



**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO.1050 OF 2007**

**(An Appeal arising from Judgment by C. W. GITHUA (Mrs.) –**

**CHIEF MAGISTRATE – MILIMANI COMMERCIAL COURTS CM. Civil Case No.1557 of 2004**

**delivered on 5<sup>th</sup> December, 2007)**

**CHRISTOPHER M. MUJULE.....APPELLANT**

**VERSUS**

**ALFRED MOFFAT OMUNDI MUCHIRA.....1<sup>ST</sup> RESPONDENT**

**DUNCAN MOGAKA MUCHIRA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION (EVIDENTIARY FACTS)**

On 8/7/2002, the plaintiff, Christopher M. Mujule was lawfully travelling in motor vehicle Reg. KAN 346R registered in the name of the defendant Linear Coach along Eldoret Road and the defendant agent, servant or driver managed, controlled and drove the motor vehicle in a manner that he caused an accident and the Plaintiff was seriously injured and suffered damage and loss.

**PLEADINGS TESTIMONY SUBMISSIONS JUDGMENT**

**PLEADINGS**

The Plaintiff filed Plaintiff on 19/2/2004 against the defendant on the principle of vicarious liability; the motor vehicle registered under Linear Coach and through its agent, servant or driver drove and caused an accident that led to injuries to the Plaintiff.

The Plaintiff pleaded particulars of negligence of the authorised driver as outlined in paragraph 5 of the Plaintiff and relies on the doctrine of *Res Ipsa Loquitur*, Highway Code and the Traffic Act.

The Defendant filed defence on 18/3/2004 admitted the accident occurred on the date and place stated in paragraph 4 but denied particulars of negligence and that the Plaintiff was a passenger thereof.

**ORAL EVIDENCE**

The evidence on record is by PW1 Dr. Moses Kinuthia who examined the Plaintiff on 21<sup>st</sup> January, 2004. He had;

1. Erectile dysfunction
2. Pain on left shoulder
3. Tenderness on tissue of left shoulder joint
4. He produced the medical report- PEx1

The Plaintiff PW 2 Muyemba Christopher Mujule testified that on 8/7/2002 he boarded a bus reg. KAN 346 R from Isebania to Nairobi. On the way the bus picked up more passengers who stood in the bus. When they reached Rongai, he saw a trailer ahead of them on a sloppy stretch of the road. The driver began to overtake the trailer, in the process there came oncoming vehicles. The driver of the bus swerved to the left and attempted to overtake the trailer, in the process the bus landed in a ditch.

Passengers were hurt and got out through the window. He was treated and discharged in Nakuru Provincial hospital. He obtained injuries as enumerated as per the doctor's evidence. He went and sought medical services in Bunda, Tanzania and was admitted for 3 days. He continued to experience back pains and water dripping from private parts. He produced documents to prove special damages and Police abstract -PEx6 and copy of records from a search conducted at Registrar of Motor vehicles PEx9. The defence did not adduce any evidence.

## **SUBMISSIONS**

The plaintiff through Counsel filed submissions and attributed liability to the defendant based on negligence and particulars outlined in paragraph 5 of the Plaintiff. The evidence adduced was summarized as the plaintiff having boarded Linear Bus from Isebania, loaded with passengers. On arriving at Rongai, the said vehicle veered off its lane in an attempt to overtake a slow moving vehicle ahead, there was an oncoming vehicle Counsel gave proposals on quantum based on relevant decided cases the proposed quantum of damages.

The plaintiff's submissions filed on 1<sup>st</sup> August, 2012 confirmed the plaintiff was a passenger in motor vehicle reg. KAN 346R. He conducted a search that revealed the bus was registered in the name of LINEAR COACH as at 8/7/2002 on the date of the accident. The plaintiff conducted a search at the Companies Registry and found Linear Coach was a business name whose proprietors are the two (2) respondents sued by the Plaintiff.

## **JUDGMENT**

The judgment of the Court was the Plaintiff did not discharge the burden of proof on a balance of probability that the two (2) defendants were in fact owners of the firm of Linear Coach. Therefore they were the people who were in possession and control of the said bus and were the principals of the driver of the bus at the time the accident occurred.

The Court held that the plaintiff would have established a connection between the defendants and the accident in question and the basis on which the defendants could be held vicariously liable by proving the tortious actions of the bus driver who caused the accident in question through negligence driving.

## **APPEAL**

The memorandum of appeal of 8/7/2010 has two (2) grounds;

The learned Magistrate erred in law and fact by not holding the Respondents vicariously liable for acts of the driver who caused the accident.

The learned Magistrate erred in law for not linking the Respondents to the business name under which the vehicle in question was not registered where the Respondents did not controvert evidence adduced by the appellant.

The matter proceeded for hearing on 31/7/2014 *ex parte*, service was by the Deputy Registrar's Office for

hearing during the Civil service week. The appellant through Counsel Ms. Gitonga informed the Court that the Respondents did not deny the fact of existence of Linear Coach Ltd and the occurrence of the accident in the Defence filed on 2/4/2004.

The issue raised was that the defendants were not the drivers and therefore could not be culpable as they did not exercise care and control of the bus and therefore caused the accident. The search on the bus Reg. KAN 346 was conducted at the Registrar of motor vehicles on 30<sup>th</sup> August, 2003 and showed it is registered as Linear Coach Limited and CFC. This is evidenced by the copy of records and official receipt attached on Page 34 of the Appeal.

They conducted a search in the Companies Registry and attached receipts on page 35 of the Appeal. They got the names of the defendants as Directors of Linear Coach Limited. They however did not get written proof of the search.

The third issue is that the appellant testified in oral evidence and the Counsel for the defendants was to proceed with cross-examination but the matter was adjourned on 30/7/2007. The matter was scheduled to proceed on various dates, 27/6/2007; Counsel for defendants' was unable to proceed due to the fact that he was proceeding with another matter. On 29/7/2007 matter was not mentioned, on 8/8/2007, the defendants did not attend court despite service, 30/8/2007 the matter was mentioned for submissions on 7/9/2007, 14/9/2004 and 21/9/2007 the matter was for fixing of judgment date. All these times the defendants and or their advocate failed to attend court, write to the Court or make any enquiries as to the conclusion of the matter. The evidence on record remained uncontroverted. The Defendant's advocate declined to cross-examine PW2 twice when the matter came up for hearing and thereafter abandoned the matter completely.

Despite service for hearing of the appeal, the defendants did not appear in Court. After the hearing, this Court gave the option to file submissions before judgment. The defendants did not take up the matter.

The issues for determination on appeal are as follows;

1. Re-evaluation of the evidence to arrive at an independent conclusion
2. Who is /are liable for the accident of 8/7/2002 of Motor Vehicle KAN 364R
3. Have the particulars of negligence been proved
4. Is vicarious liability proved
5. Are the defendants liable?
6. What remedy (ies) is the Plaintiff entitled to?

This Court has considered the evidentiary burden of each party and it is summarised in the following provisions;

Section 107 (1) of the Evidence Act Cap 80, which provides;

***“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

Section 109 of the Evidence Act provides;

***“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.***

Section 112 of the Evidence Act provides;

***“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”***

Cumulatively, therefore any party that alleges must prove the allegation. In the instant case; the record confirms the Plaintiff/ appellant testified on 30/5/2007, that on 8/7/2002 he boarded bus Reg. KAN 346R from Isebania to Nairobi and paid 350/-. The bus was overloaded and overcrowded.

The bus was not driven in a careful manner; the plaintiff /appellant stated;

***“while on the road to Nairobi, near Rongai, I saw a trailer ahead of us on a sloppy stretch of the road. The driver started overtaking the trailer but noted oncoming motor vehicles. He swerved to the left side wanting to overtake on the left side but there was a deep ditch on that side and the bus overturned landing into the ditch.”***

The evidence above-mentioned was not controverted by any other evidence on record. The defendants or any other witness did not testify. Secondly, despite the plaintiff being available for cross examination by the advocate for the defendants, they successively failed to attend court, give any explanation or even follow through the logical conclusion of this case. In the absence of any other evidence, this court finds the evidence and proof of the allegations of negligence pleaded in paragraph 5 of the Plaintiff filed on 19<sup>th</sup> February, 2004.

The driver of KAN 346R was negligent, he drove at excessive speed; he was overtaking, normally this requires more speed than the vehicles being overtaken, the driver accelerates to successfully overtake. The driver failed to keep proper lookout, drove without due care and attention to other vehicles, had he seen the oncoming vehicles, he would not have started overtaking instead he would have driven on his lane and avoided the accident.

When, the driver started to overtake and saw oncoming vehicles, he failed to manoeuvre KAN 364 R or in any other way, move the vehicle to a safer place and avoid the accident. Instead, he swerved on the left side which was sloppy and had a ditch and that is where the bus rolled and landed in the ditch.

**IN JUSTUS THURANIRA VS ABDUL HALIM T/A TAWFIQ BUS SERVICE 2004 KLR (SITATI J)**  
the Court observed in terms of proving negligence as follows;

***“PW2 clearly told the court that he was a passenger in the ill-fated bus traveling to Mombasa together with two of his children, Wanja and Nkanata and that Nkanata perished in the accident. His testimony was that as they approached the bridge, the bus was very fast and that the driver failed to negotiate the corner at the bridge and fell into the river. On whether or not the accident was caused by a tyre burst, the only defence witness, DWI, only thought that the accident was due to a tyre burst. Against this evidence is the evidence of PW2 who testified that the bus was going fast as they approached the bridge and that the driver failed to negotiate the corner.***

***In KENYA BUS SERVICES LTD V. KAWIRA (2003) E.A. 519 (Court of appeal Kenya), the respondent who sued as the personal representative of the deceased who died in a Kenya bus at the same Nithi Bridge called only one witness who was a passenger in the ill-fated Kenya bus whose testimony was that as the bus approached the Nithi Bridge, it was swaying from side to side and that the bus overturned over the bridge. I am satisfied that the evidence of PW2 established negligence against the driver of the bus which caused the death of the deceased when it plunged into the river as a result of the bus having been driven fast as a result of which speed the driver failed to negotiate the corner as the bus approached the bridge. As admitted by DWI, the passengers were not responsible for the accident. I find therefore that on the evidence on record, the respondent was wholly liable in negligence for the accident. It has not been disputed that Ali Omar the deceased driver was a driver for the respondent and that on the fateful day, he was acting as such driver in the course of his employment with the respondent”.***

This Court finds in instant case the plaintiff/appellant proved he was a fare-paying passenger in the bus therefore he had no role to play in driving the bus and he was not in the care and control of the bus. The driver of KAN 346R was negligent in driving the bus too fast in the process of overtaking other vehicles on a sloppy stretch of the road. The manner of driving as described by the Plaintiff was negligent and he

was to blame for the self- involving accident that caused the plaintiff injury and loss.

With regard to the issue whether the defendants in this suit and appeal are to blame for the accident that was caused by the driver of KAN 364R, the Court considered the judgment of learned Magistrate that the Plaintiff did not prove the defendants were liable because despite conducting search, the Plaintiff did not produce written evidence from Companies Registry that could connect the defendants to this case or the bus in question.

The Court if a different opinion, the burden of proof in civil cases is not of the standard of beyond reasonable doubt but on a balance of probabilities. The fact of no written document from Companies Registry showing the defendants as proprietors or directors of Linear Coach Ltd is not a bar to liability; there is no prescribed form issued by Companies Registry as is done at the Registrar of Motor Vehicles Department.

Secondly, In this case no shred of evidence was adduced to the contrary or the veracity of the Plaintiff's testimony tested through cross-examination having been in court and available severally. The Plaintiff pleaded in paragraph 2 of the Plaint filed on 15/2/2004.

***“At all material times Linear Coach was the registered owner of the Bus KAN 364 R that the defendants managed, controlled by the defendant’s agent, servant or employee with authority and or instructions of the defendants.”***

The plaintiff testified as to the driver's manner of driving the bus, KAN 364 R which from Registrar of Motor Vehicles belongs to Linear Coach and from oral testimony it is not controverted the bus was owned by Linear Coach and owned by the defendants.

***The doctrine of vicarious liability was expounded in the case of MORGAN VS LAUNCHBURY (1972) 2 ALL E R 606 which stated that;***

***“to establish agency relationship it was necessary that the driver was using the car at the owners request, express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner.”***

***Section 8 of the Traffic Act; “the person under whose name the vehicle is registered shall be deemed to be the owner of the vehicle unless the contrary is proved”.***

The defendants did not provide evidence to the contrary; that they were not liable as proprietors of Linear Coach. The defendants are liable for the driver's manner of driving of motor vehicle KAN 364 R. He was driving the bus that belongs to Linear Coach Ltd. The defendants in the Defense filed on 22/4/2004. Paragraph 2 and 3 admit the accident occurred but denied it was due to negligence of the driver and that the Plaintiff was a fare- paying passenger. The amount of knowledge of the accident would only be by persons concerned and are aware of the matter as the defendants as proprietors of Linear Coach Ltd, to prove that he was a passenger in the bus at the time of the accident. The plaintiff produced a Police Abstract filled on 9/8/2002 (Ex 6 A). Again this fact has not been controverted.

This Court finds it very strange that throughout the pleadings and oral hearings, it is agreed the bus KAN 364 R had a driver, yet the driver's identity has been closely guarded and not divulged or any information as to his whereabouts and or circumstances disclosed. So that this Court finds the most crucial and critical element and aspect of the suit is conspicuously missing.

In the case of ***JOHN WANAINA KAGWE vs HUSSEIN DAIRY LTD 2013 ECLR, (GITHINJI, MAKHANDIA, MURGOR JJA)*** the Court observed as follows on the issue of adducing evidence in Court by the parties.

***“The respondent never called any witness (es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning, that the allegations in its defence with regard to the***

***blameworthiness of the accident on the appellant either wholly or substantially remained just that, mere allegations. The respondent thus never tendered any evidence to prop up its defence. Whatever the respondent gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence. As it were therefore, the respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tendered to exonerate it fully from culpability. It was thus substantially to blame for the accident. "***

The driver did not testify, no information or reason was given to Court, the defendants did not cross examine through their lawyer on record to test veracity of the Plaintiff's testimony. Therefore, in the absence of any evidence from the defendants, the plaintiff has proved allegations of negligence pleaded in the Plaint, conducted searches and found the defendants are the proprietors of the bus company and therefore the driver was carrying out duties in the course of employment under the authority of the defendants. It is also in the course of carrying out his duties, that the driver drove bus KAN 364R negligently and directly caused the Plaintiff's injury and loss. The defendants are vicariously liable, as the driver is culpable for the accident and the resulting injury and loss to the plaintiff.

With regard to the remedies available to the Plaintiff, he testified he was a fare-paying passenger in the bus, he paid Ksh. 350/- to travel from Isebania to Nairobi. In the process the bus was involved in an accident, he was injured; on the left shoulder, dislocation, the right leg and bruises on the left hand. He suffered severe pains and developed back pains. PW1 Dr Moses Kinuthia examined the Plaintiff, Christopher Mujule on 21<sup>st</sup> January, 2004 one and a half years after the accident. He had the following complaints;

1. Erectile dysfunction
2. Pain on left shoulder
3. Tenderness on tissues of the left shoulder joint.

He formed the opinion that these were severe injuries; especially the erectile dysfunction was permanent and due to complication of severe injury on the lower back. The fact of no longer being able to enjoy sexual intercourse caused him psychological trauma. He prepared the medical report and produced it in court as exhibit (P Ex1)

On cross examination by the counsel for the defendants, the doctor said his opinion was from the treatment notes of the primary doctor who treated the Plaintiff after the accident and the P3 Form and observations he made when the Plaintiff visited the doctor's offices. The Doctor's evidence and report confirm the plaintiff was injured from the accident and the extent of injury was severe.

With regard to quantum of damages, of all the injuries, the most severe is impotence due to erectile dysfunction. The Condition is permanent and not reversable and cannot not be fully compensated. The Plaintiff's submissions proposed an award of ksh.1.8 million. They relied on the case on the case of

**MAURICE AJUOGA OLANG VS JV STRABAG – BAU-AG –LIMA LIMITED; CIVIL CASE 2299 OF 1994 (ETYANG J)**

The Court considered the Plaintiff in similar circumstances; the plaintiff was injured from an accident in a construction site and among other injuries; "He complained of difficulty in passing urine, impotence. Back pain and a scar on the nose."

The Court relied on the case of

**ZABLON MARIGA VS MORRIS WAMBUA MUSILA 1982-1988 1KAR 507, 522(NYARANGI J.A)** who observed the impact of impotence on the Plaintiff's life as follows;

***"The learned Judge did not accord sufficient weight to sexual impotency. It was necessary to relate the defect of impotency to the age of the Respondent and to that of his young wife. That was a consequence of the injuries which merited serious separate treatment and not merely a passing***

**remark. The impotency is a loss of amenity which affects the Respondent's wife (a third party) in a manner which will have an adverse effect on the husband as much as it will affect his relationship with his wife and have a potentially detrimental effect on the care she can give him."**

The Court will adopt the same view as expressed in the two (2) judgments of the impact of erectile dysfunction the Plaintiff sustained from the accident on him and his family. In 2004, the plaintiff was aged fifty (50) and was married. The impotence has adverse effect on his life that is irreversible. There has been and will continue to be incurrence of medical attention and expenses. The level of productivity will be affected. The Court finds that due to all these circumstances the reasonable sum for the Plaintiff is Kshs.1, 500,000/= as general damages. Special damages pleaded and proved Ksh. 4,367/=

The Appeal is allowed in the following terms;

Judgment is entered for the Plaintiff against the defendants and Linear Coach Ltd for the sum of kshs. 1,504,367/= with interest and costs of the appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2014**

**MARGARET MUIGAI**

**JUDGE**

***In the presence of:***

Counsel for the Appellant.....

Counsel for the Respondent.....