



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 84 OF 2010

MOTREX LIMITED PLAINTIFF

VERSUS

1. NDURUHU JULIUS

2. NYERI MOTOR SERVICES LIMITED.....DEFENDANTS

JUDGMENT

1. The plaintiff through a plaint dated 12th February, 2010 claims the sum of Kshs. 7,025,100/= from the defendants in special damages following a road traffic accident on 8th November, 2009 at Maji ya Chumvi along the Mombasa – Voi highway. The plaintiff also sought general damages, costs, interest on special damages and general damages.

2. The 2nd defendant, Nyeri Motor Services Limited filed a statement of defence dated 19th June, 2010 and the 1st defendant, Nduruhu Julius filed his on 27th July, 2010.

THE PLAINTIFF'S CASE

3. PW1 Charles Mutuku Kamuya testified that as at the time he appeared in court, he had worked as a driver for the plaintiff, Motrex Limited for 14 years. He produced a copy of his identity card as plf. exh. 1 and a copy of his driving licence as plf. exh. 2. He recounted that on 8th November, 2009, he was driving to Nairobi when at 4:30 p.m., at Maji ya Chumvi area the vehicle he was driving, registration No. KBE 568U/ZC 9580, collided with motor vehicle registration No. KBJ 631E. It was his evidence that the Driver of the latter vehicle moved to the left side onto his path. PW1 stated that he swerved off the road but the other motor vehicle still collided with his. It was PW1's evidence that the driver of motor vehicle registration No. KBE 631E overtook at a corner and drove onto his path. PW1 stated that the said Driver was driving at a high speed. He stated that the vehicle he was driving had been bought when it was brand new and had been on the road for only 2 months at the time of the accident. He indicated that the other vehicle overturned and he went to rescue the injured. PW1 further testified that the cabin of the motor vehicle he was driving got damaged on the left hand side. He added that the cabin was changed.

4. On cross-examination PW1 stated that the motor vehicle which hit the one he was driving was being driven from Nairobi to Mombasa and that the vehicles collided when he drove off the road. He further said that there was a very short distance between them when the accident occurred. He indicated that the cabin was changed and the motor vehicle was on the road.

5. PW2 was Force No. 73616 Corporal Hassan Ali attached to Taru Police Station performing traffic duties. He informed the court that the Investigating Officer in the traffic accident case, Inspector Ali Juma was transferred to Turkana. He added that the said Officer was a Police Constable at the time of the accident. It was his evidence that an accident occurred on 8th November, 2009 at 4:30 p.m., at Maji ya Chumvi along the Voi - Mombasa road. It involved motor vehicle registration Nos. KBJ 631E a Nissan bus belonging to Chania shuttle and KBE 568U/ZC 9580 Mercedes Benz Actros belonging to Motrex Ltd.

6. PW2 stated that the Driver of motor vehicle KBJ 631E was charged with the offence of careless driving, and fined Kshs. 5,000/= by Hon. Khadambi on 2nd February, 2010 after the said Driver pleaded guilty to the charge. He indicated that the Driver's name was Joseph Maina Kinuthia. PW2 produced a copy of the police abstract as plf. exh. 3. He explained that the original police abstract was produced in a civil case in Kwale Court. He stated that from the police file he had in court, the recommendation made by PC Juma was that the Driver of the bus by the name Joseph Maina Kinuthia was to blame for the accident.

7. On cross-examination, PW2 stated that the plaintiff's motor vehicle was being driven to Nairobi and the 1st defendant's motor vehicle was heading to Mombasa. He further stated that the accident happened at a place with a bend, where a motorist is not allowed to overtake. He informed the court that the point of impact was on the left, on the path of the lorry as one faces the Voi direction. He further stated that the

skid marks indicated that that Driver of the bus attempted to avoid a collision but the accident happened.

8. On further cross-examination, PW2 stated that the Driver of the bus overtook improperly without seeing what was ahead of him. He indicated that the bus was extensively damaged from the Driver's door to the fuel tank and the plaintiff's motor vehicle's cabin was extensively damaged.

9. On re-examination, PW1 informed the court that the skid marks were indicative of the attempts that the bus Driver made to avoid the accident.

10. PW3 was George Henry Matta a motor vehicle Assessor working for Kibmat loss assessors. He stated that at the time of testifying, he had 16 years' experience as a motor vehicle Assessor. It was his evidence that he was retained by the plaintiff to assess accident damages caused to their motor vehicle registration No. KBE 568U a Mercedes Benz Actros model 3340 that had an accident on 8th November, 2009. He inspected the motor vehicle at the plaintiff's premises near Mikindani area. He stated that the motor vehicle was manufactured in the year 2008 and was registered on 19th November, 2008. It was barely one year and a week old since registration at the time of the accident. He stated that the motor vehicle was in good condition and serviceable. He assessed the pre-accident value at Kshs. 8,800,000/=. He testified that the motor vehicle sustained extensive damage on the left hand side from the front to the rear. The cabin and chassis frame were extensively damaged. He produced the motor vehicle assessment report as plf. exh. 4. He indicated that the report contained photographs of the damaged vehicle. He assessed the cost of repairs at Kshs. 4,924,219.00 which was above 50% of the estimated pre-accident value of the vehicle. He advised the plaintiff to deem it as a constructive total loss. He estimated the salvage value at Kshs. 1,800,000/=.

11. PW3 testified that they charged the plaintiff Kshs. 25,000/= for all their services which included attending court, for which they issued a receipt dated 22nd June, 2016. He clarified that they charged Kshs. 15,000/= for professional fees, Kshs. 5,000/= for attending the scene of accident and Kshs. 5,000/= for attending court.

12. On being shown a motor vehicle assessment report for motor vehicle registration No. KBE 568U by Poly - Tech Assessors dated 14th August, 2012, PW3 stated that the report indicated that the spare parts for the said vehicle were not available in the open market but could have been used from other models. The said report stated that a cabin could have cost Kshs. 1,500,000/=. PW3 disagreed with the proposal and opined that if the foregoing would have been done, it would have denied the owner the inherent value of the motor vehicle. In his view, the damaged vehicle could not have been modified with a second hand cabin of a different model as such repairs could have devalued the vehicle. He clarified that their report proceeded on the scale of indemnity to restore the plaintiff close to the position they were in before the accident. He stated that indemnity is about value, not costs.

13. On cross-examination, PW3 stated that the intrinsic value of the vehicle was Kshs. 8,800,000/=. The vehicle was retailing at Kshs. 11,000,000/= and after depreciating it by 20%, the value came to Kshs. 8,800,000/=. He stated that the parts listed as damaged were not a conclusive list of all the damaged parts as the said motor vehicle had over 10,000 components in the damaged part and listing all the parts would have been a tedious exercise. He informed the court that they arrived at a rational and logical decision using the parts they listed in the report. He indicated that the price quotations for the spare parts were from DT Dobie. He said that Poly - Tech Assessors observed that the cabin could have been shipped to Kenya for Kshs. 1,500,000/=.

14. On re - examination, PW3 informed the court that the use of another cabin type would have changed the face of the vehicle rendering it inferior.

15. The plaintiff's Operations Manager testified as PW4. His name was Richard Nyamai Mwaniki. He recounted how he was called by PW1 on 8th November, 2009 and informed of an accident that had happened to the motor vehicle he was driving, registration No. KBE 568U/ZC 9580. PW4 called the Base Commander of Taru Patrol Base. PW4 visited the scene at Maji ya Chumvi where he found a bus that had overturned. Their vehicle which was being driven towards Nairobi direction was damaged on the left hand side. It was towed to the Police Station where it was inspected by the Police the following day. The vehicle was also assessed and a report which he identified as plf exh. 4 was written. He produced the inspection report for the said motor vehicle as plf. exh. 9(a) and for the trailer as plf. exh. 9(b). He indicated that he was issued with a police abstract which showed that the Driver of motor vehicle KBJ 631E was to be charged for the offence of careless driving. He paid Kshs. 100/= for the police abstract.

16. He testified that the motor vehicle was assessed and the cost of repairs given as Kshs. 4,924,218.56. He stated the value of the vehicle was Kshs. 8,800,000/=. the salvage value Kshs. 1,800,000/= thus the market value was Kshs. 7 Million. It was his evidence that the vehicle was imported on 30th October, 2008 as per the invoice which he produced as plf. exh. 10.

17. He stated that a search at KRA revealed the vehicle that caused the accident was owned by Nduruhu Julius and Nyeri Motor Services Ltd. He produced a receipt for Kshs. 500/= for the said search as plf. exh. 11. They paid the Assessor Kshs. 25,000/= and fees to their Advocate.

18. On cross-examination, PW4 stated that they repaired the motor vehicle after purchasing spare parts. They did not purchase a new truck. He stated that their claim was for the cost of the motor vehicle at the time of the accident, less salvage cost. He stated that the motor vehicle is on the road but is not as efficient as before.

DEFENCE CASE

19. The 1st defendant called Peter Emisembe Owiti who testified as DW1. He informed the court that he was a motor vehicle loss assessor at Poly-Tech Assessors. He stated that he had been an assessor for more than 20 years as at the time he appeared in court.

20. It was his evidence that on 8th November, 2009 he received a request to conduct reassessment on a report for a prime mover registration No. KBE 568U Mercedes Benz which had been assessed by the Kibmat loss assessors. He stated that the agent of the insured, Julius Nduruhu, suspected that the claim was fraudulently exaggerated. He noted that the assessment was based on a DT Dobie quotation but when

he asked Kibmat Assessors for the quotation, they had none. He stated that the vehicle had been on the road for 1½ years. He indicated that the pre-export value of the vehicle was Kshs. 8,800,000/=.

21. It was his evidence that although Kibmat Assessors reported that the motor vehicle was a total loss, DW1 was of the opinion that the motor vehicle was repairable. He stated that he would give a devaluation of Kshs. 2,200,000/= being 20% of the value of the purchase price of the motor vehicle and that they did their valuation based on open market prices. In his view Kshs. 2,120,600/= was adequate to repair the vehicle. He further stated that they sourced a cabin at Kshs. 1,500,000/=. He did not recommend the motor vehicle to be written off as it was repairable. He produced the report by poly-Tech Assessors as def. exh. 1. He stated that he was paid Kshs. 40,000/= to attend court. He produced a receipt thereof as def. exh. 2.

22. On being cross-examined, DW1 stated that he received instructions from the 1st defendant to do an opinion on Kibmat's report on 14th August, 2012, which was 2 years after the accident. He indicated that the Mercedes Benz vehicle was a new model whose spare parts were not readily available in the Kenyan market. He further stated that the cabin could not be found locally, it could only be imported from Germany, South Africa, United Kingdom or Saudi Arabia. He clarified that the amount they reflected on their report at Kshs. 1.5 Million was for a used cabin from the open market. His Assistant checked in 3 shops whose names they did not disclose. He further stated that in the open market, one can get used spare parts for a Mercedes Benz, but DT Dobie deals with new parts.

23. DW1 stated that they rejected Kibmat's costing as there was no authenticity as their report was not supported by a quotation for a Mercedes Benz cabin from DT Dobie.

24. On re-examination, DW1 stated that an Assessor must be thorough and detailed, not selective and random. In his view, the report by Kibmat Assessors was fraudulent. He reiterated that a new cabin would have cost Kshs. 1.5 Million less Value Added Tax (VAT). He added that the plaintiff's motor vehicle was not a write off.

ANALYSIS AND DETERMINATION

25. Although the plaintiff's counsel in his written submissions states that he filed a list of issues, a page by page perusal of the court file reveals none. The 1st defendant did not file a list of issues either. From the evidence adduced in court, the issues that call for determination are on:-

(i) Liability; and

(ii) Quantum of damages.

26. The 1st defendant's Counsel highlighted his submissions but the plaintiff's Counsel did not attend court on the date scheduled for the said purpose. In his written submissions, the plaintiff's Counsel urged this court to find the 1st defendant's Driver 100% liable for the accident and the 1st defendant vicariously liable for the acts of his Driver. He relied on the case of **Tabitha Nduhi Kinyua vs Francis Mutua Mbuvi and Another** [2014] eKLR, on vicarious liability.

27. He also submitted on the failure of the 1st defendant to call any witness to testify on how the accident happened and cited the case of **Julius Majoni Juma vs Miwa Hauliers Ltd.**, [2013] eKLR, where the court stated that pleadings are mere allegations and remain so unless they are proven through evidence. The court therein held the respondent 100% liable in negligence for the accident since there was no contrary evidential version of the occurrence of the accident from the defence.

28. The plaintiff's counsel asserted that his client was entitled to the sum of Kshs. 7,000,000/= being the lost value of the truck and assessor's fees of Kshs. 25,000/=.

29. On the other hand, Counsel for the 1st defendant urged the court to apportion liability at 50:50 as a conviction for a traffic offence whether on a plea of guilty or not, is not conclusive proof of negligence.

30. On the issue of liability, PW1, the Driver of the motor vehicle registration No. KBE 568U/ZC 9580 Mercedes Benz Actros was driving from Mombasa to Nairobi direction when at Maji ya Chumvi area, the said vehicle collided with bus registration No. KBJ 631E being driven from Nairobi to Mombasa direction.

31. According to PW1, he was driving on the correct side of the road, specifically, on the left hand side but the bus Driver overtook at a bend thereby occasioning a collision. PW1 in his evidence indicated that he tried to avoid the accident by driving off the road but the bus Driver did likewise thereby hitting the cabin of his vehicle, which became extensively damaged on the left side. PW1 stated that the bus driver should not have overtaken at a bend.

32. The 1st defendant did not call any evidence to controvert the account given by PW1 on how the accident happened. Arising from the accident, the 1st defendant's Driver was charged and convicted for the offence of careless driving on his own plea of guilty in Kwale Traffic Case No. 2770 of 2009 and fined Kshs. 5,000/=.

33. In light of the foregoing evidence, this court is not persuaded that liability should be apportioned as between the plaintiff and the 1st defendant. I therefore find the 1st defendant 100% liable for the accident, the subject of this suit.

34. On quantum, the plaintiff claims Kshs. 7,025,100/= being the pre-accident value of the vehicle registration No. KBE 568U/ZC 9580. It also claims Kshs. 25,000/= being assessors fees and Kshs. 100/= being charges for the police abstract.

35. PW1 in his evidence indicated that the entire cabin was changed as it was damaged. PW3, a motor vehicle Assessor testified that the cabin and chassis frame was extensively damaged. He deemed the motor vehicle a constructive total loss as the cost of repairs could have been Kshs. 4,924,219/= which was above 50% of the pre-accident value of the vehicle. He used quotations from DT Dobie to arrive at that figure. He disputed the report by poly-Tech Assessors that a new cabin would have cost Kshs. 1.5 Million and their proposal was for the spare parts to be sourced from other models as they were not available in the open market.

36. PW4, the plaintiff's Operations Manager indicated that the market value of motor vehicle registration No. KBE 568U/ZC 9580 as at the time of the accident was Kshs. 7 Million as per PW3's report. On cross-examination, he stated that they repaired the motor vehicle after purchasing spare parts for the same. He however stated that their claim was for a new truck. He indicated that the truck is on the road but it is not as efficient as it was before.

37. DW1 in cross-examination indicated that the amount of Kshs. 1,500,000/= he proposed in his report for a cabin was not for a new cabin but a used one. DW1 did not disclose the source from which he got the cost of a new cabin.

38. An analysis of the evidence shows that the plaintiff has discharged its burden of proof in so far as the issue of the damage caused to its truck is concerned. The 1st defendant's Counsel in his submissions argued that the plaintiff's evidence deviated from the pleadings. He relied on the case of **IEBC and Another vs Stephen Mutinda Mule and 3 Others**, Civil Appeal Nairobi No. 219 of 2013 and **Adetoun Olageji (NIG) Ltd. vs Nigeria Breweries PLC S.C 91/2002** which state that parties are bound by their pleadings.

39. In this suit, although the plaintiff prays for the pre-accident value of his motor vehicle in the sum of Kshs. 7 Million, the evidence shows that the motor vehicle was repaired and is being used by the plaintiff. In view of the evidence tendered by PW1 and PW4 as to the foregoing fact, I decline to make an award in the sum of Kshs. 7 Million to the plaintiff as pleaded in the plaint. If this court was to make such an award, it would be conferring a benefit that is not justifiable to the plaintiff.

40. The photographs attached to PW3's report show the extensive damage caused to motor vehicle registration No. KBE 568U/ZC 9580. The said motor vehicle was a Mercedes Benz actros for which PW3 sought a quotation from DT Dobie in assessing the cost of repairs. DW1 on the other hand in his evidence stated that the damaged motor vehicle could have been repaired with spare parts from other motor vehicle models. In my view, this would have devalued the vehicle and the plaintiff would not have realized the intrinsic value for it. DW1's evidence was that the motor vehicle was new in the market and spare parts had to be sourced from outside the country. He assessed the cost of a used cabin and repairs of the damaged parts at Kshs. 2,120,600/=.

41. This court notes that DW1's evidence was suggestive of the plaintiff sourcing for spare parts that were not suitable for the motor vehicle model that was damaged. I decline to be persuaded that the plaintiff would have obtained value for money by buying spare parts that were not of the same model as his motor vehicle. I therefore find that the report produced by DW1 as being unreliable and unconvincing. The report produced by PW3 is more thorough and conclusive as compared to the report produced by DW1 who reviewed PW3's report.

42. In **Nkuebe Dairy Farmers Cooperative Society Limited and Another vs Ngacha Ndeiya** [2010] eKLR, the Court of Appeal held:-

“In our view special damages in material damages claim need not be shown to have been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which was damaged. Against each item he assigned a value. We think the 3 particulars of damage and value of the repairs were given with some degree of certainty.”

43. The above decision shows that in a material damage claim, a plaintiff does not have to produce receipts to prove the cost of repairs. A report by a motor vehicle assessor indicating the costs of restoring a damaged vehicle to a condition close to what it used to be prior to the accident is sufficient. I therefore hold that in this case, the plaintiff's claim can only succeed to the extent of the costs of repairs as per the assessment contained in the motor vehicle assessment report produced by PW3. The fact that this court has declined to award the plaintiff the sum of Kshs. 7,000,000/= being the pre-accident value of its motor vehicle does not estop this court from compensating the plaintiff for the damage caused to his vehicle. The evidence of PW1 and PW4 shows that the plaintiff incurred costs to repair the damaged motor vehicle. PW3 in his report gave an estimated figure of Kshs. 4,924,218.56 as the costs for repairs. I hereby award the plaintiff the said amount.

44. The plaintiff paid Kshs. 25,000/= to the PW3 as costs for assessment of its motor vehicle. It also paid Kshs. 100/= for a police abstract. I therefore award the plaintiff special damages in the sum of Kshs. 25,100/=, as claimed in the plaint. Although a receipt for Kshs. 500/= was produced for the search conducted with the Kenya Revenue Authority to unearth the owner of the bus that caused the accident, the said amount of money was not claimed in the plaint.

45. On 1st September, 2016, by the consent of parties, the motor vehicle Assessor's receipt from Kibmat Assessors issued on 27th November, 2009 for the sum of Kshs. 15,000/= was produced as plt. exh 5, the said motor vehicle Assessor's receipt for the sum of Kshs. 3,000/= issued on 22nd August, 2012 for court attendance by PW3 was produced as plt. exh. 6, a receipt of Kshs. 2,000/= issued on 24th February, 2016 for court attendance by PW3 was produced as plt. exh. 7 and another receipt issued on 22nd June, 2016 for court attendance by PW3 was produced as plf. exh. 8.

46. The 2nd defendant filed a statement of defence but did not adduce any evidence in court. The certificate of search issued by the Registrar of motor vehicles on 5th February, 2010 indicates that the registered owners of the motor vehicle registration No. KBJ 631E are the 1st and 2nd defendants. The evidence adduced by DW1 however showed that the insured was Julius Kinyanjui Nduru, the 1st defendant, who had exclusive use of the motor vehicle. I therefore find that the 2nd defendant was not liable for the accident in issue. I hold that the 1st defendant is vicariously liable for the negligence of his driver, Joseph Maina Kinuthia, who caused the accident the subject of this suit.

47. I enter judgment in favour of the plaintiff as against the 1st defendant in the gross sum of Kshs. 4,949,318.56. Costs are awarded to the plaintiff. Interest is awarded to the plaintiff at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of February, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. K'bahati for the plaintiff

No appearance for the defendant

Mr. Oliver Musundi - Court Assistant