REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 618 OF 2005

EXPRESS KENYA LIMITED.....…….,.,.....…APPELLANT

VERSUS

PARMINDAR S. LOTAY.....RESPONDENT

JUDGMENT

1. The Respondent, **Parmindar S. Lotay,** sued**, Express Kenya Limited** for loss of his personal property amounting to kshs 362,900/=. He pleaded that on 4th May 2001, he hired the services of taxi from the appellant who agreed to transport him and his property from Jomo Kenyatta International Airport to Westlands Nairobi. He claimed that he paid kshs 1,100/= for the services but did not get to his destination since while on Mombasa- Nairobi Highway, the car ran out of fuel and the appellants driver abandoned the respondent who was consequently robbed by unknown people. When the matter came up for hearing in the trial court, the Magistrate found the appellant 100% liable and awarded the respondent a sum of kshs 362,900/= for damages.

2. The Appellant, aggrieved by the Trial Court's decision filed this appeal on the following grounds:

1. ***The Learned Magistrate erred in law and in fact by finding that the respondent did prove his case on a balance of probability against the appellant;***
2. ***The Learned Magistrate misdirected herself on the law relating to special damages by awarding the same to the respondent without strict proof ;***
3. ***The Learned Magistrate erred in law and in fact in holding that the appellant was 100% liable for the acts giving rise to the cause of action herein;***
4. ***The Learned Magistrate erred in law and in fact in shifting the burden of proof to the appellant;***
5. ***The Learned Magistrate erred in law and in fact in failing to consider that the quantum was denied in the appellant's defence;***
6. ***The Learned Magistrate erred in law and in fact in failing to consider all the relevant issues an circumstances surrounding this case.***

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday Post Limited (1958) EA at Pg. 424,** it was held interalia as follows:

> ***"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the***

appellate court might itself have come to a different conclusion."

3. The respondent's case, was that on the material day he had arrived at the airport when he proceeded to the appellants counter at the airport to hire a car which he paid kshs 1,100/=. He claimed that he obtained a receipt upon payment and was given motor vehicle KAK 939 E with a driver by the name Kinuthia. He stated that he noted from the dash board that the fuel light was on signifying that the fuel was low. He claimed that he notified the driver who assured him he would fuel the car. He asserted that at around 9 p.m the car stalled and the driver got into another motor vehicle and left him. He further stated that he continued flagging other drivers to stop and eventually, one motor vehicle a Peugeot stopped and he boarded it together with his property. He averred that the three people in the motor vehicle robbed him of his watch, wallet and luggage, which included a briefcase and a suitcase before pushing him out of the car.

4. The appellant's case was that, on 8th May, 2001, the respondent reported the robbery incident to them. It claimed that, its drivers used to use fuel cards to fuel their motor vehicles but the subject motor vehicle ran out of fuel before it could get to the petrol station. It averred that upon receiving the complaint, it reported to its insurance company which refused to pay because the respondent had taken alternative transport. It denied liability.

5. I have re-evaluated the evidence as adduced in the lower court. When the matter came before **Onyancha J**. he directed that the parties file their written submissions. I have considered the submissions of the parties as filed in this court.

6. The appellant submitted on liability that, it was not negligent since the respondent assumed the risk of loss and damage, when it hiked a lift in an unknown motor vehicle where he was robbed. It argued that it should not have been held 100% liable since the driver's actions are so remote to the causation of the loss and damage that no liability can attach to it. It further stated that the respondent should have stayed in the vehicle while their driver went to fetch fuel since they had sent a third party to keep the respondent company. It contended that, the respondent did not adduce evidence in the lower court to substantiate claims that the motor vehicle KAK 939E belonged to the appellant or that the driver was its employee or that he actually suffered damage as he claimed. He argued that the trial magistrate erred in awarding special damages that were not proved and fully relied on the police abstract. It concluded that the loss was not a direct result of the appellant's actions as it took place in a different motor vehicle not owned by the appellant.

7. The respondent on the other hand submitted that, the appellant was negligent for exposing him to loss by giving him a car without adequate fuel or breached the contract to transport him safely to his destination and should be held 100% liable. On the issue of quantum, the respondent submitted that he produce exhibits 1 to 9 that prove the claim for special damages. He asserted that the appellant failed since he did not provide him with alternative means of transport to get him to his destination as was required in their contract. He contended that the running out of the fuel is what triggered the respondent's loss and argued that the loss was a consequence of the appellant's actions or in actions. He asserted that the appellant did not adduce evidence to show that he attempted to rescue him given that it did not call its driver to show that he attempted to rescue the respondent, instead it called witnesses that were not eye witnesses. He added that vicarious liability applies to this case.

8. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. I will first address ground 3 of the appeal, where the appellant claims that the magistrate erred in holding the appellant 100% liable. The arguments by the parties is very clear. It is apparent that that none of the parties is disputing the fact that the respondent hired the services of the appellant to transport him to his point of destination which was Westlands from the point of departure being, the Jomo Kenyatta International Airport. It is also not in contention that the vehicle that was used for this services stalled due to lack of fuel. It is also not in dispute that the appellant's driver left the respondent where the car had stalled only that the appellant claims that he left to get some fuel from the nearest petrol station. The dispute arises on who should shoulder

liability between the two parties.. The appellant argues that this is not a vicarious liability case and that the appellant should not be held liable since the respondent instead of waiting in the car, proceeded to board another vehicle, a Peugeot where he was robbed of his belongings by the occupants of the alleged Peugeot. The appellant also asserts that it sent another person to keep the respondent company as the driver proceeded to look for fuel. For purposes of advancing it's case, I note that the appellant called witnesses who testified on the state of affairs on that particular day though they were not present at the scene. The appellant did not call the driver who drove the respondent on that day neither did it call the person who was allegedly sent to guard the respondent while they waited for fuel.

9. The respondent while presenting his case, stated that he feared being left alone at 9 p.m and chose to seek other means of transport. He correctly argues that he could not wait in the night on the road side yet the driver had abandoned him. The question arising here is whether the respondent should shoulder liability for boarding another vehicle as result of which he lost his belongings. In my view, the appellant who operates taxi services owes a duty of care to its customers. He particularly should foresee acts and omissions that would breach that duty of care. In this case, the appellant owed the respondent a duty of care and should have ensured that the respondent reached his point of destination safely. The appellant should not have offered its car to the respondent knowing very well that it did not have fuel. It ought to have foreseen that the chances of it stalling on the road were high. The appellant must have been aware since it was in the taxi business that the petrol stations on the Mombasa- Nairobi Highway were sparse and the probability of the car stalling before getting to a petrol station was high. It should have mitigated that probability by offering the respondent a car that was fueled. Infact, the appellant instead of abandoning the respondent to go look for fuel as it claims, should have instead sent another vehicle that was fueled which would have been faster and safer rather than having its driver leave the customer to go look for fuel. The actions of the respondent after he was abandoned are reasonable, having been left alone at night on the road side, the respondent did what any reasonable man would do in the circumstances, he sought help from other drivers passing by to get himself out of the situation he found himself out of fault that was not his own. It is not enough to argue that it was his fault since he hitch hiked another vehicle where he was robbed. The reason he flagged another vehicle and boarded it was because of the actions and omissions of the appellant. Had the vehicle not stalled, then he would not have had to get another vehicle from a stranger to ferry him to his destination. In the circumstances, I find that the appellant did not act professionally and should shoulder the whole liability. This is a case of vicarious liability and I hold the appellant 100% liable.

10. I will address the 2 and 5 grounds of appeal together. The appellant claims that the Magistrate erred in awarding special damages without strict proof and filing to consider that the quantum was denied in the appellant's defence. It is evident from the court record that the appellant denied the quantum. The respondent however pleaded damages amounting to kshs 362,900/= and adduced evidence marked as exhibit 1-9 that illustrated the items he lost in the robbery as a result of the robbery. There is evidence that he hired a taxi from the respondent and that he reported to the appellant who advised him to report the matter to the police and obtain a police abstract in that regard. The respondent did as advised and adduced the police abstract in evidence that highlighted the property lost, which property amounted to kshs 362,900/=. The appellant argues that this damage was not proved since the respondent only produced an abstract and not the receipts. I disagree with the appellant. The respondent was robbed, he reported the matter to the police an obtained the only thing that could prove he was robbed, a police abstract. I am convinced that the appellant was robbed and his items stolen from him as enlisted in the police abstract. No evidence to the contrary has been adduced.

11. In ground 4 of appeal, the appellant claims that the magistrate erred in shifting the burden of proof. The appellant claims that the respondent did not prove that he actually suffered damages and that it was not up to the appellant to prove it. I have perused the judgment of the trial court, I do not see anywhere in the judgment where the court shifted the burden of proof to the appellant. The only thing that the court stated in regard to the loss incurred by the respondent was that the

appellant during trial leaned on denying liability instead of challenging the losses which it was convinced would be settled by its insurance. The appellant was not required at any juncture in that judgment to prove the loss. This ground cannot therefore stand.

12. On whether or not the Learned Magistrate erred in law and in fact by finding that the respondent did prove his case on a balance of probability against the appellant and in failing to consider all the relevant issues an circumstances surrounding this case as claimed in the 1st and 6th grounds of appeal, I find that given the circumstances of this case, the Magistrate did address the issues as raised and applied the law to the facts appropriately in reaching the conclusion she did. She rightly held that the respondent proved his case on a balance of probability.

13. In the end, I find no merit in the appeal. It is dismissed with costs to the respondent.

Dated and delivered in open court this 18th day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

…….for the Respondent