



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 415 OF 2011**

**AKAMBA PUBLIC ROAD SERVICES LIMITED.....APPELLANT**

**VERSUS**

**JOHN ONYANGO.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 17<sup>th</sup> August, 2011 by Hon. Mr. A. K. Ndungu (Senior Principal Magistrate) Milimani Commercial Courts in CMCC No.5913 of 2005).**

**JUDGMENT**

1. The Appellant, Akamba Public Road Services Ltd was sued by the Respondent, John Onyango for damages arising out of A Road Traffic Accident. The Respondent claimed to have been injured on 11<sup>th</sup> January, 2005 while travelling as a lawful passenger in a bus Registration No. KAM 067G which was owned by the Appellant. The Respondent attributed the accident to the alleged negligent manner in which the motor vehicle was being driven.
2. The Appellant filed a statement of defence and denied the claim. In the alternative, the Defendant blamed the accident on sudden mechanical breakdown of the motor vehicle.
3. The Respondent's case is that he boarded the motor vehicle in Kericho and was headed to Nairobi. He blamed the accident on the driver's loss of control of the motor vehicle due to over-speeding and driving recklessly over potholes.
4. On the other hand, the Appellant's side stated that the Respondent was not a passenger in the bus and that the Respondent's name did not appear in the passenger manifest. It was further stated that it was not possible for the Respondent to board the motor vehicle in Kericho as it was full.
5. The trial magistrate entered judgment on 100% liability basis against the Appellant and awarded the sum of 800,000/= as general damages and Ksh.2,100/= special damages. The total came to Ksh.802,100/= plus costs and interest.
6. The Appellant was aggrieved by the said judgment and appealed to this court. In the memorandum of appeal, the Appellant listed nine grounds of appeal. However, the same were reduced to four broad issues in the submissions as follows:
  1. Whether the Respondent was a passenger in the Appellant's motor vehicle;
  2. Whether the Appellant was liable for the accident;
  3. Whether the Respondent proved the injuries alleged to have been sustained; and
  4. Whether the award of Ksh.800,000/= as general damages was inordinately high.
7. The appeal was canvassed by way of written submissions which I have considered together with the authorities cited.
8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

**“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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".**

9. The Respondent's evidence was that he boarded the motor vehicle in Kericho near the Caltex Petrol Station and without going into the booking office. He further testified that he had not been issued with the receipt at the time of the accident despite having paid Ksh.500/= bus fare. Although DW1 Wilfred Onyiego, a booking clerk with the Appellant Company at the Busia Office, testified that the Respondent's name did not appear on the passenger manifest that was produced as an exhibit, he was not in the bus at the material time and could not confirm whether any passengers boarded or alighted on the way.

10. DW1 also conceded that some parts of the passenger Manifest had been erased, probably to make some rectifications. The erasing was done by DW1's colleagues and he could therefore not confirm the reasons for the erasing. Furthermore, the passenger manifest produced in court by DW1 as an exhibit reflected 48 passengers, yet DW1's evidence was that the bus had 49 passengers. No explanation was given for this discrepancy.

11. The medical evidence by PW3, Dr. Anthony Obiero Wandungi, reflects that the Respondent sustained fractures in both legs. As observed by the trial magistrate the possibility of stage managing such injuries is rather remote. I cannot fault the finding by the trial magistrate that the Respondent was a passenger in the bus.

12. The evidence of the Respondent (PW1) on the manner in which the bus was being driven at the material time has not been controverted by any other evidence. The Respondent's evidence is that the motor vehicle was over-speeding and being driven recklessly over pot holes when it lost control and rolled. The evidence of the investigations carried as per the evidence of PW2 P.C Erastus Ngari corroborated the Respondent's evidence that there were potholes on the road and that the Respondent was issued with a P3 form and a Police abstract. The police abstract and the P3 form reflected that the Respondent was a passenger in the bus and sustained injuries. I hold that the trial magistrate correctly held the Appellant 100% liable for the accident.

13. The Respondent's evidence that he was injured in the accident was corroborated by the evidence of PW3, Dr. Anthony Obiero Wandungi. The doctor produced a medical report in court. The medical report reflects the following injuries.

**"i. Head injury as evidenced by loss of consciousness**

**ii. Fracture (R) calcaneus**

**iii. Fracture (L) distal tibia**

**iv. Fracture (L) distal fibula**

**v. Surrendering soft tissue injuries as evidenced by swelling."**

The doctor's opinion was that the injuries resulted in chronic disabling headaches, permanent weakness of the right foot and both legs.

14. The medical evidence corroborates the Respondents evidence on the injuries sustained. The injuries sustained were proved on a balance of probability.

15. On quantum, the Appellants counsel submitted for an award of Ksh.250,000/= as general damages. The following two cases were relied with awards of Ksh.100,000/= and 180,000/= respectively.

- **Francis Mwangi Muchine v Francis Kimani Mbugua Nbi HCCC 2637 of 1994**
- **Muema Mwonga v Julius Nzambu Musembi & another HCC 861 of 2001**

16. The Respondent's counsel on the other hand submitted that the award of general damages ought to be enhanced to Ksh.2,000,000/=. He relied on the following authorities where the award of general damages was Ksh.3,000,000/= and 2,000,000/= respectively.

- **Alex Wachira Njagua v Gathuthi Tea Factory & another Nyeri CC 92 of 2008**
- **Charles Wanyoike Githuka v Joseph Mwangi Thuo & 2 other Nakuru CC 68/05**

17. The court notes that the authorities cited by the counsel for the Appellant are quite old while the cases cited by the counsel for the Respondent bear more severe injuries. The award of Ksh.800,000/= as general damages was in my view within the range of awards in similar cases. As stated by the Court of Appeal in case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727**, where the it observed:

**"...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....."**

18. With the foregoing, I find no merits in the appeal and dismiss the same with costs.

**Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of May, 2018**

**B. THURANIRA JADEN**

**JUDGE**