



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

Civil Appeal 371 of 2004

AKAMBA BUS SERVICES LIMITED.....APPELLANT

VERSUS

**DANIEL MUTUNE NJUGUNA (Suing for and on behalf
of the estate of and dependants of)
FRANCIS KIMANI MUTUNE (Deceased).....RESPONDENT**

*(An appeal from the judgment of the Hon. Mrs. H. Omondi, Chief Magistrate, delivered on 28th
May, 2004 in CMCC No.9741 of 2003)*

J U D G M E N T

1. This appeal arises from a suit which was originally filed in the High Court at Nairobi by Daniel Mutune Njuguna (hereinafter referred to as the respondent. The suit was brought by the respondent in his capacity as the administrator of the estate of Francis Kimani Mutune (hereinafter referred to as the deceased). The suit was against Akamba Bus Services Limited (hereinafter referred to as the appellant.)

2. The respondent brought the claim under the Fatal Accidents Act (Cap 32) and the Law Reform Act (Cap 26). The claim was for general and special damages arising from the death of the deceased. The respondent claimed that the deceased died as a result of injuries sustained in an accident involving the appellant's bus registration No. KAE 286D. The respondent further contended that the accident was caused by the negligence of the appellant's servants or agent in the management of the bus. As a result of the deceased's death, the deceased's dependants who were the respondent who is the father of the deceased and his mother Virginia Nyambura, lost their source of dependency.

3. The appellant filed a defence in which it denied being the owner of motor vehicle KAE 286D, or that its servants or agents were negligent. In the alternative the appellant claimed that if there was an accident then the same was contributed to substantially or solely caused by the negligence of the deceased. The appellant further denied that the deceased's estate suffered any damages.

4. The record does not clearly show how, but the suit appears to have been transferred to the Chief Magistrate's Court at Nairobi for hearing and final disposal. During the hearing before the Chief Magistrate, two witnesses testified in support of the respondent's case. These were the respondent and Francis Wanjohi Mwangi (Mwangi). Briefly their evidence was as follows:

5. On 19th July, 1998, the deceased and Mwangi who was the deceased's brother in law, were walking together. When they got to the tarmac road, Mwangi stopped to talk to a neighbor. Mwangi then heard a motor vehicle brake, and saw a vehicle approaching in a zigzag manner. The vehicle then hit the deceased and threw him into a ditch. Mwangi identified the vehicle which hit the deceased as registration No.KAA 286D. He explained that the vehicle had

come from Nakuru direction and was headed for Nairobi. Mwangi stated that the vehicle stopped about 20 metres ahead at a nearby police road block. Police from the road block came and confirmed that the deceased was already dead. Mwangi contended that the deceased was hit by the bus when he was off the road.

6. The respondent received news of the accident, made funeral arrangements and buried the deceased. He produced a police abstract report of the accident. He also produced receipts for the mortuary fees, transportation of the body, coffin, letters of administration and death certificates. All these exhibits were omitted from the record of appeal. I was however able to access them from the original record of the lower court. The respondent testified that the deceased was sending money to his parents for support and was also paying school fees for his siblings.

7. The appellant testified through Patrick Nyangeri Paul, who stated that he is a driver employed by the appellant. The witness testified that on the material day, he was driving the appellant's bus registration No.KAE 286D travelling from Nairobi to Malaba. Just as he was approaching a police road block at Uplands, he passed an oncoming vehicle and it was at that stage that the witness saw someone run across the road. The witness applied emergency brakes and the person was hit by the vehicle's right tyre.

8. The witness explained that he left Nairobi at 8.00 p.m. and that the accident occurred around 9.30 p.m. He denied driving at a speed or without due care and attention. He blamed the deceased for the accident. Under cross-examination the witness explained that the deceased was hit by the right side lights of the motor vehicle and that he fell to the left edge of the vehicle on the tarmac on impact. The witness maintained that he stopped the bus about 10 metres away.

9. Written submissions were filed on behalf of each party each urging the trial court to find in favour of his client. I note that the submissions for the respondent were omitted from the record of appeal but I have again been able to access the same from the original record of the lower court.

10. In her judgment, the trial magistrate found that the accident occurred. She dismissed the inconsistencies regarding the registration number of the vehicle involved in the accident as no more than a mix-up of the registration numbers. She found that the appellant's driver was to blame for the accident as he failed to hoot or flash to warn of his approach as he got to the stage. The trial magistrate therefore found the appellant fully liable. The trial magistrate awarded the respondent Kshs.100,000/= for loss of life expectancy, Kshs.10,000/= for pain and suffering, Kshs.320,000/= for loss of dependency, and Kshs.14,900/= as special damages. The trial magistrate reduced the general damages by the award of Kshs.110,000/= awarded under the Fatal Accidents Act for loss of life expectancy, and pain and suffering, and gave judgment for Kshs.210,000/=.

11. Being aggrieved by that judgment, the appellant lodged the current appeal raising 6 grounds as follows:

- (i) The learned Chief Magistrate erred in fact and in finding that the plaintiff had proved his case on a balance of probabilities in spite of;
 - (a) The fact that material evidence by the plaintiff's alleged eye witness relating to the date and time of the accident and the registration number of the motor vehicle involved in the accident was at variance with the pleadings.
 - (b) The fact that no police evidence was called by the plaintiff to support the evidence of the plaintiff's witnesses;
 - (c) The fact that the evidence of the plaintiff's witness and the defendant's witness relating to the accident while at odds in respect of every material fact, nevertheless the learned Chief Magistrate chose to adopt the defendant's evidence as the basis of her finding on liability without finding and/or holding

that the plaintiff's evidence relating to the occurrence of the accident was incredible and/or not plausible and that the defendant's evidence did not amount to an admission of the accident as narrated by the plaintiff's and/or did not support the plaintiff's evidence in any way; and

- (d) The fact that the learned Chief Magistrate failed to make any adverse inference in relation to the plaintiff's failure to call police evidence in relation to the accident.

- (ii) The learned Chief Magistrate erred in act and in law in holding, in the absence of police evidence by the plaintiff, that the failure by the defence to produce a worksheet for the day of the accident to show that the defendant's bus was travelling from Nairobi to Malaba and not from Nakuru to Nairobi as alleged by the plaintiff could only raise an inference that such evidence would have been damning to the defence and thereby purported to shift the burden of proof to the defence.

- (iii) The learned Chief Magistrate erred in fact and in law in laying blame on the defendant's driver on the grounds that by the defendant's witness failing to state that he hooted or flashed to warn of his approach as he got to the stage whereabouts the accident occurred the defendant's driver was to blame and by so doing:
 - (a) Essentially raised a presumption of liability against the defendant;
 - (b) Disregarded the requirement for the plaintiff to first prove his case before the burden of proof shifted to the defendant; and
 - (c) Disregarded the rule that a pedestrian should only cross the road when the same was clear and it was therefore safe so to do.

- (iv) The learned Chief Magistrate erred in fact and in law in holding that the question of the deceased crossing the road was an afterthought as the question was never put to the plaintiff's second witness in cross-examination and in so doing disregarded the failure by the plaintiff to call police evidence and the adverse inference which should be made by reason of such failure. In any event by so holding the learned Chief Magistrate overlooked, improperly, the fact that the said defence was pleaded in the defendant's defence.

- (v) The learned Chief Magistrate erred in fact and in law in holding that despite the variance between the plaintiff's pleadings and the evidence tendered she was convinced that the plaintiff's eye witness was simply mixed up and in so doing:
 - (a) Disregarded the rule that parties are bound by their pleadings;
 - (b) Purported to raise a plastic and forced consistency between the two different and irreconcilable accounts of the accident given by the plaintiff's witness and the defence witness; and
 - (c) Disregarded the fact that despite the inconsistent material facts between the evidence of the plaintiff's alleged eye witness and the pleadings the said witness reiterated during cross-examination the inconsistent facts which the plaintiff's counsel did not seek to clarify by re-examination.

- (vi) The learned Chief Magistrate erred in law and in fact in that she awarded general damages which were so manifestly high as to be a totally erroneous estimate of compensation due to the deceased's estate and dependants.

- (vii) Other grounds and reasons to be adduced at the hearing hereof.

12. Following a consent agreed upon by the parties, written submissions were duly exchanged and filed. For the appellant it was submitted that there was glaring contradiction between the pleadings and the testimony of the witnesses who testified in support of the respondent's case. The registration number of the accident vehicle and the date

of the alleged accident were identified as areas where there was contradiction. Relying on ***Philoice Kabayeka Oluoch vs Kenya Bus Services Ltd and Faraja Investments Ltd, HCCC No.1064 of 1994***, in which the court dismissed a suit due to contradiction in the registration number, and ***Galaxy Paints Company Ltd vs Falcon Guards Limited CA No.219 of 1998*** (unreported), it was submitted that the trial magistrate ought to have confined herself to the pleadings before her, and that any conflict between the pleadings and the evidence ought to have been resolved in favour of the appellant.

13. The court was urged to find that the contradiction between the evidence of Mwangi and the pleadings, was a demonstration that his evidence was not reliable and should therefore be disregarded. Further, it was pointed out that the police abstract report was wrongly produced in evidence by the respondent, and therefore ought to have been rejected. The court was urged to find that the respondent did not prove his case to the required standard. It was further pointed out that the trial magistrate erred in shifting the burden of proof from the respondent to the appellant. It was noted that the trial magistrate misdirected herself, by raising a presumption of liability against the appellant's driver, contrary to trite law that a plaintiff who alleges must prove his case on a balance of probability.

14. On the issue of damages, it was submitted that the amount awarded to the respondent as general damages was too high. It was noted that no evidence was produced to prove the deceased's alleged monthly earnings, or the allegation that the deceased was paying fees for his siblings. Relying on ***Reuben Musau Kithuka and another vs Rahab Mueni and another, HCCC NO.55 of 1999***, and ***Charles Mukumi Njoroge vs Asaph W. Kiberenge HCCC No.338 of 1990***, the court was urged to reduce the award.

15. For the respondent, it was submitted that a party is bound by his own pleadings. It was noted that the appellant had appreciated that the court faced a challenge in that the evidence of the appellant and that of the respondent were at variance. It was noted that the variance relating to the date of the accident was a new issue which was never raised in the lower court. It was noted that the error was no more than a typographical error. As regards the police abstract report, it was pointed out that the document was not objected to when it was produced during the trial. Therefore the appellant was estopped from raising an objection at this stage. It was maintained that the trial magistrate exercised her discretion judiciously in admitting the police abstract report, as the appellant did not object to its production.

16. As regards the contradiction relating to the registration number of the accident vehicle, it was pointed out that the plaint stated the registration number as KAE 286D and that despite the appellant having denied ownership of the that vehicle in its defence, the appellant's sole witness confirmed that he was in fact driving motor vehicle Registration No. KAE 286D. It was maintained that the trial magistrate was right in finding that although Mwangi gave the registration number of the vehicle as KAA 286D, that was simply a mix-up on the registration numbers. It was further submitted that the respondent having pleaded the doctrine of *res ipsa loquita*, it was trite law that the doctrine was tantamount to saying that the facts raised a presumption of negligence and the burden of proof therefore shifted to the appellant. In this regard, counsel relied on ***Eliakim Abuti Bushuru vs Francis Kahonge Nganga t/a Rwegu Bus Services Ltd HCCC No.4533 of 1992***, wherein Ringera J. stated that the concept was in reality an evidentiary rule which shifts the evidential burden of proof to the defendant.

17. It was pointed out that contrary to the appellant's defence, wherein the accident was denied, the appellant's witness admitted the accident and stated that the deceased was hit by the right tyre, and that the side headlamp broke. It was submitted that the trial magistrate was therefore right in raising a presumption of negligence against the appellant. It was maintained that the evidence before the trial magistrate was sufficient to prove the respondent's case on a balance of probability.

18. On the issue of damages it was submitted that the trial magistrate correctly exercised her discretion in awarding damages. ***Shaban vs the City Council of Nairobi Court of Appeal Civil Appeal No.52 of 1994*** where it was held that an appellate court will not disturb the award of damages unless it is inordinately high or low as to present an

entirely erroneous estimate based on some wrong principle or on a misapprehension of the evidence, was relied upon. The court was therefore urged to dismiss the appeal.

19. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. I have also considered the pleadings and the submissions as well as the authorities. I find that although in its defence the appellant denied ownership of motor vehicle KAE 286D or the fact that there was an accident involving the deceased, the defence witness who is an employee of the appellant testified that on the material date i.e. 19th September, 1998, he was driving motor vehicle KAE 286D, and that the vehicle was involved in an accident at Uplands Area where it knocked someone. Thus, the evidence of the defence witness was in tune with the respondent's allegations.

20. While it is true that the respondent's witness Mwangi who was the eye-witness to the accident gave a different registration number of the accident vehicle i.e. KAA 286D, I find that the similarities in the numbers show that Mwangi simply got mixed up and confused one of the letters and therefore gave the number as KAA 286D instead of KAE 286D. I concur with the trial magistrate's finding that the correct registration number of the vehicle which was involved in the accident was that indicated in the pleadings and the police abstract report i.e. KAE 286D.

21. As regards the contradiction concerning the date of the accident, I am satisfied that the witness again confused the date and gave the wrong month i.e. 19th July, 1998 instead of 19th September, 1998. Obviously this witness does not seem to be very good with figures. And since the witness was giving evidence about six years after the incident, such a mistake was possible, and did not necessarily mean that the witness did not speak the truth about what actually transpired. Indeed, the defence witness admitted that an accident occurred on the 19th September, 1998 and therefore nothing turns on the apparent inconsistency on the date.

22. I find that it was clear that there was an accident involving the deceased and the appellant's motor vehicle registration No.KAE 286D. The question is how did the accident arise and who was to blame. The court was faced with two versions of how the accident occurred. The respondent's version as testified to by Mwangi was that the appellant's vehicle was being driven in a zig zag manner at a speed, and that it hit the deceased who was standing off the road and threw him into a ditch. The appellant's version as testified to by the appellant's driver was that as the appellant's vehicle was passing an oncoming vehicle at Uplands, when the deceased suddenly ran across the road in front of the appellant's vehicle. The appellant's driver applied brakes but the deceased was hit by the right tyre of the vehicle and he fell to the left edge of the tarmac, whilst the appellant's vehicle stopped about 10 metres away.

23. Having considered the two versions, I find that neither of the two spoke the whole truth. I find the respondent's evidence that the appellant's motor vehicle was being driven in a zig zag manner and hit the deceased when he was off the road unsupported by any evidence. I find the evidence that the deceased was hit by the appellant's motor vehicle when he suddenly ran across the road, the more likely scenario. I find also that the appellant's motor vehicle was being driven at an excessive speed, given that the vehicle was passing at a junction in an area where there was a bus stage likely to have many people.

24. The appellant's driver was under a duty to drive cautiously but he failed to exercise due care. The deceased on the other hand also failed to take care of his own safety by ensuring that the road was safe to cross. Thus, both the deceased and the appellant's driver were negligent. Accordingly, liability should have been apportioned in the ratio of 60:40% in favour of the respondent.

25. As regards the assessment of damages, the respondent correctly stated the law that an appellate court will not ordinarily disturb an award of damages unless it is demonstrated that the award is so inordinately high or low as to present an erroneous estimate or the same is based on a wrong principle of law. In this case, the only complaint raised by the appellant was that nothing was produced by the respondent to prove that the deceased was earning a monthly salary of Kshs.4,000/= or that he was paying any fees for his siblings. While it is true that there was only the word of the respondent regarding the deceased's monthly income, both the respondent and Mwangi testified that the deceased was

working at a dairy owned by an Asian, and the amount of Kshs.4000/= was around the minimum wage given to general workers in the year 1998. Thus, the trial magistrate was right in accepting the figure as the deceased's income.

26. As regards the allegation that the deceased was paying school fees for his siblings, under Section 8 of the Fatal Accidents Act, the respondent was required to provide with his statement of claim, full particulars of the person or persons for whom or on whose behalf the action was brought. At paragraph 5 of the Respondent's plaint which was filed in the lower court, the names of persons for whose benefit the action was brought was indicated as follows:

(a) Daniel Mutune Njuguna – Father

(b) Virginia Nyambura - mother

27. The respondent's plaint did not mention any other person for whose benefit the claim was being brought. The allegation that the deceased was paying school fees for his siblings was therefore not only, not supported by evidence, but was also not pleaded. I find however that the award made by the trial magistrate in respect of damages for loss of dependency was not affected by this anomaly, and the dependency ratio adopted of $\frac{1}{3}$ was proper. Further, the deceased being 30 years old the multiplier adopted of 20 years was proper.

28. Accordingly, I find no reason to interfere with the award which was given by the trial magistrate. The upshot of the above is that I allow this appeal on the issue of liability to the extent of apportioning liability at 60:40% against the appellant. I confirm the judgment of the trial magistrate in respect of the award of damages subject to the apportionment of liability. The appellant having partly succeeded in this appeal, he shall be entitled to recover half the costs of the appeal. Those shall be the orders of this court.

Dated and delivered this 16th day of April 2010

H. M. OKWENGU

JUDGE