



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

**CIVIL APPEAL NO. 53 OF 1999 CONSOLIDATED WITH H.C.C.A 54 OF 1999**

**THE ELECTORAL COMMISSION OF KENYA ..... APPELLANT**

**VERSUS**

**1. TITUS KIETI SIMON**

**2. FLORENCE MUMBUA NZAU ..... RESPONDENTS**

*(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Kangundo of Hon C.D. Nyamweya (S.R.M) Civil Case No. 276 of 1998 dated 1<sup>st</sup> April 1999)*

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*(Before B. Thurania Jaden J)*

**J U D G M E N T**

1. The Respondents **Titus Kieti Simon** and **Florence Mumbua Nzau** sued the Appellant, the **Chairman, The Electoral Commission of Kenya** for damages arising out of a road traffic accident which occurred on 29/12/1997. The Respondents blamed the accident on the negligent manner that they claimed that the motor vehicle hired by the Appellant to ferry them as its employees to their duty station was driven.
2. In its statement of defence the Appellant denied the claims and stated that it was neither the owner of the motor vehicle nor was the driver its employee or authorized driver.
3. After hearing the case the learned trial magistrate entered judgment for the Respondents against the Plaintiff on 100% liability at Kshs.120,000/= General Damages, Kshs.88,000/= Special Damages, costs and interests for the 1<sup>st</sup> Respondent and Kshs. 140,000/= General Damages, Kshs.84,480/= Special Damages plus costs and interests for the 2<sup>nd</sup> Respondent.
4. The Appellant was aggrieved by the said judgment and appealed to this court on eleven (11) grounds that were collapsed to five grounds in the written submissions as follows:-
  - i. **That the decision as against the weight of the evidence.**
  - ii. **That the Appellant was not vicariously liable for the negligence of the driver of the motor vehicle.**
  - iii. **That the general damages awarded were excessive.**
  - iv. **That the amendment of the pleadings on the claim for special damages was irregularly carried out.**
  - v. **That the provisions of the Government Proceedings Act were not complied with.**

5. The appeal was canvassed by way of written submissions which I have duly considered.
6. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings – *See Selle –vs- Associated Boat Co. Ltd (1968) EA 123.*
7. The 1<sup>st</sup> Appellant **Titus Kieti Simon** and the 2<sup>nd</sup> Respondent **Florence Mumbua Nzau** testified that they were teachers by profession. That during the 1997 General Elections, the Respondents were working for the Appellant as the Deputy Presiding Officers at **Matendeu Polling Station**. On the material day, the Appellant ferried the Respondents and its other workers to the polling station using a hired lorry registration No. **KAH 019T**. That before they reached **Matendeu area**, the lorry which was being driven at a high speed swerved and landed into a ditch. The 1<sup>st</sup> Respondent, **Titus Kieti Simon** produced a medical report which reflected his injuries as blunt injuries to the head and back. The 2<sup>nd</sup> Respondent, **Florence Mumbua Nzau** gave a similar account of evidence and produced a medical report that reflected soft tissue injuries to the right shoulder, right hand, both legs and the neck.
8. The Appellant did not attend court on the hearing date. Both cases proceeded *ex parte*. The trial magistrate entered judgment for the Respondents against the Appellant on a 100% liability basis. In the case for the 1<sup>st</sup> Respondent, **Titus Kieti Simon**, he was awarded Kshs.120,000/= as General Damages, Kshs.88,000/= as Special Damages, costs and interests. In the case for the 2<sup>nd</sup> Respondent **Florence Mumbua Nzau**, she was awarded Kshs.140,000/= General Damages, Kshs.84,450/= Special Damages, costs and interests.
9. On the ground of appeal that the decisions of the learned trial magistrate were against the weight of the evidence, I find that the evidence by both Respondents on how the accident occurred was not controverted by any other evidence. Both cases proceeded *ex parte* as the Appellant was not in attendance on the hearing date. No particulars of negligence were set out in the statements of defence against the Respondents. The Respondents were passengers in the motor vehicle.
10. The Appellant has argued that the motor vehicle did not belong to the Appellant. That the Appellant had only hired the motor vehicle for use on the material day and that the driver of the motor vehicle was not an agent or servant or employee of the Appellant. The Respondents' claims were based on the tort of negligence and not on the breach of the contract of employment by the Respondent for failure to provide a safe system of work. There is no dispute that the Appellant had hired the motor vehicle in question.
11. The motor vehicle was under the control of the driver. The driver was not an employee of the Appellant. For vicarious liability to arise, there must be a master-servant relationship (*See for example Joseph Cosmas Khayugila –vs- Gigi & Co. Ltd and Ano. 1987 2 KAR.*)

The driver of the motor vehicle was an employee of a third party who is not a party herein. The hire contract was not produced in court as an exhibit. It is not clear why the owner of the motor vehicle and the driver were not sued. The particulars of the driver's negligence are set out in the plaint. However, without the Appellant being held vicariously liable, none of those particulars of negligence can be attributed to the Appellant. All the particulars of negligence set out relate to the manner in which the motor vehicle was being driven at the material time.

12. Were the General Damages awarded excessive? On this issue, this court is guided by the principles set out in the case of **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) L KAR 727 at page 703** that:-

**“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.**

**The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”**

13. I find no reason to disturb the awards of General Damages as they fall within the range of similar awards for comparable injuries.
14. Was the amendment of the claims for Special Damages irregularly carried out? **Order 8 r.8 of the Civil Procedure Rules** gives the court the discretion to entertain an oral application to amend pleadings. The purpose of the amendments is to allow the court to determine the real issues in controversy. The learned trial magistrate properly exercised the court's discretion in allowing the amendments. The amendment did not alter the character of the action. The Special Damages pleaded were strictly proved as per the receipts produced as exhibits.
15. Under **Section 13 A of the Government Proceedings Act** a 30 days written notice must be served on the Government before the commencement of any proceedings against the Government. **Section 41 (9) of the Constitution** provided as follows:-

**“In the exercise of its functions under this Constitution the Commission shall not be subject to the direction of any other person or authority.”**

16. The Appellant was a corporate entity. (See for example **Mbugua –vs- Ibrahim Ahmed 2014 e KLR**). That ground of appeal therefore has no merits.
17. Having arrived at the finding that the motor vehicle was not owned by the Appellant and that the Appellant was not vicariously liable for the actions of the driver, I allow the appeal. Due to the circumstances of this case, each party to bear its own costs.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this **30<sup>th</sup>** day of **September** 2014.

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**B. THURANIRA JADEN**

**JUDGE**