



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

Civil Appeal 35, 36, 37 & 38 of 2007

KENYA BUS SERVICES LTD.....APPELLANT

~VRS~

DAN OCHIENG ODUMA.....1ST RESPONDENT

CHARLES OMONDI OPIYO.....2ND RESPONDENT

LUCY ODHAIMBO3RD RESPONDENT

DAN OCHIENG ODUOR4TH RESPONDENT

JUDGMENT

The Appellant Kenya Bus Service Limited appeals against the judgment of Busia Resident Magistrate which was in favour of the Respondents Dan Ochieng Oduma, Charles Omondi Opiyo and Dan Ochieng Oduor. Being aggrieved by both the finding on liability and quantum the Appellants lodged these appeals.

The facts of the case are that the Respondents were passengers in the Appellant's vehicle registration number KAN 440 E Isuzu Bus on 31/5/2005 traveling from Siaya to Busia. The bus was involved in an accident on the way and the Plaintiff was injured. The Respondents blamed the Defendant for failing to maintain the vehicle in a good mechanical condition and for overspeeding. The Appellants denied the claim and blamed the driver of an on-coming vehicle for the accident.

The grounds of the four appeals may be summarized as follows:

1. **That the cases were not proved on the balance of probabilities.**
2. **That the burden of proof was shifted to the Appellant.**
3. **That the magistrate erred in law and in fact in both liability and quantum by finding the Appellant liable.**

Mr. Kibichy for the Appellant submitted that the Respondents did not prove that they were passengers in the Appellant's vehicle. No eye witness was called to corroborate the evidence of involvement in the accident. The parties agreed in the trial court that the Defendant's evidence would be used in other related cases but the magistrate failed to take that into consideration when writing the judgment. The medical records had a lot of discrepancies and the respondents could not prove that they were injured.

Mr. Omondi for the Respondents submitted that all the requisite issues in the case were decided by the court based on sufficient evidence. The discrepancies in the medical records at the hospital cannot be attributed to the patient because they have no access to the records. The defence witness DW2 confirmed the Appellant's driver's involvement in the accident.

The Respondent in all the appeals testified that the Appellant's vehicle had a problem of lights which were going on and off. It was around 9.00 p.m when the accident occurred. The vehicle had left Yala going to Busia. Near Ugunja, the lights went off and the bus immediately veered off the road and landed on its left side. It was also alleged that the vehicle was being driven at a high speed. The Respondents blamed the Appellant's driver for the accident.

The investigating officer said the accident was self – involving and was caused by poor lighting system. The defence called two witnesses in appeal no.37 of 2007. DW1 was the Health Records Information Officer in charge of Busia District Hospital. He testified that the name of Loice Adhiambo was not in the entry of the out patient register for 31/5/2005. It appeared on the entry for 30/5/2005 vide O.P No. 1206/05. He says the O.P number was given to another patient and the name of Loice Adhiambo added in the same space.

On cross-examination, the Respondent's counsel, DW1 admitted that the register was not complete since it had no entries for 4th and 5th June 2005 although patients were treated. He also admitted that in the night of 31/5/2005, there was no one on duty to make entries in the register.

DW2 was a private investigator hired by the Appellant to investigate whether the Plaintiffs were involved in the accident. He visited the Busia District Hospital. He found that about 20 accident patients were treated on 31/5/2005 but the names of Charles Omondi, Dan Ochieng Oduor and Lucy Odhiambo were not in the register entries for the 31/5/2005. He also noted that there was duplication of some names of patients in the register. He produced his report which brought forth a number of anomalies in the documents issued by police and the medical records at the hospital. He blamed the involvement of the police in what he called a scam. The statement of Lucy Odhiambo recorded on 3/8/2005 which was about three months after the accident. DW2's report states that PW1 instructed her lawyer to sue the Appellant on the same day she recorded the statement.

The Respondents blamed the accident on the Appellant for defective lighting system. The traffic officer who said he was one of the investigating officers testified to confirm that poor lighting of the bus was the cause of the accident. Surprisingly, he came to court without the police investigation file in the case of Lucy Adhiambo & 2 others. He did not explain why he failed to produce the file whose contents would have assisted the court to produce the file whose contents would have assisted the court to arrive at more fair and accurate judgment. As a police officer, he knew that those records were crucial in that case. He said the bus was inspected but he did not have the inspection report. The report would have shown whether the lighting system of the bus was defective. PW2 did not explain why he recorded the statement of Lucy Odhiambo three (3) months after the accident. In view of the investigation report of DW2, this casts a lot of doubt on the genuineness of the Respondent's evidence. The medical records at the hospital were in a mess. Duplication of patients' records by giving one registration number to two patients was also suspect. DW1 was not able to explain why it so happened. The Respondents may not be blamed for the messy hospital records but the scenario is no good for their cases. The treatment chit of Lucy Odhiambo was dated 31/5/2005 while her name in the outpatient register appears on the entries of 30/5/2005. This is a major discrepancy. The P.3 form was undated and referred to an accident which occurred on 31/5/2005. The date of the accident was again altered to read 31/8/2005. The same P.3 form shows that the Plaintiff was sent to hospital by police on 22/2/2006. This again was about nine (9) months after the accident.

The medical report of Lucy Odhiambo and Charles Omondi were not produced by the maker. The medical reports were based on treatment notes from Busia District Hospital. These notes are riddled with discrepancies. The outpatients' register did not contain the names of some of the Respondents. Dan Ochieng Owour's treatment notes were produced by a Clinical Officer but his name was missing from the register. The notes had no outpatient number. It is obvious that some names were inserted and squeezed between other names in the outpatient register. This is what led to

the duplication of O.P numbers on the treatment notes.

The discrepancies in the records used to support the Respondents' case are so glaring that the magistrate ought to have dealt with the issue. He failed to do so without giving any explanation since the defence had already raised it.

The court blamed the Defendant for not producing the passengers manifesto. This was not correct and it amounted to shifting the burden of proof to the Defendant. The burden was on the Respondents to prove her case and not on the Appellant to assist her or to disapprove it. The fact that Lucy Odhiambo instructed her lawyers on the same day she recorded her statement is suspect. It would attribute some kind of evidence- search on part of the Respondents in order to make up a case.

For appeal no.35 of 2007, Dan Ochieng Oduma called a clinical officer to produce the treatment notes while the police officer with the leave of the court produced the P.3 form. The medical report of Dr. Aluda was produced by the Respondent himself. The patients' name appears in the Hospital Out Patient's Register bearing O.P No. 16250 for 31/5/2005. This is the only Respondent who appears to have been treated at the hospital and entries made as required. He testified that the vehicle had defective lighting system and was being driven very fast. The vehicle's lights went off and the driver lost control. This evidence was not controverted by the defence. The Appellant has a duty to maintain the vehicle used to carry passengers for profit. Failure to maintain it in good condition is negligence of the Appellant's part. For this Respondent, I find that he proved his case on the balance of probabilities. The magistrate correctly found the appellant liable. He was awarded Ksh.110,000/= general damages and no special damages. I have looked at the medical report and I find that the damages are not inordinately high nor excessive. The award therefore remains as it is. To this extent regarding Appeal No.35 of 2007, the Appellant's appeal fails. The Appellant to meet the costs of the appeal herein.

As for appeals nos 36, 37 and 38 all of 2007. I find that due to the discrepancies and contradictions highlighted in this judgment, the Respondents did not prove their case on the balance of probabilities. The magistrate made a wrong finding to hold the Appellant liable. The appeal is therefore successful in respect of the said files and is hereby allowed. Accordingly, I quash the finding of the magistrate on liability therein and set aside the awards. The Respondents will meet the costs of the appeal and those of the magistrate's court.

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Busia this 2nd day of February 2010.
In the presence of Mr. Kweyu for Omondi for Respondents