



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 87 OF 2011**

**AAA GROWERS LIMITED .....APPELLANT**

**VERSUS**

**PETR NDIKU MUTUA .....RESPONDENT**

***(Being an appeal from the ruling delivered by C. Kabucho, Senior Resident Magistrate dated 2 February, 2011 at Kandara Court in Civil Case No. 89 of 2009)***

**JUDGMENT**

The appellant was the employer of the respondent. From the pleadings the respondent, who was a watchman, had left his place of work and was riding his bicycle home when a bus owned by the appellant knocked him down leading to some injuries. He brought a suit against the appellant in the lower court claiming damages against the appellant. He blamed the accident on the negligence of the defendant or its servant or agent.

The appellant denied the respondents claim but after the trial, the appellant was found liable. This appeal arises from the judgment of the lower court. The lower court was faulted for finding the appellant negligent to the extent of 80% without any basis for such a finding, and for failing to appreciate that the burden of proof was on the respondent to prove his case on a balance of probability. Further, the evidence of the appellant was not challenged by that of the respondent. The lower court was also faulted for failing to correctly apply the principles relating to assessment of damages.

As the first appellate court, it is my duty to evaluate the evidence of the lower court and come to independent conclusions. The plaintiff gave evidence in support of his pleadings which was disputed by a number of defence witnesses called by the appellant. According to the respondent, he was riding home when the bus driver went off the road and hit him. The time of the accident is said to have been 6.30 a.m. According to the defence witness however, the respondent was carrying a heavy bag of pumpkins which fell on him after he had lost control of his bicycle. No accident was reported according to procedure and the bus sustained no damage consistent with any collision.

The stand taken by the trial court contradicted the defence witnesses. In particular the lower court said as follows,

***“If at all he left before he could sign out why was this not recorded in ...book? Why was it not a disciplinary case at the defendant farm? Why was the theft not reported at all? The security officer admitted that when an offence or anything happened it is recorded in the...book. Why was this not recorded if it happened? Another issue is that it was alleged that the bus left at 6 a.m. and that it is usually recorded as the buses leaves. On the particular date, it is recorded that KAU 624 P left at 6.02 a.m. and the next one left at 5.50 a.m. to 6.05 a.m. could this be cover up? Or could it be that it was recorded the bus came back to cover up for the accident. That record cannot be relied on as this is the vehicle said to have left at 6.25.”***

The learned trial magistrate cast a lot of doubt by her questions on the defendant’s case. I note that the respondent was dismissed after the accident while the defendant’s witnesses numbering 6 (six) in total were still in employment. One cannot escape the conclusion that they were also protecting their jobs and would be fearing to be dismissed in the event they went against the appellant’s wish.

The fear of reprisal cannot be farfetched. If it is true that the respondent had stolen a bag of pumpkins from the farm, criminal charges would have been raised against him, but this was not the case. The allegation remains unfounded and one would be right to conclude it was raised to justify the injury that the respondent complained of.

The bus was a big vehicle and going by the evidence on record, had the capacity to carry more than 40 passengers. As it approached the appellant from behind, he ought to have heard the sound of the engine and taken precautions to move far from its path. I agree he contributed to the accident and apportionment of 20% contributory negligence on his part was correct.

The trial court stated the submissions by both counsel had been considered. Although no cases were cited in the judgment, I have looked at the authorities which were in those submissions and are in line with the award made in terms of general damages. I am unable to disturb the judgment of the lower court. Accordingly, this appeal is hereby dismissed with costs to the respondent.

*Dated, signed and delivered at Nairobi this 26th Day of April 2017.*

**A. MBOGHOLI MSAGHA**

**JUDGE**