



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 232 of 2008

JOHN KIRIA.....1ST APPELLANT
JOSEPH ONGURU.....2ND APPELLANT
JANET KAVISA.....3RD APPELLANT
EUNICE MALO.....4TH APPELLANT
MARGARET MWANZIA.....5TH APPELLANT
JOSEPH OKONDI.....6TH APPELLANT
PETER ODIK.....7TH APPELLANT

-VERSUS-

CHARLES KAUNDA MUSYOKA.....1ST RESPONDENT
AKAMBA PUBLIC ROAD SERVICES LTD.....2ND RESPONDENT

(Being an appeal from the judgment and decree of the Ag. Chief Magistrate, Mrs. M. Odero, in Milimani Civil Suit No. 1968 of 2004, prepared on 8th April, 2008 and delivered by the Hon. Mrs. R.N. Kimingi (SPM) on 11th April, 2009)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court by John Kiria, Joseph Onguru, Janet Kavisa, Eunice Malo, Margaret Mwanzia, Joseph Okondi and Peter Odik, hereinafter referred to as the 1st, 2nd, 3rd, 4th, 5th, 6th & 7th appellants, respectively. They had sued Charles Kaunda Musyoka and Akamba Public Road Services Ltd. hereinafter referred to as the 1st and 2nd respondents.

2. The cause of action arose from a road traffic accident involving motor vehicle KAH 685J and motor vehicle KXF 502. As a result of the accident, the appellants who were all travelling as fare paying passengers in motor vehicle KXF 502 were injured. The appellants claimed that the accident was caused by the negligence of the 1st respondent, who was at all material times, an employee of 2nd respondent, who is alleged to be the owner of motor vehicle KXF 502. Each of the appellants claimed general and special damages arising from the injuries suffered.

3. By an amended defence filed on 20th June, 2005, the respondents denied that the 1st respondent was an employee or driver of the 2nd respondent or that motor vehicle KXF 502 was owned by the 2nd respondent. The respondents further denied that the appellants were passengers in the subject vehicle. The respondents denied all the particulars of negligence attributed to the 1st respondent. In the alternative the respondents maintained that the accident was substantially contributed to by the negligence of the appellants. The respondents further maintained in the alternative, that the accident was wholly or substantially contributed to by the negligence of the driver of motor vehicle registration No. KAH 685 J /ZB 458.

4. During the hearing of the suit, except for the 2nd and 7th appellants, each of the other appellants testified. One Joseph Ogillo Owino and Sgt. John Kamau, also testified. Briefly their evidence was as follows:

On the 22nd December, 1997, the appellants each boarded a bus registration No. KXF 502 to travel from Mombasa to Nairobi. The appellants claimed the bus belonged to Akamba Bus Services. As they were travelling along Nairobi-Mombasa Highway, at a place near Makindu, the bus was involved in an accident with a lorry. The accident happened when the bus was trying to overtake another vehicle and was involved in a collision with a trailer. The appellants alleged that the bus was being driven at a very high speed. Each of the appellants suffered some injuries and were taken to Makindu District Hospital where they were treated.

5. Sergeant John Kamau of Makindu Traffic Base produced a police abstract report of the accident showing the names of the persons who were injured in the accident. He also testified that Charles Kaunda Musyoka the driver of motor vehicle KXF 502, was charged with careless driving under Section 49(1) of the Traffic Act but was acquitted of the charge.

6. The respondent did not call any evidence. Written submissions were however filed on behalf of each party. For the appellant it was submitted that sufficient evidence was adduced confirming that the appellants were passengers in motor vehicle KXF 502, and the vehicle was involved in an accident with the motor vehicle KAH 685J. It was submitted that evidence was adduced that the respondent's motor vehicle was being driven at excessive speed, and overtook another negligently. The Court was urged to find the appellant fully liable for the accident. The Court was also urged to award the appellants damages on the injuries each had suffered.

7. For the respondents it was submitted that the 7th respondent did not testify in support of his case, and that on the issue of liability the appellants did not establish the ownership of motor vehicle KXF 502, as no copy of records from the Registrar of Motor Vehicle, was produced. It was further contended that the particulars of negligence alleged in the plaint were not proved. And that the 1st appellant was acquitted of the offence of careless driving. It was maintained that none of the appellants proved through production of receipts, that they were actually passengers in the subject bus. It was maintained that since the ownership of subject vehicle was not proved, the 2nd appellant should not be held vicariously liable.

8. In her judgment, the trial Magistrate found that the appellants did not offer any proof of ownership of the motor vehicle KXF 502. She rejected the police abstract report, saying the same was not sufficient proof of ownership. The trial Magistrate further found that this omission was fatal to the appellant's suit and therefore dismissed the suit.

9. Being aggrieved by that judgment, the appellants have lodged this appeal raising 5 grounds as follows:

(i) That the learned Magistrate erred in both fact and in law in dismissing the entire suit as against both defendants/respondents solely on the ground that the ownership of the motor vehicle registration KXF 502 had not been established by way of a copy of records from The Registrar of Motor Vehicles.

(ii) That the learned Magistrate erred in both fact and law in dismissing the suit as against the 1st defendant/respondent despite there being ample evidence establishing liability as against him.

(iii) That the learned Magistrate erred in law and in fact in dismissing the suit in its entirety without considering the weight of evidence on record.

(iv) That the learned Magistrate erred in law and in fact in failing to appreciate the contents of the Police Abstract report and the testimony of the plaintiff's witnesses in so far as the ownership of the motor vehicle registration KXF 502 was concerned.

(v) That the learned Magistrate erred in fact and in law in failing to return a finding both on liability and quantum.

10. Following an agreement by parties, written submissions were duly filed and the Court is now invited to determine the appeal based on those submissions. For the appellants it was submitted that the decree issued by the Court, wrongly indicated the date of judgment as 8th April, 2008, as the judgment was in fact delivered on 11th April, 2008. It was therefore submitted that the appeal which was lodged on 9th May, 2008 through a memorandum of appeal dated 8th May, 2008, was filed within time.

11. As regards the grounds of appeal, it was submitted that the appellants proved on a balance of probabilities that the 2nd respondent was the owner of motor vehicle KXF 502 through the following

evidence. Firstly, a police abstract report was issued in which the 2nd respondent was indicated as the owner of motor vehicle KXF 502. Secondly, the appellants each testified in Court that they bought tickets at the Akamba offices in Mombasa. And that they boarded a bus belonging to Akamba Public Road Services, and confirmed that the vehicle was branded Akamba Public Road Services. Thirdly, that the respondents did not rebut the allegations made on the ownership of the vehicle as they did not call any evidence in support of their case.

12. It was maintained that the trial Magistrate erred in holding that the ownership of the motor vehicle could only be established by way of a copy of records from the Registrar of Motor Vehicles. The case of *Nyeri HCCA No. 334 of 2002, Samuel Mukunya Kamunge vs. John Mwangi Kamura* where a police abstract report was held to be *prima facie* evidence of the ownership of a motor vehicle was cited. Also relied upon were the following authorities.

- *Kasereka vs. Gateway Insurance Limited [2003]2EA 502,*
- *Osapil vs. Kadu [200] 1EA 193*
- *Securicor Kenya Limited vs. Kiumba Limited Civil Appeal No. 63 of 2003,*

13. It was further submitted that the appellant's claim against the 1st respondent is that he was at all material times the employee or driver of motor vehicle registration No. KXF 502, and that the claim against the 1st respondent was that of negligence and the claim against the 2nd respondent was based on vicarious liability. It was argued that liability against the 1st respondent was not contingent on the 2nd respondent being liable. However, the liability against the 2nd respondent was contingent on the 1st respondent being found liable. The trial Magistrate had therefore a duty to determine the liability or otherwise of the 1st respondent who was the driver of motor vehicle KXF 502.

14. It was further submitted that there was evidence that as a result of the accident subject of the suit, the 1st respondent was charged with traffic offence at the Makindu Law Courts, and therefore in failing to make a finding with regard to the liability of the 1st respondent, the trial Magistrate's decision ought to be overturned. It was further noted that the judgment of the trial Magistrate contravened the provisions of Order XX Rule 4 of the Civil Procedure Rules.

15. It was contended that the trial Magistrate did not consider the weight of the evidence on record; and the fact that the respondent did not call any witnesses nor did the respondents issue any third party notice despite having been granted leave to do so. It was maintained that there was sufficient evidence establishing that the appellants were all passengers in motor vehicle KXF 502 and that the 1st respondent who was the driver of the bus, owed the passengers a duty of care. The 1st respondent breached the duty of care by over speeding and overtaking carelessly and as a result of that breach the appellants suffered injuries.

16. With regard to general and special damages, the Court attention was drawn to the damages suffered by each appellant as indicated in the medical reports and discharge summary. It was submitted that the trial Magistrate erred in not assessing damages. The Court was further urged to allow the special damages in accordance with the receipts which were filed in evidence.

17. For the respondent it was submitted that the trial Magistrate acted judiciously and/or exercised her discretion rightly in finding that the appellants did not discharge the burden of proof. On the issue of liability, it was noted that none of the appellants produced a receipt to prove they were passengers in motor vehicle KXF 502, despite all witnesses having confirmed that the 2nd respondent had a customary practice of issuing receipts to its clients. It was also noted that no attempts were made by the appellants to procure the passenger manifest.

18. Further, that no copy of records from the Registrar of Motor Vehicles was produced in respect of the bus nor were the alleged traffic proceedings produced in evidence. It was submitted that no police abstract was issued to the appellants. Nor was a police abstract, proof of a person having been a passenger. It was noted further that none of the witnesses confirmed that the 1st respondent was a driver of the bus. In the light of those submissions, it was maintained that the trial Magistrate came to the right decision, as the appellant failed to discharge the burden of proof with regard to liability. The case of *Samuel Mukunya Kamunge* was distinguished.

19. Relying on Nairobi *HCCA Alexander Mathuki Maluki Seyani Brothers Company Limited*, it

was noted that the burden of proof was upon the appellants to establish the existence of facts upon which the respondent's liability arose. It was submitted that the appellants failed to prove that the 1st respondent was the driver of the bus, that the 1st respondent was a driver solely employed by the 2nd respondent, and that the bus was owned by the 2nd respondent. Relying on **Karauri vs. Ncheche [1985 – 1988] 1 EA 87**, it was maintained that since the respondent had denied ownership of the motor vehicle, it was incumbent for the appellants to establish ownership through a certificate signed by the Registrar of Motor Vehicles.

20. With regard to the issue of quantum it was conceded that trial Magistrate erred in not assessing the general damages. Nonetheless the Court was urged to dismiss the appeal as the same lacked merit.

21. In reply to the respondent's submissions, counsel for the appellants distinguished the case of **Karauri vs. Ncheche** (supra), maintaining that the respondent did not call any evidence to rebut the contents of the police abstract. Referring to sections 109 and 112 of the Evidence Act, counsel for the appellants submitted that the appellants had produced a police abstract to substantiate their claim that the 2nd respondent was the registered owner of motor vehicle KXF 502, and therefore the burden of proof shifted to the respondent to disprove that fact.

22. Further it was submitted that ownership of the bus was a matter especially within the knowledge of the 2nd respondent. The 2nd respondent also had passenger manifest for the bus, which they failed to produce to disprove the appellants' allegations that they were passengers in the stated vehicle. The Court was urged to note that the appellants were all named as passengers in the police abstract report which was produced in evidence.

23. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial Magistrate. I have also considered the submissions made before me and before the trial Court, as well as the judgment of the trial Magistrate. On the issue of liability, it is apparent from the pleadings which were before the trial Magistrate, that the appellants were under a duty to prove not only that an accident occurred involving motor vehicle KXF 502, but that they were each passengers in the said vehicle and that they were each injured as alleged.

24. Secondly, the appellants had the burden to establish that motor vehicle KXF 502 was being driven by the 1st respondent, and that the accident arose as a result of the negligence of the 1st respondent. Further, the appellants had to establish that motor vehicle KXF 502 was owned by the 2nd respondent and that the 1st respondent was an employee or driver of the 2nd respondent and that the 2nd respondent was vicariously liable for the 1st respondent's negligence.

25. From the evidence of the 1st appellant, 3rd appellant, 4th appellant, 5th appellant and 6th appellant before the trial Magistrate, each appellant claimed to have been travelling in a bus belonging to "Akamba Bus Service". Although each identified the bus as KXF 502, none of the witnesses testified that the bus belonged to the 2nd respondent who was "Akamba Public Road Services Limited". Further although each claimed to have booked and boarded "Akamba bus" none produced any receipt. Therefore it was only the police abstract report which was produced as plaintiff exhibit No.14 which identified motor vehicle KXF 502 as belonging to "Akamba Public Road Services."

26. The pertinent question was whether that evidence was sufficient to establish the ownership of motor vehicle KXF 502. Although the respondents did not adduce any evidence in support of their defence, having specifically denied the ownership of motor vehicle KXF 502, it was incumbent upon the appellants to prove on a balance of probability that the motor vehicle KXF 502, belonged to the 2nd respondent i.e. Akamba Public Road Services Limited. This was because ownership of motor vehicle KXF 502 was a fact which was necessary in order for the liability of the 2nd respondent to arise.

27. In this case, Sgt. John Kamau who produced the police abstract report, was not the investigating officer. He admitted that he never visited the scene of the accident, and merely produced the police file to the Court as a public record. At best the police abstract report was only *prima facie* evidence that an accident involving motor vehicle KXF 502 and motor vehicle KAH 685J was reported to the station.

28. Without evidence regarding how that information was procured, the contents of the police abstract report with regard to the persons involved in the accident, and ownership of the vehicles alleged to have been involved in the accident, is of little evidential value and cannot be relied upon. In this regard, this case is distinguishable from **Samuel Mukunya Kamunge vs. John Mwangi Kamura**, (supra) in which the officer who produced the police abstract report visited the scene and verified his information.

29. Further, the information on the police abstract report that the bus belonged to "Akamba Public Road Services Limited" was not consistent with the appellants' evidence that the motor vehicle KXF 502

belonged to “Akamba Bus Services.” It is clear that the appellants goofed in failing to produce a certificate from the Registrar of Motor Vehicles which would have provided appropriate evidence of ownership of motor vehicle KXF 502.

30. Moreover, although the appellants all claimed to have been passengers in the “Akamba bus”, none of them produced any receipts which would have confirmed a contract of carriage between each of the appellants and the 2nd respondent. In the circumstances, the finding that the appellants failed to establish the ownership of motor vehicle KXF 502 cannot be faulted.

31. As regards quantum, the trial Magistrate notwithstanding her finding on liability, ought to have addressed her mind on the issue of quantum. I do note that in this case all the medical reports were produced by the respective appellants. None of the doctors who examined the appellants were called to testify. The medical reports not having been produced by consent, the trial Magistrate ought not to have admitted them in evidence without them being produced by the maker. Therefore the medical reports are hearsay evidence and cannot be taken into account in considering the appellant’s injuries. That leaves only the evidence of each of the appellants regarding their respective injuries.

32. The 1st appellant who was PW5, testified that he was injured on the leg and on the hand, and that he was admitted at Makindu Hospital for 6 days. He produced a discharge summary from the Hospital. He showed that he was treated for the compound fracture of the left hand and injuries to the fingers. A sum of Kshs.200,000/= would have been appropriate for his injuries.

33. The 2nd appellant Joseph Onguru did not testify and therefore there is no evidence to support his claim. The 3rd appellant testified as PW5. She testified that she sustained a fracture of the right arm, and was injured on the head and chest. She was admitted at Makindu Hospital for 1 week. Her discharge summary from Makindu Hospital confirmed her admission and the fact that she had a fracture on the right forearm with blunt injuries to the chest and head. A sum of Kshs.200,000/= would also have been appropriate for her injuries.

34. The 4th appellant who testified as PW6, stated that she was injured on the arm and chest. She was admitted at Makindu Hospital for 6 days. She also produced a discharge summary from Makindu Hospital which confirmed her admission and the fact that she had paralysis of the hands, injury to the right breast, fracture on the right shoulder and blunt trauma to the head. An award of Kshs.250,000/= would have been appropriate for her injuries.

35. The 6th appellant who testified as PW1 stated that he suffered a fracture on his leg, fracture and on his right arm as well as cuts and injuries on his head. He claimed he was admitted at Makindu Hospital, and produced his card and discharge summary which confirmed his admission and injuries which included a gross head injury, contusion on the chest, fracture on the right thigh, and the right forearm. For these injuries a sum of Kshs.300,000/= would have been appropriate as general damages. No evidence was produced on behalf of 7th appellant and therefore there is no evidence to support his claim.

36. The upshot of the above is that the appellants having failed to prove liability against the respondent, the appeal is dismissed with costs.
Orders accordingly.

Dated and delivered this 26th day of January, 2010

H. M. OKWENGU
JUDGE

In the presence of: -
Ombati for the appellant
Luseno for the respondent
Eric - court clerk