



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 28 OF 2017**

**JAMES AGGREY MAHERO ALARE.....APPELLANT**

**VERSUS**

**GUARDIAN COACH BUS t/a Nyamira Luxury Express Company Ltd.....RESPONDENT**

**(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 310 of 2013 delivered by Hon. H.Adika (SRM) on 8th February, 2016)**

**JUDGMENT**

1. **JAMES AGGREY MAHERO ALARE** (*hereinafter referred to as appellant*) sued **GUARDIAN COACH BUS t/a Nyamira Luxury Express Company Ltd** (*hereinafter referred to as respondent*) in the lower court claiming Kshs.153,554/- arising out of an accident that occurred on 2.5.13 in which his motor vehicle KBK 421 W (*hereinafter referred to as appellant's vehicle*) was damaged following a collision with respondent's motor vehicle KBP 08V (*hereinafter referred to as the bus*) allegedly due to the negligence of the respondent.

2. The defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss the appellant/plaintiff's claim with costs.

3. In a judgment delivered on **8th February, 2016**, the learned trial Magistrate **found that the appellant had not proved his claim** and dismissed it with costs.

**The Appeal**

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 21.2.18 filed the Memorandum of Appeal dated 27.3.17 which he raised 10 grounds which I have summarized into 3 grounds that:-

**1) The Learned Magistrate erred in law and in fact in dismissing the appellant's suit without any reasonable basis**

**2) The Learned Magistrate erred in law and in fact in rejecting appellant's evidence**

**3) The Learned Magistrate erred in law and in fact in failing to award damages to the appellant**

**SUBMISSIONS BY THE PARTIES**

5. When the appeal came up for hearing on 20.3.18, the court directed that it be disposed of by way of written submissions which the advocates dutifully filed.

**Appellant's submissions**

6. On liability, Appellant submitted that there was evidence of a collision between appellant and respondent's vehicle. It was further submitted that respondent's driver had in an agreement dated 2.5.13 admitted liability and hence respondent was vicariously liable for the negligent acts of its employee. Appellant urged the court to find that he did not report the accident to police immediately since Section 73(1) of the Traffic Act required him to only report if the driver of the other vehicle declined to give his details which was not the case in this accident. It was also submitted that the agreement in which respondent's driver admitted liability was sufficient for the police to issue a police abstract.

7. On quantum, appellant faulted the learned trial magistrate for failing to quantify damages and urged the court to find the case proved and to allow the appeal.

8. Appellant placed reliance on the following authorities

a. Section 73(1) (2)(3) and (4) of the Traffic Act

b. ***Joel MugaOpija -Vs- East Africa Sea Food Ltd [2013] eKLR*** where the Court of Appeal held that:

*“The best way to prove ownership of motor vehicle would be to produce a document from the registrar of motor vehicle showing the registered owner. However, if a police abstract is produced in court without any objection, its contents cannot be denied.”*

c. ***Dorcus Wangithi Nderi v Samuel Kiburu Mwaura & another [2015] eKLR*** where the court in the absence of evidence to controvert the testimony of the appellant that the 1st respondent was vicariously liable for the negligence of his driver, found respondent liable.

d. ***Jameson Siika v Andrew Maranga Ongeru [2016] eKLR*** where the court held that:

*“It is now trite law that a trial court is under a duty to assess the general damages payable to the plaintiff even after dismissing the suit.”*

e. ***Michael Herbert Kloss –vs- David Seroney& 5 Others (2009) eKLR*** and ***Linus Fredrick Msaky v Lazaro Thuram Richoro & another [2016] eKLR*** on the need to specifically plead and prove special damages

### **Respondent’s submissions**

9. Respondent holds submitted that appellant did not prove negligence and to also hold that the agreement in which liability was proved not binding on the respondent. Respondent placed reliance on the following authorities

a. ***Civil Procedure Rules***

b. ***The Traffic Act Cap 403 Laws of Kenya***

c. ***The Evidence Act Cap 80 Laws of Kenya***

d. ***Linus Fredrick Msaky v LazaroThuramRichoro& another [2016] eKLR***

e. ***Peter KanithiKimunya v Aden GuyoHaro [2014] eKLR***

### **THE EVIDENCE**

10. Appellant testified that he was driving his motor vehicle KBK 421 W on the left side of the road towards Kisumu when it collided with the bus which was being driven from the opposite direction. He blamed the bus driver for not keeping to his lane thereby causing the accident. It was his evidence that after the accident, he talked to the driver of the bus one Douglas Nyaoma and together they went to respondent’s office in Kericho where the driver admitted liability in an agreement dated 2.5.13 which was produced as PEXH. 1. It was further his evidence that he took the agreement to respondent’s Kisumu office as advised and when respondent failed to pay, he reported the matter to police and was issued with a police abstract PEXH. 2. He also produced an assessment report, receipt for the said report and a bundle of receipts for the repair costs as PEXH. 3, 4 and 5 respectively. He additionally told court that he spent Kshs.24,500/- to hire another motor vehicle while his was under repair.

11. PW2 and PW3 who were travelling with the appellant confirmed the collision between appellant’s vehicle and the bus on 2.5.13. PW2 as well confirmed that the bus driver admitted liability and entered into an agreement with the appellant.

12. DW1 Peter Ogoi Ondieki, respondent’s manager at the Kericho branch office denied knowledge of the accident but confirmed that Douglas Nyaoma was respondent’s driver. He similarly confirmed that he saw the agreement in which Douglas admitted liability for the accident in issue. In cross-examination by appellant’s counsel, the witness confirmed that Jacob Musyoki that witnessed the agreement was an employee of respondent at the Kericho office.

### **ANALYSIS AND DETERMINATION**

13. I have carefully perused the record before me, and considered the grounds of appeal and submissions on behalf of both parties.

14. I am mindful of my duty as an appellate court which is grounded in Section 78 of the Civil Procedure Act to evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction and come to my own conclusion, but in doing so, I must give an allowance of the fact that I neither saw nor heard the witnesses as they testified. See **Sellev Associated Motor Boat Co [1968]EA 123.**

15. In addition, as the appellate court, I will only interfere with the lower court’s judgment if the same is founded on wrong principles of fact and/ or law as guided by the court of Appeal decision in **Nkuba – Vs – Nyamiro [1983] KLR 403** that

**“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”**

In deciding this appeal, I will consider the following issues.

**i. Did an accident occur on 2nd May, 2013 between appellant and respondent’s vehicle?**

16. The learned trial magistrate rightfully held that the police abstract was sufficient prove of the accident that occurred on 2.5.13 between appellant’s motor vehicle and the bus. Under section 73 (3) of the Traffic Act, appellant was under no obligation to report the accident to the police immediately, since the bus driver had complied with the law and given out his details. The trial magistrate found that the occurrence of the accident was proved but fell into error when he on one hand went further to imply that the case was not proved because the accident was reported long after appellant’s vehicle had been repaired.

**ii. Who is to blame for the accident?**

17. The trial magistrate did not delve into this issue. The evidence on record however lays blame on respondent’s driver, one Douglas Nyaoma. DW1 confirmed that Douglas Nyaoma was indeed respondent’s driver. Respondent cannot therefore be heard to state otherwise. The said Douglas Nyaoma accompanied appellant to respondent’s office in Kericho where he admitted liability in an agreement dated 2.5.13 which was produced as PEXH. 1. The bus ownership details contained in the police abstract were not refuted and there’s therefore uncontroverted evidence that the bus belonged to the respondent. . (See Joel MugaOpijav East Africa Sea Food Ltd [2013] eKLR). Respondent did not call evidence to disapprove the admission of liability contained in the letter dated 2.5.13. On the basis of that admission, I find and hold that the issue of liability is settled vicariously as against the respondent at 100% for the negligent acts of its driver. (See Dorcus Wangithi Nderi v Samuel Kiburu Mwaura & another [2015] eKLR).

**iii. Was plaintiff’s case proved**

18. It is now trite law that special damages must first be pleaded and then strictly proved and there is a long line of authorities to that effect. (See Michael Herbert Kloss v David Seroney & 5 Others (2009) eKLR and Linus Fredrick Msaky v Lazaro Thuram Richoro & another [2016] eKLR).

19. Although appellant proved Kshs.201,162/- for the repairs as shown on Kshs.PEXH. 5 he is only entitled to the pleaded sum of Kshs.122,544/-, Kshs.6,000/- for the assessment report as shown on Kshs.PEXH. 4 and Kshs.24,500/- for car hire during the time that appellant’s vehicle was under repairs shown on Kshs.PEXH. 4.

**DISPOSITION**

20. In the end and for the reasons given on the assessment above, the appeal is allowed. The judgment of the trial court is set aside and substituted an order on liability against the respondent at 100% and an award for damages in favor of the appellant for Kshs.153,044/-. Appellant will also have costs of this appeal and of the proceedings in the lower court.

**DATED, DELIVERED AND SIGNED THIS 17th DAY OF May 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Felix**

**Appellant - Ms. Ayieta**

**Respondent - Ms. Akol/Mr. Nyambogo**