Case Number:	Civil Suit 375 of 1992
Date Delivered:	14 Sep 1994
Case Class:	Civil
Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	David Maitai Rimita
Citation:	Richard Boywa Gor v East African Sugar Industries Ltd [1994] eKLR
Advocates:	M/s Kinyanjui & Company Advocates for the Plaintiff M/s Wetangula and Company Advocates for the Defendant
Case Summary:	**Gor *v* East Africa Sugar Industries Ltd** High Court, at Nakuru September 14, 1994 Rimita J Civil Suit No 375 of 1992 ***Civil Practice and Procedure*** *– pleadings – whether failure to raise point of law precludes one from adducing and relying on such evidence – Civil Procedure Rules order VI rule 7.* ***Negligence*** *– duty of care – where the employer is in breach of duty of care – whether he can be held liable when employee is injured in the course of duty.* ***Damages*** *– general and special damages - assessment of – factors to be considered when assessing damages.* The plaintiff, an employee of the defendant, was travelling in defendant's lorry when the lorry stalled on a hill, reversed and overturned injuring

the plaintiff and others. The plaintiff alleged that the accident was not caused by negligence of the driver, but that of the employer for failing to maintain the lorry and making it safe for him and others to travel in. The driver was however charged with the traffic offence of using an unroadworthy motor vehicle and he was convicted. His lawyer however urged the Court to ignore conviction stating it had not been pleaded. The defendant on its part contended that it was not negligent and further that it had done all it could to make the motor vehicle roadworthy.

Held:

1. Failure to plead an important point of law in one's pleadings does not preclude plaintiff from adducing and relying on such evidence.

2. A contract between an employer and the employed involves on the part of the employer the duty of taking reasonable care to provide proper appliances, to maintain them in proper condition, to carry on his operations as not to subject those employed by him to unnecessary risk.

3. The defendant was in breach of its duty to take reasonable care of the plaintiff by properly maintaining its motor vehicle.

4. Plaintiff awarded Shs 126,000 in damages.

Judgment for the plaintiff.

Cases

1. *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57; [1937] 3 All ER 628; (1937) 157 LT 406

2. *Smith v Charles Baker & Sons* [1891] AC 325; [1891] All ER 69

Statutes

1. Traffic Act (cap 403) section 55(1)

2. Evidence Act (cap 80) section 47

3. Civil Procedure Rules (cap 21 Sub Leg) order VI rules 3, 7

	4. Factories Act (cap 514) **Advocates** *M/s Kinyanjui & Company Advocates* for the Plaintiff *M/s Wetangula and Company Advocates* for the Defendant
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Judgment for the plaintiff.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	Ksh.126000

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 375 OF 1992

RICHARD BOYWA GOR.....PLAINTIFF

VERSUS

EAST AFRICAN SUGAR INDUSTRIES LTD.....DEFENDANT

JUDGMENT

In his plaint dated 7th July, 1992 the plaintiff claims the following from the defendant:

(a) Special damages in the sum of Shs 1000/-

(b) General damages

(c) Costs of the suit and interest therein at court rates

The plaintiff is Richard Boywa Gor and the defendant is East African Sugar Industries Ltd.

The plaintiff was an employee of the defendant at the material time. On or about 4th November, 1989 the plaintiff who was a “headman” with the plaintiff, was given motor vehicle Reg No KVA 931, a lorry, to take him and about 50 men to cut sugar-cane for the defendant. The driver was also an employee of the defendant. The lorry was the property of the defendant. The plaintiff being a headman was seated in the front cabin with one other passenger and the driver. The rest of the men were at the back of the lorry.

The lorry was unable to go uphill and as the driver struggled it reversed and overturned injuring the plaintiff and the others travelling in the lorry. The plaintiff was taken to New Nyanza Hospital.

According to the plaintiff, the accident was not caused by the negligence of the driver. The accident was caused by the negligence and/or breach of duty by the defendant the employer. Particulars of negligence and breach of common law duty of care have been given by the defendant in paragraphs 5 & 6 of the plaint. According to the plaintiff, the defendant had failed to properly maintain motor vehicle Reg No KVA 931 and make

it safe for the plaintiff and other employees to travel in.

The plaintiff called two witnesses a doctor, Dr Mwangi PW1, and Mr Michael Akira PW3 who was himself a passenger in the lorry at the material time. PW3 confirms the plaintiff’s story.

The defendant denies the claim and on its part called one witness (DW1) Edward Onyango Adul. DW1 joined the company in 1992 long after the accident had taken place and the case filed.

According to DW1, the company had done all what it could to make the motor vehicle roadworthy. The repairs were done at the defendant's workshop. DW1, produced a schedule of motor vehicle repairs (Exh A). DW1's evidence shows that the repairs of KVA 931 took several hours. However, it is not clear what was done on the motor vehicle or whether those who worked on the motor vehicle had the necessary expertise.

After the accident the driver of the motor vehicle one Gordon Ochieng was charged with the offence of using unroadworthy motor vehicle contrary to section 55(1) of the Traffic Act cap 403 Laws of Kenya. He was convicted and sentenced to pay a fine of Shs 3,000/- in default three (3) months imprisonment. This was vide District Magistrate's Traffic Case No 250/90 at Tamu. Copies of the charge sheet and proceedings were produced as exhibit 5.

In his submission the advocate for the defendant has urged the Court to ignore the conviction as the same was not pleaded. He has supported his argument with English authorities.

We do not have to get recourse to English Law as our law is clear on that point. Section 47A of the Evidence Act cap 80 Laws of Kenya is clear on the point. While it may be desirable to plead such an important point of law in one's pleadings failure to do so in my view does not preclude the plaintiff from adducing and relying on such evidence. Under order VI rule 3 Civil Procedure Rules a party need not plead evidence and under order VI rule 7 a party is at liberty to raise or leave out a point of law in his pleadings.

Where a defendant or a defendant's agent has been convicted by a Court of law such defendant would not be right to say that he has been ambushed or taken by surprise when such conviction is introduced and provoked during the hearing of a case.

The plaintiff was the defendant's servant. A master owes a duty to his servant at common law and also under various statutes, such as the Factories Act. At common law the duty of the master, or an employer to his servants is to take reasonable care for their safety.

The general nature of the duty owed by a master to a servant was described by Lord Wright as follows in *Wilsons vs English* [1938] AC 57 at p 87.

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

And by Lord Harschell in *Smith vs Charles Baker & Sons* [1891] AC 362:

"It is quite clear that the contract between the employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, to maintain them in a proper condition, to carry on his operations as not to subject those employed by him to unnecessary risk."

From the evidence before me I am satisfied that the defendant was in breach of its duty to take reasonable care of the plaintiff by properly maintaining motor vehicle Reg No KVA 931.

From the evidence before me, it is clear that the said motor vehicle needed extensive and thorough repairs in bigger garages but the defendant confined it to its local workshop just to see it move on the road. If the defendant had performed its duty of care properly this accident would not have occurred.

I find the defendant liable to the plaintiff.

The plaintiff received injuries as a result of the accident. He had a fracture of the right arm and injury to both ears. He still suffers pain and cannot do any work.

I have considered DW1's evidence. Exhibit 1,2 and 4 and the written submissions by the learned counsels for the parties. M/s Wetangula & Co Advocates for the defendant suggests a figure of Shs 80,000/- M/s KJ

Kinyanjui a figure of Shs 170,000/-. Both have relied on case law. Plaintiff still complains of pains on shoulders, chest and loss of hearing in right ear. Doing the best I can I would assess general damages at Shs 125,000/-.

Special damages are being claimed at Shs 5,860/- but were only pleaded at Shs 1000/-. I will give the figure of Shs 1000/- as pleaded and proved.

Finally, there will be judgment against the defendant in favour of the plaintiff in the total sum of Shs 126,000/- plus costs and interest at court rates.

Dated and Delivered at Nakuru this 14th day of September 1994.

D.M.RIMITA

JUDGE