</sup> November 2009, the Respondent who was employed by the Appellant as a driver, was assigned the task of ferrying containers to Miritini, using the Respondent's motor vehicle registration number KSV 574.
3. Upon reaching Miritini, the breaks of the motor vehicle failed causing it to veer off the road and hit a wall. The Respondent pleaded that as a result of the accident, he suffered the following injuries:
  - a) Fractures on the right tibia and right fibula leg bones;
  - b) Blunt object injury on the right knee;
  - c) Bruises on the right knee.
4. In its Statement of Defence dated 9<sup>th</sup> June 2010, the Appellant denied having employed the Respondent as a driver. The Appellant also denied occurrence of the accident as pleaded by the Respondent. In the alternative, the Appellant stated that if an accident occurred, it was solely caused by and/or substantially contributed to by the negligence of the Respondent.
5. The learned trial magistrate apportioned blame between the Appellant and the Respondent at 90% and 10% respectively and awarded the Respondent Kshs. 316, 800 as general damages. The Respondent was also awarded Kshs. 3,000 as special damages plus costs and interest.
6. Being aggrieved by the decision of the lower court, the Appellant filed High Court Civil Appeal No 128 of 2013. In its Memorandum of Appeal dated 30<sup>th</sup> September 2013, the Appellant cites the following grounds:

- a) That the learned trial Magistrate erred in law in applying wrong principles while assessing liability and finding the Appellant liable for the acts, omissions and negligence of the Respondent under the law of tort as the driver in control and management of the subject motor vehicle at the time of the accident;
- b) That the learned trial magistrate erred in law in disregarding the submissions of the Appellant and evidence of the defence witness;
- c) That the learned trial magistrate erred in law and in fact by awarding a sum of Kshs. 350,000 for general damages which was manifestly too high and excessive compared to the nature of the injuries suffered by the Respondent;
- d) That the learned trial magistrate erred in law by applying wrong principles while assessing damages and the decision therein being exorbitantly high and excessive in the circumstances.

7. This being a first appeal, I am obligated to assess and re-evaluate the evidence as recorded by the trial court, making allowance for the fact that this Court had no opportunity to see and hear the witnesses.

8. On the issue of liability, the Appellant's case is that the accident, being self-involving, was caused entirely by the Respondent's negligence. Counsel for the Appellant, Miss Kaburi submitted that the Respondent had himself confirmed that the motor vehicle had been inspected by a mechanic on the morning of the accident and found to be in good condition. The Appellant's conclusion therefore was that the accident could only have been caused by the Respondent's negligence.

9. None of the parties produced a police report on the accident nor was there a post-accident report on the subject motor vehicle. The Court was referred to the decision by **Okwengu J** (as she then was) in ***John Kamoche Muiruri v Hezron Kiranga Njaga [2009] eKLR*** where it was held that a driver of a motor vehicle bears the responsibility of ensuring that the motor vehicle under his command is in a good and roadworthy condition.

10. The Court was also referred to Section 107(1) of the Evidence Act which provides 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.***

11. In his plaint filed in the lower court, the Respondent pleaded the following particulars of negligence:

- a) Failing to provide a safe system of work;
- b) Failing to maintain motor vehicle registration number KSV 574 in good working condition so as to avoid the said accident;
- c) Exposing the Respondent to risk of damages which the Appellant knew or ought to have known;
- d) Failing to take reasonable precautions for the safety of the Respondent in the course of his duties.

12. In ***Statpack Industries v James Munyao [2005] eKLR***, **Visram J** (as he then was) restated the principle in ***Woods v Durable Suites Ltd (1953) 2 AER 391*** that an employer's duty at common law is not to watch over the employee constantly but to take reasonable steps to ensure the safety of the employee.

13. On the issue of causation, the learned judge stated the following:

***"It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence***

*from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."*

14. In reviewing the evidence adduced before the lower court, the Court did not see any attempt by the Respondent to prove any of the particulars of negligence pleaded in the plaint.

15. Ultimately, the Court did not find any link between the accident and any act of negligence on part of the Appellant. The appeal therefore succeeds. In light of this, the issue of quantum of damages does not arise. Nevertheless, if liability had accrued, I would have confirmed the award of Kshs. 316, 800 as general damages and Kshs. 3,000 as special damages. As it stands now, the appeal is allowed and the judgment and decree of the lower court is set aside.

16. The relationship between the parties having been one of employer/employee, I direct that each party will bear their own costs.

17. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF FEBRUARY 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Kaburi for the Appellant

Mr. Mathare for the Respondent