



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 20 of 1999 RD**

**M. A. BAYUSUF & SONS LTD.....PLAINTIFF**

**VERSUS**

**AGNES WANGARI WAMBUGU.....DEFENDANT**

**JUDGMENT**

The plaintiff, M. A. Bayusuf and Sons Limited, instituted this suit against the defendant, Agnes Wangari Wamburu by way of a plaint dated 18<sup>th</sup> February 1999 and filed on 10<sup>th</sup> March 1999. The defendant is sued as the Administratrix of the estate of Wamburu Kahindi (hereinafter the deceased) who was the registered owner of motor vehicle registration number KUHE 24 a Nissan Matatu. The plaintiff was at all material times the registered owner of motor vehicle registration number KAG 487K/ZB 4482 – Mercedes Benz Truck.

The plaintiff pleaded that on or about 10<sup>th</sup> May 1997, the plaintiff's authorized driver was lawfully driving the said plaintiff's motor vehicle Registration No. KAG 487K ZB 4482 along the Mombasa/Nairobi Road when, at Mariakani, the deceased so negligently drove, managed and controlled the said motor vehicle Registration No. KUHE 24, that he permitted the same to violently collide with the said plaintiff's motor vehicle, in consequence whereof the plaintiff's said motor vehicle was extensively damaged. The particulars of the negligence were given.

The plaintiff further pleaded that by reason of the deceased's negligence resulting in the said accident, the plaintiff's said motor vehicle was extensively damaged and the plaintiff had suffered loss and damage which was particularized as costs of repairs – Kshs. 727,882.15, Assessors fee – 10,000/= and police abstract Kshs. 100/= making a total of Kshs. 737,982.30 which sum the plaintiff claimed together with loss of user, costs and interest.

The defendant denied the plaintiff's claim in a defence filed on 11<sup>th</sup> March 1999. The plaintiff's case was heard by J. Khaminwa, then a Commissioner of Assize and P. M. Tutui also then a Commissioner of Assize. Two witnesses testified before Khaminwa, Commissioner of Assize and one witness testified before Tutui, Commissioner of Assize. The witnesses were Hussein Gulamhussein Nurbhai, (PW 1), Dickens Omondi (PW 2) and C.I Luke Mushiboji (PW 3). PW 1 testified that he was a loss assessor, adjuster and investigator. He carried out an assessment on the plaintiff's said motor vehicle and prepared a report on 12<sup>th</sup> May 1997. According to him the damage to the vehicle was to the tune of Kshs. 727,882.15. He produced his report as P EX 1. He also testified that he had been paid Kshs. 10,000/= for the preparation of the report and issued a receipt which he produced as P EX 3.

PW 2, Dickens Omondi, told the court that, he was a panel beater and did spray-painting on contract. He recalled the year 1997 when he was contracted to work on the plaintiff's said motor vehicle. He requisitioned for parts from the plaintiff's store to be fitted onto the said motor vehicle and fitted the same. According to him the total cost of the parts was Kshs. 727,882.15. He produced the requisitions and the invoices as P EX 4.

PW 3, C.I. Luke Mushiboji, a police officer at the material time stationed at Mariakani Police Base, testified that an investigation file had been opened in respect of the accident involving the plaintiff and the deceased's said motor vehicles. According to that file, the deceased's said vehicle was at the material time being driven by the deceased when the accident occurred along Mombasa – Nairobi Highway near Ngway Bar. The deceased motor vehicle was being driven towards Nairobi when at the said place it swerved onto the right hand side to avoid a pot hole and collided with the plaintiff's said motor vehicle. According to PW 3, the deceased under estimated the distance and speed of the plaintiff's motor vehicle. PW 3 produced the accident file in respect of the accident as P EX 5.

After several adjournments, the case came up before me for hearing on 18<sup>th</sup> June 2009 when only counsel for the plaintiff attended. There being no explanation for the non-attendance of the defendant and her counsel, I recorded the defendant as offering no evidence and counsel for the plaintiff prayed that judgment be entered for the plaintiff as prayed in the plaint.

Having carefully considered the matter, I am satisfied that the evidence tendered by the plaintiff which included documentary evidence on the accident involving the said vehicles, a loss assessor's report, copies of requisition forms from the plaintiff's stores, invoice for Kshs. 727,882.15 and receipt for Kshs. 10,000/= issued by the loss assessor adjuster and investigator, produced in support of the plaintiff's claim conclusively establish that the plaintiff suffered the loss and damage pleaded in the plaint and that the deceased was to blame for the accident and consequently, the defendant being the Administratrix of the deceased's estate is liable to the plaintiff. I also find that the defence put forward by the defendant has no merit and in any event the allegations therein were not established by evidence. The evidence adduced by the plaintiff was therefore uncontroverted. In the premises, I find the deceased 100% liable to the plaintiff in damages for negligence. The plaintiff claimed special damages Kshs. 737,982.30. I find and hold that the same were not only specifically pleaded but were also strictly proved. With regard to the claim for loss of user of the said motor vehicle the plaintiff pleaded that it would specify the same at the hearing. In the event none was proved. At any rate evidence could not have been led on the same in the absence of a pleading for the same.

In the result I enter judgment for the plaintiff for Kshs. 727,982.30 plus costs. I award interest at court rates on both sums to be applied on the special damages from the date of filing suit until payment in full and on costs from the date of taxation or agreement until payment in full.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF JULY 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Kisavuli Ms for the Plaintiff.

**F. AZANGALALA**

**JUDGE**

**27<sup>th</sup> JULY 2009**